

# **The 2021 Annual Statement**

## **Human Rights in Northern Ireland**

December 2021



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

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2021



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RIGHTS  
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## About us

The NI Human Rights Commission (the Commission) protects and promotes the human rights of everyone in NI. We do this by:

- keeping under review the adequacy and effectiveness in NI of law and practice relating to the protection of human rights;
- monitoring the implementation of Protocol Article 2;
- reporting to the Secretary of State for NI and the NI Executive Office on the implementation of Protocol Article 2;
- advising the Secretary of State for NI and the Executive Committee of the NI Assembly of legislative and other measures which ought to be taken to protect human rights and/or implement Protocol Article 2;
- advising the NI Assembly whether proposed legislation is compatible with human rights standards and/or Protocol Article 2;
- promoting understanding and awareness of the importance of human rights and/or of Protocol Article 2 in NI, for example, by undertaking or commissioning or otherwise assisting research and educational activities.
- giving assistance to individuals who apply to it for help in relation to proceedings involving law or practice concerning the protection of human rights and/or involving an alleged breach (or potential future breach) of Protocol Article 2(1);
- bringing proceedings involving law or practice concerning the protection of human rights;
- taking judicial review proceedings in respect of an alleged breach (or potential future breach) of Protocol Article 2;
- intervening in legal proceedings concerning human rights where it need not be a victim or potential victim of the unlawful act to which the proceedings relate;
- intervening in legal proceedings concerning an alleged breach (or potential future breach) of Protocol Article 2;
- conducting investigations;
- requiring a person to provide information and documents in their possession, and to give oral evidence, in respect of an investigation;
- entering a specified place of detention in NI, in respect of an investigation;
- bringing any appropriate matters of relevance to Protocol Article 2 to the attention of the Specialised Committee on issues related to the implementation of the Protocol established by the UK-EU Withdrawal Agreement; and
- publishing its advice and the outcome of its research and investigations.

**Our mission statement:**

The Commission champions and guards the rights of all those who live in NI.

**Chief Commissioner:** Alyson Kilpatrick

**Commissioners:** Helen Henderson  
Jonathan Kearney  
David Lavery CB  
Eddie Rooney  
Stephen White OBE

**Chief Executive:** Dr David Russell





## Abbreviations


<b>CJEU</b>	Court of Justice of the European Union
<b>CoE</b>	Council of Europe
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>EEA</b>	European Economic Area
<b>EU</b>	European Union
<b>NI</b>	Northern Ireland
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>UN CAT</b>	United Nations Convention against Torture, Inhuman or Degrading Treatment or Punishment
<b>UN CERD</b>	United Nations Convention on the Elimination of All Forms of Racial Discrimination
<b>UN CEDAW</b>	United Nations Convention on the Elimination of Discrimination against Women
<b>UN CRC</b>	United Nations Convention on the Rights of the Child
<b>UN CRPD</b>	United Nations Convention on the Rights of Persons with Disabilities
<b>UN ICCPR</b>	United Nations International Covenant on Civil and Political Rights
<b>UN ICESCR</b>	United Nations International Covenant on Economic, Social and Cultural Rights

## Understanding the annual statement

The Commission's annual statement uses a traffic light system to assist readers.

**Red**  identifies a subject that requires immediate action by the UK Government, NI Executive or relevant public authorities where the issue may be an ongoing violation or abuse of human rights within NI.

**Amber**  identifies a subject that requires action by the UK Government, NI Executive or relevant public authorities but is not at a level that constitutes an ongoing violation or abuse of human rights. Amber means initial steps have already been taken or been acknowledged as necessary by the relevant body. The necessary action has not yet been completed.

**Green**  identifies a subject that required action by the UK Government, NI Executive or relevant public authorities and a firm commitment has been made, followed by an effective response.

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## Foreword

Since the Commission's last Annual Statement, in common with our global neighbours, NI has continued through a public health crisis of such proportion not seen in our life time. Everyone has been touched, but in different ways and to different extremes. What the COVID-19 pandemic has demonstrated beyond doubt is the deep-seated inequality across society. We have found, unsurprisingly, that those who were already vulnerable or marginalised suffered the greatest impact. Many who were not vulnerable or marginalised have become so, without adequate support. Urgent action was required by the State and all public authorities to mitigate the harm caused. Unprecedented measures were imposed to try to keep people safe. While such measures are laudable, they must be approached with caution and with a real respect for human rights and civil liberties. They must be justified and subject to close scrutiny. They must be accompanied by timely and appropriate support, targeted at those who need it most.

In the last 12 months, we identified that some people were more vulnerable than others. For example, victims of domestic and sexual violence and abuse were at particular risk as a result of lockdown and the closure of services. People living with disabilities faced isolation without the support they had relied on. Women and people from a minority ethnic background, being more exposed to precarious and part-time working conditions, were affected more quickly and deeply. Many children with special educational needs were left without access to appropriate education. Those living in or at risk of poverty fared badly as a result of poor living conditions, overcrowding and barriers to their ability to mitigate the crisis. Older people suffered the greatest impact in health terms, with over 90 per cent of all deaths being in the over 65s group. The disproportionate number of people who died in a care home or other congregated setting raises serious questions about the provision of health and social care.

The Commission advised on the human rights obligations owed by the State and on the impact of restrictions. That will continue but we must also plan for recovery from the pandemic. We must ensure that extraordinary powers deployed in crisis do not become the norm. As soon as is reasonably possible, freedoms must be restored while continuing to protect those most vulnerable. The disproportionate impact of the pandemic on certain groups must inform our approach to future monitoring and advice. An inquiry has been promised and we welcome that, but wish to see it convened sooner rather than later and within a human rights framework. If there is any silver lining to the pandemic, surely it should be the transformation of NI to a society in which the protection of fundamental rights is our collective top priority. Rights must be enjoyed equally by all but, as we have seen, more is needed to achieve that.

None of this was new, but it reminded the Commission of the desperate need for a human rights approach to the provision of public services and prompted the Commission to reconsider how it could better promote and

protect human rights in very practical ways. A human rights approach has always delivered practical protections, but perhaps more needs to be done to demonstrate that.

Last year the Commission accepted additional responsibilities to advise on and monitor the rights protections built into the Ireland/Northern Ireland Protocol. With the Equality Commission for NI, we form the Dedicated Mechanism. To accommodate that extra work, the Commission was fortunate to find additional staff of expertise and experience who have been working relentlessly to explore the scope of protection and the practical impact of withdrawal from the EU.

The Commission is actively seeking greater input from the public. We want to hear about your lived experience and meet your challenge to address the imbalance in the protection of human rights. This year the Commissioners and staff will be, if covid restrictions permit, travelling around NI and visiting grass roots organisations. We also encourage people to contact us directly to air their concerns and to raise individual issues at our advice clinic.

We were inspired by the early response of the wider community to adapt and provide life-saving and life-changing support at a time of crisis. That community response was the embodiment of real-life human rights protection. The Commission is trying to follow that example. At the same time, however, we fear there may be a government led shift from a human rights approach, which must be countered. That is not least in the case of 'legacy' investigations.

When it comes to the State discharging its human rights obligations to deal with deaths and serious injuries, which were 'Troubles-related', we await the outcome of a consultation process and anticipated draft legislation. We will consider the draft when it is produced and will do so within the framework of objective legal standards. We can say at this stage that the framework within which we will assess the proposals will include the Human Rights Act, the Ireland/Northern Ireland Protocol, international treaty standards and other advisory instruments. Truth, justice and the rule of law are, together, the very bases of our joint values over centuries. They are the foundation of democracy itself. We do not believe one must be sacrificed for the benefit of the other. The Commission is strongly of the view that if the law does not protect human rights, then the rule of law is stripped of its very principle. The Commission will insist that the proposals respect the letter of the law, and the wider rule of law.

An ongoing review of the Human Rights Act 1998 should consider how to improve protections, not limit them. An essential element in practical protection is the public's right to challenge breaches by public authorities. Now is the time to strengthen the Act, not strip it of its power. Now is the time to enable greater access to an independent judiciary, not block it.

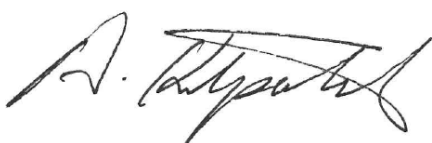
An independent judiciary, accessible to hear challenges about infringements of rights, is critical to a healthy society. The Commission has had reason to take issues to the courts and has achieved amendment

to the law on abortion, requiring the provision of high-quality services for women and girls. We will work to ensure that the commitment to delivering those services across Northern Ireland is met. A related issue arises in the provision of relationship and sexual education in schools. As required by international standards and directed by the Secretary of State, the Commission has now opened an investigation into educational provision. The Commission also brought a case challenging the law on the rehabilitation of offenders, success in which means that people now have a real prospect of rehabilitating themselves and moving on to participate fully in society.

Climate change has created an increasingly urgent need to address its impact on and correlation with human rights. The Commission is advising upon and will monitor the progress of two Bills that have been introduced but is also working to support others better placed to address the climate challenges. For example, we participated in a third-party intervention in a Swiss case on human rights at a time of climate change. We are also, through our Business and Human Rights Forum, bringing business leaders in NI together with climate experts to agree an action plan.

This is my first statement as Chief Commissioner, since my appointment in September 2021. I cannot take credit for much of the work reflected in this statement. I must instead thank my predecessor, Les Allamby, my fellow Commissioners, the Chief Executive David Russell and all the team at the Commission, for their dedication and sheer hard work over a number of years. Sadly, this year the Commission lost one of its most treasured Commissioners. Maura Muldoon passed away much too soon. She spent her life defending rights and championing greater protection for others. She is much missed but is always remembered around the board table.

I joined the Commission in the midst of a pandemic, unable to meet the public in person, colleagues still working from home and facing human rights issues that no one had to consider before. Despite that, I knew I was in the privileged position to have taken over with colleagues who have offered me a warm welcome, support, exceptional advice and encouragement. I am already struck by the quality and quantity of work achieved within a surprisingly limited budget. I am enthusiastic to build on the work of my predecessor and to lead this exceptional organisation to make an even greater impact on the human rights of all of the people in NI. My ultimate aim is to make sure that the people of NI feel the real impact of good human rights compliance as they go about their daily lives.



**Alyson Kilpatrick**

Chief Commissioner



## Chapter 1 Introduction

The Commission was established following the Belfast (Good Friday) Agreement 1998. It is a national human rights institution with 'A status' accreditation by the Global Alliance of National Human Rights Institutions.

Having assessed developments affecting human rights protections in NI throughout 2021, the Commission publishes this annual statement, operating in accordance with the NI Act 1998, and recalling its mandate to:

- *keep under review the adequacy and effectiveness in NI of law and practice relating to the protection of human rights; and*
- *to advise the Secretary of State for NI and the Executive Committee of the NI Assembly of legislative and other measures which ought to be taken to protect human rights.*<sup>1</sup>

The Commission is mandated in accordance with Article 2(1) of the Protocol on Ireland/NI of the UK-EU Withdrawal Agreement to ensure there is no diminution of rights protected in the 'Rights, Safeguards and Equality of Opportunity' chapter of the Belfast (Good Friday) Agreement as a result of United Kingdom's withdrawal from the EU. It is also mandated to ensure that, if certain EU equality laws are changed after 1 January 2021 to improve the protection of human rights, then NI will keep pace with those changes.

The Commission exercises this mandate alongside the Equality Commission for NI, and through the Joint Committee of representatives of the Human Rights Commissions of NI and Ireland.

The Commission's statutory functions for this purpose in accordance with the European Union (Withdrawal Agreement) Act 2020 are:

- *monitor the implementation of Article 2 of the Protocol on Ireland/Northern Ireland to the UK-EU Withdrawal Agreement ('Protocol Article 2');<sup>2</sup> and*
- *to advise the Secretary of State for NI and the Executive Committee of the NI Assembly of legislative and other measures which ought to be taken to implement Protocol Article 2.*<sup>3</sup>

The Commission operates under the UN Paris Principles, and, in particular, respects the responsibility of a national human rights institution to:

*submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights.*<sup>4</sup>

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1 Section 69, NI Act 1998.

2 Section 78A(1), NI Act 1998.

3 Section 78A(5), NI Act 1998.

4 A/RES/48/134, 'UN General Assembly Principles relating to the Status of National Institutions', 20 December 1993.

The Commission has assessed developments during 2021 against domestic human rights standards and those treaty obligations of the UN and European systems that are legally binding in NI.<sup>5</sup> Moreover, since 1 January 2021 the Commission assesses developments against the requirements of Protocol Article 2.<sup>6</sup>

## Domestic standards

The ECHR is given direct domestic effect across the UK as a consequence of the Human Rights Act 1998. Subject to limited exception all public authorities in NI must ensure that their actions are compatible with the Human Rights Act and therefore with the ECHR.

The definition of a public authority includes a court or tribunal, and any person certain of whose functions are of a public nature.<sup>7</sup>

Protocol Article 2 is given domestic effect through the EU (Withdrawal) Act 2018 and the EU (Withdrawal Agreement) Act 2020, which confirm that all rights, obligations and remedies from Withdrawal Agreement, including Protocol Article 2, are recognised and available in domestic law.<sup>8</sup>

Human rights law applies directly in NI by virtue of the NI Act 1998, section 24(1). That means that Ministers of the Executive Committee of the NI Assembly (NI Executive) and Executive departments are required to ensure that all legislation and actions are compatible with the ECHR and Protocol Article 2.<sup>9</sup>

The NI Assembly is proscribed from making any law that is incompatible with the ECHR or with Protocol Article 2.<sup>10</sup>

Moreover, the NI Act 1998, section 26, requires compliance with other international human rights obligations. For that purpose the Secretary of State for NI may, by direct order, prohibit any proposed action by Ministers of the NI Executive and devolved Executive departments.<sup>11</sup>

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- 5 By ratifying a treaty the State agrees to be bound by the contents of that treaty. Those relevant in NI can be found on page 14.
- 6 Article 2, Protocol on Ireland/NI to the Agreement on the Withdrawal of the UK of Great Britain and NI from the EU and the European Atomic Energy Community 2020.
- 7 Section 6, Human Rights Act 1998. This means that private sector contractors may, depending on their role, be subject to the requirements of the Human Rights Act.
- 8 Section 7A, EU (Withdrawal) Act 2018.
- 9 Section 24 of the NI Act 1998 states: 'A Minister or NI department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act— (a) is incompatible with any of the Convention rights; (aa) is incompatible with Article 2(1) of the Protocol on Ireland/ Northern Ireland in the EU withdrawal agreement (rights of individuals)'.
- 10 Section 6 of the NI Act 1998 states: '(1) A provision of an Act is not law if it is outside the legislative competence of the Assembly. (2) A provision is outside that competence if — (c) it is incompatible with any of the Convention rights; (ca) it is incompatible with Article 2(1) of the Protocol on Ireland/ Northern Ireland in the EU withdrawal agreement (rights of individuals)'.
- 11 Section 26 of the NI Act 1998 states: 'If the Secretary of State considers that any action proposed to be taken by a Minister or NI department would be incompatible with any international obligations, with the interests of defence or national security or with the protection of public safety or public order, he may by order direct that the proposed action shall not be taken'.

## Binding International Standards

The treaties which the UK has ratified and is bound by include:

- *European Convention on Human Rights (ECHR)*<sup>12</sup>
- *European Social Charter*<sup>13</sup>
- *Framework Convention for the Protection of National Minorities*<sup>14</sup>
- *Convention on Action against Trafficking in Human Beings*<sup>15</sup>
- *European Charter for Regional or Minority Languages*<sup>16</sup>
- *International Covenant on Civil and Political Rights (ICCPR)*<sup>17</sup>
- *International Covenant on Economic, Social and Cultural Rights, (ICESCR)*<sup>18</sup>
- *UN Convention on the Elimination of All Forms of Racial Discrimination (UN CERD)*<sup>19</sup>
- *UN Convention on the Elimination of Discrimination Against Women, (UN CEDAW)*<sup>20</sup>
- *UN Convention on the Rights of the Child (UN CRC)*<sup>21</sup>
- *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*<sup>22</sup>
- *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*<sup>23</sup>
- *UN Convention Against Torture, Inhuman or Degrading Treatment or Punishment (UN CAT)*<sup>24</sup>
- *the UN Educational, Scientific and Cultural Organisation Convention on the Protection and Promotion of the Diversity of Cultural Expressions*<sup>25</sup>
- *Charter of Fundamental Rights of the European Union*<sup>26</sup>
- *UN Convention on the Rights of Disabled Persons (UN CRPD)*<sup>27</sup>
- *UK-EU Withdrawal Agreement*<sup>28</sup>

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12 UK ratification 1951 and given further domestic effect by the Human Rights Act 1998.

13 UK ratification 1962.

14 UK ratification 1998.

15 UK ratification 2008.

16 UK ratification 2001.

17 UK ratification 1976.

18 UK ratification 1976.

19 UK ratification 1969.

20 UK ratification 1986.

21 UK ratification 1991.

22 UK ratification 2003.

23 UK ratification 2009.

24 UK ratification 1988.

25 UK ratification 2007.

26 UK ratification 2000.

27 UK ratification 2009.

28 UK ratification 2020.

## Treaty examinations

The Commission, in assessing compliance with international human rights standards, takes account of the findings of international monitoring bodies that are directed to or otherwise apply to NI, as well as the general comments and other interpretive texts adopted by such bodies.<sup>29</sup>

### **Treaty examinations in 2021:**

#### **CoE European Charter for Regional and Minority Languages**

In March 2021, the Committee of Experts published its evaluation on the implementation of the Recommendations for Immediate Action Contained in the Committee of Experts' fifth evaluation report on the UK. The Commission has provided a written submission to the Committee of Experts in February 2021.

#### **UN Convention on the Rights of the Child**

In March 2021, the UN CRC Committee published its List of Issues prior to reporting in respect of the combined sixth and seventh periodic reports of the UK which is due to be examined in 2022.

#### **UN Committee on the Elimination of Discrimination against Women**

Following its 2019 concluding observations on the UK's compliance with the UN CEDAW, in line with the follow-up procedure, the Commission provided a further submission in September 2021 updating on developments.

#### **CoE Framework Convention for the Protection of National Minorities**

The UK Government submitted its fifth period report in respect of compliance with the Framework Convention for the Protection of National Minorities in November 2021. The Commission will make a written submission to the Advisory Committee in early 2022.

29 The 'soft law' standards developed by the human rights bodies of the CoE and UN are non-binding but provide further guidance in respect of specific rights areas.

## Chapter 2 Substantive rights and issues

### Constitutional Protections

This section considers rights under the heading Constitutional Protections, including a number of issues related to the UK's withdrawal from the EU. Issues considered within this section include: a Bill of Rights for NI; a Charter of Rights for the Island of Ireland; the Commission's status as a National Human Rights Institution; other constitutional reforms; human rights after UK Exit from the EU; the Common Travel Area; the EU Settlement Scheme; and birthright issues.

#### A Bill of Rights for NI

In 2008, as required by the Belfast (Good Friday) Agreement and the NI Act 1998, the Commission provided advice to the UK Government on a Bill of Rights for NI. On receipt of its advice the NI Office sought views from the public by way of a public consultation, which found “considerable support from human rights and community groups for a wide-ranging Bill of Rights along the lines of that recommended by the NI Human Rights Commission”.<sup>30</sup>

Since 2010, UK Government Ministers have referred to a lack of political consensus around a Bill of Rights for NI.<sup>31</sup> This lack of political consensus is reflected in the absence of any significant development.

Following commitments made in the New Decade, New Approach Agreement<sup>32</sup> the Ad Hoc Committee on a Bill of Rights has been established and, during 2021, conducted a stakeholder consultation.

The Committee also carried out a survey between November 2020 and February 2021, seeking views on human rights and a Bill of Rights for NI. The results of this survey were published in March 2021.<sup>33</sup>

The Commission has provided a written submission and oral evidence to the Committee, building on its previous advice and focusing on the technical aspects of a Bill of Rights.<sup>34</sup> Together with the Equality Commission for NI, further written and oral evidence was provided on how the ‘non-diminution’ clause contained within Article 2 of the NI Protocol and the provisions of the EU Charter of Fundamental Rights should inform the development and drafting of a NI Bill of Rights.<sup>35</sup>

Under New Decade, New Approach<sup>36</sup>, a panel of five experts was to be appointed by the First and deputy First Ministers, to assist the work of the

30 UK Parliament Hansard, ‘Written Ministerial Statement: Minister of State Hugo Swire MP’, 16 December 2010.

31 UK Parliament Hansard, ‘House of Commons (Westminster Hall) - Bill of Rights (NI)’, 16 July 2003.

32 NI Office, ‘New Decade, New Approach’ (NIO, 2020), at para 37.

33 Research and Information Service Briefing Note, ‘NI Bill of Rights Survey’, (NI Assembly, 2021).

34 NI Human Rights Commission, ‘Response to the Ad Hoc Committee’s consultation on a Bill of Rights for Northern Ireland’, February 2021.

35 NI Human Rights Commission, ‘Briefing note to the Ad Hoc Committee on a Bill of Rights EU Withdrawal and a Bill of Rights’, April 2021.

36 NI Office, ‘New Decade, New Approach’ (NIO, 2020), at para 5.26.

Ad-Hoc Committee. A panel has yet to be appointed, with reports that the DUP has blocked the appointment of experts.<sup>37</sup> At its meeting on 25 November 2021, the Chair of the Committee proposed suspending the Committee until such time as a panel of experts has been appointed.<sup>38</sup>

The Ad Hoc Committee is due to report to the NI Assembly in February 2022.<sup>39</sup>

### Recommendation

The Commission welcomes local progress made by the Ad-Hoc Assembly Committee on a Bill of Rights for NI but continues to recommend that the UK Government implements its commitment to legislate for a Bill of Rights for NI.

## A Charter of Rights for the island of Ireland

The Commission and the Irish Human Rights Commission were mandated by the Belfast (Good Friday) Agreement 1998 to consider through a Joint Committee “the possibility of establishing a charter, open to signature by all democratic political parties, reflecting and endorsing agreed measures for the protection of the fundamental rights of everyone living in the island of Ireland”.<sup>40</sup>

A Charter should recognise the commonality of rights protected in both jurisdictions and that an equivalence of human rights protections, if achieved, could assist in underpinning peace in both jurisdictions. In 2011, this task was completed when the Commissions together presented advice to the Governments of the UK and Ireland, the Speaker of the NI Assembly and the Ceann Comhairle of Dáil Éireann.<sup>41</sup> The Speaker and Ceann Comhairle both agreed to forward the advice to political parties in their respective legislative bodies for further consideration. Since then, no further communication has been received on this matter.

The issue of a Charter of Rights for the Island of Ireland has arisen in the context of discussions regarding the implications of Brexit for the island of Ireland.<sup>42</sup> A Seanad Special Select Committee on Withdrawal of the UK from the EU published the report ‘Brexit: Implications and Potential Solutions’. Within the Report, the Committee state “an all-island approach to human rights should be explored, with possible solutions including a reimagined role for the Joint Committee on Human Rights and a Charter of Rights for the island of Ireland. Additionally, the Bill of Rights project in NI should also be revisited”.<sup>43</sup>

37 Sinn Féin, ‘Press Release: Human Rights expert being blocked by DUP from Bill of Rights Panel – Sheerin’, 4 November 2021.

38 NI Assembly, Ad Hoc Committee on a Bill of Rights, Meeting of 25 November 2021. Available at: <https://niassembly.tv/ad-hoc-committee-on-a-bill-of-rights-meeting-thursday-25-november-2021/>.

39 NI Office, ‘New Decade, New Approach’ (NIO, 2020), at Part 2, para 28.

40 Joint Committee of the NI Human Rights Commission and the Irish Human Rights Commission, ‘The Advice of the Joint Committee on a Charter of Rights for the Island of Ireland’ (NIHRC, 2011).

41 Ibid.

42 Colin Harvey, ‘Brexit, NI and Human Rights’, (Rights NI, 5 May 2017).

43 Seanad Special Select Committee on Withdrawal of the UK from the European Union, ‘Brexit: Implications and Potential Solutions’ (Houses of the Oireachtas, 2017), at 34.

## Recommendation

The Commission, in accordance with the advice provided by the Joint Committee, recommends that political parties in both NI and Ireland adopt a Charter of Rights for the island of Ireland. The Commission calls on the UK Government and Government of Ireland to endorse a proposed Charter of Rights for the island of Ireland as co-guarantors of the peace process.

## National human rights institution

In June 2021, the Commission submitted its Statement of Compliance to the Global Alliance of National Human Rights Institutions' Sub-Committee on Accreditation as part of the five year periodic review process. This statement details how the Commission has complied with the UN Paris Principles since the 2016 review and sets out developments in terms of the Commissions amended powers and additional mandate under the EU (Withdrawal Agreement) Act 2020.

The Commission has called for an independent review of the organisation, as the last was conducted in 2001. The Commission's mandate has developed substantially during this period, most recently with the addition of the dedicated mechanism function under Article 2(1) of the Ireland/Northern Ireland Protocol to the EU Withdrawal Agreement, for which it receives a separate budget of £838,000.

The Sub-Committee on Accreditation reviewed the Commission's status during its October 2021 session and has recommended that further consideration of the reaccreditation application be deferred until 2022. The Sub-Committee highlighted the serious and time sensitive funding position and recommends that "an improved and sustainable position is reached within this deferral period".<sup>44</sup>

The Sub-Committee has also made recommendations that include the Commission advocating for pluralism, including with respect to gender balance and minority representation, in its composition and also further powers to enter places of detention without notice.<sup>45</sup>

The Commission was previously awarded its A status in 2016.

## Recommendation

The Commission recommends that the NI Office provides adequate and secure funding to enable it to fulfil its statutory functions, in line with its role as an A status institution under the UN Paris Principles. The Commission recommends that, in determining what is necessary, the NI Office conducts an independent review of the organisation.

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<sup>44</sup> Correspondence between the Sub-Committee on Accreditation and the NI Human Rights Commission, 2 November 2021.

<sup>45</sup> Ibid.



## Other constitutional reforms

In 2017, the Report of the UN Working Group on the Universal Periodic Review recommended the UK Government ensure that there was no regression in rights and effective participation of all stakeholders in any process to amend the Human Rights Act and design a possible UK Bill of Rights.<sup>46</sup> It also recommended that “in view of the process of leaving the EU, ensure that any new legislation aims at strengthening human rights in the entire jurisdiction of the country”.<sup>47</sup>

Specific to NI, the UN Working Group recommended that the UK Government “provide reassurance that any proposed British Bill of Rights would complement rather than replace the incorporation of the ECHR in NI law” and further stated “that a Bill of Rights for NI to reflect the particular circumstances of NI should be pursued to provide continuity, clarity and consensus on the legal framework for human rights there”.<sup>48</sup>

In 2016, speaking following a visit to the UK, the former CoE Commissioner for Human Rights, Nils Muižnieks, stated:

*the repeatedly delayed launch of the consultation process for repeal of the Human Rights Act has created much speculation and an atmosphere of anxiety and concern in civil society and in some parts of the devolved administrations. There is a real fear of regression in terms of rights’ protection in the UK.*<sup>49</sup>

## Human Rights Act

In December 2020, the UK Government announced that there would be an independent review of the Human Rights Act 1998. The Terms of Reference and a Call for Evidence for the Independent Review were published in January 2021.<sup>50</sup> The Terms of Reference specified that the content of the rights contained within the Human Rights Act were not under consideration. Rather, the Review would consider its operational mechanisms, noting “the [Human Rights Act] is underpinned by the UK’s international obligations under the Convention, and the UK remains committed to upholding those obligations”.<sup>51</sup>

In March 2021, the Commission responded to the Independent Human Rights Act Review Team’s Call for Evidence, identifying the specific impact that altering the operational mechanisms of the Human Rights Act could have on NI.<sup>52</sup> The Commission recommended that “the [Independent Review on the Human Rights Act] Team consider the Belfast (Good

46 A/HRC/36/9, ‘UN Working Group on the Universal Periodic Review, Report of the Working Group on the Universal Periodic Review - UK of Great Britain and NI’, 14 July 2017, at paras 134.66-134.78.

47 Ibid, at para 134.76.

48 Ibid, at para 134.67.

49 CoE, ‘Press Release: UK – Forthcoming reforms to human rights law must not weaken protection’, 22 January 2016.

50 Independent Human Rights Act Review Team, ‘Independent Human Rights Act Review Team: Call for Evidence’ (IHRART, 2021).

51 Ibid, at 10.

52 NI Human Rights Commission, ‘Submission to the Independent Human Rights Act Review Team’s Call for Evidence’, (NIHRC, 2021).



Friday) Agreement and the UK Government's commitment to non-diminution when considering its deliberations".<sup>53</sup>

The Commission further recommended that the Independent Human Rights Act Review Team engage with the Ad Hoc Committee on a Bill of Rights for NI to ensure that the NI context was appropriately considered in the course of the review.<sup>54</sup>

In March 2021, the Commission responded to the call for evidence on the Government's Independent Human Rights Act Review by the UK Joint Committee on Human Rights.<sup>55</sup> The Chief Commissioner,<sup>56</sup> along with the Chief Commissioners of the Scottish Human Rights Commission and the Equality and Human Rights Commission, gave oral evidence to the Joint Committee. During this oral evidence session, the Chief Commissioner outlined how the Human Rights Act has impacted on NI's specific context, including by reference to the Belfast (Good Friday) Agreement 1998 and Article 2 of the Ireland/Northern Ireland Protocol.<sup>57</sup> The Commission also participated in a seminar alongside the Independent Human Rights Act Review Team, organised by the Law Society NI and Bar Council, as well as a roundtable of Human Rights Organisations organised by the Review Team.

The UK Government has received the Independent Human Rights Act Review Panel's report and is considering its conclusions "as part of a wider reform programme".<sup>58</sup> The UK Government will publish the Panel's report in due course and has committed to consulting on proposed changes to the Human Rights Act 1998.<sup>59</sup>

### Judicial review

In July 2020, the UK Government launched an Independent Review of Administrative Law, chaired by Lord Faulks QC. The review panel considered options for reform to the process of judicial review for the UK Government's consideration.<sup>60</sup> In September 2020, the panel sought evidence on the effectiveness of judicial review in enabling citizens to challenge the lawfulness of government action while also allowing the Executive and local authorities to carry on the business of government.<sup>61</sup>

In March 2021, the report of the Independent Review of Administrative Law was published. The report makes two recommendations involving legislative change and a number of recommendations for procedural

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53 NI Human Rights Commission, 'Submission to the Independent Human Rights Act Review Team's Call for Evidence', (NIHRC, 2021), at 3.

54 Ibid, at 3.

55 NI Human Rights Commission, 'Submission to the Joint Committee on Human Rights on the Independent Human Rights Act Review', (NIHRC, 2021).

56 Les Allamby, then Chief Commissioner.

57 UK Parliament Hansard, 'Joint Committee on Human Rights: Corrected oral evidence: The Government's Independent Human Rights Act Review - HC 1161', 10 March 2021.

58 UK Parliament Hansard, 'Written Answers: Human Rights - James Cartlidge MP - UIN 62891, 2 November 2021.

59 Ibid.

60 Gov.UK, 'Independent Review of Administrative Law'. Available at: <https://www.gov.uk/government/groups/independent-review-of-administrative-law>.

61 Independent Review of Administrative Law Secretariat, 'Does Judicial Review Strike the Right Balance Between Enabling Citizens to Challenge the Lawfulness of Government Action and Allowing the Executive and Local Authorities to Carry on the Business of Government: Call for Evidence' (MoJ, 2020).

change.<sup>62</sup> The UK Government responded in March 2021, identifying merit in addressing issues and producing a closed consultation on its proposals to address these points.<sup>63</sup> In June 2021, the Chair of the Review Team, Lord Faulks, gave evidence on the Review to the UK Joint Committee on Human Rights, noting that the UK Government refused his request to publish all the Government's submissions to the Review's Call for Evidence.<sup>64</sup> Lord Faulks identified that:

*the compromise that was finally reached was that there was no interference with any of the contents of our report, but the government departments were effectively anonymised. There was then, subsequent to our report and to the Government's response to our report, a further document summarising all the Government's submissions.*

In July 2021, the UK Government introduced the Judicial Review and Courts Bill 2021/2022 in response to the Independent Review of Administrative Law.<sup>65</sup> Part 1 of the Bill makes reforms to the law of Judicial Review throughout the UK,<sup>66</sup> while Part 2 of the Bill covers a wide range of court and tribunal reforms.<sup>67</sup> The Commission responded to the Public Bill Committee's call for evidence in November 2021.<sup>68</sup>

## Retained EU Law

The EU (Withdrawal) Act 2018 repealed the European Communities Act 1972, a significant constitutional change.<sup>69</sup> Notwithstanding that repeal, Sections 2-4 carry over EU-derived law and direct EU obligations into the domestic legal framework on and after exit day and ensure that any rights, obligations and remedies which were available before exit day continue to be recognised and available on and after exit day.

Section 5 of the EU (Withdrawal) Act identified a number of exclusions from retained EU law. The EU Charter of Fundamental Rights was not carried over into domestic law as part of EU retained law as the UK left the EU.<sup>70</sup> References to the Charter in case law are "to be read as if they were references to any corresponding retained fundamental rights or principles".<sup>71</sup> The general principles of EU law are recognised, but are given much more limited scope as "there is no right of action in domestic law on or after exit day for failure to comply with any of the principles of EU law".<sup>72</sup>

62 Independent Review of Administrative Law, 'The Independent Review of Administrative Law', (IRAL, 2021).

63 Ministry of Justice, 'Closed Consultation: Judicial Review Reform', 18 March 2021.

64 UK Parliament Hansard, 'Joint Committee on Human Rights: Oral Evidence: Judicial Review and Human Rights (non-inquiry session) - Lord Faulks QC, Chair, Independent Review of Administrative Law - HC 321', 16 June 2021.

65 Ministry of Justice, 'Judicial Review Reform Consultation: The Government Response', (MOJ, 2021).

66 Part 1, Judicial Review and Courts Bill 2021/2022.

67 Ibid.

68 NI Human Rights Commission, Correspondence to the Public Bill Committee on the Judicial Review and Courts Bill, November 2021.

69 Section 1, EU (Withdrawal) Act 2018.

70 Section 5, EU (Withdrawal) Act 2018.

71 Section 5(5), EU Withdrawal Act 2018.

72 Schedule 1 EU (Withdrawal) Act 2018, para 1.

Both the EU Charter and the general principles of EU law will continue to be relevant to the provisions of the Withdrawal Agreement, including Article 2 if the Ireland/Northern Ireland Protocol.<sup>73</sup>

Section 6(5A) of the EU (Withdrawal) Act 2018 permits a Minister, by regulation, to amend the Act and change the extent to which courts can diverge from retained EU case law. In 2020, following a consultation,<sup>74</sup> the UK Government introduced regulations to extend the power to depart from retained EU case law to additional courts, including the Court of Appeal NI.<sup>75</sup> These regulations came into effect on 1 January 2021. The regulations preserved the normal operation of precedent between decisions of UK courts, therefore a decision of a superior court on whether or not to depart from retained EU case law would continue to be binding.

The Court of Appeal in England has recently explored the extent to which it can depart from retained EU caselaw and identified a number of principles to be taken into consideration. These principles include that the meaning and effect of an EU measure is determined by reference to CJEU jurisprudence up to and including 31 December 2020 and that general principles derived from the EU Charter and Treaties continue to be relevant to interpretation. The Court further clarified that in construing and applying such a measure it can depart from any retained CJEU case law or any retained general principles if it considers it right to do so.<sup>76</sup>

In September 2021, the UK Government announced a planned review of retained EU law to accelerate its repeal and amendment.<sup>77</sup> Following the UK withdrawal from the EU there is a risk that as the UK amends and updates retained EU law over time that it could repeal or amend a provision that leads to a diminution of rights, safeguards and equality of opportunity and therefore engage Protocol Article 2, without adequate parliamentary scrutiny.

### Recommendation

The Commission continues to recommend that the UK Government recognise the Human Rights Act 1998 as a constitutional statute and ensure any reform builds upon the Act as part of further progress in the promotion and protection of human rights.

The Commission recommends that when making any change to retained EU law the Minister confirms that an assessment for compliance with the commitment in Protocol Article 2 has been undertaken and that there is no diminution of the rights, safeguards and equality of opportunity as set out in the relevant part of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU.

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73 Article 4, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

74 NI Human Rights Commission, 'Briefing Paper: Ministry of Justice Consultation on Retained EU Case Law' (NIHRC, 2020).

75 The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020.

76 *Lipton & Another v BA City Flyer Ltd* [2021] EWCA Civ 454, para 83.

77 UK Parliament Hansard 'House of Lords: Brexit Opportunities- Lord Frost' 16 September 2021.

## Human Rights after UK Exit from the EU

### Withdrawal Agreement and Ireland/NI Protocol

The UK signed the UK-EU Withdrawal Agreement in January 2020 and the Protocol on Ireland/NI Protocol (the Protocol), which is part of the treaty, took effect from 1st January 2021.

Protocol Article 2(1) commits the government to:

*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.<sup>78</sup>*

The ‘non-diminution’ guarantee commits the UK Government to ensuring there is no lowering of the rights set out in the relevant chapter of the Belfast (Good Friday) Agreement and which are underpinned by EU obligations, including EU treaties, directives and regulations, in place on 31 December 2020.

The rights, safeguards and equality of opportunity provisions set out in the relevant Chapter of the Belfast (Good Friday) Agreement include the following:

- *the right to freedom and expression of religion;*
- *the right to pursue democratically national and political aspirations;*
- *the right to seek constitutional change by peaceful and legitimate means;*
- *the right to freely choose one’s place of residence;*
- *the right to equal opportunity in all social and economic activity,*
- *regardless of class, creed, disability, gender or ethnicity;*
- *the right to freedom from sectarian harassment;*
- *the right of women to full and equal political participation;*
- *the right of victims to remember as well as to contribute to a changed society;*
- *respect, understanding and tolerance in relation to linguistic diversity; and*
- *the need to ensure that symbols and emblems are used in a manner which promotes mutual respect rather than division.<sup>79</sup>*

<sup>78</sup> Protocol on Ireland/NI to the Agreement on the Withdrawal of the UK of Great Britain and NI from the EU and the European Atomic Energy Community 2020.

<sup>79</sup> Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

Annex 1 of the Protocol sets out six EU equality directives. The Directives are:

- *Gender Goods and Services Directive*,<sup>80</sup>
- *Equal Treatment Directive*,<sup>81</sup>
- *Racial Equality Directive*,<sup>82</sup>
- *Equality Framework Directive*,<sup>83</sup>
- *Self-Employment Equal Treatment Directive*,<sup>84</sup> and
- *Equal Treatment in Social Security Directive*.<sup>85</sup>

Under the Protocol, the UK Government has committed not only to ensuring there is no diminution of the rights contained in the Annex 1 Directives but also that NI equality law must dynamically align, or ‘keep pace’, with any enhancements made by the EU to these rights, on or after 1 January 2021.<sup>86</sup>

In addition to the Annex 1 directives, there are a number of other EU obligations which underpin the rights and safeguards in the relevant part of the Belfast (Good Friday) Agreement and are subject to a no-regression commitment. The UK Government has recognised a non-exhaustive list of relevant measures which fall within scope of the commitment in Protocol Article 2(1), including:

- *the Victim’s Directive*,<sup>87</sup>
- *the Parental Leave Directive*,<sup>88</sup>
- *the Pregnant Worker’s Directive*,<sup>89</sup>
- *other specific measures which protect the rights of disabled people*.<sup>90</sup>

The Commission, with the Equality Commission for NI, are undertaking research to identify the range of measures which fall within scope

80 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.

81 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.

82 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.

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

84 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.

85 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.

86 Article 13, Protocol on Ireland/Northern Ireland to the UK-EU Withdrawal Agreement 2020.

87 Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

88 Directive 2010/18/EU, ‘Council Directive implementing the revised Framework Agreement on parental leave’, 8 March 2010.

89 Directive 92/85/EEC, ‘Council Directive on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding’, 19 October 1992.

90 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 13.

of Protocol Article 2. These measures include for example additional protections for victims<sup>91</sup> and employment protections for workers.<sup>92</sup>

In June 2021, following a legal challenge, the NI High Court upheld the legality of the Protocol.<sup>93</sup> The Court found that the EU Withdrawal Act 2018 overrode the Act of Union 1800, that the Protocol had no impact on section 1(1) of the NI Act 1998 and did not breach ECHR nor EU law.

## Dedicated mechanism

Protocol Article 2(1) provides that the no-diminution guarantee in that paragraph shall be implemented through dedicated mechanisms. Protocol Article 2(2) states that:

*the UK shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the NI Human Rights Commission, the Equality Commission for NI and the Joint Committee of representatives of the Human Rights Commissions of NI and Ireland, in upholding equality standards.*<sup>94</sup>

The EU (Withdrawal Agreement) Act 2020 amended the Northern Ireland Act 1998 to empower the NI Human Rights Commission and the Equality Commission for NI with new functions to monitor, advise, report on, promote, and enforce the implementation of Article 2(1) of the Protocol.<sup>95</sup> These new powers took effect from 1 January 2021.

In July 2020, the Commission was provided with additional funds to undertake its role as part of the dedicated mechanism.

Protocol Article 2 is relevant across many of the rights issues addressed in the Commission's Annual Statement. The Commission has focused on highlighting obligations under Protocol Article 2 and comments have been largely confined to those areas where the Commission has raised substantive concerns across the first year of this work.

## Extent of Article 2

The Commission, along with the Equality Commission for NI, are currently undertaking work to examine the scope of Protocol Article 2. The Commission is undertaking further research on immigration law and the right to health. In addition, the Commission and Equality Commission for NI have sought a series of legal opinions on the underpinning EU obligations which fall within scope of Protocol Article 2: franchise rights of EU citizens in NI; travel with assistance dogs; civil service nationality rules; and delays in EU Settlement Scheme decisions pending resolution of minor criminal cases.

91 Directive 2011/36/EU 'Council Directive on preventing and combating trafficking in human beings and protecting its victims', 5 April 2011; Directive 2011/92/EU, 'Parliament and Council Directive on combating the sexual abuse and sexual exploitation of children and child pornography', 13 December 2011; Directive 2004/80/EC, 'Council Directive relating to the compensation to crime victims', 29 April 2004.

92 Directive 97/81/EC, 'Council Directive concerning the Framework Agreement on part-time workers', 15 December 1997; Directive 2008/104/EC, 'EU Parliament and Council Directive on temporary agency work' 19 November 2008.

93 *In the matter of an application by James Hugh Allister for Judicial Review* [2021] NIQB 64.

94 Protocol on Ireland/Northern Ireland to the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2020.

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



The ‘keeping pace’ obligation which arises in the context of the Annex 1 Directives requires ongoing monitoring of the development and interpretation of EU law, including the application of the EU Charter of Fundamental Rights and decisions by the Court of Justice of the EU in the context of the Annex 1 Directives.

The scope of Protocol Article 2 will be subject to the determination of the courts, which will interpret the parameters of Article 2 and confirm the extent to which the identified underpinning EU obligations fall within scope of this commitment. In addition, the UK-EU Joint Committee can make binding decisions to resolve disputes on interpretation and application of the Withdrawal Agreement, including Article 2.<sup>96</sup> Any decision of the Joint Committee must be agreed by mutual consent by the UK and EU and has the same legal effect as the Withdrawal Agreement and is binding on both parties.<sup>97</sup> Where a dispute on the application and interpretation of the Withdrawal Agreement 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.<sup>98</sup>

## All-island dimension of Protocol Article 2

In March 2021 the Commission, the Equality Commission for NI and the Irish Human Rights and Equality Commission (the three Commissions) agreed a Memorandum of Understanding on providing oversight of and reporting on rights and equalities issues falling within the scope of the commitment in Protocol Article 2 that have an island of Ireland dimension.<sup>99</sup>

In April, the three Commissions provided oral evidence to the NI Assembly Committee for the Executive Office on Article 2 of the Protocol.<sup>100</sup> In May the Commission and Equality Commission for NI submitted a written briefing<sup>101</sup> to the Seanad Special Committee on UK Withdrawal from the EU in advance of oral evidence by the three Commissions. This focused on the scope and significance of Protocol Article 2 and provided an overview of the role of the ‘dedicated mechanism’ and the work of the Commissions to provide oversight of, and reporting on, rights and equalities issues falling within the scope of Article 2 that have an island of Ireland dimension.<sup>102</sup>

<sup>96</sup> Article 164, UK-EU Withdrawal Agreement 2020.

<sup>97</sup> Article 166, UK-EU Withdrawal Agreement 2020. The Specialised Committee on the implementation of the Protocol can consider any matter of relevance to Article 2 brought to its attention by the Commissions and the Joint Committee of representatives of the NIHRC and IHREC (Article 14, Ireland/Northern Ireland Protocol). The Specialised Committee may draft decisions and recommendations and refer them to the Joint Committee for adoption (Article 165, UK-EU Withdrawal Agreement 2020).

<sup>98</sup> Article 164-161 UK-EU Withdrawal Agreement. Article 174 clarifies that where any question on the interpretation of an EU law concept is raised in arbitration, it shall be referred to CJEU to give a ruling on that question and that ruling will be binding on the arbitration panel.

<sup>99</sup> NI Human Rights Commission, Equality Commission for NI, Irish Human Rights and Equality Commission, ‘Ireland/Northern Ireland Protocol of the European Union Withdrawal Agreement, Article 2: Island of Ireland Dimension - Memorandum of Understanding’ (NIHRC, ECNI, IHREC, 2021).

<sup>100</sup> NI Assembly Hansard, ‘Committee for the Executive Office: Article 2 of the Protocol on Ireland/Northern Ireland: Equality Commission for Northern Ireland; Irish Human Rights and Equality Commission; Northern Ireland Human Rights Commission’, 14 April 2021.

<sup>101</sup> NI Human Rights Commission and Equality Commission for NI, ‘Submission to Seanad Éireann Special Select Committee on UK Withdrawal from the EU’, (NIHRC and ECNI, 2021).

<sup>102</sup> Oireachtas Official Report, ‘Seanad Special Committee on the Withdrawal of the United Kingdom from the European Union: Citizens’ Rights in Northern Ireland Post Brexit Discussion’, 24 May 2021.

In addition, the three Commissions jointly with the Centre for Cross Border Studies held a cross border stakeholder roundtable engagement in May, attended by over thirty organisations. Chief Commissioners briefed on the powers and functions under Protocol Article 2 and facilitated discussion on key issues for people living and working in border areas.

The three Commissions are also undertaking further research scoping out impact of Brexit on the divergence of rights and best practice on the island of Ireland.

## Internal Market Act 2020

While the UK Internal Market Bill was passing through Parliament, the Commission and the Equality Commission for NI raised concerns about the potential for the Bill to impact on the mandate of the dedicated mechanism.<sup>103</sup> The Commission welcomed clarification from the Minister, by way of a letter lodged in the Library of the House of Lords, that the market access principles in the (now) Internal Market Act do not apply in NI as they do in other parts of the UK and that they must be read in light of the Protocol and implementing legislation.<sup>104</sup>

## Engagement

The Commission and the Equality Commission for NI have been working closely across a number of areas, including regular meetings with officials in the Executive Office and the NI Office charged with implementing Protocol Article 2. The Commissions have also had regular meetings with the Independent Monitoring Authority for the Citizens' Rights Agreements.

The Commissions have also met with representatives of the EU Delegation to the UK. In September 2021 the Commissions hosted Vice President Maroš Šefčovič and his delegation in NI and facilitated engagement with civil society stakeholders, which focused on the centrality of rights and equality in NI.

In December 2020, the Commissions provided a written briefing to the NI Affairs Committee Inquiry on Brexit and the Protocol.<sup>105</sup>

The Commission provided a written submission to the Ad Hoc Committee on a Bill of Rights on how the 'non-diminution' clause contained within Protocol Article 2 and the provisions of the EU Charter of Fundamental Rights should inform the development and drafting of a NI Bill of Rights.<sup>106</sup> This submission was followed by the Commission, jointly with the Equality Commission for NI, providing oral evidence in April 2021.<sup>107</sup> The Commission and Equality Commission for NI submitted a written briefing

103 NI Human Rights Commission and Equality Commission NI, 'Briefing on the Internal Market Bill' (NIHRC and ECNI, 2020).

104 Letter from Lord Callanan, Minister for Climate Change and Corporate Responsibility to Baroness Ritchie of Downpatrick, 26 November 2020.

105 Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland, 'Submission to the Northern Ireland Affairs Committee Inquiry on Brexit and the Northern Ireland Protocol', (NIHRC and ECNI, 2020).

106 Northern Ireland Human Rights Commission, 'Briefing Note for Ad Hoc Committee on a Bill of Rights: EU Withdrawal and a Bill of Rights', (NIHRC and ECNI, 2021).

107 NI Assembly Hansard, 'Ad Hoc Committee on a Bill of Rights: Implications of Brexit for Human Rights: Equality Commission for Northern Ireland; Northern Ireland Human Rights Commission', 29 April 2021.



to the Introductory Inquiry of the House of Lords EU Affairs Committee Sub Committee on the Protocol in June 2021.<sup>108</sup> The Introductory Report recognised the importance of Article 2<sup>109</sup> and committed to undertaking further work on Article 2 in the Autumn, resulting in an invitation to the Commissions to give oral evidence to the Committee on 15 September 2021. Following this evidence session, the Chair of the Committee wrote the Secretary of State for NI asking for clarification on a number of the issues identified by the Commissions and urging the UK Government to confirm its commitment to upholding Protocol Article 2 and the dedicated mechanism and to foster public engagement and awareness to ensure individuals can vindicate their rights.<sup>110</sup>

On request from the Committee at the oral evidence session, the Commission and Equality Commission for NI wrote to the Chair of the House of Lords Sub Committee on the Protocol, to provide supplementary information on the potential negative impact of any divergence from EU rights and on existing gaps between rights in NI and Great Britain and NI and Ireland.<sup>111</sup> In addition, the Commissions provided further written evidence to the Committee on the UK and EU proposals and prospects for agreement which highlighted the need for long-term, sustainable solutions relating to the supply from GB to NI of medicines and foods affecting faith communities in NI, and on assistance dogs travelling from Great Britain to NI.<sup>112</sup>

The Commission has been working closely with the Equality Commission for NI and engaged with a range of civil society stakeholders to discuss and raise awareness of Article 2 and the Commissions' new powers and functions. These include the Human Rights Consortium; the NI Committee of the Irish Congress of Trade Unions; women's sector groups; and the Equality Coalition. In addition, the Commissions have presented to the Law Society Employment Lawyers Group.

## Trade and Cooperation Agreement

On 30 December 2020, the UK and EU signed the Trade and Cooperation Agreement governing the future UK-EU relationship. The Agreement provisionally applying from 1 January 2021, formally entered into force on 1 May 2021. The Trade and Cooperation Agreement was given effect in UK law by the European Union (Future Relationship) Act 2020.

The Trade and Cooperation Agreement is largely focused on trade and covers a range of issue relating to trade, transport and fisheries, which includes level playing field provisions on labour and social standards and the climate and environment. In addition, the Agreement sets out

<sup>108</sup> Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland, 'Submission of the NIHRC and ECNI to the Introductory Inquiry into the Operation of the Protocol by the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland', (NIHRC and ECNI, 2021).

<sup>109</sup> House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, 'Introductory Inquiry into the Operation of the Protocol on Ireland/Northern Ireland: Introductory Report', (HoL, 2021), para 181.

<sup>110</sup> Letter from Lord Jay of Ewelme, Chair of the House of Lords EU Affairs Committee Sub Committee on the Ireland/Northern Ireland Protocol to Brandon Lewis MP, Secretary of State for NI, 25 October 2021.

<sup>111</sup> Letter from the Equality Commission for NI and the NI Human Rights Commission to the Lord Jay of Ewelme, Chair of the House of Lords EU Affairs Committee Sub Committee on the Ireland/Northern Ireland Protocol, 11 November 2021.

<sup>112</sup> Equality Commission for NI and NI Human Right Commission, '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', (ECNI and NIHRC, 2021).

agreed standards on law enforcement and judicial cooperation in criminal matters including the exchange of biometric and vehicle registration data, passenger data and exchange of criminal record information. The agreement also covers framework for cooperation on health security and cyber security. The Trade and Cooperation Agreement also creates a number of mechanisms for civil society engagement, including Domestic Advisory Groups<sup>113</sup> and a Civil Society Forum.<sup>114</sup>

In October 2021, the Commission and Equality Commission for NI submitted evidence to the European Scrutiny Committee inquiry on the institutional framework of the UK-EU Trade and Cooperation Agreement and its impact on the operation of the Protocol.<sup>115</sup>

### Recommendations

The Commission welcomes the confirmation of the necessary powers and resources for the establishment of the dedicated mechanisms to oversee the UK Government commitment to no diminution in Protocol Article 2, the right of members of the public to assert their rights in court under this provision.

The Commission recommends that the UK Government and NI Executive embed effective consideration of Protocol Article 2 obligations at all stages of policy and legislative development to ensure that there is no diminution to the rights and safeguards which fall within its scope and that NI law keeps pace with any enhancements made by the EU to the Annex 1 Directives.

The Commission recommends that the NI Executive in its Programme for Government Outcomes Framework makes its support clear for the commitment to act in accordance with its Protocol Article 2 obligations and to keep pace with any enhancements made by the EU to the Annex 1 Directives.

The Commission recommends that, 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 Protocol Article 2. This includes working with the UK Government to establish formal relationships for timely information to flow through the Specialised Committee on the implementation of the Protocol and the Joint Consultative Working Group on developments relating to relevant EU human rights and equality obligations.

113 Article 13.

114 Article 14.

115 NI Human Rights Commission and Equality Commission for NI, 'Response to Call for Evidence by the European Scrutiny Committee on the institutional framework of the UK-EU Trade and Co-operation Agreement' (NIHRC and ECNI, 2021).

The Commission recommends that the UK Government and EU ensure effective and timely communication of proposed policy and legislative developments, between the bodies established under the Trade and Cooperation Agreement with those established under the Withdrawal Agreement and Protocol, the Commission and with other relevant civil society stakeholders, including equality and human rights organisations.

The Commission recommends that the UK Government and NI Executive take effective steps to ensure that the loss of funding from the EU does not lead to gaps in support and services, particularly those provided to vulnerable and marginalised groups.

### Common Travel Area

Article 3 of the Ireland/Northern Ireland Protocol recognises that the UK and Ireland “may continue to make arrangements between themselves relating to the movement of persons between their territories”, subject to Ireland’s obligations under EU law.

In 2018, the Commission and the Irish Human Rights and Equality Commission commissioned and published research on the Common Travel Area, which explored the legal obligations it created within Ireland and the UK. This research noted that the Common Travel Area is “written in sand”, and that what legal underpinning it had was largely dependent on EU rights.<sup>116</sup> The report identified that putting these rights on a legal footing in a bilateral Common Travel Area treaty would be the strongest form of protection. Such a treaty codifying “common immigration rules, travel rights, residency rights and related rights to education, social security, work, health, and security and justice” would be the ‘Gold Standard’ for safeguarding those rights.

In May 2019, the UK Government and Government of Ireland signed a Memorandum of Understanding setting out what they understand by the Common Travel Area and associated rights and privileges.<sup>117</sup> The Memorandum of Understanding clarifies that the Common Travel Area only extends to British and Irish citizens and further clarifies that it does not create “legally binding obligations”.<sup>118</sup>

The UK Government and the Government of Ireland have agreed a treaty which codifies the areas relating to social security coordination.<sup>119</sup> However, all other rights associated with the Common Travel Area, including free movement of people, the rights to reside and to work, the rights to social housing, social protection, healthcare and education, are based on separate protections in the domestic law in the UK and Ireland alongside

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116 Sylvia de Mars, Colin Murray, Aoife O’Donoghue and Ben Warwick, ‘Discussion Paper on the Common Travel Area’ (NIHRC and IHREC, 2018), at 11.

117 Memorandum of Understanding between the UK Government and the Government of Ireland Concerning the Common Travel Area and Associated Reciprocal Rights and Privileges, 8 May 2019.

118 Ibid, para 2 and 17.

119 Convention on Social Security between the Government of the UK and the Government of Ireland 2019. This Convention has not yet entered into force.

reciprocal agreements often through Memorandum of Understanding and other non-judicially enforceable agreements.

On 1 October 2021, new Home Office guidance took effect, stating that while travellers into the UK from Ireland need not show a passport to a Border Force officer, they may be asked to show a document confirming their identity and nationality.<sup>120</sup> EEA and Swiss citizens may be asked to show their passport or identity card to enter Great Britain when travelling from Ireland if they are encountered by Border Force. Only certain categories of people may use their identity card, such as those who have EU settled status, the rest will be required to show their passport. The Commission has raised concerns about the risk of racial profiling in the context of additional checks arising from EU exit.<sup>121</sup>

### Recommendations

The Commission recommends that the Common Travel Area and rights associated with it are enshrined in law by a comprehensive bilateral treaty that codifies reciprocal free movement rights and rights to employment, education, health care, justice and security to maintain the same level of protection as existed on 31 December 2020. That treaty should be incorporated into domestic legislation.

The Commission recommends that the Home Office take action to ensure that any checks to verify identity and nationality on people travelling to the UK from Ireland are fully in compliance with international human rights standards and take effective measures to address the risk of racial profiling, ensuring it is clearly prohibited and that this is effectively communicated, monitored and enforced.

### EU Settlement Scheme

The EU Settlement Scheme was designed to protect the rights of EU and EEA citizens and their family members already living in the UK prior to 1 January 2021. This EU Settlement Scheme gives effect to the Citizens' Rights provisions in the UK-EU Withdrawal Agreement.<sup>122</sup> Applicants, and their families, can be granted either settled status or pre-settled status under the EUSS. For EU and EEA nationals with five years' continuous residency in the UK, they will ordinarily be granted settled status which is indefinite leave to remain, while those with less than five years' continuous residency will be granted pre-settled status, which is a temporary right to reside for five years. Pre-settled status allows the applicant to remain in the UK, subject to conditions, in order to fulfil the residency requirements to apply for settled status. EU, EEA and Swiss citizens who come to the UK from 1 January 2021 are subject to the UK's points-based immigration system.

120 Home Office, 'Common Travel Area - Version 11.0' (HO, 2021), at 44-47.

121 Joint Committee of the Irish Human Rights and Equality Commission and the HI Human Rights Commission 'Policy statement on the United Kingdom withdrawal from the European Union' (NIHRC and IHREC, 2018), at 10-11.

122 Part 2, UK-EU Withdrawal Agreement 2020.

In July 2021, the House of Lords European Affairs Committee published a report on Citizens' Rights which is its assessment of the operation of the EU Settlement Scheme.<sup>123</sup> In particular, the report expressed concern that the absence of a physical document for those who had been granted settled status may prove problematic for the elderly or those not digitally astute in claiming their rights. The report also expressed concern about the status of the 2 million people who had been granted pre-settled status and the fact that their future applications are subject to individualised deadlines which may create uncertainty. The report further highlighted the need to ensure greater clarity and certainty around late applicants to the EU Settlement Scheme who may lose rights as a result of late applications.

### Late applications

The deadline for applications to the EU Settlement Scheme was 30 June 2021. The UK Government has confirmed that late applications will be accepted where there are reasonable grounds for failing to meet the deadline and in guidance to caseworkers has advised that:

*in line with the general approach under the EU Settlement Scheme of looking to grant status, rather than for reasons to refuse, you must take a flexible and pragmatic approach to considering, in light of the circumstances of each case, whether there are reasonable grounds for the person's failure to meet the deadline applicable to them under the EU Settlement Scheme.*<sup>124</sup>

The guidance also clarifies that where a person without status under the EU Settlement Scheme is encountered by Immigration Enforcement, the officer should consider whether the person is an EU or EEA citizen or their family member and if that is the case, they should "provide the person with a written notice giving them an opportunity to make a valid application".<sup>125</sup>

In August 2021, the UK Government issued further guidance confirming that applicants making late applications to the EU Settlement Scheme will continue to have their rights protected while their application is determined.<sup>126</sup>

However, a number of issues arose regarding the implementation of the scheme. There was concern that children and young people, including looked after children and care leavers, who did not apply to the EUSS within the prescribed time frame, would find themselves unlawfully residing in the UK. Following engagement with the Children's Law Centre, the Commission understands that outstanding applications for looked after children have been resolved.

The Independent Monitoring Authority for the Citizens Rights Agreements has called on the Home Office to provide further clarity on the rights

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123 House of Lords European Affairs Select Committee, 'Citizens' Rights, 1st Report of Session 2021/2022', (HL, 2021).

124 Home Office, 'EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members - Version 13.0' (HO, 2021), at 31-32.

125 Home Office, 'EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members - Version 13.0' (HO, 2021), at 34.

126 Home Office, 'Press Release: Temporary protection for more applicants to the Settlement Scheme', 6 August 2021.

of EU citizens whose applications are pending or who have made late applications to ensure public bodies and individuals concerned are aware of and can vindicate their rights.<sup>127</sup>

## Deferrals

Applicants to the EU Settlement Scheme with pending criminal proceedings have been experiencing delays in getting their applications processed and decisions are being deferred until the criminal process is resolved.<sup>128</sup> In the case of pending criminal proceedings, the delays in the criminal justice system are well documented and have been exacerbated by the COVID-19 pandemic, meaning applicants can face extensive delays in getting their status confirmed.<sup>129</sup> The Commission has been supporting applicants who have not had their applications to the EU Settlement Scheme finalised on account of minor criminal convictions which are causing either a suspension or deferral of their applications.

The Commission has written to the NI Housing Executive following evidence of an individual being denied housing executive benefit on account of their status under the EU Settlement Scheme not being regularised.<sup>130</sup> In its response the NI Housing Executive confirmed that where a person cannot confirm they have Settled Status, then a direct inquiry is undertaken to establish whether the individual has a qualifying right to reside under EU law.<sup>131</sup> The Commission and the Equality Commission for NI have also written to the Independent Monitoring Authority to raise concerns about access to housing benefit and individuals being denied employment, despite being able to prove that they had applied for settled status.<sup>132</sup>

## Pre-settled Status

Pre-settled status under the EU Settlement Scheme is limited leave to remain. Under the Universal Credit Regulations, access to this benefit is limited to applicants who are habitually resident in the UK and this excluded people with pre-settled status from this benefit.<sup>133</sup> A challenge was brought by a woman who had left a violent relationship and was refused access to Universal Credit before the end of the transition period despite not having the means to support herself or her children.<sup>134</sup> The CJEU found that the right to human dignity,<sup>135</sup> the right to private and family life<sup>136</sup> and the rights of the child<sup>137</sup> were engaged and decided that:

127 Independent Monitoring Authority, 'Press Release: Home Office asked to clarify the rights of EU citizens applying late to the EU Settlement Scheme', 27 September 2021.

128 Home Office, 'EU Settlement Scheme: Suitability Requirements – Version 6.0 (HO, 2021).

129 Cormac Campbell, 'Coronavirus: COVID-19 courthouse closures create huge backlog', *BBC News*, 15 July 2020; Northern Ireland Audit Office, 'Speeding Up Justice: Avoidable Delay in the Criminal Justice System' (NIAO, 2018).

130 Letter from the NI Human Rights Commission to the NI Housing Executive, 22 July 2021.

131 Letter from NI Housing Executive to the NI Human Rights Commission, 26 August 2021.

132 Letter from the NI Human Rights Commission and Equality Commission for NI to the Independent Monitoring Authority, 23 August 2021.

133 Regulation 9(3)(d), The Universal Credit Regulations (Northern Ireland) 2016.

134 *CG v Department for Communities*, Case C-709/20, 15 July 2021.

135 Article 1, EU Charter of Fundamental Rights.

136 Article 7, EU Charter of Fundamental Rights.

137 Article 24, EU Charter of Fundamental Rights.



*In such a situation, the competent national authorities may refuse an application for social assistance, such as Universal Credit, only after ascertaining that that refusal does not expose the citizen concerned and the children for which he or she is responsible to an actual and current risk of violation of their fundamental rights.*<sup>138</sup>

The court further stated that:

*Where that citizen does not have any resources to provide for his or her own needs and those of his or her children and is isolated, those authorities must ensure that, in the event of a refusal to grant social assistance, that citizen may nevertheless live with his or her children in dignified conditions.*<sup>139</sup>

In October 2021, the Independent Monitoring Authority issued a pre action protocol letter to the Home Office noting that the automatic loss of residence status for EU citizens with pre-settled status who do not apply in time for EU Settled Status is a breach of the UK-EU Withdrawal Agreement and the EEA EFTA Separation Agreement.<sup>140</sup>

## **Electoral Rights of EU citizens**

In June 2021, the Commission and Equality Commission for NI, wrote to the Secretary of State outlining their concerns that Article 2 would be engaged should the UK Government amend, replace, or repeal legislation governing the voting franchise for local council elections in NI to remove the right to vote and stand in these elections by EU citizens.<sup>141</sup> The UK Government subsequently confirmed that EU citizens living in the UK prior 1 January 2021 will maintain their local voting and candidacy rights in NI, including NI Assembly elections.<sup>142</sup>

In October 2021, the Commission and the Equality Commission for NI wrote to the Public Bill Committee on the Elections Bill requesting that it give further consideration to the proposed changes to voting and candidacy rights of ‘qualifying’ EU citizens NI as part of its scrutiny of the Bill. The letter further suggested that the Committee ask the UK Government to set out its assessment of the provisions of the Elections Bill in the context of their conformity with its commitment under Protocol Article 2(1).<sup>143</sup>

## **EU Citizenship and Workers’ Rights**

Under Article 26 of the UK-EU Withdrawal Agreement, frontier workers are entitled to be issued with appropriate documentation which certifies their rights as frontier workers. Article 10(1)(c) extends the rights set out in Part Two of the treaty, to: “Union citizens who exercised their right as

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138 *CG v Department for Communities*, Case C-709/20, 15 July 2021, para 92.

139 *CG v Department for Communities*, Case C-709/20, 15 July 2021, para 93.

140 Independent Monitoring Authority, ‘Press Release: IMA issues Pre-Action Protocol Letter to the Home Office’, 15 October 2021.

141 Letter from the NI Human Rights Commission to Brandon Lewis MP, Secretary of State for Northern Ireland, 11 June 2021.

142 UK Parliament Hansard, ‘House of Commons Written Statement: Local Elections – Chloe Smith MP, Minister of State for the Constitution and Devolution – HCWS99, 17 June 2021.

143 Letter from the NI Human Rights Commission and the Equality Commission for NI to the Public Bill Committee on the Elections Bill, 20 October 2021.

frontier workers in the UK in accordance with Union law before the end of the transition period and continue to do so thereafter”. In practical terms, this means that Irish, British and EU citizens who commenced a cross-border job on or before 31 December 2020 will benefit from the Withdrawal Agreement.

The Frontier Workers Permit Scheme was established by the UK Government to ensure that EU citizens living in Ireland but working in NI on or after 1 July 2021 can prove their right to work in the UK.<sup>144</sup> Any EU citizens wishing to come to the UK to work on or after 1 January 2021 will have to apply to the new points-based immigration system.

EU citizens, including Irish citizens, living in NI and working in Ireland on or after 1 January 2021 do not have to apply to a similar scheme as they maintain their right to work in the EU as an EU citizen. Similarly, British citizens living in NI and working in Ireland will have their right to work protected under the reciprocal guarantees associated with the Common Travel Area.<sup>145</sup>

The Citizens’ Rights (Frontier Workers) (EU Exit) Regulations 2020 set out the rules governing the application of the frontier workers permit scheme, the time frames within which applications have to be made, and the grounds upon which a refusal can be issued. They also set out the circumstances in which a worker or self-employed person can retain their status. These cover instances involving accidents, illnesses, engagement in vocational training and pregnancy or childbirth.<sup>146</sup> The regulations confirm that applications can be refused on grounds of public policy, public security, public health or on grounds of misuse of rights.<sup>147</sup> The regulations are likely to apply to a number of EU citizens travelling between Ireland and NI for work.

A number of civil society organisations raised concerns about this scheme, including the lack of consultation and impact assessment in advance of the regulations being published and the limited period provided for registration.<sup>148</sup>

## Recommendations

The Commission recommends that the Home Office takes immediate action to resolve all outstanding applications under the EU Settlement Scheme and ensures that no one is left without the ability to prove their right to live and work in the UK on the basis of pending minor criminal prosecutions that would otherwise not meet the threshold for refusal.

144 Citizens’ Rights (Frontier Workers) (EU Exit) Regulations 2020.

145 Memorandum of Understanding between the UK Government and the Government of Ireland Concerning the Common Travel Area and Associated Reciprocal Rights and Privileges, 8 May 2019, para 8.

146 Regulation 4, Citizens’ Rights (Frontier Workers) (EU Exit) Regulations 2020.

147 Regulation 18, Citizens’ Rights (Frontier Workers) (EU Exit) Regulations 2020.

148 Letter from the Committee on the Administration of Justice; UNISON; Border People; Centre for Cross Border Studies; Migrant Centre NI; Irish Congress of Trade Unions; Migrant Rights Centre Ireland; Stronger Together; South Tyrone Empowerment Project; Inter Ethnic Forum; Chinese Welfare Association; Omagh Ethnic Community Support Group; Belfast Metropolitan College, College of Sanctuary; North West Migrant Forum; Advice NI; Granite Legal Services NI to the Home Secretary, 26 October 2020.



The Commission recommends that the Home Office ensure that all eligible vulnerable groups and individuals, who have not applied to the EU Settlement Scheme by 30 June 2021 are supported to regularise their status in an efficient and timely way.

The Commission advises that people living and working across the border are in a particularly vulnerable situation and recommends that the Department for Communities provide support to frontline advisers and to employers to ensure that no eligible worker or self-employed person is left unprotected by the frontier worker scheme.

### Birthright

In 2020, the Joint Committee of the Commission and the Irish Human Rights and Equality Commission published a legal analysis and proposals for reform to enshrine in domestic law, the recognition in the Belfast (Good Friday) Agreement, of the “birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both”.<sup>149</sup> Under section 1 of the British Nationality Act 1981, anyone born in the UK to a British, Irish or settled parent, is deemed British.

This issue has attracted renewed focus in light of the UK’s withdrawal from the EU, due to the implications for access to EU free movement rights.

In 2019, in response to a legal challenge, the Upper Immigration and Asylum Tribunal decided that the system requiring a person to renounce their British citizenship in order to be considered Irish only was a proportionate means of achieving the legitimate aim of avoiding statelessness and maintaining a coherent system of nationality law.<sup>150</sup> In 2021, the High Court refused a challenge by an Irish identifying applicant to the same legal provision, stating that “she is an Irish citizen; and her additional British citizenship takes nothing away from this in terms of the rights, benefits and privileges which she enjoys as an Irish citizen”.<sup>151</sup>

In *New Decade, New Approach*, the UK Government noted that it had reviewed its rules on family migration arrangements “taking into account the letter and spirit of the Belfast Agreement and recognising that the policy should not create incentives for renunciation of British citizenship by those citizens who may wish to retain it”.<sup>152</sup>

On 24 August 2020, changes came into force to allow for a “relevant person of NI” to access EU free movement law protections.<sup>153</sup> A relevant person of NI is defined as someone who is a British citizen, an Irish citizen, or both British and Irish and was born in NI to a parent who was British, Irish or both, or otherwise entitled to reside in NI without any restriction

149 Alison Harvey, ‘A Legal Analysis of Incorporating into UK Law the Birthright Commitment under the Belfast (Good Friday) Agreement 1998’, (NIHRC and IHREC, 2020).

150 *De Souza (Good Friday Agreement: Nationality)* [2019] UKUT 355 (IAC), para 54-57.

151 *In the Matter of Ní Chuinneagain* [2021] NIQB 79, at para 17.

152 NI Office, *New Decade New Approach*, (NI Office, 2020), at 48.

153 Home Office, ‘Statement of Changes in Immigration Rules CP232 (HO, 2020), at 10.

on their period of residence. This scheme closed on 30 June 2021 in line with the EU Settlement Scheme.<sup>154</sup>

The Commission welcomed a statement from the Prime Minister Theresa May in February 2019 that she had initiated a joint review by the Home Office and the NIO of the issues “to deliver a long term solution consistent with the letter and spirit of the Belfast Agreement”.<sup>155</sup> The review was never published. Following correspondence from the Commission in 2020,<sup>156</sup> the Home Secretary confirmed that “the former Prime Minister did not commission a formal review and there were no terms of reference, but the conclusion of that work was published in the New Decade, New Approach deal”.<sup>157</sup>

In January 2021, the Commission provided a written submission to the NI Affairs Committee inquiry on Citizenship and Passport Processes in NI which highlighted its recommendation that UK nationality and immigration legislation be amended to give effect to the birthright commitment.<sup>158</sup> The Commission was invited to give oral evidence<sup>159</sup> and further written evidence<sup>160</sup> at the Committee’s request to respond to written evidence submitted by the UK Government.<sup>161</sup> The Committee’s report recommended that “in the interests of transparency, the Government must publish in full the results of the review announced by Mrs May”.<sup>162</sup> The Committee also called for the UK Government to “clarify the meaning of the phrase ‘to be accepted as’ in Article 1(vi) of the Agreement, including how it is respected and upheld in the Government’s approach towards the birthright provisions for the people of Northern Ireland”.<sup>163</sup> The Committee further called on the UK Government and Government of Ireland to agree a shared approach to the birthright provisions to remove any remaining ambiguity.<sup>164</sup>

In its submission to the Joint Committee on Human Rights call for evidence on the Nationality and Borders Bill in October 2021, the Commission welcomed the regularisation of historical anomalies within UK nationality and citizenship law. However, the Commission expressed concern that the Home Office had not taken the opportunity to clarify the birthright of all the people of NI to identify, and be accepted, as Irish or British or both, without any loss of rights or entitlements.<sup>165</sup>

154 NI Human Rights Commission, ‘EU Settlement Scheme extended to the people of Northern Ireland: what does it mean for me?’, (NIHRC, 2020).

155 Prime Minister’s Office, ‘Press Release: PM speech in Belfast’, 5 February 2019.

156 Letter from the NI Human Rights Commission to Home Secretary, Priti Patel MP, 23 April 2020.

157 Letter from Home Secretary, Priti Patel MP, to the NI Human Rights Commission, 4 May 2020.

158 NI Human Rights Commission, ‘Submission to the NI Affairs Committee Inquiry into Citizenship and Passport Processes’, (NIHRC, 2021).

159 UK Parliament Hansard, ‘Northern Ireland Affairs Committee: Citizenship and Passport Processes in Northern Ireland - HC 1111’, 10 March 2021.

160 NI Human Rights Commission, ‘NI Affairs Committee Inquiry into Citizenship and Passport Processes in NI: NIHRC Commentary on the Northern Ireland Office/Home Office Submission to the Committee’, (NIHRC, 2021).

161 Correspondence from Robin Walker MP, Minister of State for NI and Kevin Foster MP, Minister for Future Borders and Immigration to the NI Affairs Committee, 2 March 2021.

162 NI Affairs Committee, ‘First Report of Session 2021/2022 on Citizenship and Passport Processes relating to Northern Ireland’ (HC, 2021), para 16.

163 Ibid, para 14.

164 Ibid.

165 NI Human Rights Commission, ‘Response to Call for Evidence by the Joint Committee on Human Rights on the Nationality and Borders Bill’ (NIHRC, 2021), at paras 3.1-3.4.



### **Recommendation**

The Commission recommends that the Home Office amend nationality and immigration laws to reflect the commitment under the Belfast (Good Friday) Agreement 1998 that it is the birthright of all the people of NI to identify, and be accepted, as Irish or British or both, without any loss of rights or entitlements.

## Right to Equality and Non-discrimination

The following section explores a number of human rights issues related to equality and non-discrimination. This includes: age discrimination; business and human rights; consolidating, strengthening and clarifying equality protections; conversion therapy; discrimination on the grounds of sexual orientation; a gender equality strategy; gender recognition; hate crime; intersectional multiple discrimination; persons with disabilities; racial equality; and sectarianism.

Non-discrimination is protected under the following treaties:

<b>ECHR</b>	Article 14
<b>UN ICCPR</b>	Article 2(1) Article 3 Article 24 Article 26
<b>UN CEDAW</b>	Article 1
<b>UN CERD</b>	Articles 1-5
<b>UN CRC</b>	Article 2
<b>UN CRPD</b>	Articles 3-5
<b>UN ICESCR</b>	Article 2(2) Article 3
<b>Framework Convention for the Protection of National Minorities</b>	Article 4 Article 6(2)
<b>Ireland/NI Protocol to the UK-EU Withdrawal Agreement</b>	Article 2

### Age discrimination

In June 2016, the UN CRC Committee recommended that the UK Government and the NI Executive “consider the possibility of expanding legislation to provide protection of all children under 18 years of age against discrimination on the grounds of their age”.<sup>166</sup>

Protocol Article 2 provides specific, enhanced protection against discrimination as enshrined in the six directives listed in Annex 1 of the Protocol, including the Employment Equality (Framework) Directive which protects against discrimination on the grounds of age.<sup>167</sup> NI equality law must keep pace with any changes made by the EU to improve the

<sup>166</sup> CRC/C/GBR/CO/5, ‘UN CRC Committee, Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 12 July 2016, at para 22(a).

<sup>167</sup> Directive 2000/78/EC, ‘EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation’, 27 November 2000.

minimum levels of protection, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.<sup>168</sup>

There is currently no prohibition on discrimination in the provision of goods, facilities and services in NI on the basis of age.

In 2015, the Office of the First Minister and deputy First Minister (now the Executive Office) proposed extending age discrimination legislation to cover the provision of goods, facilities and services.<sup>169</sup> The Commission welcomed the initiative but, along with the NI Commissioner for Children and Young People and a number of children’s organisations, expressed concern that these proposals excluded children under 16.<sup>170</sup> The decision to exclude under 16s was made on the basis of seeking to advance legislation as quickly as possible with the aim of eventually extending age discrimination protection to children under 16.<sup>171</sup> The legislation proposed in 2015 or any subsequent amendments have not progressed.<sup>172</sup> Departmental officials are considering next steps to advance this matter however legislation is unlikely in the current Assembly mandate.<sup>173</sup>

### Recommendations

The Commission recommends that the Executive Office introduces promptly legislation which will extend protection against age discrimination in the provision of goods, facilities and services and that this legislation provides protection to all children under 16 years of age against discrimination on the grounds of their age.

The Commission recommends that in the development of any laws or policies in the area of employment, the Executive Office consider the extent to which any change engages Protocol Article 2 and ensure that there is no diminution to the rights and safeguards which fall within its scope and that NI law keeps pace with any changes to the Employment Equality (Framework) Directive.

### Business and human rights

In 2016, the UN CRC Committee recommended that the UK Government “integrate an explicit focus on children’s rights, including the requirement for businesses to undertake child-rights due diligence, in the revised version of its first National Action Plan on Business and Human Rights”.<sup>174</sup>

168 Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

169 The Executive Office, ‘Proposals to Extend Age Discrimination Legislation (Age Goods, Facilities and Services) Consultation Document’ (TEO, 2015).

170 NI Commission for Children and Young People, ‘Don’t Exclude Us! Strengthening Protection for Children and Young people when Accessing Goods, Facilities and Services’ (NICCY, 2013); Children’s Law Centre and Save the Children NI, ‘NI NGO Alternative Report Submission to the UN Committee on the Rights of the Child for Consideration During the Committee’s Examination of the UK of Great Britain and NI Government Report’ (CLC and StC NI, 2015), at 14; NI Human Rights Commission, ‘Response to consultation on Proposals to Extend Age Discrimination Legislation (Age Goods, Facilities and Services)’ (NIHRC, 2015).

171 NI Assembly Committee for the Executive Office, ‘Age Discrimination Legislation: Evidence from Junior Ministers and Officials’ (CfEO, 2015).

172 Email correspondence from the Executive Office to the NI Human Rights Commission, 29 July 2020.

173 Email correspondence from the Executive Office to the NI Human Rights Commission, 28 October 2021.

174 CRC/C/GBR/CO/5, ‘UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 12 July 2016, at para 18(a).

The UN Guiding Principles on Business and Human Rights provide that:

*States should promote respect for human rights by business enterprises with which they conduct commercial transactions.*<sup>175</sup>

The UN Guiding Principles further provide that:

*States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities. This provides States – individually and collectively – with unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States’ relevant obligations under national and international law.*<sup>176</sup>

## National Action Plan

Following the UK Government’s National Action Plan ‘Good Business: Implementing the UN Guiding Principles on Business and Human Rights’, first published in 2013<sup>177</sup> and updated in 2016<sup>178</sup>, a progress update on implementing the UN guiding principles was published in May 2020. Based on the pillars on the guiding principles, this highlights some of the key developments and projects but does not have a specific NI focus.

## NI Business and Human Rights Forum

The Commission continues to support the NI Business and Human Rights Forum, a multi-stakeholder membership which allows government, business, and civil society to engage on business and human rights issues. The aim of the Forum is to help answer the question of how human rights are relevant to business, and to allow the sharing of information and good practice amongst businesses.

The Forum has developed and adopted the ‘NI Action Plan on Business and Human Rights’<sup>179</sup> and a ‘Guide to Business and Human Rights’.<sup>180</sup> The current Chair of the Forum is Stephen Abram, Associate at A&L Goodbody, while the Vice-Chair is Barbara Henry, HR Manager of Caterpillar.

In October 2021, the Forum hosted the UN Special Rapporteur on Human Rights and Environment, Dr David Boyd, who spoke on the topic of ‘Climate Crisis is a Human Rights Crisis’. The Forum also heard the NI perspective on the climate crisis from Renewables NI.

## Public Procurement

In 2013, the Commission produced a report, entitled ‘Public Procurement and Human Rights in NI’, to advise on the applicable human rights

175 UN Office of the High Commissioner for Human Rights, ‘Guiding Principles on Business and Human Rights, Implementing the UN “Protect, Respect and Remedy Framework” (UNOHCHR, 2011), at para 6.

176 Ibid.

177 HM Government, ‘Good Business, Implementing the UN Guiding Principles on Business and Human Rights’ (HM Government, 2013).

178 HM Government, ‘Good Business, Implementing the UN Guiding Principles on Business and Human Rights: Updated’ (HM Government, 2016).

179 NI Human Rights Commission, ‘NI Action Plan on Business and Human Rights’ (NIHRC, 2019).

180 NI Human Rights Commission, ‘Guide for Businesses in Northern Ireland on Business and Human Rights’ (NIHRC, 2016).

standards in the context of awarding Government contracts.<sup>181</sup> In 2018, the Commission provided human rights training to the Central Procurement Directorate within the Department of Finance. In January 2019, the 'Procurement Guidance Note on Human Rights in Public Procurement' was published by the Department of Finance.<sup>182</sup> This describes the legal obligations placed on a contracting authority and contractors to consider human rights when conducting a procurement process. It provides information on how to identify potential risks to human rights in contracts and how to incorporate human rights considerations into contract documentation, to mitigate against them.

In January 2020, the Commission met with Finance Minister, Conor Murphy, who voiced support for the NI Business and Human Rights Forum and the further implementation of the Procurement Guidance Note on Human Rights.

In December 2020, the Finance Minister reconstituted the Procurement Board and announced that Procurement Guidance Notes would be elevated in status to ensure compliance and will now be approved by the NI Executive.<sup>183</sup> The Procurement Guidance Note on Human Rights has been recommended as a Procurement Policy Note and now requires the approval of the NI Executive.<sup>184</sup>

### Recommendation

The Commission recommends that measures giving effect to the UN Guiding Principles on business and human rights should provide for the effective participation of all relevant stakeholders in NI. The Commission further recommends that the NI Executive consider adopting a National Action Plan on business and human rights specific to NI. The Commission also recommends that the NI Executive approves the Procurement Policy Note on Human rights.

### Consolidating, strengthening and clarifying equality protections

In 2016, the UN ICESCR Committee stated its regret that no action had been taken on its earlier recommendation to extend "comprehensive anti-discrimination legislation" to NI.<sup>185</sup> It urged action to ensure "a similar level of protection to rights holders with regard to all grounds of discrimination for all individuals in all jurisdictions of the State party, including NI".<sup>186</sup>

In 2016, the European Commission against Racism and Intolerance also recommended, as a priority for implementation, that the NI Executive "consolidate equality legislation into a single, comprehensive equality act,

181 NI Human Rights Commission, 'Public Procurement and Human Rights in NI' (NIHRC, 2013).

182 Construction & Procurement Delivery, 'Procurement Guidance Note PGN 03/18 Human Rights in Public Procurement' (CPD, 2018).

183 Minister of Finance, 'Oral Statement: The Procurement Board', 1 December 2020.

184 Email correspondence from the Department of Finance to the NI Human Rights Commission, 16 September 2021.

185 E/C.12/GBR/CO/5 'UN ICESCR Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI' 12 June 2009, at para 16.

186 Ibid, at para 23.



taking inspiration from the Equality Act 2010, and taking account of the recommendations of the Equality Commission NI".<sup>187</sup>

In August 2017, the UN CRPD Committee recommended reform of equality law in NI "to protect persons with disabilities in NI from direct and indirect disability-based discrimination and discrimination through association".<sup>188</sup>

In March 2019, the UN CEDAW Committee recommended that the NI Executive "revise its legislation in NI to ensure that it affords protection to women on an equal footing with women in other administrations of the State Party".<sup>189</sup>

In NI, discrimination is prohibited by a number of laws and regulations, resulting in a complex framework. Unlike other parts of the UK, there is no single legislative instrument to consolidate, clarify and enhance existing equality protections in NI.<sup>190</sup>

The Executive Office has advised that in the absence of agreement on a single Equality Bill it is satisfied that the current equality framework protects against discrimination on a range of grounds, albeit with some exceptions.<sup>191</sup>

### Recommendation

The Commission continues to recommend that the Executive Office introduces a Single Equality Act. In doing so, the Commission suggests that the NI Executive support the Executive Office in securing the necessary political consensus on this matter.

### Conversion therapy

The UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity defined conversion therapy as:

*... an umbrella term to describe interventions of a wide-ranging nature, all of which are premised on the belief that a person's sexual orientation and gender identity, including gender expression, can and should be changed or suppressed when they do not fall under what other actors in a given setting and time perceive as the desirable norm, in particular when the person is lesbian, gay, bisexual, trans or gender diverse. Such practices are therefore consistently aimed at*

187 CRI(2016)38, 'European Commission on Racial Intolerance Report on the UK (Fifth Monitoring Cycle)' (ECRI, 2016), at para 22.

188 CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the United Kingdom of Great Britain and NI', 3 October 2017, at para 17(b).

189 CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 14 March 2019, at para 16(a).

190 See Employment Equality (Age) Regulations (NI) 2006; Disability Discrimination Act 1995; Special Educational Needs and Disability (NI) Order 2005; Equal Pay Act (NI) 1970; Sex Discrimination (NI) Order 1976; Race Relations (NI) Order 1997; Fair Employment and Treatment (NI) Order 1998; Employment Equality (Sexual Orientation) Regulations (NI) 2003; Equality Act (Sexual Orientation) Regulations (NI) 2006; NI Act 1998.

191 Email correspondence from the Executive Office to the NI Human Rights Commission, 29 July 2020.

*effecting a change from non-heterosexual to heterosexual and from trans or gender diverse to cisgender.*<sup>192</sup>

The UN Expert found that such practices can involve a range of methods and religious interventions often combined with traditional rituals and/or pseudo-medical or mental health consultations; examples of extreme physical and psychological violence have also been linked to alleged intentions of conversion. This includes but is not limited to physical punishment and abuse, “corrective” rape, forced pregnancy, and family or community-based coercion.<sup>193</sup>

The UN Independent Expert has called for a global ban on all practices which are commonly referred to as conversion therapy, which has been held to inflict severe pain and suffering on lesbian, gay, bisexual, transgender and gender-diverse (LGBTQI+) persons, often resulting in long-lasting psychological and physical damage.<sup>194</sup>

The Independent Expert also found that “young people are disproportionately subjected to practices of conversion therapy”, noting that the Committee on the Rights of the Child has urged States to eliminate such practices. In its General Comment No.20 (2016), the Committee said:

*The Committee emphasizes the rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy. It condemns the imposition of so-called “treatments” to try to change sexual orientation and forced surgeries or treatments on intersex adolescents.*<sup>195</sup>

Highlighting the primacy best interests of the child, the Independent Expert:

*concludes that the imposition of practices of “conversion therapy” on children runs counter to States’ obligation to protect them from violence, harmful practices and cruel, inhuman or degrading treatment, to respect the right of the child to identity, physical and psychological integrity, health and freedom of expression and to uphold the core principle of taking the best interests of the child as a primary consideration at all times.*<sup>196</sup>

In 2012, the Pan American Health Organization noted that conversion therapies had no medical justification<sup>197</sup> and in 2017, the World Psychiatric

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192 A/HRC/44/53 'UN Human Rights Council, 'Practices of so-called “conversion therapy”': Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' 1 May 2020, at para 17.

193 Ibid, at paras 37 - 54.

194 A/HRC/44/53, 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity: Practices of so-called “conversion therapy”', 1 May 2020.

195 Committee on the Rights of the Child, General Comment No. 20, 6 December 2016, at para 34.

196 A/HRC/44/53, 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, on Practices of So-called “Conversion Therapy”', 1 May 2020, at 17.

197 Pan American Health Organisation, "'Cures" for an illness that does not exist: Purported therapies aimed at changing sexual orientation lack medical justification and are ethically unacceptable' (2012) available at: <https://www.paho.org/hq/dmdocuments/2012/Conversion-Therapies-EN.PDF>.

Association found that “there is no sound scientific evidence that innate sexual orientation can be changed”.<sup>198</sup>

In December 2020, in line with commitments made under New Decade, New Approach, an Expert Advisory Panel published a report to inform the development of the Executive’s Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), Intersex+ (LGBTQI+) Strategy.<sup>199</sup> The Panel concluded that any practice (medical, therapeutic or otherwise) aimed at changing or suppressing a person’s sexual orientation or gender identity, should be illegal.<sup>200</sup> The Panel also made a series of recommendations for the Department of Health including that: such practices are not commissioned or funded; practitioners have adequate knowledge of gender and sexual diversity through education/training; if conversion therapy is offered or practiced, claims are investigated, and punishments are established; appropriate medical services are created to provide free access to support for victims.<sup>201</sup>

On 20 April 2021, the NI Assembly passed a motion by 59-24, calling on the Minister for Communities to commit to bringing forward legislation to ban conversion therapy in all its forms before the end of the current Assembly mandate. Before passing the motion, MLAs voted down an amendment 59-28 which would have removed a line stating that it is “fundamentally wrong to view our LGBTQ community as requiring a fix or cure” and inserted protections for “legitimate religious activities such as preaching, prayer and pastoral support”, contending such practices do not represent conversion therapies.<sup>202</sup> In response to the debate, the Minister advised that Departmental officials have commenced policy work to inform the drafting of the required legislation, alongside the work in respect of the LGBTQI+ Strategy, and confirmed her intention to provide a rights-based approach framed within an international human rights framework.<sup>203</sup>

The Commission wrote to the Minister for Communities to support the proposed ban to these practices and to highlight the international human rights standards relevant to the development of domestic laws and policies that seek to implement the State’s obligations towards LGBTQI+ persons in respect of conversion therapy.<sup>204</sup>

In May 2021, the Queen’s Speech set out the UK Government’s commitment to ban conversion therapy.<sup>205</sup> The then Minister for Women and Equalities Minister, Liz Truss, confirmed that the Government will take legislative steps to ban conversion therapy in England and Wales, including in religious settings.<sup>206</sup> A consultation on legislative proposals

198 World Psychiatric Association, ‘WPA Position Statement on Gender Identity and Same-Sex Orientation, Attraction, and Behaviours’ (2017) available at [https://3ba346de-fde6-473f-b1da-536498661f9c.filesusr.com/ugd/e172f3\\_2842912d737742fdb5d549d2b7ebfc5c.pdf](https://3ba346de-fde6-473f-b1da-536498661f9c.filesusr.com/ugd/e172f3_2842912d737742fdb5d549d2b7ebfc5c.pdf).

199 LGBTQI+ Strategy Expert Advisory Panel, ‘Themes and Recommendations,’ (2020).

200 Ibid, at para 33.

201 Ibid.

202 NI Assembly Hansard, ‘Private Members Business – Conversion Therapy’, 20 April 2021.

203 Department for Communities, ‘Press Release: Conversion Therapy must end - Hargey’, 20 April 2021.

204 Correspondence from NI Human Rights Commission to Minister for Communities, May 2021.

205 Prime Minister’s Office, ‘Queen’s Speech 2021’, (UKG, 2021).

206 Government Equalities Office, The Rt Hon Elizabeth Truss MP, ‘Government sets out plan to ban conversion therapy’, 11 May 2021.

to end conversion therapy, including a new criminal offence as well as civil measures, was launched in October 2021 and will run for six weeks.<sup>207</sup> The proposals intend to ban conversion therapy of all kinds in England and Wales for anyone under the age of 18, and adults who are vulnerable and not able to consent. However, there is provision for consenting adults to undergo talking conversion therapy. Alongside legislation, the UK Government plans to create a new support fund to ensure that victims of these practices have better access to the support they need.

### Recommendation

The Commission is concerned that conversion therapy in many forms persists. It is incompatible with domestic and international human rights law, which upholds the innate and equal value of all human beings. The Commission recommends that the Department of Justice, working with other Departments, introduces legislation to ban all practices of conversion therapy by any person or group of persons. The most effective way to protect the human rights of children and adults and ensuring the best interests of the child principle remains a primary consideration is to prohibit all such practices in all circumstances.

### Discrimination on grounds of sexual orientation

Protocol Article 2 provides specific, enhanced protection against discrimination as enshrined in the six directives listed in Annex 1 of the Protocol, including the Employment Equality (Framework) Directive which protects against discrimination on the grounds of sexual orientation.<sup>208</sup> NI equality 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.<sup>209</sup>

### Homophobic motivated hate crimes

The rights, safeguards and equality of opportunity provisions set out in the relevant Chapter of the Belfast (Good Friday) Agreement include the right of victims “to remember as well as contribute to a changed society”.<sup>210</sup> EU obligations underpinning the rights of victims include the Victims’ Directive<sup>211</sup> as well as other relevant EU laws which support victims.<sup>212</sup>

207 UK Government Equalities Office, ‘Open consultation: Banning conversion therapy’, 29 October 2021.

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

209 Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

210 Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

211 Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

212 Directive 2011/36/EU ‘Council Directive on preventing and combating trafficking in human beings and protecting its victims’, 5 April 2011; Directive 2011/92/EU, ‘Parliament and Council Directive on combating the sexual abuse and sexual exploitation of children and child pornography’, 13 December 2011; Directive 2004/80/EC, ‘Council Directive relating to the compensation to crime victims’, 29 April 2004.

In 2020/21, the Police Service of NI reported that there were 366 homophobic motivated incidents, 94 more than in 2019/2020.<sup>213</sup> The number of homophobic crimes recorded by the police was 246, an increase of 51 on the previous year. These are the highest financial year figures since the start of the Police Service of NI's data series in 2004/05.<sup>214</sup>

Under the Criminal Justice (No 2) (NI) Order 2004, sexual orientation is recognised as one of the grounds on which someone could incite hatred. In 2020, the Independent Hate Crime Review team considered aggravating sentences associated with hate crimes, including homophobic hate crime, which is already recognised as a protected characteristic. The Hate Crime Review Team concluded that:

*statutory aggravations should be added to all existing offences in NI following the model adopted in Scotland and become the core method of prosecuting hate crimes in NI. This would mean that any criminal offence could be charged in its aggravated form.*<sup>215</sup>

## LGBTQI+ Strategy

The New Decade, New Approach agreement committed to publishing a Sexual Orientation Strategy.<sup>216</sup> The Department for Communities has adopted a co-design approach to developing the strategy, which included appointing an Expert Advisory Panel and undertaking ongoing engagement with a Co-Design Group and cross-departmental working group made up of key stakeholders. The Expert Panel was tasked with preparing a report setting out key recommendations about the themes and key actions the strategy should include and the gaps in provision that it should seek to address. The report was published in March 2021 and it included the recommendation to rename the strategy as the Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), Intersex+ (LGBTQI+) Strategy to encompass the diversity of the LGBTQI+ community beyond the issue of sexual orientation.<sup>217</sup> The Co-Design Group and cross-departmental working group have met regularly since November 2020 and will continue to meet until the finalisation of the action plan. The strategy is due to be subject to public consultation in early 2022, followed by its publication. The Commission is a member of the Co-Design Group for the LGBTQI+ Strategy.

## Lee case

In 2018, the UK Supreme Court held that the refusal of Ashers bakery to make and sell a cake iced with a statement supporting the extension of civil marriage to same sex couples was not discriminatory, as the same bakery would have refused to supply this particular cake to anyone, whatever their personal characteristics and as such, there had been no

213 Police Service of Northern Ireland, 'Incidents and Crimes with a Hate Motivation Recorded by the Police in Northern Ireland: Update to 31 March 2021', 14 May 2021.

214 Ibid.

215 Independent Hate Crime Review Team, Hate Crime Legislation in NI Independent Review, (DoJ 2020), at Recommendation 2.

216 NI Office, 'New Decade New Approach', (NI Office, 2020), at 27.

217 LGBTQI+ Strategy Expert Advisory Panel, Themes and Recommendations, (2020).

discrimination on grounds of sexual orientation.<sup>218</sup> In 2019, Mr Lee made an application to the ECtHR on the grounds that the UK Supreme Court failed to give appropriate weight to his ECHR rights.<sup>219</sup> In March 2020, the ECtHR requested that the parties provide their views on how Mr Lee exhausted domestic remedies, whether there has been an interference with Articles 8, 9 and 10 ECHR and if this can be justified, and the appropriate test to be applied in a dispute of a “purely private nature”.<sup>220</sup> The UK Government was due to provide its written observations in December 2020, and a hearing date is awaited.

## Recommendations

The Commission recommends that in the development of any laws or policies in the area of employment, the Department for Economy and NI Executive consider the extent to which any change engages Protocol Article 2 and ensure that there is no diminution to the rights and safeguards which fall within its scope and that NI law keeps pace with any changes to the Employment Equality (Framework) Directive.

The Commission recommends that the Hate Crime Review Team’s recommendations on homophobic hate crime are fully and promptly implemented, led by the Department of Justice.

The Commission recommends that the Department for Communities promptly publishes and implements a robust LGBTQI+ Strategy for NI, accompanied by a measurable plan of action.

The Commission continues to advise that the right to hold religious beliefs is absolute, but the right to manifest one’s religion or beliefs is qualified. The Commission recommends clear guidance is introduced by the Executive Office to provide legal certainty for businesses and customers on what constitutes discrimination, in the wake of the *Ashers* judgment and that such guidance is amended to reflect the outcome of *Lee v the United Kingdom*.

## Gender equality strategy

Protocol Article 2 provides specific, enhanced protection against discrimination as enshrined in the six directives listed in Annex 1 of the Protocol, including the equal treatment directives which protect against gender discrimination and which cover employment and vocational training,<sup>221</sup> access to goods and services,<sup>222</sup> and social security.<sup>223</sup> NI equality law must keep pace with any changes made by the EU to

218 *Colin McArthur, Karen McArthur and Ashers Baking Company Ltd v Gareth Lee* [2018] UKSC 49.

219 ‘Ashers ‘gay cake’ row referred to European Court’, *BBC News*, 15 August 2019.

220 ECtHR, ‘Lee v. the United Kingdom: Statement of Facts’ (23 March 2020).

221 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.

222 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.

223 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.



improve the minimum levels of protection, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.<sup>224</sup>

The rights, safeguards and equality of opportunity provisions set out in the relevant Chapter of the Belfast (Good Friday) Agreement include the “right to equal opportunity in all social and economic activity, regardless of ... gender”. To the extent that additional EU obligations fall within scope of Protocol Article 2, such as the Parental Leave Directive<sup>225</sup> and the Pregnant Worker’s Directive,<sup>226</sup> there should be no regression of rights, safeguards and equality of opportunity following the UK withdrawal from the EU.

Following the commitment in the New Decade, New Approach agreement to publish a new Gender Equality Strategy<sup>227</sup>, the Department for Communities has adopted a co-design approach to developing the strategy. This has included appointing an Expert Advisory Panel and undertaking ongoing engagement with a Co-Design Group and cross-departmental working group made up of key stakeholders. The Expert Panel published its report in March 2021.<sup>228</sup> The report highlighted key human rights obligations as relevant to gender equality and outlined a number of key themes for discussion by the Co-Design Group.<sup>229</sup> The Co-Design Group and cross-departmental working groups have met regularly since November 2020. The strategy is due to be subject to public consultation in early 2022. The Commission is a member of the Co-Design Group for the Gender Equality Strategy.

## Recommendations

The Commission continues to call on the Department for Communities to promptly publish and implement a robust Gender Equality Strategy that reflects gender-specific elements. The Commission recommends that this is accompanied by a measurable action plan for advancing gender equality that is effectively monitored.

The Commission recommends that in the development and implementation of the Gender Equality Strategy that the Department for Communities consider its obligations under Protocol Article 2 ensure that there is no diminution to the rights and safeguards which fall within its scope and that NI law keep pace with any changes to the four equal treatment directives listed in Annex 1.

224 Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

225 Directive 2010/18/EU, ‘Council Directive implementing the revised Framework Agreement on parental leave’, 8 March 2010.

226 Directive 92/85/EEC, ‘Council Directive on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding’, 19 October 1992.

227 NI Office, ‘New Decade New Approach’, (NI Office, 2020).

228 Department for Communities, ‘Gender Equality Strategy Expert Advisory Panel Report’, (DfC, 2021).

229 Ibid, at p12.



## Gender recognition

In June 2019, the UN CAT Committee recommended that the UK Government and NI Executive ensure that:

- a) *The parents or guardians of intersex children receive impartial counselling services and psychological and social support, including information on the possibility of deferring any decision on unnecessary treatment until they can be carried out with the full, free and informed consent of the person concerned;*
- b) *Persons who have been subjected to such procedures without their consent and resulting in severe pain and suffering, obtain redress, including the means for rehabilitation.*<sup>230</sup>

In 2015, the CoE High Commissioner for Human Rights published a number of recommendations pertaining to the rights of intersex persons, including that:

*Member States should facilitate the recognition of intersex individuals before the law through the expeditious provision of birth certificates, civil registration documents, identity papers, passports and other official personal documentation while respecting intersex persons' right to self-determination. Flexible procedures should be observed in assigning and reassigning sex/gender in official documents while also providing for the possibility of not choosing a specified male or female gender marker. Member States should consider the proportionality of requiring gender markers in official documents.*<sup>231</sup>

Protocol Article 2 provides specific, enhanced protection against discrimination as enshrined in the six directives listed in Annex 1 of the Protocol. Four of these non-discrimination Directives cover employment and vocational training,<sup>232</sup> access to goods and services,<sup>233</sup> and social security<sup>234</sup> and relate to a prohibition discrimination on grounds of sex, including transgender people. The CJEU has made it clear in that “to tolerate such 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”.<sup>235</sup> NI equality 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.<sup>236</sup>

230 CAT/C/GBR/CO/6, 'UN Committee against Torture, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland', 7 June 2019, at para 65.

231 CoE High Commissioner for Human Rights, 'Human Rights and Intersex People' (CoE, 2015), at 5.

232 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.

233 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.

234 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.

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

236 Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

## Gender recognition

Under the Gender Recognition Act 2004, for a transgender person's acquired gender to be legally recognised in the UK, an application must be submitted to a Gender Recognition Panel. The Gender Recognition Panel will then assess the application and if successful will issue a Gender Recognition Certificate. Currently, the Gender Recognition Panel process for the whole of the UK is centralised, based in England. Consultations on possible amendments to the gender recognition process have been conducted in England, Wales and Scotland, but not NI.<sup>237</sup> There are concerns that any change to the process for the rest of the UK, without making provision to accommodate applicants from NI seeking gender recognition, could in effect deny transgender individuals in NI from accessing a legal gender recognition process.

Eligibility criteria for a Gender Recognition Certificate requires an applicant is over 18, diagnosed with gender dysphoria and has lived in the acquired gender for more than two years and intends to do so permanently.<sup>238</sup>

There are significant waiting lists for the application and transitioning process in NI. The assessment for eligibility can take between six and 18 months and the waiting list for an initial appointment to start the transition process with the Brackenburn Clinic is two years. Consequently, the Brackenburn Clinic had ceased holding drop-in sessions for new and potential patients for a period of time.<sup>239</sup> However, in July 2021, Transgender NI published a healthcare update providing that to their knowledge, the Brackenburn Gender Identity Clinic had started to see new patients.<sup>240</sup>

In 2019, Transgender NI conducted a regional NI Trans Healthcare Consultation. It was reported that 60.5 per cent of respondents claimed that their mental health worsened as a result of attending the Brackenburn Clinic.<sup>241</sup> Some respondents found their experience with the Clinic to be "draining" and "confusing".<sup>242</sup> It was reported that 15 per cent of respondents were self-medicating and many of those felt forced to do so due to the three-plus year wait to access Gender Identity Services in NI.<sup>243</sup>

The report further identified a lack of understanding within the process. For example, some reported that clothing appeared to influence the panel's decision. Such as, a transgender woman wearing so-called male clothing at some point during the assessment period is assumed not to have lived in the acquired gender for more than two years. This adopts a stereotypical gendered approach to clothing and places individuals at risk

237 Scottish Government, 'Review of the Gender Recognition Act 2004: A Consultation' (Scottish Government, 2017); Gender Equalities Office, 'Reform of the Gender Recognition Act - Government Consultation' (GEO, 2018).

238 NI Direct, 'Gender Recognition'. Available at: <https://www.nidirect.gov.uk/articles/gender-recognition>.

239 Transgender NI, 'Healthcare for trans people' Available at: <https://transgenderni.org.uk/healthcare/>.

240 Transgender NI, 'Healthcare Update', 26 July 2021.

241 Ibid, at 2.

242 Transgender NI, 'The Future of Trans Healthcare', (Transgender NI, 2019), at 3.

243 Ibid.

of harassment, particularly when they are forced to wear male or female clothing too early in the process and before they are ready.<sup>244</sup>

Some transgender representatives have reported to the Commission that the gender recognition process does not provide reasonable adjustments for transgender persons with mental health issues or learning disabilities.<sup>245</sup>

The self-declaration model is considered by some to be more appropriate than the mental health model that is currently used in the UK. The self-declaration model places the decision regarding treatment choice with the patient alone, following appropriate education and advisement about the treatment in question.<sup>246</sup> The self-declaration model was introduced to Ireland with the enactment of the Gender Recognition Act 2015.<sup>247</sup>

In 2018, the UK Government published a consultation on reform of the Gender Recognition Act in England and Wales. The consultation focused on the process for achieving legal recognition and the removal of the requirement for a medical diagnosis towards the self-declaration model.<sup>248</sup> However, in 2020, the UK Government published its response which outlined that the requirements necessary to legally change gender remain the same and medical diagnosis will still be required.<sup>249</sup>

However, the review made changes to modernise the process of applying for a Gender Recognition Certificate, reducing the £140 fee and moving the process online. From May 2021, applicants in England and Wales are required to pay £5 for a certificate, ensuring the process is more affordable and remedying one of the key issues that was identified by transgender people in the consultation.<sup>250</sup> However, in NI the application fee for a Gender Recognition Certificate remains £140, which can be a barrier to access.<sup>251</sup> Assistance may be available to individuals on certain benefits or a low income. Applicants should be able to obtain the required medical report on the National Health Service, but it was reported that generally doctors in NI refuse to provide the required medical report to prove gender dysphoria due to their own personal beliefs. The one known doctor in NI that would provide the required medical report on the National Health Service has not been able to do so since 2018 due to time constraints. As a result, individuals must pay privately to receive the required report, which costs £4,000.<sup>252</sup>

### Support Services

Knowing Our Identity is a service that supports transgender and gender variant children and adolescents, up to the age of 18, across NI.<sup>253</sup> They accept referrals from Child and Adolescent Mental Health Service teams

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244 Roundtable discussion with civil society representatives, November 2018.

245 Ibid.

246 Ibid.

247 Oireachtas, 'Gender Recognition Act 2015'.

248 Minister for Women and Equalities, 'Reform of the Gender Recognition Act - Government Consultation', July 2018.

249 Minister for Women and Equalities' 'Written Ministerial Statement: Response to Gender Recognition Act (2004) consultation', 22 September 2021.

250 UK Government Equalities Office, 'Press Release: Gender Recognition Certificate fee reduced', 4 May 2021.

251 NI Direct, 'Gender Recognition'. Available at: <https://www.nidirect.gov.uk/articles/gender-recognition>.

252 Roundtable discussion with civil society representatives, November 2018.

253 Transgender NI, 'Healthcare for trans people' Available at: <https://transgenderni.org.uk/healthcare/>.

across NI, and can chat directly with parents, guardians and patients directly about referrals. There is no similar support for adults, with the only option being the Brackenburn Clinic.

In 2020, a judicial review was brought against NHS England gender identity development service for children, by a case brought by a 24-year-old woman who began taking puberty blockers when she was 16 before de-transitioning. The Court ruled that a child under 16 may only consent to the use of medication intended to suppress puberty where he or she is competent to understand the nature of the treatment. In respect of young persons aged 16 and over, the legal position is that there is a presumption that they have the ability to consent to medical treatment.<sup>254</sup>

In September 2021, the Court of Appeal overturned the case ruling for under-16s. The appeal court judges stressed that it was established legal principle that it was for clinicians rather than the court to decide on competence to consent.<sup>255</sup>

In 2019, the Department of Health asked the Health and Social Care Board to undertake a review of the Regional Gender Identity Service pathway. A multi-agency Gender Identity Service Pathway Review Group was established to take this forward.

In 2020, despite some delays due to COVID-19, the group developed a draft set of objectives to help inform the future direction of the service in the region. Once agreed, the development of a set of objectives will provide the baseline from which a number of options will be developed and assessed to identify how to deliver a gender identity service that addresses existing need and is capable of meeting demand.<sup>256</sup> Some civil society organisations have welcomed the creation of the multi-agency group, but has raised concerns that a number of persistent issues need immediate action including significant delays in receiving support and treatment from Brackenburn Clinic and the need to support those self-medicating as a result.<sup>257</sup>

In 2021, a transgender woman brought an application for judicial review in NI including complaints aspects of healthcare provision for transgender people in NI. The applicant had been receiving medical assistance, including counselling and hormone therapy since 1996, but had not yet had gender confirmation surgery or been granted a Gender Recognition Certificate. The NI High Court considered claims that aspects of the Gender Recognition Act 2004 were incompatible with Article 8 and Article 14 ECHR, requiring a medical diagnosis and challenging what that diagnosis needs to be, before a Gender Recognition Certificate is granted. The Court held that although the requirement that the applicant provides medical evidence in support of her application was proportionate the specific requirement to evidence a “disorder” was unnecessary and unjustified. The legislation was ruled incompatible with the applicant’s

254 *Bell & Anor v The Tavistock and Portman NHS Foundation Trust* [2020] EWHC 3274.

255 *Bell & Anor v The Tavistock and Portman NHS Foundation Trust* [2021] EWCA Civ 1363.

256 Health and Social Care Board, ‘Gender Identity Service Review of the Pathway’. Available at: <http://www.hscboard.hscni.net/gender-identity-service/>.

257 Email correspondence with Transgender NI and NI Human Rights Commission, 21 October 2020.

rights under the ECHR.<sup>258</sup> Following further negotiations in this case, the Belfast Health and Social Care Trust agreed to fund assessments and reports for current and previous patients at the regional gender identity clinic.<sup>259</sup>

In 2021, through a NI Assembly question, the Minister of Finance indicated that research has been commissioned by the Department of Finance in order to inform how legislative change could be brought forward so as to enable people to declare their own gender identity.<sup>260</sup>

## Gender Recognition within the LGBTQI+ Strategy

The Department for Communities has adopted a co-design approach to developing the LGBTQI+ Strategy, which included appointing an Expert Advisory Panel and undertaking ongoing engagement with a Co-Design Group and cross-departmental working group made up of key stakeholders. The Expert Panel published its report in March 2021, making a number of recommendations around gender recognition including that legislation is fit for purpose and recognises and is reflective of the diversity of genders in NI.<sup>261</sup> The report outlined a number of key themes for discussion across the Co-Design Group meetings including, for example, healthcare, education, safety and security. The Co-Design Group and cross-departmental working groups have met regularly since November 2020. Public consultation on the strategy is expected in early 2022. The Commission is a member of the Co-Design Group for the LGBTQI+ Strategy.

### Recommendations

The Commission recommends that in the development and implementation of the LGBTQI+ Strategy, the Department for Communities consider its obligations under Protocol Article 2 to ensure that there is no diminution to the rights and safeguards which fall within its scope and that NI law keep pace with any changes to the four equal treatment directives listed in Annex 1.

The Commission recommends the Department for Communities introduce the LGBTQI+ Strategy without delay, and that the gender recognition process in NI is amended to reflect the self-declaration model. The Commission further recommends that the gender recognition process is affordable, respectful and accessible, including effectively training staff. The Commission also recommends that the application fee for a gender recognition certificate is lowered, in line with England and Wales. The Commission recommends transgender children are effectively supported and that the best interests of the child are a primary consideration.

258 *JR111* [2021] NIQB 48.

259 Barriers to transgender people securing official acknowledgment of preferred identity to be removed', *The Irish News*, 24 September 2021.

260 NI Assembly Hansard, 'Oral Question: Gender Identity - Emma Sheerin MLA - AQO 1025/17-22', 22 February 2021.

261 Department for Communities, 'Gender Equality Strategy Expert Advisory Panel Report', (DfC, 2021) p.140.



## Hate crime

In 2015, the UN Human Rights Committee recommended the UK Government and NI Executive “effectively implement and enforce the existing relevant legal and policy frameworks on combating hate crimes”.<sup>262</sup>

In 2016, the UN CERD Committee recommended that the UK Government and NI Executive “investigate all reported acts of racist hate crimes... and provide effective remedies to victims” and that it “systematically collect disaggregated data ... undertake a thorough impact assessment of the measures adopted to ensure their continued effectiveness”.<sup>263</sup> In addition, the UK Government and NI Executive should “adopt concrete measures, in consultation with affected groups, to increase the reporting of racist hate crimes” as well as adopting measures to “combat racist hate speech and xenophobic political discourse, including on the Internet”.<sup>264</sup>

In 2019, the UN CAT Committee recommended that the UK Government and NI Executive “strengthen its efforts to investigate alleged hate crimes and prosecute perpetrators, including by improving hate crimes training for the police and improving their initial handling of hate crimes reports”.<sup>265</sup>

In Protocol Article 2, the UK Government commits to ensuring there is no diminution of the rights, safeguards and equality of opportunity protections contained in that chapter of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU, including the right of victims “to remember as well as contribute to a changed society”.<sup>266</sup> EU obligations underpinning the rights of victims include the Victims’ Directive<sup>267</sup> as well as other relevant EU laws which support victims.<sup>268</sup>

In 2020/21, there were 2,493 recorded incidents of hate crime and 1,757 recorded crimes - an increase on the previous year.<sup>269</sup> The number of hate motivated incidents recorded rose across four of the six hate motivations (racist, homophobic, sectarian, and transphobic), when compared with the previous 12 months. The number of crimes recorded also increased across four of the six motivations (racist, homophobic, sectarian and faith/religion), whilst both incidents and crimes with a disability motivation showed falls with nine fewer incidents and 14 fewer crimes. Incidents with

262 CCPR/C/GBR/CO/7, ‘UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland’, 17 August 2015 at para 10.

263 CERD/C/GBR/CO/21-23, ‘UN CERD Committee Concluding Observations on the Twenty-first to Twenty-third periodic Reports of the United Kingdom of Great Britain and Northern Ireland’, 26 August 2016, at para 16(a) and (b).

264 Ibid, at para 16(c) and (d).

265 CAT/C/GBR/CO/6, ‘UN CAT Committee Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and NI’, 7 June 2019, at para 63.

266 Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

267 Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

268 Directive 2011/36/EU ‘Council Directive on preventing and combating trafficking in human beings and protecting its victims’, 5 April 2011; Directive 2011/92/EU, ‘Parliament and Council Directive on combating the sexual abuse and sexual exploitation of children and child pornography’, 13 December 2011; Directive 2004/80/EC, ‘Council Directive relating to the compensation to crime victims’, 29 April 2004.

269 Police Service of NI, ‘Incidents and Crimes with a Hate Motivation Recorded by the Police in Northern Ireland: Financial year update’, (PSNI, 2021).

a homophobic motivation and crimes with a racist motivation showed the largest overall increase (94 incidents and 93 crimes respectively).<sup>270</sup>

In early 2020, the Independent Hate Crime Review Team undertook a public consultation on reviewing hate crime legislation in NI.<sup>271</sup> The findings and recommendations were published in December 2020, following delays due to COVID-19.<sup>272</sup>

In July 2021, Judge Marrinan provided evidence to the NI Assembly Justice Committee, in which he highlighted shortcomings in the current legislative framework and the issue of hate crime within NI and outlined his recommendations for improvement.<sup>273</sup> In discussing the concept of a 'religious defence', he noted "It is important to know how to strike the balance, and the best way to strike the balance is to make sure that article 9 and 10 rights are enshrined in any proposed legislation, with explicit reference to the European Convention". In his evidence, Judge Marrinan noted that while he had recommended a Hate Crime Commissioner for NI, he said he would "strongly support" the alternative proposal from the Department of Justice to establish a Victims of Crime Commissioner who would particularly focus on victims of hate crime and domestic violence.<sup>274</sup> The Commission has also welcomed the proposal to establish a Victims of Crime Commissioner in its response to the Department's consultation on the matter.<sup>275</sup>

The Department of Justice published its response to the Hate Crime Review in July 2021, indicating that no recommendations had been wholly rejected at this stage.<sup>276</sup> The response also outlined how the Department has put in place a dedicated Hate Crime Branch, with effect from 1 June 2021, to take forward work on implementing the Hate Crime Review Report.<sup>277</sup> The Department plans to continue monitoring developments in related policy areas and in other jurisdictions, with a view to introducing a consolidated Hate Crime Bill in the next NI Assembly mandate following consultation.<sup>278</sup>

Addressing hate crime was noted as a priority area in the Programme for Government draft outcomes framework, which was published for consultation in early 2021.<sup>279</sup>

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270 Police Service of NI, 'Incidents and Crimes with a Hate Motivation Recorded by the Police in Northern Ireland: Financial year update', (PSNI, 2021), at 4.

271 Independent Hate Crime Review Team, 'Hate Crime Legislation in NI: An Independent Review - Consultation Paper' (IHCRT, 2020).

272 Department of Justice, 'Hate Crime Legislation in NI: Independent Review' (DoJ, 2020).

273 NI Assembly Hansard, 'Committee for Justice: Review of Hate Crime Legislation in Northern Ireland - Judge Desmond Marrinan; Mr Noel Marsden', 8 July 2021.

274 Department of Justice, 'Improving the experiences of victims and witnesses in the criminal justice system: a consultation on a new three-year Victim and Witness Strategy for Northern Ireland and the establishment of a Victims of Crime Commissioner for Northern Ireland', May 2021.

275 NI Human Rights Commission, 'Response to the public consultation on 'Improving the experiences of victims and witnesses in the criminal justice system: a new three-year Victim and Witness Strategy for Northern Ireland; and the establishment of a Victims of Crime Commissioner for Northern Ireland', July 2021.

276 Department of Justice, 'Review of Hate Crime Legislation in Northern Ireland - Departmental Response', July 2021, at 3.

277 Ibid, at 13.

278 Ibid, at 14.

279 NI Executive, 'Programme for Government: draft Outcomes Framework', 2021, at 26.



## Recommendation

The Commission welcomes the NI Executive's commitment to addressing hate crimes. The Commission recommends that the Department of Justice promptly and effectively implements the recommendations of the Independent Hate Crime Review Team.

## Intersectional multiple discrimination

In 2017, the UN CRPD Committee recommended that the UK Government and NI Executive:

*explicitly incorporate in its national legislation protection from, in particular multiple and intersectional discrimination on the basis of gender, age, race, disability, migrant, refugee and/or other status, and provide appropriate compensation, and redress for victims, and sanctions proportional with the severity of the violation.*<sup>280</sup>

In 2019, the UN CEDAW Committee recommended that the NI Executive “revise its legislation in NI to ensure that it affords protection to women on an equal footing with women in other administrations of the State party” and:

*review and amend the public sector equality duty in order to address situations of intersectional forms of discrimination, such as discrimination faced by ‘Black, Asian and Minority Ethnic’ women, older women, women with disabilities, asylum-seeking and refugee women, and lesbian, bisexual, transgender women and intersex persons.*<sup>281</sup>

NI legislation does not provide for cases of intersectional multiple discrimination. At present in NI, each ground of discrimination must form its own case, meaning it has to be considered and ruled on separately.<sup>282</sup> The Equality Act 2010 which applies in England, Scotland and Wales, contains a dual discrimination provision, which has not been brought into force.<sup>283</sup>

The Executive Office Racial Equality Strategy 2015-2025 committed to reviewing the Race Relations (NI) Order 1997 and terms of reference of the review include reference to the UN CERD Committee's recommendation on multiple discrimination.<sup>284</sup> The Executive Office has confirmed that a comparison of protections offered by the Race Relations (NI) Order with laws in the rest of the UK and Ireland this has been examined by the Departmental Solicitor's Office and formed part of the engagement with stakeholders and other administrations. Proposals for a

280 CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI', 3 October 2017, at para 19.

281 CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 14 March 2019, at para 15(a) and (c).

282 Equality Commission for NI, 'Strengthening Protection against Racial Discrimination: Recommendations for Law Reform', (ECNI, 2014), at 38.

283 House of Lords Select Committee on the Equality Act 2010 and Disability, 'The Equality Act 2010: The Impact on Disabled People (Report of session 2015-16) HL Paper 117, (HL, 2016).

284 Eoin Mullan, Sinead Brown and Paul Roddy, 'Racial Equality Legislation Review' (TEO, 2018), at 7-8.

consultation on a new piece of primary legislation a being developed and a public consultation process is due to take place early next year.<sup>285</sup>

In his independent review of Hate Crime legislation in NI, published in 2020, Judge Desmond Marrinan considered the issue of intersectionality and recommended that any new legislation should provide appropriate recognition of the importance of intersectionality and be reflected in the drafting of the statutory aggravations to existing offences.<sup>286</sup> The Department of Justice published its response to the Review in July 2021, indicating that no recommendations had been wholly rejected at this stage.<sup>287</sup> The Department agreed that all protected groups should be treated equally and intersectionality between these groups should be recognised in legislation.<sup>288</sup>

### Recommendation

The Commission recommends that the Executive Office introduce legislation providing for intersectional multiple discrimination claims in NI.

### Persons with disabilities

In 2017, the UN CRPD Committee stated that it was “concerned at the lack of UK Government and NI Executive-led “initiatives aimed at assessing and sufficiently addressing the inclusion of and living conditions for persons with disabilities, particularly in NI and the overseas territories”.<sup>289</sup> The Committee recommended that the UK Government and NI Executive “collect information and adopt a strategic and measurable plan of action for improving the living conditions of all persons with disabilities, including in close cooperation with authorities in NI and the overseas territories”.<sup>290</sup>

The UN CRPD Committee also recommended that the UK Government and NI Executive “recognise the right to living independently and being included in the community as a subjective right, recognise the enforceability of all its elements, and adopt rights-based policies, regulations and guidelines to ensure implementation”.<sup>291</sup>

Protocol Article 2 provides specific, enhanced protection against discrimination as enshrined in the six directives listed in Annex 1 of the Protocol, including the Employment Equality (Framework) Directive which protects against discrimination on the grounds of disability in employment and vocational training.<sup>292</sup> NI equality law must keep pace with any changes made by the EU to these rights to improve the minimum levels

285 Email correspondence from The Executive Office to the NI Human Rights Commission, October 2021.

286 Independent Hate Crime Review Team, ‘Hate Crime Legislation in NI Independent Review’, (DoJ 2020), Recommendation 11.

287 Department of Justice, ‘Review of Hate Crime Legislation in Northern Ireland - Departmental Response’, (DoJ, 2021), at 3.

288 Ibid, at 5.

289 CRPD/C/GBR/CO/1, ‘UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI’, 29 August 2017, at paras 8 and 9.

290 Ibid, at para 9.

291 Ibid, at para 45(a).

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

of protection available, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.<sup>293</sup>

In addition, as the EU has acceded to the UN CRPD,<sup>294</sup> there is an overriding obligation to promote, protect and implement the UN CRPD through EU law and policy.<sup>295</sup> The UN CRPD is also relevant to the interpretation of Withdrawal Agreement, including Protocol Article 2, and to all EU measures referenced in that Agreement.<sup>296</sup> The UN CRPD is similarly relevant to the interpretation of any additional underpinning EU obligations for the rights, safeguards and equality of opportunity listed in the relevant part of the Belfast (Good) Friday Agreement.<sup>297</sup>

## COVID-19

In June 2020, the Commission and the Equality Commission for NI, as the UN CRPD Independent Mechanism in NI, jointly hosted two roundtables with key stakeholders on issues facing persons with disabilities in NI due to COVID-19. The issues raised during these roundtables informed the UN CRPD Independent Mechanism in NI's submission to the House of Commons Women and Equalities Committee's sub-inquiry into the unequal impact of COVID-19 on disability and access to services.<sup>298</sup>

In January 2021, the NI Executive's Draft Budget 2021/2022 document was published setting out the Executive's proposed spending plans for the period from April 2021 to March 2022.<sup>299</sup> This document detailed the Department for Communities proposed Draft Budget 2021/2022 allocations and how they would deliver public services, support COVID-19 recovery and deliver on the wider Executive priorities as outlined in the New Decade New Deal agreement. In February 2021, a consultation exercise was launched by the Department for Communities on the Equality Impact Assessment - Draft DfC Budget 2021/2022.<sup>300</sup> The Commission responded to the consultation recommending that in relation to persons with disabilities, the Department of Finance implement the additional £20 payment to low income households with a person with a disability, as reflected in the New Mitigation package recommended by the Commission, to offset the disproportionate losses to annual income experienced by households with disabilities because of tax and social security reforms since 2010.<sup>301</sup> The Department for Communities published its response to consultation views outlining a number of next steps including seeking to ensure that its 2021/2022 budget allocations are

293 Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

294 EU Commission, 'Press Release, EU Ratifies UN Convention on Disability Rights', 5 January 2011.

295 *HK Danmark (Jette Ring and Lone Skouboe Werge)*, Case 335/11 and Case 337/11, 11 April 2013, at paras 28-32; *Z v A Government Department*, Case C-363/12, 14 March 2014, at para 85.

296 Article 2(a)(iv) and Article 4 UK-EU Withdrawal Agreement 2020.

297 Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity - Human Rights.

298 Independent Mechanism in Northern Ireland, 'Written evidence to the WEC Inquiry into unequal impact? Coronavirus, disability and access to services', (IMNI, 2020).

299 Department of Finance, 'Draft Budget 2021/2022', (DfC, 2021).

300 Department for Communities, 'Draft Budget 2021/2022 Final Equality Impact Assessment', (DfC, 2021).

301 NI Human Rights Commission, 'Submission to the Department for Communities in Response to Their Equality Impact Assessment of the Draft Budget 2021/2022', (NIHRC, 2021).

applied as far as possible in a manner that does not disproportionately or adversely affect one Section 75 category over another.<sup>302</sup>

In August 2021, the NI Executive published its COVID-19 recovery plan 'Building Forward: Consolidated COVID-19 Recovery Plan'.<sup>303</sup> It brings together a number of recovery actions that will be delivered over a 24-month period which includes tackling inequalities as a recovery accelerator; however, there is limited mention of disability specifically. In its response to the draft plan, the Commission highlighted how our assessment of the reforms to the social security system in NI since 2010 found that they infringe the right to social security in several key aspects, and that reforms have had a disproportionately negative impact on some of the most vulnerable groups in NI, including households where members have disabilities.<sup>304</sup> In response to the draft consolidated COVID-19 recovery plan, the Commission recommended that the recommendations outlined in our Impact Assessment are revisited by the NI Executive and considered in the context of the ongoing pandemic and recovery.<sup>305</sup>

### Central Regional Disability Forum

In 2016, the Executive Office Draft Executive Programme for Government 2016-21 made a commitment to involve disabled persons in the setting up of a "central regional disability forum".<sup>306</sup>

The Disability Strategy Expert Advisory Panel Report, published in March 2021 to assist with the development of the Disability Strategy, highlighted the commitment made by the Executive Office to develop a NI Disability Forum was yet to be delivered and recommended the Department for Communities and Disability Strategy to implement it.<sup>307</sup>

### Disability Strategy

Following the New Decade, New Approach commitment to publish a Disability Strategy<sup>308</sup>, the Department for Communities has adopted a co-design approach in the development of a Disability Strategy. This included appointing an Expert Advisory Panel and undertaking ongoing engagement with a Co-Design Group and cross-departmental working group made up of key stakeholders. The Expert Panel published its report in March 2021, highlighting a focus on the general principles of UN CRPD which should form a guide to what should be included in a Disability Strategy.<sup>309</sup> The Co-Design Group and cross-departmental working group have met regularly from November 2020. The Strategy is expected to be subject to public consultation in early 2022. The Commission is a member of the Co-Design Group for the Disability Strategy. The Commission

302 Department for Communities, 'Draft Budget 2021/2022 Consultation Outcome Report', (DFC, 2021).

303 The Executive Office, 'Building Forward: Consolidated COVID-19 Recovery Plan' (TEO, 2021).

304 NI Human Rights Commission, 'Cumulative Impact Assessment of Tax and Social Security Reforms', (NIHRC, 2019).

305 NI Human Rights Commission correspondence to The Executive Office, July 2021.

306 NI Executive, 'Draft Programme for Government Framework 2016-21', (2016). Available at: <https://www.northernireland.gov.uk/sites/default/files/consultations/newnigov/draft-pfg-framework-2016-21.pdf>.

307 Disability Strategy Expert Advisory Panel, 'Report and Recommendations' (March 2021), at p.16.

308 NI Office, 'New Decade, New Approach' (NIO, 2020), at 27.

309 Disability Strategy Expert Advisory Panel, 'Report and Recommendations' (March 2021) at p.4.

identified the need to embed consideration of Protocol Article 2 into the Disability Strategy.

## Independent Living Fund

The UK-wide Independent Living Fund was closed on 30 June 2015 and future responsibilities were transferred to the individual devolved administrations.<sup>310</sup> The Scottish Government established a new body, Independent Living Fund Scotland, to administer the fund in Scotland, and an agreement was reached between the Department of Health and the Scottish Government for Independent Living Fund Scotland to also administer the fund on behalf of NI recipients with effect from 1 July 2015.<sup>311</sup>

The Fund supports severely disabled adults to live in the community. It provides additionality through financial awards directly to the disabled person and these are used to purchase care and support and to achieve independent living related outcomes. The Independent Living Fund exists to give disabled people choice and control over their support and it helps increase their quality of life. In April 2019, at the inaugural meeting of the Independent Living Fund Scotland Stakeholder Groups from Scotland and NI, the Department's Permanent Secretary said that exploratory and scoping work would be carried out on the feasibility and sustainability of re-opening the Fund to new applications in NI.<sup>312</sup> Department of Health officials confirmed they have been working with Independent Living Fund Scotland, the Scottish Government, the Health and Social Care Trusts, community and voluntary groups, service users and others through an Independent Living Fund Working Group, established by the Department to scope and assess the feasibility of reopening the Fund to new applicants in NI.<sup>313</sup> The Commission is also a member of the group. This work is at an advanced stage and it is anticipated that officials will shortly provide draft advice, including options, to the Minister of Health for his consideration.<sup>314</sup>

The Disability Strategy Expert Advisory Panel Report, published in March 2021 to assist with the development of the Disability Strategy, made a number of recommendations in relation to the cease of the Independent Living Fund to new applicants. The Expert Advisory Panel recommended the Department for Communities and Disability Strategy adopt any final recommendations from the Independent Living Fund Working Group including agreed options and terms for reopening the Independent Living Fund to new applicants as well as improvements of the operation of Independent Living Fund taking account of experience of recipients.<sup>315</sup>

310 Independent Living Fund, 'Press Release: Decision on the Future of the ILF', 6 March 2014.

311 Steven Preece, 'NI Independent Living Fund to be Administered in Scotland', *Welfare Weekly*, 28 January 2018.

312 Correspondence from Department of Health to NI Human Rights Commission, 3 November 2021.

313 Ibid.

314 Ibid.

315 Department for Communities, 'Disability Strategy Expert Advisory Panel - Report & Recommendations', (DfC, 2020) at 37.



## UN CRPD Independent Mechanism's Disability Forum

Reflecting Article 33(3) of the UN CRPD and the UN CRPD Committee's General Comment No 7<sup>316</sup>, the Commission and Equality Commission for NI have established a Disability Forum to provide a dedicated space to ensure disabled people and their representative organisations are at the core of the Independent Mechanism's work in promoting, protecting and monitoring the implementation of the UN CRPD in NI. In January 2021, membership for the Independent Mechanism NI Disability Forum was confirmed with 15 members from across the disability sector. The Disability Forum held its first meeting in March 2021 and continues to meet on a quarterly basis. The Forum has discussed issues such as mainstreaming UN CRPD within the Disability Strategy and Programme for Government as well as upcoming planning for the UN CRPD List of Issues Report.

## Autism strategy

The Autism Act (NI) 2011 places a statutory responsibility on the Department of Health to publish an autism strategy every seven years.<sup>317</sup> The first Autism Strategy 2013-2020 expired at the end of 2020, with its three-year action plan already having expired in 2016. The New Decade, New Approach agreement commits to publish a Disability Strategy and a Children and Young People's Strategy, but not an Autism Strategy.<sup>318</sup>

Following delays caused by the COVID-19 pandemic, in March 2021, the Department of Health published the 'Autism Interim Strategy 2021/2022'.<sup>319</sup> Key priorities highlighted within the interim strategy are underpinned by a series of outcome-based, cross-departmental actions with associated target dates. These actions are to be collated into an Action Framework which will be used to monitor implementation across government departments. In August 2021, the Department of Health consulted on key priorities to inform the next five year Autism Strategy, with development due to begin later in 2021.<sup>320</sup>

In July 2021, Pam Cameron MLA introduced a Private Member's Bill, the Autism (Amendment) Bill, which seeks to amend the Autism (Northern Ireland) Act 2011 as well as to introduce new duties, review and update the current Programme for Care, introduce an independent scrutiny mechanism and develop funding for a NI autism training strategy.

The Commission provided advice to the Committee for Health on the Bill in September 2021, welcoming the intention of the Bill to strengthen the impact of the Autism Strategy and the relevancy of the UNCRPD. The Commission further advised that the Department should consider the Employment Equality Directive and continue to monitor relevant current and future CJEU jurisprudence insofar as it is relevant to those parts of

316 CRPD/C/GC/7, 'UN CRPD Committee General Comment No 7: Participation of Persons with Disabilities, Including Children with Disabilities, Through their Representative Organisations, in the Implementation and Monitoring of the Convention', 9 November 2018.

317 Autism Act (Northern Ireland) 2011.

318 NI Office, New Decade New Approach, (NIO, 2020), at 27.

319 Department of Health, 'Autism Interim Strategy 2021/2022', (DoH, 2021).

320 Department of Health, 'Autism Strategy 2023 - 2028 Questionnaire', August 2021.

the Autism Strategy relating to employment and vocational education.<sup>321</sup> The Commission also provided oral evidence to the Committee in November 2021.

## Supported employment

The employment rate of disabled people in NI is 35 per cent, which is significantly lower compared to 42 per cent in Scotland, 47 per cent in Wales and 50 per cent in England.<sup>322</sup> Disabled people in NI have identified that the NI Statistics and Research Agency's categorisation of different types of disability are too restrictive and as a result, figures on disability employment statistics are a conservative estimate of the reality.<sup>323</sup>

The Disability Strategy Expert Advisory Panel Report, published in March 2021 to assist with the development of the Disability Strategy, highlighted employment as an important issue. The Expert Advisory Panel Report highlighted that the employment rate of working aged deaf and disabled people in NI is significantly lower than in Great Britain and the EU. The report made a number of recommendations for actions the Department for Communities and the Disability Strategy could address relating to employment, including developing a new Disability Employment Strategy and ensuring funding for Supported Employment model for deaf and disabled people in NI.<sup>324</sup>

## Assistance Dogs

Rules around taking pets between the EU and the UK changed after the UK withdrew from the EU, meaning pet owners in Great Britain have to fulfil additional requirements before travelling to the EU.<sup>325</sup> Due to being bound by certain EU standards post-Brexit, these additional requirements are also applicable for pet owners travelling from Great Britain into NI. These new regulations impact upon disabled people's ability to travel freely as they may require assistance dogs.<sup>326</sup> The Commission and Equality Commission for NI wrote jointly to the Minister for Agriculture, Environment and Rural Affairs to raise concerns about the UK's international human rights obligations in relation to the additional obligations and raise human rights and equality implications under Protocol Article 2.<sup>327</sup> Checks on pets entering NI 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.<sup>328</sup>

321 NI Human Rights Commission, 'Response to Autism (Amendment) Bill', September 2021.

322 Joseph Rowntree Foundation, 'Poverty in Northern Ireland 2018' (JRF, 2018), at 9.

323 UK Independent Mechanism, 'Progress on Disability Rights in the United Kingdom: the UK Independent Mechanism Update Report to the UN Committee on the Rights of Persons with Disabilities', (UKIM, 2018), at 29.

324 Department for Communities, 'Disability Strategy Expert Advisory Panel - Report & Recommendations', (DFC, 2020) at 81.

325 'Pet passport: Can I take my pet to the EU after Brexit?', *BBC News*, 24 June 2021.

326 Amy Stewart, 'Guide Dogs: Charity calls for NI exemption on new post-Brexit rules' *BBC News NI*, 5 January 2021.

327 Letter from the NI Human Rights Commission and Equality Commission for NI to Head of the NI Civil Service, 10 June 2021.

328 Department of Agriculture, Environment and Rural Affairs, 'Press Release: Permanent solutions needed for pet checks' 15 September 2021.



## Recommendations

The Commission continues to call on the Department for Communities to promptly publish and effectively implement a robust disability strategy, accompanied by a measurable plan of action for improving the living conditions of all persons with disabilities and effective monitoring arrangements.

The Commission further calls on the Department for Communities to establish a Central Regional Disability Forum, that is sufficiently resourced and consists of persons with disabilities and their representative organisations, without further delay.

The Commission recommends that the Independent Living Fund is reopened.

The Commission recommends that the Department ensures full implementation of the Autism Act (NI) 2011 and commits to meeting its legislative requirement to publish a revised strategy.

The Commission also recommends that clarification is provided on the future funding arrangements for disability employment projects currently supported by the European Social Fund.

The Commission recommends that in the development of any laws or policies in the area of employment and vocation training and other areas captured by Protocol Article 2, that the Department for Communities and NI Executive ensure that there is no diminution to the rights and safeguards of disabled people which fall within its scope and that NI law keeps pace with any changes to the Employment Equality (Framework) Directive.

The Commission recommends that the Cabinet Office work with the EU to find a long-term solution which minimise checks on assistance dog owners travelling between Great Britain and NI.

## Racial equality

In 2016, the UN CERD Committee recommended that the UK Government and NI Executive “act without further delay to adopt comprehensive legislation prohibiting racial discrimination, in accordance with the provisions of the [UN CERD]”.<sup>329</sup>

In 2018, the UN Special Rapporteur on contemporary forms of racism, E Tendayi Achiume, visited NI. During her visit, the UN Special Rapporteur noted inconsistency in the data collected by government departments and the limitations in its scope, including a failure to account for the racial impact of immigration and counter terrorism law and policy.<sup>330</sup> The UN Special Rapporteur called on the UK authorities and other key

329 CERD/C/GBR/CO/21-23, ‘UN CERD Committee Concluding Observations on the Combined Twenty-first to Twenty-third Periodic Reports of the UK of Great Britain and NI’, 3 October 2016, at para 8(c).

330 Office of the High Commissioner for Human Rights, ‘UN rights expert hails UK for anti-racism action but raises serious concerns over Immigration Policy, Prevent programme and Brexit’, 11 May 2018.

stakeholders to “ensure the adoption of comprehensive legislation prohibiting racial discrimination in NI”.<sup>331</sup>

Protocol Article 2 provides specific, enhanced protection against discrimination as enshrined in the six directives listed in Annex 1 of the Protocol, including the Racial Equality Directive which protects against discrimination on the grounds of race and ethnicity across a range of areas, including employment and vocational training, access to goods and services, education and social security.<sup>332</sup> The UK Government has committed to ensuring that NI equality law must keep pace with any changes made by the EU to these rights to improve the minimum levels of protection available, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.<sup>333</sup>

## Statistics

In 2020/2021, there were 993 incidents and 719 crimes recorded where there was a racist motivation.<sup>334</sup> There were higher levels of both racist incidents and crimes recorded when compared with the previous 12 months.<sup>335</sup> Judge Marrinan’s Independent Review of Hate Crime Legislation in NI noted that beginning in 2016, the number of racist hate motivated incidents has overtaken sectarian motivated incidents, so that by 2018/19 there were no fewer than 1,124 racist hate motivated incidents as against 865 sectarian hate motivated incidents.<sup>336</sup>

## Review of Race Relations (NI) Order 1997

The Executive Office Racial Equality Strategy 2015-2025 committed to reviewing the Race Relations (NI) Order 1997 and relevant aspects of other legislation.<sup>337</sup> This review recognised that “following the enactment of the Equality Act 2010 in England, Scotland and Wales, a significant gap has opened up between the protections offered in Great Britain and [NI]”.<sup>338</sup> The review of the Race Relations (NI) Order 1997 has now been completed. Policy and legal work on draft proposals and a timeline for implementation is underway and officials engaged with the Racial Equality Subgroup and other stakeholders earlier this year; the input from this engagement has informed the work on proposals for consultation on the new piece of primary legislation.<sup>339</sup> It is intended that this consultation will take place early next year to support progress in this mandate that will facilitate early introduction in the next Assembly session.<sup>340</sup>

331 A/HRC/41/54/Add.2, 'Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance: Visit to the United Kingdom of Great Britain and Northern Ireland', 27 May 2019, at para 74(f).

332 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.

333 Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

334 Police Service of NI, 'Incidents and Crimes with a Hate Motivation Recorded by the Police in Northern Ireland: Financial year update', (PSNI, 2021), at 4.

335 Ibid, at 6.

336 Independent Hate Crime Review Team, 'Hate Crime Legislation in NI Independent Review', (DoJ 2020), at 100.

337 The Executive Office, 'Racial Equality Strategy 2015-2025' (TEO, 2015).

338 Ibid, at para 5.9.

339 Email correspondence from The Executive Office to NI Human Rights Commission, October 2021.

340 Ibid.

In June 2021, the Commission and Equality Commission for NI wrote to the head of the NI Civil Service highlighting a recent EU Commission Report on the Race Equality Directive and the Employment Equality (Framework) Directive highlighting recent legal and other developments.<sup>341</sup> The Commissions underlined that these developments were of particular significance in relation to the ongoing review of the Race Relations (NI) Order 1997.

## Ethnic Monitoring

The Racial Equality Strategy committed to ethnic monitoring as an important tool in tackling inequality and racism and proposes to “examine where ethnic monitoring should be introduced and consult on proposals for implementation”.<sup>342</sup> In 2020, the Executive Office completed a study to determine the feasibility of introducing monitoring to the public sector in NI. The final report is now complete: following receipt of the report, the Department has initiated work to consider how best to look beyond the report’s evidence for operation and to implement its key findings. To date officials have been engaging with stakeholders to gauge the impact of introducing monitoring and what information might be required to ensure the outcome is fit for purpose. They have also engaged with Departments and other administrations already collecting forms of Ethnic Monitoring data to scope potential strategies for implementation here. Work is already underway to update Departmental Guidance on Ethnic Monitoring which will be the foundation for harmonisation of data collection across the NI Civil Service. It is anticipated that next steps will be to finalise and publish Executive Office guidance in the coming months and establish an interdepartmental working group, tasked with taking this work forward.<sup>343</sup>

In its submission to the NI Affairs Committee inquiry into the experience of minority ethnic and migrant people in NI, the Commission highlighted the need for effective data collection on racial equality.<sup>344</sup>

### Recommendations

The Commission recommends that the Executive Office takes effective steps to ensure data collection on racial equality across all departments is consistent, extensive and disaggregated.

The Commission further recommends that the Executive Office implements the outstanding recommendations from international human rights treaty bodies to reform the Race Relations (NI) Order 1997 without further delay.

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

342 The Executive Office, ‘Racial Equality Strategy 2015-2025’ (TEO, 2015), at 5.

343 Email correspondence from The Executive Office to NI Human Rights Commission, October 2021.

344 NI Human Rights Commission, ‘Submission to the NI Affairs Committee Inquiry into the experience of minority ethnic and migrant people in Northern Ireland’, May 2021, at 14.

The Commission recommends that in the development of any laws or policies in the area of racial equality, including reform of the Race Relations (NI) Order 1997, the Executive Office consider the extent to which any change engages Protocol Article 2 and ensure that there is no diminution to the rights and safeguards which fall within its scope and that NI law keeps pace with any changes to the Racial Equality Directive.

## Sectarianism

In 2016, the UN CERD Committee reiterated its “previously expressed concern that measures to tackle racism and sectarianism are kept outside the framework of protections against discrimination provided by the Convention and the Durban Programme of Action”.<sup>345</sup> The UN CERD Committee recommended that the next periodic report contain information on concrete measures adopted to address racial discrimination and on the impact of the Together: Building a United Community Strategy.<sup>346</sup>

In 2017, the Advisory Committee on the Framework Convention for the Protection of National Minorities recommended that:

*the NI Executive should endeavour to implement the ‘good relations’ duty as provided under the NI Act 1998 in a manner that does not run counter to the equality duty and that does not prevent access to rights of persons belonging to all national and ethnic minorities.*<sup>347</sup>

The rights, safeguards and equality of opportunity provisions set out in the relevant Chapter of the Belfast (Good Friday) Agreement include the “the right to freedom from sectarian harassment”.<sup>348</sup> EU obligations underpinning the rights of victims include the Victims’ Directive<sup>349</sup> as well as other relevant EU laws which support victims.<sup>350</sup>

In 20120/21, 934 sectarian incidents and 674 sectarian crimes were recorded.<sup>351</sup> This represented an increase from 888 recorded sectarian incidents and 639 recorded sectarian crimes in 2019/2020.<sup>352</sup>

## Definition of sectarianism

The Together: Building a United Community strategy contains a commitment to develop a statutory definition of ‘sectarianism’ and ‘good

345 CERD/C/GBR/CO/21-23, ‘UN Committee on the Elimination of Racial Discrimination Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of UK’, 26 August 2016, at para 36.

346 CERD/C/GBR/CO/21-23, ‘UN Committee on the Elimination of Racial Discrimination Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of UK’, 26 August 2016, at para 37.

347 ACFC/OP/IV(2016)005, ‘CoE Advisory Committee on the Framework Convention for the Protection of National Minorities Fourth Opinion on the UK’, 27 February 2017, at 2.

348 Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

349 Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

350 Directive 2011/36/EU ‘Council Directive on preventing and combating trafficking in human beings and protecting its victims’, 5 April 2011; Directive 2011/92/EU, ‘Parliament and Council Directive on combating the sexual abuse and sexual exploitation of children and child pornography’, 13 December 2011; Directive 2004/80/EC, ‘Council Directive relating to the compensation to crime victims’, 29 April 2004.

351 Police Service of NI, ‘Incidents and Crimes with a Hate Motivation Recorded by the Police in Northern Ireland: Financial year update’, (PSNI, 2021), at 4.

352 Ibid.

relations'.<sup>353</sup> The New Decade New Approach agreement re-commits to “ending sectarianism and robust supporting strategies and actions will be put in place”.<sup>354</sup>

In 2020, the Commission responded to the Independent Hate Crime Review Team’s consultation on reviewing hate crime legislation in NI. This submission highlighted that such a review is an opportunity to introduce a statutory definition of sectarianism in NI.<sup>355</sup> In the subsequent Hate Crime Review report published in late 2020, Judge Desmond Marrinan reflected the need for an agreed definition and recommended that the findings in the report of the Working Group on defining sectarianism in Scots law in November 2018 should be applied in NI.<sup>356</sup> The Department of Justice published its response to the Review in July 2021, in which it agreed in principle that there should be a sectarian offences definition in legislation and that, whilst wide-ranging, there is merit in considering the Scots law definition carefully in relation to its implementation in NI.<sup>357</sup>

Sectarian offences are not included in the Criminal Justice (No 2) (NI) Order 2004 as attracting an enhanced sentence as ‘aggravated by hostility’. The New Decade, New Approach agreement recognises “the need to tackle sectarianism, prejudice and hate in seeking to eliminate discrimination... [and] to see sectarianism given legal expression as a hate crime”.<sup>358</sup>

In 2020, the Independent Hate Crime Review Team explored the possibility of including sectarian motivation in NI hate crime law, with the final report recommending that there should be a new statutory aggravation for sectarian prejudice.<sup>359</sup> In its response, the Department of Justice agreed in principle to the aggravation (subject to the agreed definition of sectarianism), which could be monitored by the proposed Victims of Crime Commissioner.<sup>360</sup> However, the Department highlighted that both this recommendation and the above recommendation in relation to a definition of sectarianism will need to be considered in conjunction with any recommendations in the Flags, Identity, Culture, Tradition Report once published.<sup>361</sup>

## Measures to tackle sectarianism

In 2016, the Commission on Flags, Identity, Culture and Tradition, as provided for within the Stormont House Agreement, was established. It was initially due to report after 18 months, but was delayed by the collapse of devolution in 2017. In 2020, the Commission on Flags, Identity, Culture

353 The Executive Office, ‘Together: Building a United Community Strategy’ (TEO, 2013), at para 1.36.

354 NI Office, ‘New Decade New Approach’, (NIO, 2020), at 42.

355 NI Human Rights Commission, ‘Submission to Hate Crime Review Consultation’, (NIHRC, 2020), at para 6.44.

356 Independent Hate Crime Review Team, ‘Hate Crime Legislation in NI Independent Review’, (DoJ 2020), Recommendation 12.

357 Department of Justice, ‘Review of Hate Crime Legislation in Northern Ireland - Departmental Response’, (DoJ, 2021), at 6-7.

358 NI Office, ‘New Decade New Approach’, (NIO, 2020), at 43.

359 Independent Hate Crime Review Team, ‘Hate Crime Legislation in NI Independent Review’, (DoJ 2020), Recommendation 13.

360 Department of Justice, ‘Review of Hate Crime Legislation in Northern Ireland - Departmental Response’, July 2021 at 6-7.

361 Ibid, at 7.

and Tradition recommenced its work after the restoration of devolution<sup>362</sup> and submitted its report to the Executive Office, after a further delay due to COVID-19.<sup>363</sup> Whilst the report has not yet been published publicly, an Executive paper on progressing the report was approved by the Executive on 25 March 2021 and a working group, involving Junior Ministers, advisers and officials, is advancing the cross-departmental engagement to take this forward.<sup>364</sup> The rationale provided for this process is to ensure NI Executive endorsement and support.<sup>365</sup>

In 2018, the draft NI (Stormont House Agreement) Bill proposed the establishment of the Implementation and Reconciliation Group which was intended to promote reconciliation and anti-sectarianism.<sup>366</sup> However, in March 2020, the Secretary of State for NI, Brandon Lewis, speaking on the Stormont House Agreement stated that “significant changes will be needed to obtain a broad consensus for the implementation of any legislation”.<sup>367</sup> The statement largely related to a shift in the UK Government’s policy to put “information recovery and reconciliation to be at the heart of a revised legacy system that puts victims first”.<sup>368</sup> It provided little detail as to what this would mean in practice.

In 2021, the Secretary of State published a command paper outlining proposals for a new Information Recovery Body, which would focus on information recovery and reconciliation rather than a criminal justice response to the Troubles.<sup>369</sup> The Command paper also said: “We are also considering how best to support the wider sector in helping to deliver oral history and memorialisation objectives, recognising the good work already being done by grassroots organisations - many of whom have struggled due to the pandemic - and in line with the previously proposed Implementation and Reconciliation Group’s broader function to consider and support initiatives geared towards reconciliation and anti-sectarianism”.<sup>370</sup>

In February 2020, the Equality Coalition NI published a research report that considers how to tackle institutional sectarianism in NI.<sup>371</sup>

362 Jayne McCormack, ‘Flag Commission to resume work’, *BBC News NI*, 29 January 2020.

363 Jayne McCormack, ‘Stormont: Flags body submits delayed report’, *BBC News NI*, 17 July 2020.

364 Written Question: Date for the publication of the report by the Commission on Flags, Identity, Culture and Tradition - Matthew O’Toole MLA - AQW 19631/17-22’, 8 June 2021.

365 Written Question: Rationale of why the report by the Commission on Flags, Identity, Culture and Tradition has not been published - Clare Bailey MLA - AQW 19536/17-22’, 23 June 2021.

366 NI Office, ‘Consultation Paper: Addressing the Legacy of NI’s Past’, (NIO, 2018), at 46.

367 UK Parliament Hansard, ‘Written Statement: Addressing Northern Ireland Legacy Issues - Secretary of State for Northern Ireland, Brandon Lewis MP - HCWS168, 18 March 2020.

368 *Ibid.*

369 NI Office, ‘Addressing the Legacy of NI’s Past: Analysis of the Consultation Responses’, (NIO, 2019).

370 *Ibid.*

371 Robbie McVeigh, ‘Sectarianism: The Key Facts’, (Equality Coalition, 2020).



## **Recommendations**

The Commission condemns sectarianism and supports a NI that promotes the human rights principles of tolerance, understanding and mutual respect. The Commission calls on the Executive Office to introduce legislation that provides statutory definitions of 'sectarianism' and 'good relations'. The recommendations of the Independent Hate Crime Review Team should be promptly and effectively implemented.

The Commission welcomes the advancement in the Commission on Flags, Identity, Culture and Tradition's report and advises that this report is published without further delay and the required steps are taken by the NI Executive to promptly and fully implement its recommendations.

## Right to Life

This section looks at issues related to the right to life. This includes: conflict related investigations, including transitional justice and individual cases; legacy inquests and inquiries; the Inquiries Act 2005; and the rule of law: non-state actors.

The right to life is protected under the following treaties:

<b>ECHR</b>	Article 2
<b>UN CRC</b>	Article 6(1)
<b>UN CRPD</b>	Article 10
<b>UN ICCPR</b>	Article 6
<b>Ireland/Ni Protocol to the UK-EU Withdrawal Agreement</b>	Article 2

### Conflict related investigations: transitional justice and individual cases

In 2019, the UN CAT Committee recommended that the UK Government “take urgent measures to advance and implement the Stormont House Agreement and the mechanisms it contemplates for investigating conflict-related violations, particularly the Historical Investigations Unit”.<sup>372</sup> The UN CAT Committee also recommended the UK Government “refrain from enacting amnesties or statutes of limitations for torture or ill-treatment”, which are inconsistent with the UN CAT.<sup>373</sup>

The UN CAT Committee’s recommendations are supported by the UN Human Rights Committee,<sup>374</sup> and Pablo de Greiff, the then UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition.<sup>375</sup>

In 2020, the UN Human Rights Committee asked the UK Government to “provide information on the Historical Investigations Unit, including information about its mandate, and measures taken to ensure a full, transparent and credible account of the circumstances surrounding events in NI with a view to identifying, prosecuting and punishing perpetrators of human rights violations and providing appropriate remedies for victims”.<sup>376</sup>

Furthermore, in September 2020, the CoE Committee of Ministers “strongly urged” the UK Government to “act, within the shortest possible timeframe, on their obligation to put an end to the type of violation

372 CAT/C/GBR/CO/6, ‘UN Committee against Torture Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI’, 7 June 2019, at paras 41(a) and 41(b).

373 Ibid, at paras 41(a) and 41(f).

374 CCPR/C/GBR/CO/7, ‘UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the UK of Great Britain and NI’, 17 August 2015, at para 11(b).

375 A/HRC/34/62/Add.1, ‘Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff on his Mission to the UK of Great Britain and NI’, 17 November 2016, at para 39.

376 CCPR/C/GBR/QPR/8, ‘UN Human Rights Committee List of issues prior to submission of the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland’, 5 May 2020.

identified by the [ECtHR] in the present cases and to secure compliance with the requirements of Article 2 of the [ECHR]”.<sup>377</sup> The Committee of Ministers also noted “the length of time these judgments have been pending, with the families waiting for answers”.<sup>378</sup> The Committee of Ministers requested that the UK provide a detailed timeframe by 22 October 2020, or it would consider issuing an interim resolution against the UK.<sup>379</sup> The UK Government submitted its response and the Committee of Ministers met in December 2020 to consider it.<sup>380</sup> The Committee decided to resume examination of these cases and instructed the Secretariat to prepare a draft interim resolution for consideration.<sup>381</sup> This was further discussed at the March 2021 meeting.<sup>382</sup>

In Protocol Article 2, the UK Government commits to ensuring there is no diminution of the rights, safeguards and equality of opportunity protections contained in that chapter of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU, including the right of victims “to remember as well as contribute to a changed society”.<sup>383</sup> EU obligations underpinning the rights of victims include the Victims’ Directive<sup>384</sup> as well as other relevant EU laws which support victims.<sup>385</sup>

In 2020, following the re-establishment of the NI Assembly, the New Decade, New Approach document stated that:

*in moving to a better, more prosperous and shared future the parties recognise the need to address the legacy of the past. To that end, the parties are committed to working together and to doing everything possible to heal wounds and eliminate the issues that divide us.*<sup>386</sup>

Despite a public consultation on a draft Stormont House Agreement Bill, on 18 March 2020, the Secretary of State for NI, Brandon Lewis MP, issued a written Ministerial Statement outlining the UK Government’s new approach to addressing the legacy of the past in NI. This statement indicated a significant roll back on the commitments made in New Decade, New Approach and the Stormont House Agreement. In the Secretary of State for NI’s view, “it is clear that, while the principles underpinning the draft Bill as consulted on in 2018 remain, significant changes will be needed to obtain a broad consensus for the implementation of any legislation”.<sup>387</sup> His statement continued that:

377 CM/Notes/1377bis/H46-44, ‘CoE Committee of Ministers Decision: McKerr Group v UK (Application No 28883/95)’, 3 September 2020, at para 6.

378 Ibid.

379 Ibid.

380 DH-DD(2020)931, ‘CoE Committee of Ministers Communication from the Authorities in the McKerry Group of Cases v UK (Application No 28883/95)’, 28 October 2020, at 4; Email from CoE Committee of Ministers Secretariat to NI Human Rights Commission, 28 October 2020.

381 CM/Notes/1390/H46-32, ‘CoE Committee of Ministers Notes on the Agenda, 1390th meeting, 1-3 December 2020 (DH): H46-32 McKerr group v. the United Kingdom (Application No. 28883/95)’, 3 December 2020.

382 CM/Del/Dec(2021)1398/H46-38, CoE Committee of Ministers Decision: McKerr Group v UK (Application No 28883/95)’, 11 March 2021.

383 Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

384 Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

385 Directive 2011/36/EU ‘Council Directive on preventing and combating trafficking in human beings and protecting its victims’, 5 April 2011; Directive 2011/92/EU, ‘Parliament and Council Directive on combating the sexual abuse and sexual exploitation of children and child pornography’, 13 December 2011; Directive 2004/80/EC, ‘Council Directive relating to the compensation to crime victims’, 29 April 2004.

386 NI Office, ‘New Decade New Approach’, (NI Office, 2020), at 14.

387 NI Office, ‘Press Release: UK Government sets out way forward on the legacy of the past in NI’, 18 March 2020.

*while there must always be a route to justice, experience suggests that the likelihood of justice in most cases may now be small, and continues to decrease as time passes. Our view is that we should now therefore centre our attention on providing as much information as possible to families about what happened to their loved ones - while this is still possible. Our proposals have therefore evolved to remain true to the principles of the Stormont House Agreement, but with a greater emphasis on gathering information for families; moving at a faster pace to retrieve knowledge before it is lost; and doing more to help individuals and society to share and understand the tragic experiences of the past.*<sup>388</sup>

Additionally, the Ministerial statement does not address the issue of expanding the remit of the Historical Investigations Unit to address allegations of torture, sexual violence, and disappearances committed during ‘the Troubles’. There are no plans that the Commission is aware of to address this using other initiatives.

Furthermore, there are 28 cases where individuals have died at the scene of a conflict-related incident, but are not recorded as conflict-related deaths.<sup>389</sup> These cases include individuals that died of shock-related injuries, for example a heart attack, when exposed to scenarios such as arriving at a scene where a relative had been shot, being within the vicinity of a bomb attack, or raids and missile attacks on their home.<sup>390</sup> These cases are not recognised as potentially falling within the remit of the Stormont House Agreement and its proposed remedies.

In July 2021, in a statement to the UK Parliament, the Secretary of State for NI set out the UK Government’s plans for legislation to address the legacy of the Troubles.<sup>391</sup> The accompanying command papers, entitled ‘Addressing the Legacy of Northern Ireland’s Past’ sets out a number of proposals which the UK Government claims, if implemented, would:

- *Establish a new independent body to enable individuals and family members to seek and receive information about Troubles-related deaths and injuries;*
- *Establish a major oral history initiative - to be delivered via new physical and online resources and through empowerment of the museums sector in NI - supported by rigorous academic research projects, to further mutual understanding and reconciliation in both the short and long term while realising ideas put forward at Stormont House;*
- *Introduce a statute of limitations to apply equally to all Troubles-related incidents, bringing an immediate end to the divisive cycle of criminal investigations and prosecutions, which is not working for anyone and has kept Northern Ireland hamstrung by its past.*<sup>392</sup>

388 Ibid.

389 Noel McAdam, ‘New push to recognise tragic cases of ‘forgotten dead’ of the Troubles’, *Belfast Telegraph*, 18 July 2017; Roundtable discussion with civil society representatives, January 2019.

390 Ibid.

391 NI Office, ‘Addressing the Legacy of Northern Ireland’s Past’ (NIO, 2021).

392 NI Office, ‘Addressing the Legacy of Northern Ireland’s Past’ (NIO, 2021) at para 34.

The UK Government cited that it “is increasingly of the view, after long and careful reflection, that any process that focuses on the lengthy pursuit of retributive justice will severely hold back the successful delivery of a way forward focused on information recovery, mediation and reconciliation that could provide a sense of restorative justice for many more families than is currently achieved through the criminal justice system.”<sup>393</sup>

In August 2021, UN experts voiced concern at a proposed blanket impunity to address the legacy of ‘the Troubles’ in NI. UN Special Rapporteurs Fabián Salvioli (on the promotion of truth, justice, reparation and guarantees of non-recurrence) and Morris Tidball-Binz (on extrajudicial, summary or arbitrary executions) said:

*We express grave concern that the plan outlined in July’s statement forecloses the pursuit of justice and accountability for the serious human rights violations committed during the troubles and thwarts victims’ rights to truth and to an effective remedy for the harm suffered, placing the United Kingdom in flagrant violation of its international obligations.*<sup>394</sup>

In September 2021, the Commissioner for Human Rights of the Council of Europe also expressed her concerns at the new proposals which may “bring the United Kingdom into conflict with its international obligations”.<sup>395</sup> The Commissioner also stated that “virtually every effective transitional justice effort to date has relied on elements of both criminal justice and truth and reconciliation. Conversely, impunity and the absence of justice can be a major impediment to achieving lasting peace and reconciliation.”<sup>396</sup>

The Command paper states that the UK Government intends to achieve a collective way forward to enable legislation to be introduced as soon as possible, through engagement with the Government of Ireland, political parties in NI, and victims and survivors.<sup>397</sup> The Secretary of State has confirmed that the NI Office has been “engaging with interested parties in the past couple of months” and remains “focused on delivering legislation to the House this autumn”.<sup>398</sup> In November 2021, a legal challenge was launched by two families, claiming that the UK Government proposals are unconstitutional and unlawful<sup>399</sup>, but leave to apply for judicial review was refused by the NI High Court.

In November 2021, a report published by the Centre for Children’s Rights at Queen’s University Belfast, in partnership with the Commission for Victims and Survivors, considered the on-going transgenerational impacts of the Troubles/Conflict on the lives of children, young people and parents

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393 Ibid, at at para 7.

394 OHCHR, ‘Press release: UN experts voice concern at proposed blanket impunity to address legacy of “the Troubles” in Northern Ireland’, 10 August 2021.

395 Correspondence from Council of Europe Commissioner for Human Rights to Brandon Lewis MP, 13 September 2021.

396 Correspondence from Council of Europe Commissioner for Human Rights to Brandon Lewis MP, 13 September 2021.

397 NI Office, ‘Addressing the Legacy of Northern Ireland’s Past’ (NIO, 2021) at para 46.

398 ‘Legacy of the Troubles’, HC Deb, 27 October 2021, vol 702, Col 257.

399 Allan Preston, ‘Families of two victims killed during Troubles set to challenge amnesty plans in court’, *Belfast Telegraph*, 10 November 2021.

throughout NI and the border regions.<sup>400</sup> The research highlighted that failing to include the participation and experiences of children and young people in transitional justice processes not only neglects Article 12 of the UN CRC, but can also have a significant impact in the long term transition to peace. It explores the impacts of conflict legacy on children's rights across four themes: divided space; health and wellbeing; family life and parenting; paramilitarism and policing.

## Statute of limitations

The Queen's Speech, in May 2021, indicated that the Government would bring forward legislation to address the legacy of NI's past.<sup>401</sup> This was followed by the publication of a Command paper by the Secretary of State for NI in July 2021, setting out a proposal to "bring an immediate end to criminal investigations into Troubles-related offences and remove the prospect of prosecutions" through the application of a statute of limitations.<sup>402</sup>

Following the publication of the Command paper, the NI Assembly was recalled in July 2021 to debate a motion opposing the proposals<sup>403</sup>; MLAs agreed the motion to reject the proposals for a statute of limitations in relation to criminal investigations and prosecutions and its further proposals in relation to "current and future civil cases and inquests".<sup>404</sup>

Legislation is expected in the autumn 2021, but at the time of writing no further details as to the proposals for a statute of limitations have been published.

## Prosecutions

In March 2019, the Public Prosecution Service NI issued decisions regarding 19 individuals reported for a range of offences relating to 'Bloody Sunday', including murder, attempted murder and wounding committed on 30 January 1972. In May 2021 two former British military paratroopers, Soldiers A and C, were acquitted of the 1972 murder of Joe McCann, after their trial collapsed due to inadmissibility of evidence.<sup>405</sup>

In July 2021, prosecutors dropped murder charges against two former British army soldiers for Troubles-era killings, including on Bloody Sunday.<sup>406</sup> One of the soldiers, known as Soldier F had been charged with murdering James Wray and William McKinney and five counts of attempted murder. The other soldier, known as Soldier B, had been charged with murdering a Catholic teenager, Daniel Hegarty, in Derry in July 1972. A court hearing to withdraw murder charges against Soldier F has been adjourned due to a legal challenge by the brother of William

400 The Centre for Children's Rights and the Commission for Victims and Survivors, 'It Didn't End in 1998: Examining the Impacts of Conflict Legacy Across Generations' (QUB, 2021).

401 The Queen's Speech, May 2021, available at: <https://www.gov.uk/government/speeches/queens-speech-2021>.

402 NI Office, 'Addressing the Legacy of Northern Ireland's Past' (NIO, 2021), at para 34.

403 NI Assembly Hansard, 'NI Assembly: British Government Proposals for Troubles Amnesty - Nichola Mallon MLA', 20 July 2021.

404 Chris Andrews, 'MLAs back motion to oppose Troubles legacy plans', *BBC News*, 20 July 2021.

405 Public Prosecution Service NI, 'PPS offers no further evidence against Soldiers A and C', 4 May 2021.

406 Public Prosecution Service NI, 'Prosecutions of Soldier B and Soldier F to be discontinued after PPS Review', 2 July 2021.



McKinney. He has been granted leave to seek a judicial review of the determination that Soldier F should not stand trial.<sup>407</sup>

Also in July 2021, Colum Eastwood MP used parliamentary privilege to name Soldier F in a House of Commons debate on the Armed Forces Bill.<sup>408</sup>

Criminal proceedings were commenced against Dennis Hutchings in 2015, in connection with the death of John Pat Cunningham in 1974.<sup>409</sup> The prosecution was challenged as an abuse of process, but the application to stay the proceedings was refused by the Crown Court in 2018.<sup>410</sup> Following a legal challenge to the decision to hold a non-jury trial, in 2019, the UK Supreme Court dismissed the appeal. Lord Kerr, highlighted that Article 6 ECHR does not specify a trial by jury and that “it should not be assumed, however, that this is the unique means of achieving fairness in the criminal process”.<sup>411</sup>

In October 2021, Dennis Hutchings passed away during the course of the trial. His family has criticised the prosecution of veterans. The Public Prosecution Service NI has commented that the decision to prosecute was taken following the independent application of the Test for Prosecution and the confirmation by the High Court that “the proceedings were not an abuse of process”.<sup>412</sup>

## Omagh

In July 2021, the NI High Court gave judgment in the case of Gallagher, a challenge to the failures of the State to prevent and investigate the Omagh bombing. In finding a breach of Article 2 ECHR, Mr Justice Horner concluded that some of the grounds of challenge gave “rise to plausible arguments that there was a real prospect of preventing the Omagh bombing” which would be for an investigation to consider.<sup>413</sup> While the Court did not order a public inquiry, it directed that:

*an Article 2 compliant investigation should be carried out in Northern Ireland to examine the grounds referred to above and expresses the desire that simultaneously an Article 2 compliant investigation will consider the same issues in the Republic of Ireland. It is not the role of the court to determine the precise nature of the investigation(s) but any investigation should be capable of receiving both open and closed material.*<sup>414</sup>

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407 ‘Soldier F: Dropping of Bloody Sunday murder charges adjourned’, *BBC News*, 9 July 2021.

408 ‘Armed Forces Bill’, HC Deb, 13 July 2021, vol 699, col 235.

409 Public Prosecution Service NI, ‘Press release: PPS statement on the death of Dennis Hutchings’, 19 October 2021.

410 *R v Dennis Hutchings* [2018] NICC 5.

411 *Re Dennis Hutchings* [2019] UKSC 26, at para 34-5.

412 Public Prosecution Service NI, ‘Press release: PPS statement on the death of Dennis Hutchings’, 19 October 2021.

413 *Re Gallagher* [2021] NIQB 85, at para 310.

414 *Ibid*, at para 1(iv).

## Recommendations

The Commission remains deeply concerned about the human rights incompatibility of the proposals in 'Addressing the Legacy of the Past'. In particular, the Commission is concerned at the apparent disregard for the requirements of Article 2 ECHR, incorporated directly into domestic law.

The Commission continues to advise the UK Government of its obligations to all victims of the conflict and their families, and to advise that legislation, and any resulting mechanisms to deal with addressing the past in NI must be fully compliant with domestic human rights law and international human rights standards.

The Commission continues to advise that a statute of limitations restricting the investigation and prosecution of alleged unlawful killings and serious injuries which is determined by the identity of the suspect is incompatible with Articles 2 and 3 ECHR.

The Commission remains concerned that the UK continues to fail to implement ECtHR judgments stipulating measures to achieve effective investigations into 'Troubles-related' deaths. The Commission is particularly concerned that it has been nineteen years since the McKerr judgment and the ECtHR's ruling is still not fully implemented. This continued failure is itself resulting in further findings of violations against the UK.

## Legacy inquests and inquiries

International mechanisms, including the UN Human Rights Committee<sup>415</sup>, Pablo de Greiff, the then UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition<sup>416</sup>, and the CoE Committee of Ministers continue to call for prompt, adequate and effective resourcing of legacy inquests and inquiries in NI.<sup>417</sup>

The UN CAT Committee<sup>418</sup> and UN Human Rights Committee have also specifically called for an inquiry into the killing of Patrick Finucane.<sup>419</sup> In March 2021, the CoE Committee of Ministers decided to reopen its supervision of the individual measures in the case of Finucane.<sup>420</sup>

In Protocol Article 2, the UK Government commits to ensuring there is no diminution of the rights, safeguards and equality of opportunity protections contained in that chapter of the Belfast (Good Friday)

415 CCPR/C/GBR/CO/7, 'UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the UK of Great Britain and NI', 17 August 2015, at para 11(b).

416 A/HRC/34/62/Add.1, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff on his Mission to the UK of Great Britain and NI', 17 November 2016, at para 39.

417 CM/Del/Dec(2021)1398/H46-38, CoE Committee of Ministers Decision: McKerr Group v UK (Application No 28883/95)', 11 March 2021.

418 CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019, at para 41(d).

419 CCPR/C/GBR/CO/7, 'UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the UK of Great Britain and NI', 17 August 2015, at para 8.

420 CM/Del/Dec(2021)1398/H46-38, CoE Committee of Ministers Decision: McKerr Group v UK (Application No 28883/95)', 11 March 2021, at para 4.

Agreement as a result of the UK leaving the EU, including the right of victims “to remember as well as contribute to a changed society”.<sup>421</sup>

EU obligations underpinning the rights of victims include the Victims’ Directive<sup>422</sup> as well as other relevant EU laws which support victims.<sup>423</sup>

## Legacy inquests

In 2019, the Department of Justice NI established a new Legacy Inquest Unit within the Coroner’s Service, under the remit of the Lord Chief Justice. The Legacy Inquest Unit was to complete its work within five years, however, restrictions due to COVID-19 regulations have delayed court business throughout 2020 and these delays continue into 2021.

The first full hearings were due to start in April 2020, according to a thematic approach.<sup>424</sup> However, due to COVID-19 all non-urgent court business, including legacy inquests, were adjourned on 20 March 2020.

The UK Government stated that the delay due to COVID-19 “will have an impact on the timeline for the Five Year Plan, however, because the full impact of the pandemic on legacy inquests is not yet known, the overall impact on the timeline cannot yet be assessed”.<sup>425</sup> The progress with the resumption of inquests and recovery planning was noted by the Committee of Ministers, with the recommendation that the authorities “step up their efforts to accelerate as far as possible to meet their target of the conclusion of all inquests within five years”.<sup>426</sup>

In January 2021, the first of the legacy inquests concluded, with Justice Siobhan Keegan finding that the shooting and killing of Paddy McElhone on 7 August 1974 was unjustified.<sup>427</sup> On 11 May 2021, Justice Keegan delivered her findings in relation to the deaths that took place at Ballymurphy during August 1971. Justice Keegan found that there had been inadequate investigations into the deaths of Father Hugh Mullan, Frank Quinn, Joan Connolly, Daniel Teggart, Noel Phillips, Joseph Murphy, Edward Doherty, John Laverty, Joseph Corr, and John McKerr. Further, there had been a disproportionate use of force and violation of Article 2 ECHR with respect to all deaths, aside from John McKerr’s for lack of sufficient evidence. Justice Keegan held that the lack of investigation into John McKerr’s death to be “a significant State failing and an abdication of responsibility. It is a matter of grave concern as the court has been hampered in reaching a more definitive finding in relation to the death of an innocent civilian on the streets”.<sup>428</sup>

421 Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

422 Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

423 Directive 2011/36/EU ‘Council Directive on preventing and combating trafficking in human beings and protecting its victims’, 5 April 2011; Directive 2011/92/EU, ‘Parliament and Council Directive on combating the sexual abuse and sexual exploitation of children and child pornography’, 13 December 2011; Directive 2004/80/EC, ‘Council Directive relating to the compensation to crime victims’, 29 April 2004.

424 ‘Families assured over timeframe for legacy inquests’, *Belfast Telegraph*, 7 June 2019.

425 DH-DD(2020)931, ‘CoE Committee of Ministers Communication from the Authorities in the McKerr Group of Cases v UK (Application No 28883/95)’, 28 October 2020, at 4.

426 CM/Del/Dec(2021)1398/H46-38, CoE Committee of Ministers Decision: McKerr Group v UK (Application No 28883/95), 11 March 2021, at para 7.

427 *In the Matter of an Inquest into the Death of Patrick McElhone* [2021] NICoroner 1.

428 *In the Matter of a Series of Deaths that Occurred in August 1971 at Ballymurphy* [2021] NICoroner 6.

A challenge to the Inquest into the death of Martin McCaughey has been brought by the family to the ECtHR, the third application by the family in respect of the investigatory obligations of the State.<sup>429</sup> It is argued that the Coronial process was not Article 2 ECHR compliant. The Commission submitted a third party intervention in the case and a hearing date is awaited.

## Patrick Finucane

In February 2019, the UK Supreme Court unanimously made a declaration that there has not been an Article 2 ECHR compliant inquiry into the death of Patrick Finucane. The UK Supreme Court identified the lack of ability of Sir Desmond to compel the attendance of witnesses or cross-examine witnesses on the veracity of their evidence as limitations of the De Silva review.<sup>430</sup> The UK Supreme Court did not order a public inquiry, noting that:

*it is for the State to decide, in light of the incapacity of Sir Desmond de Silva's review and the inquiries which preceded it to meet the procedural requirement of Article 2, what form of investigation, if indeed any is now feasible, is required in order to meet that requirement.*<sup>431</sup>

Following further judicial review proceedings by the Finucane family challenging the delay in implementation of the Supreme Court judgment, in November 2020, the Secretary of State NI confirmed that the UK Government does not intend to hold a public inquiry into Patrick Finucane's death at this point in time, stating that "I am not taking the possibility of a public inquiry off the table at this stage, but it is important we allow ongoing Police Service of NI and Police Ombudsman NI processes to move forward".<sup>432</sup> The Police Service of NI issued a statement confirming there are currently no new lines of inquiry and it will decide if a further review is necessary. If so, it is highly likely that any review will need to be conducted independently of the Police Service of NI due to the "accepted position of State involvement in this matter".<sup>433</sup> Highlighting the UK Supreme Court judgment, the Finucane family has stated that it will continue to campaign for a full public inquiry.<sup>434</sup>

At its most recent consideration of the McKerr group of cases in March 2021, the CoE Committee of Ministers "decided to reopen their consideration of the individual measures in the case of Finucane in order to supervise the ongoing measures to ensure that they are adequate, sufficient and proceed in a timely manner. It further "invited the authorities to clarify how the ongoing police and OPONI [Office of the Police Ombudsman for Northern Ireland] processes will proceed promptly and in line with Convention standards given the issues raised by both of those

429 See also *McCaughey and Others v the United Kingdom* (2013) ECHR 778; *Gribben and Quinn v the United Kingdom*, Application No 20855/15, 15 March 2016.

430 *In the Matter of an Application by Geraldine Finucane for Judicial Review* (NI) [2019] UKSC 7.

431 *Ibid.*, at para 153.

432 'Pat Finucane: No public inquiry into Belfast lawyer's murder', *BBC News*, 30 November 2020.

433 Police Service NI, 'Press Release: Statement from Chief Constable Simon Byrne following the announcement from the Secretary of State on the murder of Pat Finucane', 30 November 2020.

434 'Pat Finucane: No public inquiry into Belfast lawyer's murder', *BBC News*, 30 November 2020.

bodies in recent statements.”<sup>435</sup> The Committee of Ministers will next consider the case in December 2021.

On 15 April 2021, the NI High Court granted Geraldine Finucane leave to seek a judicial review of the position taken by the Secretary of State.<sup>436</sup> The case is due to be heard in early 2022.<sup>437</sup>

## Recommendations

The Commission calls on the Department of Justice and NI Office to fully support the work of the Legacy Inquests Unit, to ensure that all investigations are compliant with Article 2 ECHR.

The Commission further recommends that an Article 2 right to life compliant inquiry is conducted as soon as possible into the death of Patrick Finucane, in line with the judgment of the UK Supreme Court.

The Commission is deeply concerned about the proposals to bring inquests and civil cases to an end, preventing victims from accessing their right to a remedy.

## Rule of law: non-State actors

In 2016, the UN CRC Committee noted that “in NI, children face violence, including shootings, carried out by non-State actors involved in paramilitary-style attacks, as well as recruitment by such non-State actors”.<sup>438</sup>

The UN CRC Committee recommended that the UK Government and NI Executive “take immediate and effective measures to protect children from violence by non-State actors involved in paramilitary-style attacks as well as from recruitment by such actors into violent activities, including through measures relating to transitional and criminal justice”.<sup>439</sup>

## Statistics

In 2020/2021, there were three security related deaths, compared to one in 2019/2020. There were 43 casualties of paramilitary style assaults, a decrease from 62 in 2019/2020. One of the casualties was a child. In 2020/2021, there were 47 shooting incidents, including both paramilitary and security force incidents; 13 bombing incidents and 19 casualties from paramilitary style shooting.<sup>440</sup>

## Ending paramilitarism

In 2016, the NI Executive published an action plan on tackling paramilitary activity, criminality and organised crime, modelled on the four goals of

435 CM/Del/Dec(2021)1398/H46-38, CoE Committee of Ministers Decision: McKerr Group v UK (Application No 28883/95), 11 March 2021, at para 4.

436 ‘Pat Finucane’s family to legally challenge government’, *BBC News*, 15 April 2021.

437 Alan Irwin, ‘Legal action against UK Government to hold Pat Finucane public inquiry put back to next year’, *Belfast Telegraph*, 18 October 2021.

438 CRC/C/GBR/CO/5, ‘UN CRC Committee Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and NI’, 12 July 2016.

439 *Ibid.*, at para 47(c).

440 PSNI Statistics Branch, ‘Police Recorded Security Situation Statistics: 1 March 2020 to 28 February 2021’ (PSNI, 2021).

promoting lawfulness, support for transition, tackling criminality and addressing systemic issues.<sup>441</sup> A dedicated Paramilitary Crime Task Force has been established between the Police Service of NI, the National Crime Agency and Her Majesty's Revenue and Customs to focus on the criminality of paramilitary groups.

In 2019, journalist Lyra McKee was shot and killed while observing rioting in the Creggan estate, Derry/Londonderry. The New IRA admitted responsibility<sup>442</sup>. Investigations by the Police Service of NI into the murder are ongoing. In 2020, two men were arrested and charged in connection with the killing.<sup>443</sup> A dozen people linked to the political party Saoradh have now been charged over her death, and New IRA-related terror offences, with nine more people awaiting decisions by the Public Prosecution Service.<sup>444</sup> Police said a number of young people involved with dissident republican groups are being radicalised.<sup>445</sup>

The New Decade, New Approach agreement includes a commitment to “ending paramilitarism”.<sup>446</sup> This includes a continued commitment by the UK Government to ensure the Police Service of NI is “appropriately resourced to deal with terrorism and paramilitary activity”.<sup>447</sup> Also that funding is “available for a range of projects aimed at supporting community and reconciliation initiatives... which could include areas such as additional funding for tackling paramilitarism”.<sup>448</sup>

The programme for ending paramilitarism in NI was initially established for five years under the Fresh Start Agreement.<sup>449</sup> The programme is administered by the NI Executive, with financial support from the UK Government. In August 2020, the NI Executive agreed to extend the programme for three years. The UK Government is yet to confirm what financial support it will provide for the continuation of this programme.<sup>450</sup> In April 2021, the Department of Justice announced that £13 million in funding would be provided to community groups and other organisations to tackle paramilitarism and criminality. Additionally, the Communities in Transition project has been awarded £10 million in funding for the next three years.<sup>451</sup> According to the Department of Justice, the Paramilitary Crime Task Force will also be supported.<sup>452</sup>

## Independent Reporting Commission

In 2017, following the passage of the NI (Stormont Agreement and Implementation Plan) Act 2016, the Independent Reporting Commission

441 NI Executive, 'Tackling Paramilitary Activity, Criminality and Organised Crime -Executive Action Plan' (NI Executive, 2016).

442 Matthew Weaver and Kevin Rawlinson, 'Lyra McKee: New IRA says its activists killed journalist', *The Guardian*, 23 April 2019.

443 Ben Quinn and Rory Carroll, 'Lyra McKee: Man, 52, charged with murder of journalist', *The Guardian*, 12 February 2020; Zoe Drewett, 'Man, 27, charged by detectives investigating murder of Lyra McKee', *The Metro*, 16 July 2020.

444 Emma Vardy, 'Lyra McKee arrest highlight radicalisation, police warn', *BBC News*, 8 October 2021.

445 Ibid.

446 NI Office, 'New Decade, New Approach' (NIO, 2020), at 9.

447 Ibid, at 48.

448 Ibid, at 53.

449 NI Office, 'A Fresh Start: The Stormont Agreement and Implementation Plan', (NIO, 2015) at Section A.

450 Email from the the NI Office to the NI Human Rights Commission, 15 September 2020.

451 NI Executive, 'Executive programme for tackling paramilitary activity and organised crime', available at: <https://www.justice-ni.gov.uk/articles/executive-programme-tackling-paramilitary-activity-and-organised-crime>.

452 Christopher Leebody, '£13 million announced to tackle paramilitarism in Northern Ireland communities', *Belfast Telegraph*, 28 April 2021.



was legally constituted. In 2020, the Independent Reporting Commission published its third annual report, which stated that:

*while the challenges facing communities where paramilitaries operate are clear and obvious, the reality is that for many other communities paramilitarism is not visible on a daily basis. But for these communities too, and therefore for NI as a whole, the continued existence of paramilitarism in our view constitutes a 'clear and present danger' on an ongoing basis.*<sup>453</sup>

The Independent Reporting Commission identified that there are different categories of paramilitaries, which include:

*those who have already decided on a peaceful pathway but say they remain in their groupings in the fear that if they walk away they will leave the field to darker forces, those who are involved for what they believe are genuine ideological or political reasons to do with identity, insecurity or because they are fearful of their political future, and those who use paramilitarism as cover for pure criminality, together with a range of other categories. In other words, the landscape is a complex one, requiring a wide and diverse range of responses.*<sup>454</sup>

Thus, the Independent Reporting Commission advocates “for a Twin Track Approach to ending paramilitarism, which combines policing and criminal justice response alongside measures to tackle the deep, socio-economic issues in the communities most affected by paramilitarism”.<sup>455</sup>

## Recommendations

The Commission condemns paramilitarism and criminality, and supports the commitment in New Decade, New Approach to end paramilitarism. The Commission recommends that sufficient resources are allocated to the programme to end paramilitarism by the UK Government and that consistent monitoring is established by the Executive Office to ensure the steps taken to end paramilitarism in NI are reflective of the Independent Reporting Commission’s recommendations.

## Inquiries Act 2005

In 2015, the UN Human Rights Committee recommended that the UK “reconsider its position on the broad mandate of the executive to suppress the publication of Inquiry reports under the Inquiries Act 2005”.<sup>456</sup> There has been no substantive progress on this issue to date.

In 2017, the UK intended to bring forward legislation to address some of the recommendations issued by the House of Lords Select Committee

<sup>453</sup> Independent Reporting Commission, ‘Third Report’, (IRC, 2020), at 8.

<sup>454</sup> Ibid.

<sup>455</sup> Ibid.

<sup>456</sup> CCPR/C/GBR/CO/7, ‘UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the UK of Great Britain and NI’, 17 August 2015, at para 8.

on the Inquiries Act.<sup>457</sup> In May 2018, the National Audit Office expressed concerns that the Cabinet Office and the Ministry of Justice have not fulfilled their commitment to improve the efficiency and effectiveness of inquiries.<sup>458</sup> In June 2018, the Cabinet Office intended to draft and publish guidelines on the Inquiries Act 2005.<sup>459</sup> There has been no progress since then.

The Inquiries Act continues to be utilised in NI, with the commencement of a public inquiry into allegations of abuse at Muckamore Abbey Hospital in October 2021.<sup>460</sup> Other ongoing inquiries initiated under the Act include the Urology Services inquiry into the work of a urology consultant who has retired from the Southern Health and Social Care Trust which began in September 2021<sup>461</sup>, and the Independent Neurology Inquiry which was upgraded from an independent inquiry to a public inquiry in January 2021.<sup>462</sup>

In 2020, the Commission raised the issue of the lack of effective measures and legislative amendments taken in NI to guarantee the independence of inquiries under the Inquiries Act 2005 to the UN Human Rights Committee.<sup>463</sup>

## COVID-19

The UK Government announced, in May 2021, that it will establish an independent statutory inquiry under the Inquiries Act 2005 which is due to commence in Spring 2022.<sup>464</sup> The terms of reference, including details of its timeline and extension to NI, were not published at the time of writing. The Public Administration and Constitutional Affairs Committee has recommended for each devolved administration to establish its own inquiry<sup>465</sup>; however, the UK Government response to the recommendations has noted this for further consideration. The Scottish Government has already taken steps to establish its own independent public inquiry into the handling of the COVID-19 pandemic in Scotland.<sup>466</sup>

The Executive Office conducted a targeted consultation on its COVID Recovery Plan in July 2021. In its response, the Commission noted the absence of any reference human rights obligations, the transition from the present emergency legislative framework or to learning lessons from how NI responded to the pandemic in order to inform the NI Executive's response to future emergencies.<sup>467</sup>

457 House of Lords Select Committee on the Inquiries Act 2005, 'Report of Session 2013-14, The Inquiries Act 2005: Post legislative Scrutiny' (HoL, 2014).

458 Ministry of Justice, 'Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005' (MoJ, 2014).

459 Parliamentary Business, 'Inquiries Act 2005 - House of Lords, Vol 792', 28 June 2018.

460 'Media Statement from Tom Kark QC, Chair of the Muckamore Abbey Hospital Inquiry', 11 October 2021.

461 Urology Services Inquiry, 'Terms of Reference for the Statutory Independent Public Inquiry into urology Services in the Southern Health and Social Care Trust', 31 August 2021.

462 Independent Neurology Inquiry, 'Chairman's Statement', 11 January 2021.

463 NI Human Rights Commission, 'Submission to the UN Human Rights Committee Regarding the United Kingdom's Eighth Periodic Report on Compliance with the International Covenant on Civil and Political Rights: List of Issues', (NIHRC, 2020).

464 'COVID-19 Update', HC Deb, vol 695, col 137, 12 May 2021.

465 Public Administration and Constitutional Affairs Committee, 'A Public Inquiry into the Government's Response to the COVID-19 pandemic', 10 September 2020, at para 50.

466 Scottish Government, 'Press release: A COVID-19 Inquiry for Scotland', 24 August 2021.

467 Correspondence from the NI Human Rights Commission to the Executive Office, July 2021.

The Executive Office published its COVID Recovery Plan in August 2021, which will act as a cross-departmental plan of action for the next 24 months, aligned to the draft Programme for Government and addressing the four areas of sustainable economic development, green growth and sustainability, tackling inequalities and the health of the population.<sup>468</sup> The Plan, in its foreword, notes the need to continue to monitor and review coronavirus restrictions<sup>469</sup>; however, there is no clear commitment to a formal review of emergency powers that were introduced as temporary measures during the pandemic. Furthermore, there is no commitment to any form of review or inquiry into the handling of the pandemic in NI.

### **Recommendations**

The Commission continues to recommend that the UK Government review and introduce necessary legislative amendments to guarantee the independence of inquiries established under the Inquiries Act 2005.

The Commission recommends that there is a public inquiry into the handling of COVID-19 within NI, either by full inclusion in the UK-wide inquiry or that those areas within the competence of the devolved administration will be subject to an independent process that is human rights compliant.

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468 The Executive office, 'Building Forward: Consolidated COVID-19 Recovery Plan' (TEO, 2021).

469 Ibid, at 2.

## Freedom from Torture, inhuman and degrading treatment

The following section considers a number of human rights issues relevant to the right to be free from torture, inhuman or degrading treatment. Issues covered in this section include: abuse in health and social care settings; allegations of torture and cruel, inhuman or degrading treatment or punishment overseas; deprivation of citizenship; domestic and sexual violence and abuse; female genital mutilation; historical abuse of children and adults; mechanisms to identify victims of torture detained in immigration facilities; physical punishment of children; prison conditions; refugee resettlement; spit and bite guards; strip searches; and victims' payments.

The right to protection from torture, inhuman and degrading treatment is protected under the following treaties:

<b>ECHR</b>	Article 3
<b>UN CAT</b>	Articles 1-16
<b>UN CRC</b>	Article 37(a) Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography
<b>UN CRPD</b>	Article 15 Article 17
<b>UN ICCPR</b>	Article 7
<b>Ireland/NI Protocol to the UK-EU Withdrawal Agreement</b>	Article 2

### Abuse in health and social care settings

In 2017, the UN CRPD Committee recommended that the UK Government and NI Executive:

*establish measures to ensure equal access to justice and to safeguard persons with disabilities, particularly women, children, intersex people and elderly persons with disabilities from abuse, ill-treatment, sexual violence and/or exploitation. [And] ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.<sup>470</sup>*

In Protocol Article 2, the UK Government commits to ensuring there is no diminution of the rights, safeguards and equality of opportunity protections contained in that chapter of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU, including the right of

470 CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI', 29 August 2017, at para 39.

victims “to remember as well as contribute to a changed society”.<sup>471</sup> EU obligations underpinning the rights of victims include the Victims’ Directive<sup>472</sup> as well as other relevant EU laws which support victims.<sup>473</sup>

Section 267 of the Mental Capacity (NI) Act 2016 makes it an offence to ill-treat, or wilfully neglect a person who lacks capacity. In addition, the 2016 Act includes a statutory definition of restraint. The Commission, both during the passage of the Bill itself and beyond, has advised that need for a free standing offence where an individual, who has the care of another individual by virtue of being a care worker, ill-treats or wilfully neglects that individual to reflect the protections of the Criminal Justice and Courts Act 2015.<sup>474</sup>

In December 2020, the Department of Health consulted on options for an Adult Protection Bill in NI<sup>475</sup>, recognising a gap in the law for persons who are being cared for with capacity and proposed two new offences in respect of ‘care worker’ and ‘care providers’.<sup>476</sup> The Department has since confirmed that a draft Bill will introduce new offences of ill-treatment and wilful neglect.<sup>477</sup>

The Coronavirus Act 2020 made amendments to the Mental Capacity Act (Northern Ireland) 2016. The temporary provisions relax some of the requirements of Deprivation of Liberty Safeguards during the Coronavirus emergency, to ensure that persons can still be deprived of liberty during the pandemic crisis when staff availability may be significantly reduced. The Department has made a Code of Practice for the amendments which provides practical guidance on how they operate. Emergency forms and a reporting template for Health and Social Care Trusts have also been created.<sup>478</sup>

## Adult Protection Bill

In September 2020, Health Minister Robin Swann pledged to bring forward a new Adult Safeguarding Bill for NI, to help protect care home residents and other vulnerable members of society.<sup>479</sup> In December 2020, the Department of Health launched a consultation on legislative options to inform the development of an Adult Protection Bill for NI.<sup>480</sup> In April 2021, the Commission provided a response to the consultation, highlighting that

471 Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity - Human Rights.

472 Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

473 Directive 2011/36/EU ‘Council Directive on preventing and combating trafficking in human beings and protecting its victims’, 5 April 2011; Directive 2011/92/EU, ‘Parliament and Council Directive on combating the sexual abuse and sexual exploitation of children and child pornography’, 13 December 2011; Directive 2004/80/EC, ‘Council Directive relating to the compensation to crime victims’, 29 April 2004.

474 NI Human Rights Commission, ‘Submission to the Consultation on Proposals for New Mental Capacity Legislation for NI’ (NIHRC, 2014).

475 Department of Health, ‘Legislative options to inform the development of an Adult Protection Bill for Northern Ireland: Consultation document’, 17 December 2020.

476 Ibid, at para 2.96.

477 Department of Health, ‘Adult Protection Bill - Draft Final Policy Proposals for Ministerial Consideration’, 27 July 2021, at para 12.

478 Department of Health, ‘Mental Capacity Act (Northern Ireland) 2016, Emergency Code of Practice: Coronavirus Act 2020’, 10 July 2020.

479 Louise Cullen, ‘Health Minister to bring forward adult safeguarding bill for NI’, *BBC News NI*, 10 September 2020.

480 Department of Health, ‘Legislative options to inform the development of an Adult Protection Bill for Northern Ireland Consultation document’, (DoH, 2020).

the principles guiding the implementation of future legislation operate within a human rights based framework which incorporates the full range of international human rights standards ratified by the UK.<sup>481</sup>

The Department of Health published a consultation analysis report and final policy proposals in July 2021.<sup>482</sup> Some of the proposals include a definition of ‘adult at risk and need of protection’, a set of principles which should be adhered to by everyone involved in adult safeguarding and adult protection as well as a duty to report and make enquiries.

### **Restrictive Practices**

Currently in NI, there are limited regulatory requirements or formal standards for recording, reporting and monitoring this area of health and social care activity. Many health and social care organisations have their own governance systems to monitor the use of seclusion and there is currently no agreed regional approach.<sup>483</sup>

In July 2021, the Minister of Health Robin Swann launched a public consultation on a draft policy on the use of restrictive practices in health and social care settings.<sup>484</sup> The draft policy provides a regional framework to integrate best practice in the management of restrictive interventions, restraint and seclusion across all areas where health and social care is delivered in NI. It also provides guidance on the definition of restrictive practices, when and how they can be used and monitoring and reporting requirements. The policy also sets out a clear operating framework for seclusion in health and social care settings to be adhered to when seclusion takes place.<sup>485</sup>

In October 2021, the Commission provided a response to the consultation recommending a clearly defined list of general principles that apply to the use of all restrictive practices in accordance with human rights standards.<sup>486</sup>

### **COVID-19: High numbers of deaths of care home residents**

During the first surge of the pandemic, statistical updates provided by the Department of Health indicate around half of COVID-19 related deaths to date involved care home residents, either in the care home or in hospitals. Indications are that the high numbers of deaths within care homes may be linked to the slow introduction of testing within such settings, discharging patients to care homes without those individuals being tested for COVID-19, the late arrival of Personal Protective Equipment, the delay in including care home deaths in COVID-19 statistics to enable an understanding of the issue, and the relative under funding and general

481 NI Human Rights Commission, ‘Submission on legislative options to inform the development of an Adult Protection Bill in Northern Ireland’, (NIHRC, 2021).

482 Department of Health, ‘Adult Protection Bill – Consultation Analysis Report’, 5 July 2021; and Department of Health, ‘Adult Protection Bill – Final Policy Proposals’, 27 July 2021.

483 Department of Health, ‘Press Release: Public Consultation on Regional Policy on the Use of Restrictive Practices in Health and Social Care Settings’, 7 July 2021.

484 Ibid.

485 Department of Health, ‘Draft Regional Policy on the Use of Restrictive Practices in Health and Social Care Settings and Regional Operational Procedure for the Use of Seclusion’, (DoH, 2021).

486 NI Human Rights Commission, ‘Submission to DoH on the Regional Policy on the use of Restrictive Practices in Health and Social Care Settings’, (NIHRC, 2021).



neglect of the care home sector.<sup>487</sup> In May 2020, these concerns were highlighted in a joint statement by the Commission and Commissioner for Older People NI.<sup>488</sup> The Commission also raised these issues with the House of Commons and House of Lords Joint Committee on Human Rights<sup>489</sup> and House of Commons Women and Equalities Committee<sup>490</sup> in response to their inquiries into the UK Government's response to COVID-19.

In September 2020, it was reported that the Health and Social Care Trusts in NI had discharged patients to care homes without those individuals being tested for COVID-19. Almost 70 patients confirmed as having or suffering potential symptoms of the virus were discharged from hospitals to care homes in one health trust.<sup>491</sup> Between 1 March and 15 April 2020, 318 patients were discharged to care homes, of which only 52 were tested for COVID-19 prior to discharge.<sup>492</sup>

In June 2020, the Department of Health announced the establishment of a Rapid Learning Initiative Group, which aims to learn from care homes' experiences during COVID-19.<sup>493</sup> The group is made up of representatives of the independent care home sector, the Health and Social Care system and the Royal College of Nursing. The Department of Health is clear that this initiative is not a research project, investigation or inquiry. In September 2020, the Group published a report of their findings into the transmission of COVID-19 into and within care homes during the first surge of the pandemic, and makes recommendations on the way forward prior to further potential surges of infection.<sup>494</sup>

In July 2020, the NI Assembly Committee for Health decided, based on evidence it had received in relation to the particular impact of COVID-19 on care homes, to conduct a short inquiry to produce recommendations to help mitigate and manage the impact of a potential second surge of the virus in care homes. In February 2021, the Committee published its inquiry report on the impact of COVID-19 in care homes.<sup>495</sup> The report made 54 recommendations across a number of issues including visiting, testing, discharge policy, access to PPE, funding and staffing issues.

In November 2021, the Commissioner for Older People called for a public inquiry into the handling of the pandemic in care homes in NI. Eddie Lynch said: "I urge the Northern Ireland Executive to conduct an inquiry which specifically looks at the care and management of residents and care

487 NI Human Rights Commission, 'Women and Equalities Committee's Inquiry into the Unequal Impact of COVID-19: Disability and Access to Services', (NIHRC 2020).

488 NI Human Rights Commission, 'Press Release: Joint Statement from Chief Commissioner and Commissioner for Older People on COVID-19', 6 May 2020.

489 NI Human Rights Commission, 'Response to Joint Committee on Human Rights Inquiry into the Government's Response to COVID-19: Human Rights Implications', (NIHRC, 2020).

490 NI Human Rights Commission, 'Response to the Women and Equalities Committee Inquiry into the Government's Response to COVID-19: Human Rights Implications' (NIHRC, 2020); 'Women and Equalities Committee's Inquiry into the Unequal Impact of COVID-19: Disability and Access to Services' (NIHRC, 2020).

491 Tanya Fowles, 'NI health trust discharged 70 COVID patients into care homes', *Belfast Telegraph*, 9 September 2020.

492 Ibid.

493 Department of Health, 'Press Release: Work underway to learn from care home COVID-19 experiences', 24 June 2020.

494 Department of Health, 'The Rapid Learning Initiative into the Transmission of Covid-19 into and Within Care Homes in Northern Ireland -Report of the Task & Finish Group', (DoH, 2020).

495 Committee for Health, 'Inquiry Report on the Impact of COVID-19 in Care Homes', 1 February 2021.

homes, and not to delay any longer in commencing what is likely to be a long process."<sup>496</sup>

## COVID-19: Regulation of care homes

In March 2020, the Department of Health directed the Regulation and Quality Improvement Authority Board to reduce the frequency of its statutory inspection activity and cease its non-statutory inspection activity and review programme.<sup>497</sup> A judicial review was initiated by a concerned family, challenging the lawfulness of the Department of Health's direction.<sup>498</sup> In June 2020, the Department of Health revoked its direction and suspended inspections were reinstated.<sup>499</sup> The Regulation and Quality Improvement Authority Board's members claim they were not consulted on a number of decisions taken by the Department of Health, including ending inspections of care homes and re-deploying senior Regulation and Quality Improvement Authority Board staff to other health bodies.<sup>500</sup> On 22 June 2020, all nine members of the Regulation and Quality Improvement Authority Board resigned as a result.<sup>501</sup> On 23 June 2020, the Minister of Health, Robin Swann MLA, announced a review into the resignations.<sup>502</sup> In November 2020, a new interim board was established.

In July 2021, the Independent Review into the Circumstances of Board Member Resignations in the Regulation and Quality Improvement Authority Board was published.<sup>503</sup> The Review Team found that the response to the COVID-19 pandemic, and the speed of decision-making in the midst of the pandemic, was the primary cause of this crisis. The Minister of Health, Robin Swann MLA, made a written ministerial statement stating that the Department of Health has considered and accepted all the recommendations and since receiving the independent panel's report has developed an action plan in response.<sup>504</sup>

## Dunmurry Manor care home

In 2018, social care consultancy CPEA was appointed to independently review the health and social care system's response to care failings at Dunmurry Manor Care Home.<sup>505</sup> In September 2020, CPEA's first review report was published, which concluded that adult safeguarding practice "did not actively contribute" to keeping residents safe at Dunmurry

496 Lisa Smyth, 'Commissioner for Older People calls for public inquiry into the handling of pandemic in care homes across NI', *Belfast Telegraph*, 24 November 2021.

497 Lisa Smyth, 'Coronavirus: Swann warned families could sue if he does not call public inquiry into care homes crisis', *Belfast Telegraph*, 14 May 2020.

498 Alan Erwin, 'Coronavirus: Dementia sufferer's son starts legal action after NI care home inspections are scaled back', *Belfast Telegraph*, 30 April 2020.

499 Shauna Corr, 'Coronavirus restrictions placed on work of health and social care watchdog RQIA are lifted', *Belfast Live*, 22 June 2020.

500 Marie-Louise Connolly and Niall McCracken, 'Coronavirus: Health watchdog resigns over row with officials', *BBC News*, 22 June 2020.

501 'Coronavirus: Review ordered into RQIA mass resignations', *BBC News*, 23 June 2020.

502 Ibid.

503 Department of Health, 'Independent Review into the Circumstances Board Member Resignations in the RQIA', (DoH, 2021).

504 NI Assembly, 'Written Ministerial Statement - Department of Health Independent Review into RQIA Board Resignations Published', 19 July 2021.

505 Department of Health, 'Press Release: Department commissions independent review of actions around Dunmurry Manor Care Home', 16 July 2018.

Manor and that families' voices were repeatedly unheard.<sup>506</sup> It also found divergent safeguarding practices across the Health and Social Care Trusts.<sup>507</sup>

CPEA's eight recommendations included establishing an Adult Safeguarding/Adult Protection Change programme and an Adult Safeguarding/Protection Bill.<sup>508</sup> The Minister of Health, Robin Swann MLA, committed to "begin immediately to deliver" these recommendations, confirming that this will include legislative reform.<sup>509</sup> In addition to proposals for a new Adult Protection Bill,<sup>510</sup> a new Adult Safeguarding Transformation Board, chaired by Chief Social Worker, Sean Holland, has also been established to oversee the implementation of these recommendations and "to strengthen the governance around adult safeguarding to achieve a more accountable, regional approach".<sup>511</sup>

CPEA is due to publish its findings on regulation and complaints handling "in the near future".<sup>512</sup>

## Muckamore Abbey Hospital

In August 2020, the Department of Health published the report of an independent review of the leadership and governance at Muckamore Abbey Hospital. The report confirmed the conclusions of the previous Serious Adverse Incident Report that Muckamore Abbey Hospital was viewed as a place apart, which operated outside the sightlines and under the radar of the Belfast Health and Social Care Trust.<sup>513</sup>

In September 2020, the Minister of Health, Robin Swann MLA, announced a public inquiry into the abuse of patients by staff at Muckamore Abbey Hospital. The inquiry was initiated under the Inquiries Act 2005, and will examine the issue of abuse of patients, determine why the abuse happened and the range of circumstances that allowed it to happen, and ensure that such does not happen again at Muckamore or any similar institution.<sup>514</sup> In June 2021, Tom Kark QC was appointed to chair the Public Inquiry into abuse at Muckamore Abbey Hospital<sup>515</sup> which commenced its work in October 2021.<sup>516</sup>

In April 2021, the Public Prosecution Service confirmed its decision to prosecute seven individuals for a range of offences, including the alleged ill-treatment and wilful neglect of patients at Cranfield Psychiatric

506 CPEA, 'Independent Whole Systems Review into Safeguarding and Care at Dunmurry Manor Care Home - Evidence Paper 1: Adult Safeguarding within a Human Rights Based Framework in NI' (DoH, 2020), at para 224.

507 Ibid, at para 193.

508 Ibid, at para 221.

509 Department of Health, 'Press Release: Minister announces plans for Adult Safeguarding Bill for NI', 10 September 2020.

510 Department of Health, 'Legislative options to inform the development of an Adult Protection Bill for Northern Ireland Consultation document', (DoH, 2020).

511 Department of Health, 'Press Release: Minister announces plans for Adult Safeguarding Bill for NI', 10 September 2020.

512 Ibid.

513 Muckamore Abbey Hospital Review Team, 'A Review of Leadership and Governance at Muckamore Abbey Hospital' (DoH, 2020), at para 4.

514 Muckamore Abbey Hospital Inquiry, 'Terms of Reference', 11 October 2021.

515 Department of Health, 'Press Release: Health Minister Swann Announces Chair of Muckamore Public Inquiry', 30 June 2021.

516 Muckamore Abbey Hospital Inquiry, 'Media Statement from Tom Kark QC, Chair of the Muckamore Abbey Hospital Inquiry', 11 October 2021.

Intensive Care Unit at Muckamore Abbey Hospital.<sup>517</sup> This decision followed receipt of an investigation file received from the Police Service of NI in April 2020. A further eight suspects have been reported in a second investigation file, received in December 2020, which remains under consideration by the Public Prosecution Service.<sup>518</sup>

In June 2021, a third file relating to a further nine suspects, was forwarded to the Public Prosecution Service.<sup>519</sup> It is reported that 74 Muckamore employees, mainly nursing staff, have been suspended by the Belfast Health and Social Care Trust as part of an ongoing disciplinary investigation into suspected abuse.<sup>520</sup>

## Recommendations

The Commission continues to recommend changes in the criminal law to ensure sufficient robust protection of all individuals who are reliant on others for their health and social care needs. For example, the Department of Health should prioritise the introduction of a free-standing offence where an individual, who has the care of another individual by virtue of being a care worker, ill-treats or wilfully neglects that individual as is the case elsewhere in the UK.

The Commission recommends steps are taken to identify and promptly address any key factors which contributed to the high numbers of COVID-19 deaths within care homes. Findings from any rapid assessments (including any undertaken by the Department of Health's Rapid Learning Initiative Group) should be supplemented, in due course, with comprehensive reviews and formal recommendations to ensure any failings that led to the significant number of COVID-19 related deaths linked to care homes do not happen again.

The Commission recommends that there is a public inquiry into the handling of COVID-19 within NI, either by full inclusion in the UK-wide inquiry or that those areas within the competence of the devolved administration will be subject to an independent process that is human rights compliant.

The Commission recommends that findings from investigations into human rights abuses at Dunmurry Manor and Muckamore Abbey Hospital are addressed immediately and fully remedied. Thereafter, that mechanisms are in place to ensure that such breaches do not recur.

517 Public Prosecution Service, 'PPS issues decisions on one Muckamore Abbey Hospital file', 16 April 2021.

518 Niall Deeney, 'Muckamore Abbey abuse scandal: Family welcome PPS decision to prosecute seven staff members', *News Letter*, 17 April 2021.

519 Seanín Graham, 'Prosecutors receive police file on nine new Muckamore suspects linked to patient abuse scandal', *The Irish News*, 13 July 2021.

520 Ibid.

## Allegations of torture and cruel, inhuman or degrading treatment or punishment overseas

In 2019, the UN CAT Committee raised concerns about the closure of cases transferred for investigation under the Iraq Historic Allegations team framework and recommended that the UK Government:

*takes all necessary measures to establish responsibility and ensure accountability for any torture and ill-treatment committed by UK personnel in Iraq from 2003 to 2009, specifically by establishing a single, independent, public inquiry to investigate allegations of such conduct. The State party should refrain from enacting legislation that would grant amnesty or pardon where torture is concerned. It should also ensure that all victims of such torture and ill-treatment obtain redress.*<sup>521</sup>

The UN CAT Committee also expressed regret about the UK Government's failure to establish an independent, judge-led inquiry into allegations of torture overseas despite previous assurances to the Committee. The UN CAT Committee described as "disturbing" the reports by the Intelligence and Security Committee and noted with concern that the inquiry was prematurely closed due to lack of access to key evidence.<sup>522</sup>

The UN CAT Committee expressed 'serious concerns' about the Consolidated Guidance and recommended that the UK Government "reviews the consolidated guidance in light of its obligations under the [UN CAT]", and should furthermore consider:

- a) *eliminating the possibility of making recourse to assurances when there is a serious risk of torture or ill-treatment, and requiring intelligence agencies and armed forces to cease interviewing or seeking intelligence from detainees in the custody of foreign intelligence services in all cases where there is a risk of torture or ill-treatment;*
- b) *monitoring the application of the consolidated guidance in practice. The State party should also ensure that military and intelligence personnel are trained on the provisions of the [UN CAT], including on the absolute prohibition of torture and ill-treatment.*<sup>523</sup>

Furthermore, the UN CAT Committee expressed regret about the UK Government's position that the UN CAT is "primarily territorial" and does not have "extraterritorial effect".<sup>524</sup> The UN CAT Committee recommended that the UK Government "takes effective measures to prevent acts of torture, not only in its sovereign territory, but also 'in any territory under its jurisdiction', as required under Article 2(1) of the [UN CAT]".<sup>525</sup>

521 CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019, at para 32.

522 Ibid, at para 34.

523 Ibid, at para 36-7.

524 Ibid, at para 30.

525 Ibid, at para 31.

In Protocol Article 2, the UK Government commits to ensuring there is no diminution of the rights, safeguards and equality of opportunity protections contained in that chapter of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU, including the right of victims “to remember as well as contribute to a changed society”.<sup>526</sup>

EU obligations underpinning the rights of victims include the Victims’ Directive<sup>527</sup> as well as other relevant EU laws which support victims.<sup>528</sup>

## Application of ECHR in overseas operations

Since 2016, representatives of the UK Government have repeatedly stated the government’s intention to derogate from the ECHR with a view to protecting British troops from persistent legal claims regarding their operations overseas.<sup>529</sup>

The Overseas Operations (Service Personnel and Veterans) Act 2021 received Royal Assent on the 29 April 2021.<sup>530</sup> The Act creates protections for members of the armed forces and the UK Government relating to the legal consequences of events that occur in the course of military operations overseas, by derogation from the ECHR. It imposes a six-year statutory limitation on taking cases against UK service personnel and veterans involved in overseas operations. The Act excludes alleged crimes by UK military personnel within NI, but raises concerns as to the UK Government’s commitment to adhering to human rights standards in the broader context, including conflict-related investigations concerning NI.

## Recommendations

The Commission continues to recommend that the UK Government establish a full, independent, judge-led inquiry in relation to allegations of complicity of British military personnel, security and secret intelligence services in the ill-treatment of detainees overseas and rendition. This should comply with the investigative obligation under international human rights law.

526 Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

527 Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

528 Directive 2011/36/EU ‘Council Directive on preventing and combating trafficking in human beings and protecting its victims’, 5 April 2011; Directive 2011/92/EU, ‘Parliament and Council Directive on combating the sexual abuse and sexual exploitation of children and child pornography’, 13 December 2011; Directive 2004/80/EC, ‘Council Directive relating to the compensation to crime victims’, 29 April 2004.

529 Ministry of Defence, ‘Press Release: Government to protect armed forces from persistent legal claims in future overseas operations’, 4 October 2016; HM Government, ‘Universal Periodic Review: UK, British Overseas Territories and Crown Dependencies National Report’ (HM Government, 2017), at para 9; UK Parliament Hansard, ‘Armed Forces Personnel and Veterans: Legal Protections’, 21 May 2019.

530 Overseas Operations (Service Personnel and Veterans) Act 2021.



The Commission calls on the Home Office and Ministry of Justice to ensure that any derogation from the ECHR is only to the extent strictly required by the exigencies of the situation and remain consistent with other obligations under international law. The Commission recommends that the UK Government refrain from enacting legislation that would grant amnesty or pardon where torture is concerned and should ensure that all victims of such torture and ill-treatment obtain redress.

## Deprivation of citizenship

In 2016, the UN Human Rights Committee recommended that the UK Government “review its laws to ensure that restrictions on re-entry and denial of citizenship on terrorism grounds include appropriate procedural protections, and are consistent with the principles of legality, necessity and proportionality”.<sup>531</sup> In addition, the UK Government should “ensure that appropriate standards and procedures are in place to avoid rendering an individual stateless”.<sup>532</sup>

### Legal framework

In 2014, the British Nationality Act 1981 was amended to empower the Home Secretary to deprive a naturalised British citizen of their citizenship if they have engaged in conduct “seriously prejudicial” to the UK’s vital interests, and the Home Secretary has reasonable grounds to believe the person is able, under the law of a country or territory outside the UK, to become a national of such a country or territory.<sup>533</sup> This power may be exercised when an individual is in the UK and when they are abroad.<sup>534</sup>

The Counter Terrorism and Security Act 2015 makes provision for Temporary Exclusion Orders which prohibit the return of an individual to the UK without a permit to return. An individual subject to a Temporary Exclusion Order can apply to the court for a statutory review of the Order on their return to the UK.<sup>535</sup> In the most recently published report on the use of disruptive and investigatory powers, in 2018/2019, it was confirmed that the numbers of Temporary Exclusion Orders were small, but appear to be increasing year on year.<sup>536</sup>

In 2020, the Independent Reviewer of Terrorism Legislation, Jonathan Hall QC, noted that “the power to deprive a dual national of their British citizenship was used 104 times in 2017, but there does not appear to be any sufficient form of independent review of its use for suspected terrorists”.<sup>537</sup> The Independent Reviewer recommended that the “Independent Reviewer be given statutory authority to review any

531 CCPR/C/GBR/CO/7, ‘UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the UK of Great Britain and NI’, 17 August 2015, at para 15.

532 Ibid.

533 Section 40, British Nationality and Citizenship Act 1981.

534 Melanie Gower, ‘Deprivation of British Citizenship and withdrawal of passport facilities’ (HoC, 2015).

535 Section 10, Counter Terrorism and Security Act 2015.

536 HM Government, ‘Transparency Report: Disruptive Powers 2018/19’ (HoC, 2020), at 21.

537 Jonathan Hall QC, ‘The Terrorism Acts in 2018: Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006’, (Independent Reviewer of Terrorism Legislation, 2020), at para 1.15.

immigration power used by the Home Secretary to the extent that it is used in counter-terrorism”.<sup>538</sup> In 2021, the Independent Reviewer noted that his recommendation to extend the role to include any legislation for counter-terrorism purposes had been rejected by the government.<sup>539</sup>

In November 2021, it was reported<sup>540</sup> that individuals could be stripped of their British citizenship without warning under a proposed change added to the Nationality and Borders Bill, which is currently being considered by Parliament. The new clause, entitled ‘Clause 9: Notice of decision to deprive a person of citizenship’, exempts the Government from having to give notice if it is not reasonably practicable to do so, or in the interests of national security, diplomatic relations or otherwise in the public interest. The Commission provided written evidence on the Bill to the Joint Committee on Human Rights in October 2021.<sup>541</sup>

## Legal challenges

In February 2019, Shamima Begum was stripped of her British citizenship. Ms Begum moved to Syria to join the Islamic State at the age of 15. The then Home Secretary, Sajid Javid MP, stated that “where those people pose any threat to this country, I will do everything in my power to prevent their return. This includes stripping dangerous individuals of their British citizenship”.<sup>542</sup> He further stated that this power “is used only in extreme circumstances, where conducive to the public good”.<sup>543</sup>

In July 2020, the Court of Appeal for England and Wales noted that in her current circumstances Ms Begum was unable to play any meaningful part in her appeal which limited the fairness and effectiveness of that appeal. While recognising the security concerns about Ms Begum, the Court of Appeal unanimously found “the only way in which she can have a fair and effective appeal is to be permitted to come into the UK to pursue her appeal” and that “fairness and justice must on the facts of this case outweigh the national security concerns”.<sup>544</sup> In addition the Court of Appeal clarified that the Special Immigration Appeals Commission should undertake a ‘full merits appeal’ in any decision by the Home Secretary, rather than limiting itself to the principles of judicial review. This should include considering any risks to rights in Articles 2 and 3 ECHR for any person deprived of their UK citizenship.<sup>545</sup> Following the UK Government’s application, the Court of Appeal considered that this case raised a point of law of public importance. The matter was referred to the UK Supreme Court and heard in November 2020.<sup>546</sup>

538 Ibid, at para 1.16.

539 Jonathan Hall QC, ‘The Terrorism Acts in 2019: Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006’, (Independent Reviewer of Terrorism Legislation, 2021), at para 1.12.

540 Haroon Siddique, ‘New Bill quietly gives powers to remove British citizenship without notice’, *The Guardian*, 17 November 2021.

541 NI Human Rights Commission, ‘Response to Call for Evidence by the Joint Committee on Human Rights on the Nationality and Borders Bill’ (NIHRC, 2021).

542 UK Parliament, ‘Urgent Question: Deprivation of Citizenship Status – Sir Edward Davey MP – HC Vol654/Coll1485-1496’, 20 February 2019.

543 Ibid.

544 *Begum v Special Immigration Appeals Commission* [2020] EWCA Civ 918, at para 120.

545 Ibid, at paras 123-129.

546 *R (On the Application of Begum) v Secretary of State for the Home Department* [2020] UKSC 7.

In February 2021, the UK Supreme Court unanimously upheld all the points of appeal raised by the Home Secretary. In particular the Court stated that the Court of Appeal did not give the decision of the Home Secretary, to refuse Shamina Begum leave to enter the UK, the respect it deserved but rather made its own assessment of the requirements of national security.<sup>547</sup> The Supreme Court also stated that the right to a fair hearing does not always or automatically outweigh national security interests<sup>548</sup> and that the Home Secretary's policy guidance, which was intended to guide the discretion accorded to him by Parliament in the exercise of his functions, was not tantamount to law, which he should have obeyed.<sup>549</sup>

### Recommendations

The Commission remains concerned about the deprivation of citizenship and calls on the Home Office to strengthen protections against statelessness. The Commission recommends that the Home Office, as a minimum, introduce a requirement to ensure judicial scrutiny before exercising the power to deprive an individual of their UK citizenship.

### Domestic and sexual violence and abuse

In 2019, the UN CEDAW Committee recommended that the UK Government and NI Executive:

- a) *ratify the CoE Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention);*
- b) *adopt legislative and comprehensive policy measures to protect women from all forms of gender-based violence throughout the State party's jurisdiction, including NI;*
- c) *ensure that asylum-seeking women, migrants and women with insecure immigration status are able to seek effective protection and support services without fear of having their immigration status reported to authorities. This includes ensuring domestic violence concessions for non-EU women are accessed promptly;*
- d) *ensure that its laws and policies effectively protect women with disabilities from all forms of gender-based violence, and in particular violence perpetrated by their caregivers;*
- e) *ensure that the policy of commissioning services does not undermine the provision of specialised services for women who are victims of gender-based violence.*<sup>550</sup>

In 2019, the UN CAT Committee recommended the UK Government and NI Executive:

547 *R (on the application of Begum) v Secretary of State for the Home Department* [2021] UKSC 7, at para 134.

548 *Ibid.*, at para 135.

549 *Ibid.*, at para 136.

550 CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 14 March 2019, at para 29(e).

- a) *take effective measures to address low prosecution and conviction rates for domestic abuse and sexual violence in the State party, and to ensure that all cases of gender-based violence, especially those involving actions or omissions by State authorities or other entities that engage the international responsibility of the State party under the Convention, are thoroughly investigated, that the alleged perpetrators are prosecuted and, if convicted, punished appropriately, and that the victims or their families receive redress, including adequate compensation;*
- b) *consider revising police practices that deter migrant women from seeking protection from the authorities in cases where they have been subjected to or are at risk of gender-based violence;*
- c) *provide mandatory training on the prosecution of gender-based violence to all justice officials and law enforcement personnel and continue awareness-raising campaigns on all forms of violence against women;*
- d) *carry out a review of the availability of refuges, specialist domestic abuse services and rape support centres, throughout the State party, to ensure that the provision of increased funding results in all women who are victims of gender-based violence in the State party having access to necessary support and services;*
- e) *compile and provide to the Committee statistical data, disaggregated by the age and ethnicity or nationality of the victim, on the number of complaints, investigations, prosecutions, convictions and sentences recorded in cases of gender-based violence, as well as on the measures adopted to ensure that victims have access to effective remedies and reparation.*<sup>551</sup>

These are reflective of the then UN Special Rapporteur on Violence against Women, Rashida Manjoo's recommendations made following her 2014 visit to the UK.<sup>552</sup>

In Protocol Article 2, the UK Government commits to ensuring there is no diminution of the rights, safeguards and equality of opportunity protections contained in that chapter of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU, including the right of victims "to remember as well as contribute to a changed society".<sup>553</sup> EU obligations underpinning the rights of victims include the Victims' Directive<sup>554</sup> as well as other relevant EU laws which support victims.<sup>555</sup>

551 CAT/C/GBR/CO/6, 'UN Committee against Torture, Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 7 June 2019, at para 57(e).

552 UK National Human Rights Institutions, 'Oral Statement on the Special Rapporteur on Violence against Women Country Report on the UK and NI', 16 June 2015.

553 Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity - Human Rights.

554 Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

555 Directive 2011/36/EU 'Council Directive on preventing and combating trafficking in human beings and protecting its victims', 5 April 2011; Directive 2011/92/EU, 'Parliament and Council Directive on combating the sexual abuse and sexual exploitation of children and child pornography', 13 December 2011; Directive 2004/80/EC, 'Council Directive relating to the compensation to crime victims', 29 April 2004.

The Victims' Directive recognises that where physical, sexual, psychological or economic violence is committed in a close relationship, this can cause psychological and physical trauma and such victims are therefore in need of special protection measures. The Directive further recognises that women are disproportionately impacted by this harm.<sup>556</sup>

## COVID-19

In June 2020, the Police Service of NI reported that it received on average 570 domestic violence calls per week between February 2019 and March 2020.<sup>557</sup> However, between 8 April 2020 and 30 June 2020 the average number of calls per week was consistently above 600, with a spike of 721 calls at mid-April 2020 and 727 at the start of June 2020.<sup>558</sup> This reflected Nexus NI's experience, who reported a 13 per cent rise in calls the week commencing 13 April 2020, on top of a 27 per cent rise in the first week of April.<sup>559</sup> Nexus NI confirmed that the number of visits to its domestic and sexual abuse website had doubled. Nexus NI also stated there had been an increase in callers worried that if they leave home, they could get COVID-19.<sup>560</sup>

Due to COVID-19 restrictions, Sanctuary Scheme work was temporarily halted in March 2020, but later reinstated.<sup>561</sup> The Sanctuary Scheme for NI Housing Executive tenants is a Department for Communities supported initiative that aims to enable households at risk of violence to remain safely in their own homes by installing a 'sanctuary' in the home and through the provision of support to the household. Research to consider the potential to broaden the Sanctuary Scheme further for NI Housing Executive tenants and to consider how the scheme could be widened to include other tenures was also delayed due to COVID-19 but is now underway.<sup>562</sup> This research was an action in the Year 6 Domestic and Sexual Violence Strategy and Action Plan.<sup>563</sup> IPSOS MORI has been commissioned to carry out the research. Having established a Project Advisory Group to take the project forward, the first meeting of this Group took place on 25 May 2021 with representation invited from Police Service of NI, Department of Health, Women's Aid, Rainbow Organisation and the MARAC coordinator, a post funded by the Department of Justice, Department of Health and Police Service of NI. It is expected that this research will be completed by March 2022.<sup>564</sup>

In March 2021, Imkaan, Women's Aid England, Women's Aid Federation NI, End Violence Against Women, Welsh Women's Aid & Scottish Women's Aid published a joint statement "COVID-19: One Year On". The statement

556 Recital 18, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

557 Police Service NI, 'Domestic Abuse Calls Received by Police in NI: Weekly Management Information on Domestic Abuse Calls Received by Police Service NI Since COVID-19 Lockdown Measures were Introduced on 23 March 2020 - 1 July 2020' (PSNI, 2020), at 2.

558 Police Service NI, 'Domestic Abuse Calls Received by Police in NI: Weekly Management Information on Domestic Abuse Calls Received by Police Service NI Since COVID-19 Lockdown Measures were Introduced on 23 March 2020 - 1 July 2020' (PSNI, 2020), at 2.

559 'Increase in NI Domestic Violence Calls', *ITV News*, 13 April 2020.

560 *Ibid.*

561 Email correspondence from Department of Justice to NI Human Rights Commission, 16 July 2020.

562 *Ibid.*

563 Email correspondence from Department for Communities to NI Human Rights Commission, 5 November 2020.

564 *Ibid.*



highlighted continuing issues in relation to action needed in regards to funding, prevention and awareness and support for frontline workers. The press statement also highlighted how specialist services in NI did not receive comparable levels of funding to other nations.<sup>565</sup>

In 2021, the Stopping Domestic and Sexual Violence and Abuse Strategy in NI Year 6 Action Plan for 2021/2022, committed to continue to ensure an effective response to COVID-19.<sup>566</sup>

In 2021, the NI Executive published its 'Building Forward: Consolidated COVID-19 recovery Plan' which includes a section on 'Tackling Inequalities as a Recovery Accelerator' that acknowledges the rising number of domestic abuse crimes during the COVID-19 pandemic.<sup>567</sup>

## Statistics

Statistics collated by the Police Service of NI record that domestic violence have increased significantly since 2004/05 when the data series began. Nevertheless, the Department of Justice has stressed that domestic violence and abuse in NI remains significantly under-reported.<sup>568</sup>

In 2019/2020, there were 31,817 domestic abuse incidents recorded (an increase of 52 per cent since 2004/05)<sup>569</sup> and 18,640 domestic abuse crimes recorded (an increase of 93 per cent since 2004/05).<sup>570</sup> It is notable that the data provided for 2019/2020 were not disaggregated in the same way as 2018/2019, which included consideration of gender, age and outcomes.<sup>571</sup>

## Istanbul Convention

The UK Government has signed the CoE Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention). In 2017, the UK Government reaffirmed its commitment to ratifying the Istanbul Convention by enacting the Preventing and Combating Violence against Women and Domestic Violence (Ratification of Convention) Act 2017. This requires an annual progress report on steps being taken to address compliance issues so that the UK is in a position to ratify the Istanbul Convention.

Through the introduction of the UK Domestic Abuse Act<sup>572</sup> and the NI Domestic Abuse and Civil Proceedings Act<sup>573</sup>, Article 33 (which includes provision for psychological abuse) and Article 44 (on extraterritorial jurisdiction for domestic abuse crimes) of the Istanbul Convention were

565 Women's Aid Federation NI, 'News: COVID-19: One Year On', 23 March 2021.

566 Department of Health & Department of Justice, 'Stopping Domestic and Sexual Violence and Abuse in NI Year 6 Action Plan (2021 - 2022)', (DoH & DoJ, 2021).

567 The Executive Office, 'Building Forward: Consolidated COVID-19 Recovery Plan' (TEO, 2021).

568 Department of Justice, 'Press Release: Over 80 domestic violence and abuse incidents every day in NI - working together we can help stop it', 4 July 2018.

569 Police Service NI, 'Trends in Domestic Abuse Incidents and Crimes Recorded by the Police in NI 2004/05 and 2019/20: Annual Bulletin' (DoJ, 2020), at 1.

570 Ibid.

571 Police Service NI, 'Trends in Domestic Abuse Incidents and Crimes Recorded by the Police in NI 2004/05 and 2018/19: Annual Bulletin' (DoJ, 2019).

572 Domestic Abuse Act 2021.

573 Domestic Abuse and Civil Proceedings Act, 2021.



incorporated within domestic legislation. However, further legislative action is required in NI to ensure incorporation of all Articles of the Istanbul Convention including provision for stalking and voyeurism.

In 2020, the fourth annual progress report confirmed that providing equal protection to migrants and refugees, criminalising psychological violence, providing for extra-territorial jurisdiction and providing protection to women or girls whose residence status depends on a spouse or partner remained issues, but that steps continued to progress with a view to achieving compliance.<sup>574</sup>

The Government's 2020 progress report also highlights the 2016 UK Government 'Violence against Women and Girls Strategy' as one of the administrative measures taken by the UK Government with respect to the Convention.<sup>575</sup> However, NI currently has no such strategy. In March 2021, the Assembly debated a private motion calling for the Justice and First and deputy First Ministers to bring such a strategy.<sup>576</sup> It has since been confirmed that the Executive Office will be working towards developing a Violence against Women and Girls Strategy.<sup>577</sup>

## Domestic Abuse and Civil Proceedings Act

The Domestic Abuse and Civil Proceedings Act (NI) 2021 received royal assent on 1 March 2021. This Act creates a new domestic abuse offence, which captures patterns of psychological and emotional abuse. It also provides for a statutory aggravation, where another offence is intended to cause to suffer physical or psychological harm.

In contrast to similar legislation introduced to the UK Parliament, it did not contain a provision for a Domestic Abuse Commissioner.<sup>578</sup>

The Department of Justice has separately consulted on a Victims and Witnesses strategy, which proposes the establishment of a Victims Commissioner which will have a particular focus on domestic and sexual abuse.<sup>579</sup>

In 2020, the Department of Justice launched a consultation to introduce provision for Domestic Violence Protection Notices and Domestic Violence Protection Orders. The Commission responded to the consultation supporting the introduction of protection notices and orders.<sup>580</sup> Provision for the protection notices and orders were expected to be included within the Justice (Miscellaneous) Provisions Bill, which was to be introduced to the NI Assembly in 2021; however, a more streamlined Bill focusing only on sexual offences and trafficking victims was introduced instead in July 2021.

574 Home Office, 'Ratification of the CoE Convention on Combating Violence against Women and Girls and Domestic Violence (Istanbul Convention) – 2020 Report on Progress' (HO, 2020), at Annex A.

575 Stephen Orme, 'CEDAW and the Istanbul Convention: A comparative view on transposition and implementation in domestic law and practice', Research and Information Service NIAR 55-21, 23 April 2021.

576 Ibid.

577 Correspondence from Department for Communities to NI Human Rights Commission, 26 July 2021.

578 Domestic Abuse Act 2021.

579 Department of Justice, 'Improving the experiences of victims and witnesses in the criminal justice system: a Consultation on a new three-year Victim and Witness Strategy for Northern Ireland and the establishment of a Victims of Crime Commissioner for Northern Ireland', May 2021, at para 5.11.

580 NI Human Rights Commission, 'Response to the Department of Justice Consultation on enhancing legal protections for victims of domestic abuse', (NIHRC, 2021).

## Specific measures

In 2016, the Stopping Domestic and Sexual Violence and Abuse in NI Strategy was published, with a commitment to publish an annual action plan. In 2021, the Domestic and Sexual Abuse Action Plan Year Six for 2021/2022 was published.<sup>581</sup> Key cross Departmental actions for year six included the domestic abuse and civil proceedings bill to become operational by end of 2021 and a media awareness campaign and training to take place. Other actions included continuing to develop the Identification and Referral to Improve Safety training and support programme with general practice; introducing a new Advocacy Support Service for victims of domestic and sexual abuse; bringing forward regulations to enable the introduction of Operation Encompass; establishing an Early Intervention cross departmental working group; commissioning research to consider the extension of the Sanctuary Scheme; preparatory work on developing legislation on Domestic Abuse Protection Notices and Orders; introducing Sexual Offences Legal Advisors to provide general legal advice to victims of serious sexual offences; delivering early intervention Domestic Abuse Behavioural Change Programmes regionally and; providing funding to support emergency refuge provision, other accommodation-based services and floating support services as well as other core services including advocacy, the Domestic and Sexual Abuse Helpline, MARACs and the Rowan.

Since 2011, a Magistrates' Court pilot scheme has been operating in Derry/Londonderry which provides special listing arrangements for domestic violence cases, whereby domestic violence cases were clustered and heard by one judge on specifically designated days. The Department of Justice is aiming to introduce these to Laganside Magistrates court.<sup>582</sup>

In 2018, the Department of Justice established a Domestic Violence Disclosure Scheme in NI.<sup>583</sup> This scheme allows a victim, or a third party known to a potential victim who may have concerns, to apply to the police for information on a partner. In 2019/2020, 317 people applied to the scheme, with 45 disclosures made to potential victims at risk of domestic abuse. The Department of Justice also launched a pilot Domestic Violence Perpetrators' Programme in Derry/Londonderry.<sup>584</sup> It adopts a problem-solving justice approach, aimed at changing behaviours of convicted offenders. The pilot is to be subject to monthly judicial monitoring. Uptake of for this scheme has been low and the Department is considering next steps.

In 2019, behavioural change pilot programmes were introduced to the five health and social care trust areas in NI, in partnership with Women's Aid NI and other support organisations. These programmes are for those

581 Department of Justice, Press Release: Ministers publish progress on Domestic and Sexual Abuse Action Plan', April 2021.

582 Correspondence from the Department of Justice to the NI Human Rights Commission, July 2021.

583 Department of Justice, 'Domestic Violence and Abuse Disclosure Scheme Northern Ireland (DVADS NI) Guidance,' (DoJ, 2018).

584 Department of Justice, 'Press Release: New pilot programme aims to tackle root cause of domestic violence', 22 March 2018. Correspondence from the Department of Justice to the NI Human Rights Commission, July 2021.

demonstrating concerning behaviour, but who have not yet reached the criminal justice system. These programmes are currently ongoing with funding through to the end of the current financial year.<sup>585</sup>

In 2020, three Independent Chairs were selected for a new Domestic Homicide Review Model.<sup>586</sup> The Model will seek out and share opportunities for learning, identify what worked well and inform the development of practice to improve services with a view to preventing domestic violence and abuse and domestic homicide happening in the future. Members are currently being identified to sit on the Strategic Oversight Forum as well as the multi-agency panels that will support the Domestic Homicide Review process.

In 2021, the Department of Justice, announced the launch of a pilot scheme to provide publicly funded independent legal advice to victims of sexual offences.<sup>587</sup> The Sexual Offences Legal Advisors are based in Victim Support NI, and available to provide advice and free legal representation at both its Belfast and Foyle hubs. The provision of this additional support and legal advice for victims was identified as a key priority in the Gillen Review into the Law and Procedures in Serious Sexual Offences.<sup>588</sup>

In 2021, Criminal Justice Inspection NI published its follow up report on its thematic inspection of the handling of domestic violence and abuse cases by the Criminal Justice System in NI.<sup>589</sup> The report noted a lack of pace of progress to implement previous recommendations to improve how the criminal justice system handles cases of domestic violence and abuse. In particular, it noted that key recommendations to implement an advocacy service to support victims of domestic violence and abuse and establish regional domestic violence and abuse courts remained outstanding. The report also raised concerns with low numbers of cases being referred to the Multi-Agency Risk Assessment Conference, where information is shared between the police, health and social services, probation and child protection representatives to protect adults and children.<sup>590</sup>

## Policy Developments

In 2020, the Department of Justice was exploring introducing paid leave for those affected by domestic abuse, an initiative that is in place elsewhere in the form of both paid and unpaid leave. In 2021, Rachel Woods MLA introduced the Domestic Abuse Leave Bill. This Bill proposes introducing a statutory right to 10 days paid leave for employees that are victims or survivors of domestic violence or abuse. The Bill is awaiting its next stage.

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585 Correspondence from Department of Justice to the NI Human Rights Commission, October 2021.

586 Department of Justice, 'Press Release: Long introduces Domestic Homicide Reviews and appoints panel chairs', December 2021.

587 Department of Justice, 'Press Release: Justice Minister launches scheme to provide free legal advice to victims of sexual offences', 31 March 2021.

588 Department of Justice, 'Gillen Review: Report into the law and procedures in serious sexual offences in Northern Ireland Part 1', (DoJ, 2019), recommendation 3.

589 Criminal Justice Inspection NI, 'No Excuse: A Thematic Inspection of the Handling of Domestic Violence and Abuse Cases by the Criminal Justice System in Northern Ireland', (CJINI, 2021).

590 Ibid, at pages 18-19.

In 2020, the Department for Justice ran a consultation on outlawing the consent to serious harm for sexual gratification as not a defence.<sup>591</sup> The Commission provided a response to the consultation supporting the outlawing of the defence.<sup>592</sup>

In 2021, the Department of Justice ran a consultation exercise seeking views on the need for changes to the law on non-fatal strangulation.<sup>593</sup> The Commission provided a response to the consultation welcoming the introduction of a standalone offence for non-fatal strangulation.

In 2021, the Department of Justice introduced Justice (Sexual Offences and Trafficking Victims) Bill. The Bill includes provision to introduce recommendations arising from the Gillen Review to exclude the public from all serious sexual offence hearings and to introduce anonymity for defendant's pre-charge. It also includes provisions to give effect to the outcome of a review of the law on child sexual exploitation and sexual offences against children. These include live streamed images in the definition of exploitation for sexual purposes and create a new offence of adults masquerading as children online. The Commission gave oral evidence to the Justice Committee in November 2021.

In 2021, the Police Service of NI announced it would be developing its first violence against women and girls' strategy with co-operation from Women's Aid and Victim Support NI. The Police Service of NI Violence and Intimidation against Women and Girls Strategy is due to be published alongside an associated delivery action plan by the end of 2021.<sup>594</sup>

## Victim support

Organisations, including Women's Aid, receive funding through the Department for Communities 'Supporting People Programme'. The Supporting People initiative is delivered by the NI Housing Executive. There are currently 12 Women's Aid refuges across NI that provide safe emergency accommodation to women and children experiencing domestic abuse. In 2019/2020, 561 women and 316 children in NI accessed refuges run by Women's Aid NI.<sup>595</sup> However, in that same period, 276 women could not access a refuge because there was no space.<sup>596</sup> Women's Aid NI recorded 5,536 women and 5,143 children accessed outreach support, allowing them to stay in their own homes.<sup>597</sup> The Department for Communities jointly funds the Domestic Violence Helpline along with the Department of Justice and the Department of Health.

The Department of Health and Police Service of NI also jointly fund the Rowan Sexual Assault Referral Centre, which provides professional 24-hour support and services to children, young people, women and men

591 Department of Justice, 'Consent to serious harm for sexual gratification: not a defence. A public consultation', (DoJ, 2020).

592 NI Human Rights Commission, 'Response to the Department of Justice Consultation on Consent to Serious Harm for Sexual Gratification: Not a Defence', (NIHRC, 2021).

593 Department of Justice, 'Non-Fatal Strangulation: A public consultation', (DoJ, 2021).

594 Police Service for NI, 'Press Release: Violence against women and girls will be policing priority, says Chief Constable', 7 October 2021.

595 Women's Aid Federation NI, 'Annual Report 2019-20', (WAFNI, 2020).

596 Ibid.

597 Ibid.

who have been sexually abused, assaulted or raped, whether in the past or more recently.<sup>598</sup> Furthermore, a variety of places throughout NI, including all police stations are designated as 'Safe Places'. This is an initiative which provides support in a range of settings for people requiring information on domestic violence.<sup>599</sup>

In May 2021, the Department of Justice consulted on a proposal to establish a Victims of Crime Commissioner for NI.<sup>600</sup> The Minister proposed that the Victims of Crime Commissioner should have a particular focus on the areas of domestic and sexual abuse, as well as hate crime.<sup>601</sup> The Commission responded to the consultation in July 2021, highlighting the needs of particular groups including women and girls. In its response, the Commission recommended the adoption of trauma informed approaches to support victims and for gender to be mainstreamed throughout the Strategy, and reiterated calls for a strategy to address violence against women and girls, and for the ratification of the Istanbul Convention.<sup>602</sup> In September 2021, the Minister announced plans to establish a Victims of Crime Commissioner Designate for NI.<sup>603</sup> The public appointment competition was launched in October 2021.<sup>604</sup>

In October 2021, a new advocacy service offering impartial and practical support for victims of sexual and domestic abuse was introduced.<sup>605</sup> Assist NI, developed by the Department of Justice and Police Service of NI alongside voluntary sector partners, will provide an advocacy support service through a suite of measures, including assessing individual need, the development of safety support plans and providing impartial support and information.

## Non-nationals and domestic violence

The no recourse to public funds rule prevents persons with insecure immigration status from accessing benefits, such as refuge support. In 2012, the Destitute Domestic Violence concession was introduced. This concession aims to help non-nationals who are victims of domestic violence and on a spousal visa to leave their partner safely and secure their immigration status in the UK. The concession offers those who meet the eligibility criteria temporary leave for three months, enabling them to apply for access to public funds. During this three-month period the person should make a separate application for indefinite leave to remain under the Domestic Violence rule.<sup>606</sup> There are strict eligibility criteria for the concession and so there are some groups, such as EEA women, may

598 UK Government, 'UN Periodic Review - United Kingdom of Great Britain and NI Update' (UK Gov, 2018), at para 15.

599 Police Service NI, 'Safe Place Campaign'. Available at: <https://www.psn.police.uk/crime/domestic-abuse/safe-placecampaign/>.

600 Department of Justice, 'Consultation on Victims and Witness strategy and establishment of Victims Commissioner for Northern Ireland', 6 May 2021.

601 Ibid, at para 45.

602 NI Human Rights Commission, 'Response to the Consultation on Victims and Witness strategy and establishment of Victims Commissioner for Northern Ireland', July 2021.

603 Department of Justice, 'Press Release: Justice Minister announces the establishment of a Victims of Crime Commissioner Designate', 21 September 2021.

604 Department of Justice, 'Press Release: Public appointment competition for a Victims of Crime Commissioner Designate launched', 11 October 2021.

605 Department of Justice, 'Press Release: Long welcomes advocacy service for sexual and domestic abuse victims', 4 October 2021.

606 No Recourse to Public Funds Network, 'The Destitution Domestic Violence (DDV) Concession' (NRPF Network, 2013).

not benefit. The issuing of concessions can also be subject to delays.<sup>607</sup> In 2021, there have been no changes to the no recourse to public funds rule and the Destitute Domestic Violence concession is still running.

In 2021, organisations supporting domestic abuse victims have commented on the failures of the UK Domestic Abuse Act to protect migrant women.<sup>608</sup>

In 2020, the Commission recommended that provisions of the Domestic Abuse and Civil Proceedings Bill apply regardless of an individual's immigration status.<sup>609</sup> However, the Act did include provision relating to this.

## Stalking

There is no criminal offence of stalking in NI. There is a lack of data in relation to stalking in NI as there is no legal definition of the term.<sup>610</sup>

In 2018, the Department of Justice consulted on its proposal to create a new offence of stalking. In 2019, the Department of Justice confirmed its plans to introduce a new specific offence of stalking and stalking protection orders.<sup>611</sup>

In 2021, the Department of Justice introduced the draft Protection from Stalking Bill to create a specific new offence of stalking.<sup>612</sup> In April 2021, the Committee for Justice announced a call for evidence to which the Commission provided a written response welcoming the legislation.<sup>613</sup> The Commission further provided oral evidence to the Committee on the Protection from Stalking Bill on the 13 May 2021. The Bill is awaiting next stage.

## Voyeurism

In England and Wales, the Voyeurism (Offences) Act 2019, which criminalises upskirting, came into force on 12 April 2019. Similar legislative provision has been made in Scotland through the Sexual Offences (Scotland) Act 2009. There are no similar provisions that currently provide for the specific offence of upskirting in NI.

After consulting on the matter, in July 2021 the Department of Justice introduced a specific offence banning upskirting and downblousing in NI within the Justice (Sexual Offences and Trafficking Victims) Bill.<sup>614</sup> The

607 Nisan Zerai Kesete, 'Destitution Domestic Violence Concession - Monitoring Research Report' (Unbound Philanthropy, 2013), at 37.

608 Refuge, 'Press Release: Domestic Abuse Bill receives Royal Assent', 29 April 2021.

609 NI Human Rights Commission, 'Advice to Department of Justice: Domestic Abuse and Family Proceedings Bill' (NIHRC, 2020), at para 3.7.

610 RaISE, 'Briefing Paper: Incidence and Prevalence of Stalking in NI' (RaISE, 2017).

611 Department of Justice, 'Stalking - A Serious Concern: Consultation Report and summary of responses', (DoJ, 2019), at para 66.

612 Department of Justice, 'Press Release: Long introduces protection from Stalking Bill', January 2021.

613 NI Human Rights Commission, 'NIHRC Submission to the Committee for Justice call for evidence on the Protection from Stalking Bill', (NIHRC, 2021).

614 Justice (Sexual Offence and Trafficking Victims) Bill, 2021.



Commission provided a response to this Bill in September 2021<sup>615</sup> and oral evidence to the Committee for Justice in November 2021.

### Recommendations

The Commission calls on the UK Government to promptly ratify the Istanbul Convention.

The Commission recommends the Department of Justice ensures that effective steps are taken to ensure specialised, gender-sensitive, accessible support for victims of domestic violence is sufficiently and promptly available and adequately funded, particularly refuge places. The Commission also recommends effective steps are taken by DOJ to ensure that the policy of commissioning services effectively supports the provision of specialised services for women who are victims of gender-based violence.

The Commission recommends disaggregation of domestic violence data is improved. This includes systematically collecting, publishing and effectively monitoring data on domestic and sexual violence and abuse, stalking, and upskirting and downblousing in NI.

The Commission recommends the proposed specific criminal offences for stalking, and upskirting and downblousing, in NI are introduced without delay in order to ensure effective protection of victims or potential victims and compliance with the Istanbul Convention.

Further, the Commission welcomes proposals to outlaw the defence of consent to serious harm for sexual gratification, and the proposed introduction of a standalone offence for non-fatal strangulation, and recommends that the Department of Justice introduces these to the NI Assembly without delay.

The Commission welcomes the proposed development of a strategy to address violence against women and girls, and calls on the Executive Office to engage stakeholders in its development and introduce the strategy without delay.

### Female genital mutilation

In 2016, the UN CRC Committee stated that it was “concerned at the significant number of children who are affected by harmful practices, including female genital mutilation.”<sup>616</sup>

In 2019, the UN CEDAW Committee recommended that the UK Government and NI Executive:

*ensure the full implementation of its legislation on female genital mutilation and take further measures to effectively prosecute*

615 NI Human Rights Commission, ‘NIHRC Submission to the Committee for Justice call for evidence on the Justice (Sexual Offences and Trafficking Victims) Bill’, (NIHRC, 2021).

616 CRC/C/GBR/CO/5, ‘UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 12 July 2016, at para 46.

*perpetrators of this offence. It also recommends that the State party step up its efforts to raise awareness that female genital mutilation is a form of child abuse and gender-based violence against women and girls.*<sup>617</sup>

The UN CEDAW Committee further recommended that the UK Government and NI Executive “systematically collect and publish data disaggregated by sex, gender, ethnicity, disability and age throughout the whole of its territory to inform policy-making and assess the impact of measures taken”.<sup>618</sup>

In 2019, the UN CAT Committee recommended that the UK Government and NI Executive “review the effectiveness of preventive and protection measures in place for children at risk of female genital mutilation”.<sup>619</sup>

In Protocol Article 2, the UK Government commits to ensuring there is no diminution of the rights, safeguards and equality of opportunity protections contained in that chapter of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU, including the right of victims “to remember as well as contribute to a changed society”.<sup>620</sup> EU obligations underpinning the rights of victims include the Victims’ Directive<sup>621</sup> as well as other relevant EU laws which support victims.<sup>622</sup>

The Victims’ Directive recognises that victims of gender-based violence, including female genital mutilation, and their children, often require special support and protection against secondary and repeat victimisation, intimidation and retaliation.<sup>623</sup>

Female genital mutilation is illegal under the Female Genital Mutilation Act 2003. The Serious Crime Act 2015 provides for Female Genital Mutilation Protection Orders. In 2014, the NI Executive published the Multi-Agency Practice Guidelines on female genital mutilation.<sup>624</sup>

In Scotland, the Female Genital Mutilation (Protection and Guidance) (Scotland) Act 2020 Bill provides Protection Orders regarding female genital mutilation and directed guidance on the prevention of female genital mutilation. No such steps have been taken in NI.

In 2019, a woman from East London became the first person to be prosecuted for female genital mutilation in the UK.<sup>625</sup> There have been no

617 CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’, 14 March 2019, at para 31.

618 Ibid, at para 25(d).

619 CAT/C/GBR/CO/6, ‘UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI’, 7 June 2019, at para 57(f).

620 Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

621 Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

622 Directive 2011/36/EU ‘Council Directive on preventing and combating trafficking in human beings and protecting its victims’, 5 April 2011; Directive 2011/92/EU, ‘Parliament and Council Directive on combating the sexual abuse and sexual exploitation of children and child pornography’, 13 December 2011; Directive 2004/80/EC, ‘Council Directive relating to the compensation to crime victims’, 29 April 2004.

623 Recitals 17 and 21, Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

624 Department of Health, Social Services and Public Safety, ‘Multi-Agency Practice Guidelines: Female Genital Mutilation’ (DHSSPS, 2014).

625 Hannah Summers and Rebecca Ratcliffe, ‘Mother of three-year-old is first person convicted of FGM in UK’, *The Guardian*, 1 February 2019.

prosecutions in NI and no recorded instances of female genital mutilation being performed in NI.<sup>626</sup> The Department of Health is aware of historical cases of female genital mutilation in NI, these have been identified at maternity appointments of the affected women. The NI Maternity System records and collates data on such historical cases as they present to maternity services. The most recent statistics the Department of Health have are from 2016/17, when 32 incidences of female genital mutilation were recorded via this system.<sup>627</sup>

### Specific measures

The Manchester Guardian Project is a pilot across Greater Manchester to coordinate care and support for girls and young women (up to 21 years old) affected by or at risk of female genital mutilation. It draws from the knowledge of specialist female genital mutilation organisations to provide a bridge between professional services and potential victims, and address the gap in support and service provision for young girls around female genital mutilation.<sup>628</sup> Additionally, Operation Limelight was introduced to Heathrow airport in 2014. This involved the UK Border Force periodically undertaking proactive airside operations looking at inbound and outbound flights to countries of prevalence for female genital mutilation.<sup>629</sup> Operation Limelight has since been expanded to other parts of the UK, but not NI.

In 2019, a cross-departmental Senior Officials Group, led by the Department of Health and supported by the Safeguarding Board for NI's Female Genital Mutilation Sub-group, explored avenues to extend child protection orders to include female genital mutilation; any proposed actions would require legislative change.<sup>630</sup> Data collection continues to be a challenge, but routine inquiry is now operational within the Medway maternity system.<sup>631</sup>

In 2021, the Department of Health confirmed that the multi-agency guidelines that were issued in 2014 are currently being revised and updated.<sup>632</sup> The revised guidance will take account of Female Genital Mutilation Protection Orders, new female genital mutilation care pathways and a female genital mutilation risk assessment tool launched in October 2018. The Department of Finance is progressing work to introduce NI legislation to define Health and Social Care Trusts in NI as 'relevant third parties' in relation to Female Genital Mutilation Protection Orders. Presently, Emergency Protection Orders can be arranged by Health and Social Care organisations should they suspect a child to be at risk of female genital mutilation.<sup>633</sup> In addition, the Department of Health is introducing powers to enable a court, when dealing with an application for a Female Genital Mutilation Protection Order, to make other orders

626 Email correspondence from the Department of Health to the NI Human Rights Commission, 26 July 2021.

627 Ibid.

628 Manchester Safeguarding Board, 'The Guardian Project', (MSB, 2017).

629 Safeguarding Hub, 'Female Genital Mutilation - Operation Limelight'. Available at: <https://safeguardinghub.co.uk/female-genital-mutilation-operation-limelight/>.

630 'Stop Female Genital Mutilation', Feilie an Phobail, 1 August 2019.

631 Ibid.

632 Correspondence from the Department of Justice to the NI Human Rights Commission, July 2021.

633 Ibid.

regarding the welfare of the child, for example an interim care order or a care order. This will improve the ability of the court to act quickly to protect children at risk. NI continues to operate a cross-departmental group (Child Protection Senior Officials Group) to implement an action plan to protect against the risk of Female Genital Mutilation.<sup>634</sup>

### Recommendations

The Commission recommends measures are taken to effectively prosecute perpetrators of female genital mutilation. This also requires implementing a prevention strategy and increasing efforts to raise awareness that female genital mutilation is a form of both child abuse and gender-based violence against women and girls.

The Commission calls on the Department of Health to adopt and implement a female genital mutilation action plan for NI, including systematically collecting, publishing and effectively monitoring disaggregated data on female genital mutilation in NI. The Action Plan should also ensure specialised, accessible support for victims or potential victims of female genital mutilation that is sufficiently and promptly available and adequately funded.

The Commission recommends the UK Border Force, Department of Justice and Department of Health to consider promptly introducing initiatives such as the Guardian Project and Operation Limelight to NI.

### Intersex genital mutilation

In 2019, the UN CAT Committee stated that:

*While noting that in January 2019 the Government Equalities Office launched a call for evidence to better understand the experiences of Intersex persons in the United Kingdom, the Committee remains Concerned about reports of cases of unnecessary surgery and other medical treatment with lifelong consequences, including severe pain and suffering, to which intersex children have been subjected. The Committee is further concerned about the lack of legal provisions providing redress and rehabilitation in such cases (arts. 14 and 16).<sup>635</sup>*

The UN CAT Committee recommended the UK government and NI Executive ensure:

- a) *The parents or guardians of intersex children receive impartial counselling services and psychological and social support, including information on the possibility of deferring any decision on unnecessary treatment until they can be carried out with the full, free and informed consent of the person concerned;*

634 Ibid.

635 CAT/C/GBR/CO/6, 'UN Committee against Torture, Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 7 June 2019, at para 64.

- b) *Persons who have been subjected to such procedures without their consent and resulting in severe pain and suffering obtain redress, including the means for rehabilitation.*<sup>636</sup>

In 2016, the UN CRC Committee raised concerns that:

- c) *Cases of medically unnecessary surgeries and other procedures on intersex children before they are able to provide their informed consent, which often entail irreversible consequences and can cause severe physical and psychological suffering, and the lack of redress and compensation in such cases.*<sup>637</sup>

The Committee recommended the UK Government and NI Executive:

- a) *Take effective measures to ensure that marriage of children aged 16 and 17 years takes place only in exceptional circumstances and is based on the full, free and informed consent of the concerned children;*
- b) *Continue and strengthen preventive and protection measures to address the issue of harmful practices, including the collection of data, the training of relevant professionals, awareness-raising programmes, the provision of protection and care to the child victims and the prosecution of those found guilty of perpetrating such acts;*
- c) *Ensure that no one is subjected to unnecessary medical or surgical treatment during infancy or childhood, guarantee bodily integrity, autonomy and self determination to children concerned and provide families with intersex children with adequate counselling and support;*
- d) *Provide redress to the victims of such treatment;*
- e) *Educate medical and psychological professionals on the range of sexual, and related biological and physical diversity and on the consequences of unnecessary interventions for intersex children.*<sup>638</sup>

The law in NI does not provide for the recognition of intersex persons. In 2003, the then Department of Health, Social Services and Public Safety issued guidance for medical practitioners in relation to consent for examination, treatment or care, including providing guidance on the parameters of children's capacity to consent.<sup>639</sup> The Commission is not aware of any NI policy specific to medical treatment for intersex persons.

Civil society representatives have raised concerns about the issue of non-consensual medical intervention for intersex children.<sup>640</sup> It is unclear if any data exists in relation to the number of children in NI who would be classed as intersex or those undergoing surgery or medical treatment regarding disorders of sexual differentiation/development.

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636 Ibid, at para 65.

637 CRC/C/GBR/CO/5, 'UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 46(b).

638 Ibid, at para 47.

639 Department of Health, 'Reference Guide to Consent for Examination, Treatment or Care', (DoH, 2003).

640 Department for Communities, 'LGBTQI+ Strategy Expert Advisory Panel Report', (DfC, 2021).

## LGBTQI+ Strategy

In October 2020, the Department for Communities published an indicative timetable for the development and publication of the Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), Intersex+ (LGBTQI+) Strategy. Development of this Strategy adopts a co-design approach, which included appointing an Expert Advisory Panel and undertaking ongoing engagement with a Co-Design Group and cross-departmental working group made up of key stakeholders. The Expert Panel was tasked with gathering evidence to inform the Strategy; its report for the Department for Communities was published in March 2021.<sup>641</sup> The Expert Panel Report highlighted a number of issues the Strategy should include to address issues faced by intersex persons in NI, some of which included addressing the healthcare needs of intersex persons, informed consent of intersex children and a commitment to ending intersex genital mutilation in NI.<sup>642</sup>

### Recommendations

The Commission calls for the Department of Finance, and the Home Office, to facilitate the recognition of intersex individuals before the law through the expeditious provision of birth certificates, civil registration documents, identity papers, passports and other official personal documentation while respecting intersex persons' right to self-determination. Furthermore, the Commission recommends that the Department of Health takes all necessary measures to protect the right of intersex children to autonomy and bodily integrity and that all medical interventions have informed consent.

## Historical abuse of children and adults

In 2019, the UN CAT Committee recommended that the UK Government and NI Executive:

- a) *as a matter of urgency, adopt measures to provide victims of ill-treatment in NI identified by the Historical Institution Abuse Inquiry with redress, including compensation and the means for as full a rehabilitation as possible;*
- b) *expedite the process of carrying out an impartial and effective investigation into the practices of the Magdalene Laundries and Mother and Baby Homes in NI that is capable of resulting in the prompt identification of victims of ill-treatment inflicted at those institutions and the provision of redress to them.*<sup>643</sup>

In Protocol Article 2, the UK Government commits to ensuring there is no diminution of the rights, safeguards and equality of opportunity protections contained in that chapter of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU, including the right of

641 Department for Communities, 'Gender Equality Strategy Expert Advisory Panel Report', (DfC, 2021).

642 Ibid.

643 CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 14 March 2019, at para 45.



victims “to remember as well as contribute to a changed society”.<sup>644</sup> EU obligations underpinning the rights of victims include the Victims’ Directive<sup>645</sup> as well as other relevant EU laws which support victims.<sup>646</sup>

In addition, in cases of sexual abuse of children the Directive on combating the sexual abuse and sexual exploitation of children sets out a number of provisions in relation to criminal offences and minimum tariffs, including effective, proportionate and dissuasive penalties.<sup>647</sup> It also recognises the need for enhanced protections for victims, including, in recognition of the harm caused by these offences, that assistance should be provided for as long as necessary for the child’s physical and psychological recovery, including into adulthood.

### Historical Institutional Abuse Inquiry

In 2017, the Historical Institutional Abuse Inquiry report was published.<sup>648</sup> Its recommendations included the establishment of a Commission for Survivors of Institutional Abuse and a publicly funded compensation scheme, to be administered by a Redress Board to make determinations relating to compensation for persons who have suffered abuse in the form of sexual, physical or emotional abuse, or neglect or unacceptable practices, between 1922 and 1995, and were resident in a residential institution in NI.

In October 2020, Fiona Ryan was appointed as Commissioner for Victims and Survivors of Historical Institutional Childhood Abuse.<sup>649</sup>

### Historical Institutional Abuse Redress Board

The Redress Board was set up on 31 March 2020,<sup>650</sup> under the Historical Institutional Abuse (Northern Ireland) Act 2019 and is responsible for receiving and processing applications for compensation from those who experienced abuse in residential institutions in NI between 1922 and 1995.<sup>651</sup>

On 3 April 2020, the application process for eligible candidates opened and will run for five years. Individuals can apply if they suffered abuse while a child and resident in an institution in NI for a period of time between 1922 and 1995 and/ or were sent to Australia under the Child Migrant Programme.<sup>652</sup> Those eligible can apply for a standard award payment of £10,000, an enhanced award of between £10,001 and

644 Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

645 Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

646 Directive 2011/36/EU ‘Council Directive on preventing and combating trafficking in human beings and protecting its victims’, 5 April 2011; Directive 2011/92/EU, ‘Parliament and Council Directive on combating the sexual abuse and sexual exploitation of children and child pornography’, 13 December 2011; Directive 2004/80/EC, ‘Council Directive relating to the compensation to crime victims’, 29 April 2004.

647 Directive 2011/92/EU, ‘Parliament and Council Directive on combating the sexual abuse and sexual exploitation of children and child pornography’, 13 December 2011.

648 Anthony Hart, ‘Historical Institutional Abuse Inquiry Report’ (HIAI, 2017).

649 Jayne McCormack, ‘Historical Institutional Abuse: Fiona Ryan named commissioner for victims’, *BBC News*, 6 October 2020.

650 The Executive Office, ‘Press Release: Opening of Historical Institutional Abuse Redress Board’, 31 March 2020.

651 Historical Institutional Abuse (Northern Ireland) Act 2019.

652 Section 2, Historical Institutional Abuse (Northern Ireland) Act 2019.

£80,000; or £20,000 if the application is made by or in respect of a person who was sent to Australia under the Child Migrant Programme.<sup>653</sup>

On 8 January 2021, the Honourable Mr Justice Huddleston was appointed as President of the Board.<sup>654</sup>

On 5 July 2021, it was announced that there would be a review of the Historical Institutional Abuse redress process.<sup>655</sup> This was in light of information that Commissioner for Victims and Survivors of Historical Institutional Childhood Abuse, Fiona Ryan, had provided to the Executive Office Committee in April 2021 that it could take up to 10 years to process all the applications for redress.<sup>656</sup>

On 14 October 2021, the First and Deputy Ministers met with representatives from various institutions identified by the Hart Report as being required to make contributions towards the cost of the Historical Institutional Abuse Redress Scheme to progress negotiations on the contributions. The Ministers stated their full commitment to implementing the Hart Report.<sup>657</sup>

In response to this meeting, Fiona Ryan, added that,

*In addition to contributing to the redress scheme, the Inquiry is unequivocal that there should also be an appropriate contribution given towards the costs of specialist support services that can be put in place to improve the life outcomes of victims and survivors who have been enormously impacted by this abuse. It is imperative that this is fully considered as part of a victim-centred response.*<sup>658</sup>

## Abuses outside Historical Institutional Abuse Inquiry's remit

The Historical Institutional Abuse Inquiry's remit does not extend to adult residents of Magdalene laundry type institutions or those abused in private settings.

In 2018, the Department of Health commissioned research to be carried out on Mother and Baby Homes and Magdalene Laundries in NI to examine the operation of the homes and laundries between 1922 and 1999.<sup>659</sup>

In June 2020, Judith Gillespie was appointed as the new Independent Chair of the Inter-Departmental Working Group that was jointly established by the Department of Health and the Executive Office in 2017.<sup>660</sup> The Working Group considered evidence concerning Mother and

653 Section 12, Historical Institutional Abuse (Northern Ireland) Act 2019.

654 Judicial Communications Office. 'Press Release: Appointment to Court of Appeal and Further Judicial Appointments', 8 January 2021.

655 The Executive Office, 'Press Release: Givan and O'Neill to establish review of HIA redress processes', 5 July 2021.

656 NI Assembly Hansard, 'Committee for the Executive Office', 21 April 2021.

657 The Executive Office, 'Press Release: Givan and O'Neill host roundtable with institutions on redress for victims and survivors', 14 October 2021.

658 The Commissioner for Victims and Survivors of Historical Institutional Childhood Abuse 'Press Release: The Commissioner's comments on the Northern Ireland Executive's Meeting with Institutions', 14 October 2021.

659 Department of Health, 'Press Release: Research to start on mother and baby homes and Magdalene Laundries in NI', 11 January 2018.

660 Department of Health, 'Mother and Baby Homes - Magdalene Laundries/Historical Clerical Child Abuse'. Available at: <https://www.health-ni.gov.uk/articles/mbh-ml>.

Baby Homes, Magdalene Laundries and Historical Clerical Child Abuse and made recommendations to the NI Executive.

Research into the operation of the institutions examined eight mother and baby homes, a number of former workhouses and four Magdalene laundries was published in January 2021.<sup>661</sup> Following the publication of this report, the NI Executive announced that an independent investigation into Mother and Baby and Magdalene Laundry Institutions would be designed and developed along with the full participation of victims and survivors.<sup>662</sup>

On 5 October 2021, after a six-month period of engagement with victims-survivors and other stakeholders, the Truth Recovery Design Panel published its full report.<sup>663</sup> The Panel recommended an integrated investigation by an Independent Panel and statutory Public Inquiry.

In addition, the report recommended the urgent implementation of measures to ensure access to records, such as a statutory preservation requirement; data protection law implementation guidance; and legislation to establish a permanent, dedicated, independent truth telling archive. The panel further recommended measures to secure redress, reparation and compensation, including automatic redress payments; assistance to access the courts, criminal investigations and inquests; health and well-being services; support for researching personal and family history; restoration of citizenship; and memorialisation and apologies.

In terms of preserving evidence, the Panel recommends immediate action by the NI Executive, supported by the NI Assembly, to implement legislation to require all State and non-State institutions who hold relevant records to preserve and not destroy any information relating to Mother and Baby Institutions, Magdalene Laundries, Workhouses, adoption-related institutions and 'baby homes', and their policies and practices, including personal records.<sup>664</sup>

## Recommendations

The Commission recommends that the Department of Health and the Executive Office implement promptly and effectively the recommendations of the Truth Recovery Panel.

The Commission recommends that the Executive Office ensures victims of historical abuse outside the remit of the Historical Institutional Abuse Inquiry have an effective remedy, including expeditious access to thorough and effective independent investigations that offer effective redress (including compensation) and are subject to public scrutiny and meaningful victim participation.

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661 McCormick, O'Connell et al, *Mother and Baby Homes and Magdalene Laundries in Northern Ireland, 1922-1990*, 26 January 2021.

662 The Executive Office, 'Executive announced independent investigation into mother and baby homes', 26 January 2021.

663 Truth Recovery Panel, 'Mother and Baby Institutions, Magdalene Laundries and Workhouses in Northern Ireland - Truth, Acknowledgement and Accountability', October 2021.

664 *Ibid*, at 9 - 17.

## Mechanisms to identify victims of torture detained in immigration facilities

In 2019, the UN CAT Committee recommended that the UK Government should:

*ensure that health professional expert statements about torture victims and other persons at particular risk of suffering harm as a consequence of detention, are given due consideration by non-health professional caseworkers, and ensure that individuals identified as at risk of future harm in detention receive necessary care and protection.*<sup>665</sup>

The UN CAT Committee also recommended that the UK Government:

- a) *further develop mandatory training programmes to ensure that all public officials are well acquainted with the provisions of the Convention;*
- b) *ensure that all relevant staff, including medical personnel, are specifically trained to identify cases of torture and ill-treatment, in accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (Istanbul Protocol);*
- c) *develop a methodology for assessing the effectiveness of training programmes in reducing the number of cases of torture and ill-treatment and in ensuring the identification, documentation, investigation and prosecution of these acts.*<sup>666</sup>

In Protocol Article 2, the UK Government commits to ensuring there is no diminution of the rights, safeguards and equality of opportunity protections contained in that chapter of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU, including the right of victims “to remember as well as contribute to a changed society”.<sup>667</sup> EU obligations underpinning the rights of victims include the Victims’ Directive<sup>668</sup> as well as other relevant EU laws which support victims.<sup>669</sup>

In NI, irregular migrants are detained at Larne House short term holding facility.<sup>670</sup> Across 2020, there were 97 immigration detainees held at Larne House. This is a significant decrease from across 2019, when 473

665 CAT/C/GBR/CO/6, ‘UN Committee against Torture, Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’, 7 June 2019, at para 55(a).

666 Ibid, at para 27.

667 Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

668 Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

669 Directive 2011/36/EU ‘Council Directive on preventing and combating trafficking in human beings and protecting its victims’, 5 April 2011; Directive 2011/92/EU, ‘Parliament and Council Directive on combating the sexual abuse and sexual exploitation of children and child pornography’, 13 December 2011; Directive 2004/80/EC, ‘Council Directive relating to the compensation to crime victims’, 29 April 2004. In addition, other EU measures also include specific safeguards for victims of torture, such as the Qualification Directive (Directive 2004/83/EC, ‘Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted’, 29 April 2004) and Reception Directive (Directive 2003/9/EC, ‘Council Directive laying down minimum standards for the reception of asylum seekers’, 27 January 2003).

670 Email correspondence between UK Border Agency and NI Human Rights Commission, 26 March 2013.

immigration detainees were held in Larne House, of these 89 were women and there was one male under 18.<sup>671</sup>

Detainees are held for a maximum period of five days, or seven if removal directions have already been served. Detainees are then released, transferred to Immigration Removal Centres elsewhere in the UK, or removed (including to Ireland). The Immigration Detention Centre Rules make provision for the regulation and management of detention centres.<sup>672</sup> The Rules provide for matters such as the welfare and health care of immigration detainees. Rule 35(3) of the Detention Centre Rules places an obligation on a medical practitioner to report to the manager of the Centre any detained person who he/she is concerned may have been the victim of torture. The Detention Centre Rules do not apply to Larne House, due to its classification as a short-term holding facility.

The Short-term Holding Facility Rules 2018 provide “where a health care professional has concerns that a detained person may have been a victim of torture this must be reported to the manager”.<sup>673</sup> Concerns have been raised by civil society representatives that there is a lack of training of Larne House staff, which is inhibiting effective implementation of the rules.<sup>674</sup> This was also a finding of the HM Chief Inspector of Prisons, which reported that:

*detainee custody officers [at Larne House] were not aware of any safeguarding adults policy or the national referral mechanism to identify and support victims of trafficking. We were told that if the detainee custody officers identified detainees who were at risk of harm due to specific vulnerabilities, this would be reported immediately to the Home Office.*<sup>675</sup>

Further concerns have been raised that the private company that manages the facility employs the nurse in Larne House, which may be inhibiting the independence of health assessments within the facility.<sup>676</sup>

In March 2021, the Commission responded to the Department of Justice proposed strategy for dealing with women and girls in contact with the criminal justice system.<sup>677</sup> Within the response the Commission raised concerns in relation to women immigration detainees and access to gender-specific areas at Larne House. A copy of the response was forwarded to the Home Office.

In August 2021, the Commission received a letter from the Home Office in response to the concerns raised.<sup>678</sup> The Home Office provided that the immigration removal estate is operated in line with the Detention Centre

671 Home Office, 'Immigration Statistics Data Tables: Year Ending September 2020' (HO, 2020), at Table Dt\_01.

672 The Detention Centre Rules 2001.

673 Short-term Holding Facility Rules 2018.

674 Roundtable discussions with civil society representatives, November 2018; Meeting between civil society representatives, 11 April 2018.

675 HM Chief Inspector of Prisons, 'Report on an Unannounced Inspection of the Short-term Holding Facility at Larne House', (HM Inspectorate of Prisons, 2018), at para 1.8.

676 Roundtable discussions with civil society representatives, November 2018; Meeting between civil society representatives, 11 April 2018.

677 NI Human Rights Commission, 'NIHRC response to the Department of Justice proposed strategy to support and challenge women and girls in contact with the justice system', (NIHRC, 2021).

678 Correspondence from Home Office to NI Human Rights Commission, 26 August 2021.

Rules 2001 and for short-term holding facilities such as Larne House, the Short-Term Holding Facility Rules 2018, as well as Detention Services Orders; a framework which includes specific guidance on women in detention. The Home Office further stated that oversight is provided by HM Chief Inspector of Prisons and the Independent Monitoring Boards.

The Home Office stated that accommodation changes are currently being planned at Larne House, which will provide for a separate contained wing for women, with single occupancy bedrooms and a separate association room. The Home Office stated that this project is currently at early stages, but it is hoped that building work will commence later in 2021.

### Recommendations

The Commission recommends that the Home Office ensures effective implementation of the Short-term Holding Facility Rules 2018, including comprehensive training of all staff in Larne House on identifying and reporting torture, and the local services and safeguarding services available. The Commission also recommends that the UK Government ensures the independence of health care professionals dealing with detained asylum seekers.

The Commission recommends that the NI Office takes steps to amend the NI Act 1998 to allow it to enter places of detention without notice, in order to address the recommendation of the Sub Committee on Accreditation.

### Physical punishment of children

In 2016, the UN CRC Committee reiterated its recommendation to abolish the physical punishment of children in the UK in all settings, recommending that the UK Government and NI Executive:

- a) *prohibit as a matter of priority all corporal punishment in the family, including through the repeal of all legal defences, such as 'reasonable chastisement';*
- b) *ensure that corporal punishment is explicitly prohibited in all schools and educational institutions and all other institutions and forms of alternative care;*
- c) *strengthen its efforts to promote positive and non-violent forms of discipline and respect for children's equal right to human dignity and physical integrity, with a view to eliminating the general acceptance of the use of corporal punishment in child-rearing.*<sup>679</sup>

In Protocol Article 2, the UK Government commits to ensuring there is no diminution of the rights, safeguards and equality of opportunity protections contained in that chapter of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU, including the right of

679 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 40.



victims “to remember as well as contribute to a changed society”.<sup>680</sup> EU obligations underpinning the rights of victims include the Victims’ Directive<sup>681</sup> as well as other relevant EU laws which support victims.<sup>682</sup>

The Victims’ Directive recognises that the best interests of the child is a primary consideration for child victims, in line with the EU Charter of Fundamental Rights and UN CRC. In addition, the Directive recognises that violence within close relationships can result in physical, mental or emotional harm and can cause systematic psychological and physical trauma and therefore may need special protection measures. A person is considered a victim whether an offender is identified, apprehended, prosecuted or convicted and regardless of familial relationship between them.<sup>683</sup>

The Law Reform (Miscellaneous Provisions) (NI) Order 2006 continues to allow for a defence of reasonable punishment of a child and provides that this is a defence to a charge of common assault tried summarily. This reflects the situation in England, pursuant to section 58 of the Children’s Act 2004, but is contrary to changes that are coming into effect in Scotland and Wales.

In contrast, both Scotland and Wales have passed legislation recently to prohibit the physical punishment of children by parents and others caring for them. The Children (Equal Protection from Assault) (Scotland) Act 2019 came into force in Scotland in November 2020, and the Children (Abolition of Defence of Reasonable Punishment) (Wales) Act 2020 was given Royal Assent in March 2020 and will come into force in Wales in March 2022. In Ireland, the Children Act 2011 and Children First Act 2015 abolished the statutory and common law defence of reasonable chastisement.

The UK Government’s justification for the continued approach in England is provided in its report to the 2017 UN Universal Periodic Review in which it stated that it “does not condone any violence towards children and has clear laws to deal with it. But parents should not be criminalised for giving a child a mild smack in order to control their behaviour”.<sup>684</sup>

In March 2021, the Minister of Justice pledged her support to taking legislative steps to remove the defence of reasonable chastisement in NI and advised proposals would be included as part of the Justice (Miscellaneous Provisions) Bill which was to be introduced to the Assembly later in 2021.<sup>685</sup> The Minister of Justice noted that any change to the current law will require fresh approaches to supporting parents,

680 Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity - Human Rights.

681 Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

682 Directive 2011/36/EU ‘Council Directive on preventing and combating trafficking in human beings and protecting its victims’, 5 April 2011; Directive 2011/92/EU, ‘Parliament and Council Directive on combating the sexual abuse and sexual exploitation of children and child pornography’, 13 December 2011; Directive 2004/80/EC, ‘Council Directive relating to the compensation to crime victims’, 29 April 2004.

683 Recitals 14, 17-18, Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

684 HM Government, ‘Universal Periodic Review, UK, British Overseas Territories and Crown Dependencies National Report’ (HM Government, 2017), at para 78.

685 Assembly Hansard, ‘Written Question: Ban on smacking in Northern Ireland Miss Rachel Woods MLA - AQW 16699/17-22’, 22 March 2020.

extending to areas such as health, parenting strategies and family law. However, the Minister has since instead introduced the Justice (Sexual Offences and Trafficking Victims) Bill, which is smaller in remit and therefore makes legislative change within this mandate unlikely.<sup>686</sup> This was discussed with the Children's Commissioner at a Justice Committee meeting in July 2021.<sup>687</sup>

In June 2021, a research review led by the University College London and an international team of experts analysed 20 years of research on the physical punishment of children, looking at 69 studies worldwide.<sup>688</sup> The research found clear and compelling evidence that physical punishment does not improve children's behaviour and instead makes it worse. Lead author, Dr Anja Heilmann said:

*Physical punishment is ineffective and harmful and has no benefits for children and their families. This could not be clearer from the evidence we present. We see a definitive link between physical punishment and behavioural problems such as aggression and antisocial behaviour. Physical punishment consistently predicts increases in these types of behavioural difficulties.*<sup>689</sup>

So far, 62 sovereign countries have full prohibition of corporal punishment in all settings including the home.<sup>690</sup>

## Recommendations

The Commission recommends that the Department of Justice introduces legislation to the Assembly to repeal the defence of reasonable chastisement of a child and devises and implements a strategy to effectively promote positive and non-violent forms of discipline and respect for children's equal right to human dignity and physical integrity, with a view to eliminating the use of physical punishment in child-rearing.

## Prison conditions

In 2015, the UN Human Rights Committee recommended robust measures:

- a) *to prevent self-inflicted deaths, including suicides and self-harm in custody, inter alia by:*
- b) *studying and addressing the root causes of the problem, continuing improving the identification of persons at risk of suicide and self-harm and operating effective early prevention strategies and programmes;*

686 Justice (Sexual Offences and Trafficking Victims) Bill.

687 NI Assembly, Official Report: Minutes of Evidence, Committee for Justice meeting on Thursday, 8 July 2021.

688 Press Release: University College London, 'Physically punishing children is not effective and increases behavioural problems' 29 June 2021.

689 Press Release: University College London, 'Physically punishing children is not effective and increases behavioural problems' 29 June 2021.

690 The Global Partnership to End Violence Against Children, 'End Corporal Punishment: Global Progress' (2021).

- c) *providing adequate training to prison officials on suicide and self-harm prevention;*
- d) *ensuring adequate protection of, and appropriate mental health and other support services to, prisoners;*
- e) *combating bullying in custody facilities effectively.*<sup>691</sup>

In 2019, the UN CEDAW Committee recommended that the NI Executive “take further measures to improve the provision of mental health care in all prisons, taking into account the particular needs of women”.<sup>692</sup> The UN CAT Committee also recommended that the NI Executive:

- a) *continue its efforts to improve conditions of detention and alleviate overcrowding of penitentiary institutions and other detention facilities, including through the application of non-custodial measures. In that connection, the Committee draws the State party’s attention to the UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) and the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules);*
- b) *recruit and train sufficient number of prison personnel to improve security, reduce violence and ensure the adequate treatment of detainees;*
- c) *continue to implement preventive strategies related to prisoner violence, including measures to monitor and document incidents;*
- d) *investigate all incidents of violence in places of detention and ensure that prison officials are held accountable in cases where they fail to take reasonable measures to prevent and respond to such violence.*<sup>693</sup>

The UN CAT Committee further recommended that the NI Executive:

- a) *provide the Committee with detailed information on cases of deaths in custody and the causes of those deaths;*
- b) *take measures to ensure that all instances of death in custody are promptly and impartially investigated by an independent entity;*
- c) *compile detailed data on suicides among persons deprived of their liberty and assess the effectiveness of prevention and risk identification strategies and programmes.*<sup>694</sup>

## Population

There are three prisons in NI – Maghaberry (Category A and B male prisoners), Magilligan (Category C male prisoners), Hydebank Wood

691 CCPR/C/GBR/CO/7, ‘UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the UK of Great Britain and NI’, 17 August 2015, at para 16.

692 CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI’, 14 March 2019, at para 57(c).

693 CAT/C/GBR/CO/6, ‘UN Committee against Torture, Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’, 7 June 2019, at para 21.

694 Ibid, at para 25(c).

(young male and female prisoners). The Ash house block within Hydebank Wood College (prison for males aged 18-21) accommodates NI's women prisoners.

The overall average daily prison population decreased by 4.5 per cent during 2020/21 to 1,448.<sup>695</sup> The number of males fell from 1,442 to 1,393, while the female population decreased from 74 to 55. The remand population increased by 10.8 per cent from 492 in 2019/20 to 545 this year and is at its highest level since reporting by financial year began in 2014/15. During 2020/21, the average daily immediate custody prison population decreased by 11.8 per cent to 898, the lowest level since reporting by financial year began in 2014/15. Prisoners aged between 30 to 39 years of age made up the largest proportion (35.4 per cent) of the average daily immediate custody prison population. In terms of custodial sentence length, the average daily population slightly increased in the sentence categories 'life' and 'greater than five years but less than life'. Decreases were found in the remaining custodial sentence length categories. Violence against the Person offences continued to account for the largest proportion of all principal offence categories (35.9 per cent). The impact of COVID-19 in 2020/21 is reflected in the prison population statistics, with a large increase in remand figures, a large decrease in immediate custody figures and the decrease in receptions numbers due to the effects of court activity.<sup>696</sup>

## Conditions of detention

In 2019/2020, the NI Prisoner Ombudsman received 328 individual complaints from prisoners, a decrease of 20 per cent from 2018/2019.<sup>697</sup> 92 per cent of prisoners' complaints came from Maghaberry, 54 per cent of which came from separated prisoners. Of the 328 individual complaints, 31 per cent were upheld or partially upheld. The NI Prisoner Ombudsman made 146 recommendations for improvement, of which 94 per cent had been accepted with six per cent rejected.

In 2018, the Criminal Justice Inspection NI's report on Maghaberry Prison noted that living conditions were good and identified some areas undergoing modernisations. However, it further noted that the older buildings ('square houses') were "claustrophobic, unhygienic and extremely uncomfortable".<sup>698</sup> The report recommended that the prison should "work to increase prisoner confidence in staff and important processes like the complaints system".<sup>699</sup>

In 2019, the Criminal Justice Inspection NI published its report into the safety of prisoners held by the NI Prison Service. The then Chief Inspector of Criminal Justice in NI, Brendan McGuigan, stated:

695 Department of Justice, 'Press Release: The Northern Ireland Prison Population 2020/21 report published today', 17 September 2021.

696 Ibid.

697 NI Prisoner Ombudsman, 'Annual Report 2019/20', May 2021.

698 National Preventative Mechanism, 'Report on an unannounced inspection of Maghaberry Prison: 9-19 April 2018' (CJINI, 2018).

699 National Preventative Mechanism, 'Report on an unannounced inspection of Maghaberry Prison: 9-19 April 2018' (CJINI, 2018), at Recommendation 5.

*the NI Prison Service and the South Eastern Health and Social Care Trust have improved the operational delivery of prison healthcare. However, this report highlights difficulties at a strategic level which have led to very slow progress in establishing the levels of partnership that are essential to embedding and improving the fundamental building blocks that will make prisons safe. I am frustrated at having to repeat recommendations from my 2014 report.*<sup>700</sup>

The then Chief Inspector continued “I believe there is a critical need for the creation and appointment of a Director of Healthcare, within the NI Prison Service, an individual with the level of knowledge and expertise to drive forward the prison healthcare agenda”.<sup>701</sup>

## Mental health care in prisons

In 2017, the Criminal Justice Inspection NI published a largely positive report concerning its inspection of Magilligan prison. However, the report raised concerns that:

*more prisoners than at the last inspection reported feeling unsafe or being victimised. The reasons for this were complex, but included the prevalence of illicit drugs, levels of vulnerability in the population and the welcome but challenging integration within the regime of men convicted of sexual offences. We found evidence of the under-reporting of bullying, and the ‘Safer at Magilligan’ (SAM) process, which aimed to manage these issues, was not yet fully effective. While day-to-day care for the most vulnerable men held was good, there were still frailties in the Supporting Prisoners at Risk (SPAR) process and overuse of anti-ligature clothing.*<sup>702</sup>

In 2018, the Regional Quality Improvement Authority published its audit of forensic mental health and learning disability services. It recommended “the Prison Health Commissioning Team should in partnership with NI Prison Service/South Eastern Health and Social Care Trust re-assess the need for a residential healthcare facility within Maghaberry prison”.<sup>703</sup>

Commenting on the report a representative from the Royal College of Psychiatrists in NI, Dr Adrian East, stated:

*the audit presents clear evidence that, in the absence of such a facility, some mentally disordered offenders are being managed in the Care and Supervision Unit in conditions of segregation... Segregating mentally disordered prisoners from the general prison population is harmful to their mental health... Any such segregation must be for the shortest period of time possible and closely monitored... We believe that the residential prison healthcare facility should be re-opened.*<sup>704</sup>

700 National Preventive Mechanism, ‘The Safety of Prisoners Held by the NI Prison Service: A Joint Inspection by the Criminal Justice Inspection NI and the Regulation and Quality Improvement Authority’ (CJINI, 2019), at 7.

701 Ibid.

702 National Preventive Mechanism, ‘Report on an Unannounced Inspection of Magilligan Prison: 12-22 June 2017’ (CJINI, 2017), at 6.

703 The Regulation and Quality Improvement Authority, ‘Baseline Audit of Forensic Mental Health and Learning Disability Services – Adult Services’ (RQIA, 2018), at 35.

704 Claire Smyth, ‘Call for re-opening of residential healthcare facility at Maghaberry Prison’, *the Detail*, 30 October 2018.

In 2018, the Criminal Justice Inspectorate NI's report on Maghaberry Prison found that 66 per cent of prisoners said they had a mental health problem, but only 24 per cent received assistance. The Criminal Justice Inspectorate NI recommended that “patients with mental health needs should receive stepped care within agreed pathways, and care plans should be regularly reviewed and overseen at effective multi-disciplinary team meetings”.<sup>705</sup>

In 2019, the NI Audit Office published its report into mental health in the NI justice system. It found that the justice system has prioritised developing a better response to mental health issues, but highlighted that for the reform process to be effective better evidence about the prevalence and impact of mental health issues in the justice system is required.<sup>706</sup>

In 2019, the Criminal Justice Inspection NI reported that “concerns remained that prison did not provide the therapeutic environment required for prisoners with complex needs and the Courts should be aware of these limitations when committing people to prison for mental health assessments”.<sup>707</sup>

In 2020, the Criminal Justice Inspectorate NI published reports into two unannounced inspections of Hydebank Wood and Ash House in 2019. The Inspection Team found 64 per cent of the recommendations made to the NI Prison Service and their partners in 2016 to improve Hydebank Wood Secure College had been achieved and a further 12 per cent partially achieved. The findings were similar at Ash House with 58 per cent of recommendations achieved and 13 per cent partially achieved. However, the inspections found that previous inspection recommendations to tackle the supply and use of illegal and prescription drugs and improve governance around the use of force at both facilities still needed to be addressed.

In 2021, the Regulation and Quality Improvement Authority published a report of its Review of Services for Vulnerable Persons Detained in NI Prisons. The Review found that existing services are under considerable pressure, with demand greatly exceeding capacity; waiting times for urgent and routine mental health assessments fall significantly short of national standards; there is a distinct lack of specialist support for people with personality disorder and for those with specific vulnerabilities such as learning disability and autism; acutely mentally unwell people are still being looked after within the prison Care and Supervision Units rather than receiving appropriate inpatient treatment; and waiting times for transfer to mental health beds are unacceptably long. The Review made 16 recommendations, allocating these to a timescale for implementation.<sup>708</sup>

705 National Preventative Mechanism, 'Report on an unannounced inspection of Maghaberry Prison: 9-19 April 2018' (CJINI, 2018), at Recommendation 10.

706 NI Audit Office, 'Mental Health in the Criminal Justice System', (NIAO, 2019), at 10 and 46.

707 Criminal Justice Inspection NI and Regulation and Quality Improvement Authority, 'The Safety of Prisoners Held by the NI Prison Service: A Joint Inspection by Criminal Justice Inspection NI and the Regulation and Quality Improvement Authority' (CJINI and RQIA, 2019), at 7.

708 Regulation and Quality Improvement Authority, 'Review of Services for Vulnerable Persons Detained in Northern Ireland Prisons', (RQIA, 2021).



## Prisoner violence

In 2019/2020, there were 31 prisoner assaults on prison staff and 92 assaults between prisoners. In 2020/2021, there were 38 prisoner assaults on prison staff and 40 assaults between prisoners.<sup>709</sup>

The NI Prison Service has a range of measures in place, which contribute to violence reduction. Operational and physical security measures – including staff supervision, the use of CCTV and Body Worn Video Camera – are used as preventative measures against violence in prisons. NI Prison Service also employs effective population management techniques, including arrangements to manage potential ‘enemies’ in prison, cell sharing risk assessments, specific locations for prisoners who may be more vulnerable because of their offence. Prisoners who are involved in a violent incident, bullying or anti-social behaviour will be considered for prison disciplinary action, and in serious incidents referred to the police. NI Prison Service is also introducing restorative practice in establishments.<sup>710</sup>

Prisoners are also supported to address their behaviour in prison and post-release through sentence planning, offending behaviour programmes and through a range of rehabilitative and pastoral support mechanisms. These include mental health referrals and support, addictions support, safer custody case conferencing and access to chaplaincy services.<sup>711</sup>

The abuse of substances, both illicit and prescribed, can be a significant contributing factor to violence in prisons. NI Prison Service is committed to reducing the access to and demand for drugs. This is based around a three-strand approach – to restrict supply, to reduce demand and to assist recovery. A range of measures are in place to prevent illicit drugs coming into prison, these include the use of prisoner drug testing, passive drugs dogs, and visitor/staff searches. The NI Prison Service has placed increased emphasis on preventing trafficking by prisoners returning from any form of temporary release. The NI Prison Service also continues to work closely with colleagues in other agencies including the South Eastern Health and Social Care Trust to minimise the misuse of drugs and to educate and support those prisoners who have addiction issues.<sup>712</sup>

In 2020, the Criminal Justice Inspection NI report into Ash House stated:

*a further key concern was that the strategy to reduce the supply of illicit drugs and prescribed medicines in the establishment was not sufficiently robust, given that they were easily available. Too many women were testing positive for drugs and when intelligence was acted on, finds of illicit substances were frequent. However, intelligence as not used sufficiently well, and the drugs supply reduction strategy needed to be made far more effective.*<sup>713</sup>

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709 Correspondence from the Department of Justice to NI Human Rights Commission, October 2021.

710 Email from Department of Justice officials to NI Human Rights Commission, 6 February 2019.

711 Ibid.

712 Email from Department of Justice officials to NI Human Rights Commission, 6 February 2019.

713 Criminal Justice Inspection NI, ‘Report on an Unannounced Inspection Ash House Women’s Prison Hydebank Wood’ (CJINI, 2020) at 4.

## Deaths in custody

In the 2019/2020 reporting period, the NI Prisoner Ombudsman commenced investigations into two deaths in custody, both involving Magilligan prisoners. There were no deaths at Hydebank Wood, Ash House or Maghaberry Prison. The two deaths appeared to be from natural causes. Definite causes of death in all cases are only determined at the Coroner's inquest. In addition, eleven post-release death investigations were initiated to establish whether there was any link to the person's time in custody. Work continues on some of these investigations. In 2019/20 we completed seven investigations and published four reports. The published reports contained ten recommendations for improvement (five for the Prison Service, three for the Trust and two joint). Only one recommendation was not accepted by the Trust. On 31 March 2020 there were twenty-three ongoing investigations - ten death in custody, eleven post-release and two serious adverse incidents.

In 2018, the Criminal Justice Inspection NI's report on Maghaberry Prison concluded that a number of improvements had taken place, but:

*care planning required improvement, not just to keep prisoners safe but to focus on helping them solve their problems. Families needed more involvement in this process. There were too few Listeners to provide cover for all the men who needed support. A number of Listeners were in training for the role.*<sup>714</sup>

In 2017, the NI Prison Service and South Eastern Health and Social Care Trust introduced a joint Suicide and Self-Harm Risk Management Strategy. A revised approach to supporting people at risk of suicide and self-harm in custody has been developed and is undergoing testing across the NI Prison Service. The SPAR Evolution, is person centred and will be supported by enhanced IT provision, which will see the introduction of mobile technology that is also under development. It went live in March 2019.

In 2019, the then Chief Inspector of the Criminal Justice Inspection NI, Brendan McGuigan, stated that:

*the death in custody investigations revealed that in many cases... [the prisoner's] unmet needs in the community during their childhood and adolescence, their mental ill health, their addiction to drugs and alcohol had not be adequately dealt with and their descent into criminality became almost inevitable. I acknowledge the limited choices available to Judges who must of course, consider the safety of the public and the offender when sentencing. In my view the most difficult issue facing the NI Prison Service is the identification of those really vulnerable prisoners, as opposed to those who just seek isolation from the main prisoner population, or those prisoners who seek to avoid the more challenging elements of the prison regime designed for rehabilitation. I have often said that prison is not by nature a therapeutic environment and yet, that is exactly what the NI*

<sup>714</sup> Criminal Justice Inspection NI, 'Report on an Unannounced Inspection of Maghaberry Prison (9-19 April 2018)' by the Chief Inspector of Criminal Justice in NI; Her Majesty's Chief Inspector of Prisons; the Regulation and Quality Improvement Authority; and the Education and Training Inspectorate' (CJINI, 2018), at Executive Summary.

*Prison Service has to create to stabilise individuals at risk and enable them to manage their imprisonment more safely.*<sup>715</sup>

In 2019, a Post-Release Deaths Project was launched. This is a collaborative project between prison, probation, court services and the South Eastern Health and Social Care Trust.<sup>716</sup> This project aims to provide details on the cause of death of former prisoners to better inform custodial interventions. Plans are also being developed for the prison authorities to work with the NI Statistics and Research Agency to track deaths of former prisoners.

### Recommendations

The Commission recommends the Department of Justice promptly and effectively implements the recommendations of the Prison Ombudsman NI and the Criminal Justice Inspection NI concerning conditions of detention, addressing deaths in custody and mental healthcare in prisons.

The Commission recommends detailed data is compiled on cases of deaths in custody and the causes of those deaths, particularly related to suicides among persons deprived of their liberty.

The Commission recommends that the Department of Justice and the NI Prison Service effectively monitors and develops measures in NI prisons aimed at reducing prisoner violence, including ensuring such measures are human rights compliant. Furthermore, that the Department ensure that prison officers and prisoners that are victims of violence in prisons are effectively supported.

The Commission recommends that the NI Office takes steps to amend the NI Act 1998 to allow it to enter places of detention without notice, in order to address the recommendation of the Sub Committee on Accreditation.

### Refugee resettlement

In 2016, the UN CRC Committee noted that “unaccompanied and separated refugee children within and outside of the State party face restrictions on family reunification” and urged the UK Government and NI Executive to “review its asylum policy in order to facilitate family reunion for unaccompanied and separated refugee children within and outside of the State party”.<sup>717</sup> In addition it noted that that “asylum-seeking, refugee and migrant children and their families face difficulty in accessing basic services, such as education and health care, and are at a high risk of destitution” called for “sufficient support to ... access basic services”.<sup>718</sup>

715 Criminal Justice Inspection NI and Regulation and Quality Improvement Authority, ‘The Safety of Prisoners Held by the NI Prison Service: A Joint Inspection by Criminal Justice Inspection NI and the Regulation and Quality Improvement Authority’, (CJINI and RQIA, 2019), at 6.

716 Niall McCracken, ‘Post-custody deaths in NI to be investigated’, *BBC News*, 11 December 2019.

717 CRC/C/GBR/CO/5, ‘UN CRC Committee Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland’, 12 July 2016, at paras 76-77.

718 Ibid.

The European Commission against Racial Intolerance recommended that a refugee integration strategy is developed in NI “to assist newly-arrived refugees, in particular as concerns housing, employment, access to welfare and learning English, and that refugee integration is systematically evaluated”.<sup>719</sup>

## Refugee Integration Strategy

The Racial Equality Strategy 2015-2025 commits to the development of a Refugee Integration Strategy, which already exists in Scotland and Wales.<sup>720</sup> Refugee integration is a particular issue for NI as “integration is more difficult in a divided society”.<sup>721</sup>

Despite a commitment within the Racial Equality Strategy that “a draft strategy is being prepared for consultation”, this has yet to be published. As of 2021, NI remains the only part of the UK without a Refugee Integration Strategy, though a 12-week public consultation on a draft Strategy is expected before the end of this year following engagement with refugees and asylum seekers.<sup>722</sup>

## Global Resettlement Scheme

In April 2020, the Global Resettlement Scheme was established by the UK Government. This scheme consolidates the Vulnerable Persons’ Resettlement Scheme, the Vulnerable Children’s Resettlement Scheme and the gateway protection programme into one scheme. It aims to be simpler to operate and provide greater consistency in the way that the UK Government resettles refugees. Its geographical focus is also broadened beyond the Middle East and North Africa. It includes a new process for emergency resettlement with the intention of the UK being able to respond quickly to instances when there is a heightened need for protection, providing a faster route to resettlement where lives are at risk. The new scheme will be based on need and involve the UK Government working closely with the UN High Commissioner for Refugees to identify the most vulnerable refugees from around the world.<sup>723</sup>

The UK Government committed to receiving up to 5000 refugees in 2020/2021 under the Global Resettlement Scheme.<sup>724</sup> The then Head of the NI Civil Service, David Sterling, committed to NI’s involvement in the scheme until March 2021. The Executive Office is conducting an evaluation of the future of refugee resettlement in NI. This evaluation was due to be completed in November 2020, but has been delayed until January 2021 due to COVID-19. In October 2020, the Commission wrote to the Executive Office in support of NI’s continued and long-term involvement in refugee resettlement.<sup>725</sup>

719 ECRI (2016) 38, ‘European Commission against Racial Intolerance Report on the UK (Fifth Monitoring Cycle)’, 4 October 2016, at para 116.

720 The Executive Office, ‘Racial Equality Strategy 2015-2025’ (TEO, 2015).

721 Michael Potter, ‘Refugees and Asylum Seekers in NI’, (NI Assembly, 2014), at 14.

722 Correspondence from The Executive Office to the NI Human Rights Commission, 27 October 2021.

723 Home Office, ‘Press Release: New global resettlement scheme for the most vulnerable refugees announced’, 17 June 2019.

724 Correspondence from Bryson to the Executive Office, 8 July 2020.

725 Correspondence from NI Human Rights Commission to the Executive Office, October 2020.

As of February 2020, NI has received approximately 1,815 Syrian refugees under the UK Government's Vulnerable Person Relocation (VPR) Scheme. This number remained unchanged at October 2021.<sup>726</sup> Under this scheme, it is the Home Office who determines suitability for resettlement and subsequently refers such cases onto the devolved administrations, for consideration, with the first 12 months of a refugee's resettlement costs fully funded by central government using the overseas aid budget.

## Unaccompanied refugee children

In 2019, 14,100 unaccompanied minors were among asylum seekers registered in the EU.<sup>727</sup> Section 67 of the Immigration Act 2016 commits the Secretary of State to "make arrangements to relocate to the UK and support a specific number of unaccompanied refugee children from other countries in Europe" in addition to the resettlement of children under the then Vulnerable Persons Relocation Scheme.

Lord Dubs, who introduced these provisions, had hoped 3,000 of the most vulnerable unaccompanied refugee children would benefit from this scheme, however the UK government announced that the specific number of children to be transferred under section 67 will be 480.<sup>728</sup> As of May 2020, 478 children have been transferred to the UK under the scheme while the remaining two children were in Italy on account of travel restrictions stemming from COVID-19. To date, no children have been resettled in NI under this scheme.

In 2021, the Department of Health consulted on proposals for a new regional model of service for separated and unaccompanied asylum seeking children in NI. The Commission provided a response to this consultation in July 2021, in which it supported proposals for a single Trust Based Central Hub with Dispersal Arrangements. The Commission also highlighted the need for trauma informed approaches, and recommended cross-departmental collaboration to support long-term integration and settlement for unaccompanied and separated children.<sup>729</sup>

## Reform of UK Refugee and Asylum Law

In May 2021, the UK Home Office published its 'New Plan for Immigration' as part of a wider public consultation on refugee and asylum reform.<sup>730</sup> The Commission responded to this consultation, highlighting the failure of the proposals to engage with human rights and refugee law across several fronts. This included highlighting how the proposals failed to establish future refugee resettlement figures and failed to demonstrate the human rights compliance of many of the proposed reforms which included changes to the age assessment of minors and changes to the evidential and procedural rules underpinning a future application for refugee status which would make it more difficult for individuals to apply for refugee

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726 Correspondence from the Executive Office to the NI Human Rights Commission, 27 October 2021.

727 Eurostat, 'Asylum Statistics', 26 May 2020. (Available at: [https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics#Applications\\_by\\_unaccompanied\\_minors](https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics#Applications_by_unaccompanied_minors)).

728 Home Office, 'Policy Statement: Section 67 of the Immigration Act 2016', (HO, July 2017).

729 NI Human Rights Commission, 'Response to Department of Health consultation on proposals for a new regional model of service for separated and unaccompanied asylum seeking children in NI', July 2021.

730 Home Office, 'New Plan for Immigration', (HO, May 2021).



status or asylum. The proposals also failed to demonstrate how the non-diminution of rights provision within Article 2(1) of the Ireland/Northern Ireland Protocol would be upheld in the context of refugee and asylum seekers. The Commission further reiterated these concerns in its response to the Joint Committee on Human Rights' call for evidence on the subsequent Nationality and Borders Bill in September 2021.<sup>731</sup>

## Recommendations

The Commission recommends that the Home Office, the Executive Office and the Department of Health put in place appropriate arrangements to ensure NI accommodates a proportionate number of unaccompanied asylum seeking children and refugees, such as joining the scheme set up under section 67 of the Immigration Act 2016.

The Commission recommends that the Executive Office publish promptly and effectively a Refugee Integration Strategy, with a comprehensive action plan, and that this strategy is developed in cooperation with refugees and their representative organisations.

The Commission recommends that the Home Office give effect to human rights and refugee law in relation to the future reform and development of UK refugee and asylum law and practice. In particular, the Commission recommends that the Home Office incorporate human rights standards within the new proposals and clarify how the reforms will not result in a diminution of rights for refugees and asylum seekers in NI under Article 2(1) of the Ireland/Northern Ireland Protocol.

## Spit and bite guards

In March 2020, spit and bite guards were introduced by the Police Service of NI to protect officers working in specialist functions, such as the COVID-19 Response Teams, custody suites, cell vans and armed response, during the COVID-19 pandemic.<sup>732</sup> There have been a number of incidents reported where police officers were spat at by individuals claiming to have COVID-19.<sup>733</sup>

The Police Service of NI and Policing Board NI are exploring the use of spit and bite guards in NI on a longer term basis.<sup>734</sup> Spit and bite guards are already used more broadly in police forces across other parts of the UK. In Ireland, spit and bite guards have been used by An Garda Síochána, but this is a measure of last resort that is to only be used during the COVID-19 pandemic.<sup>735</sup> In 2020, the Commission provided advice and met both

731 NI Human Rights Commission, 'Response to Call for Evidence by the Joint Committee on Human Rights on the Nationality and Borders Bill', October 2021.

732 Rebecca Black, 'Police Service NI to deploy spit and bite guards in custody suites', *Belfast Telegraph*, 27 March 2020.

733 Andrew Quinn, 'Man on NI bus says he has COVID-19, spits at Police Service NI officers and is arrest for drugs offences', Newsletter, 29 May 2020; 'Newtownabbey man spat blood in policeman's face before claiming he had COVID-19, court told', *Belfast Telegraph*, 17 June 2020.

734 Meeting between NI Human Rights Commission and Policing Board NI, 19 June 2020; Meeting between NI Human Rights Commission and Police Service of NI, 22 July 2020.

735 Conor Gallagher, 'COVID-19: Large spike in use of spit hoods by gardaí in past week Enforcement proceedings related to coronavirus laws brought against 192 individuals', *The Irish Times*, 12 May 2020.



the Police Service of NI and the Policing Board NI on the human rights concerns linked to spit and bite guards, particularly in the context of more long-term use.

In November 2020, the NI Policing Board published its review of the Police Service of NI's response to COVID-19. It recommended that:

*spit and bite guards should now be phased out as soon as possible and officers who have been provided with spit and bite guards should, instead, be provided with the necessary Personal Protective Equipment or other alternative... The use of spit and bite guards should, regardless, cease by 31 December 2020.*<sup>736</sup>

However, the Police Service of NI has announced that, from 18 December 2020, spit and bite guards will be issued to a wider range of police officers, including all local policing teams, all neighbourhood policing teams, tactical support groups, Roads Policing Unit, district support teams and C4 Special Operations.<sup>737</sup> The Chief Constable of the Police Service of NI, Simon Byrne, has stated that he “believes that an enhanced roll out to all operational officers fulfils his obligations under health and safety legislation which require... [the provision of] safe systems of work for all employees”.<sup>738</sup> The use of spit and bite guards by the Police Service of NI remains a temporary measure in response to the COVID-19 pandemic and is subject to a monthly review by the Chief Constable.<sup>739</sup> All police officers issued with a spit and bite guard must have completed the mandatory online training package. The Police Service of NI is also issuing a revised policy and guidance document on the use of spit and bite guards in NI and plans to continue to keep this a live document.<sup>740</sup>

Spit and bite guards can be used on children aged 10 years old and upwards, in line with the current age of criminal responsibility in NI.<sup>741</sup> The policy includes requirements to consider the best interests of the child as a primary concern when deciding whether to use a spit and bite guard on children. It also states “where officers or staff are already aware that a member of the public is vulnerable by way of age (under 18), mental health or other debilitating condition, which the use of a spit and bite guards could exacerbate, the presumption will be that a spit and bite guard should not be used”.<sup>742</sup> In its meeting with the Police Service of NI on spit and bite guards, the Commission raised concerns about using them beyond the pandemic and the use of spit and bite guards on children in any circumstances alongside the need to ensure spit and bite guards were a last resort and only used where they did not cause harm.

Between 16 March 2020 and 17 February 2021, spit and bite guards were applied to 95 individuals. 87 of these individuals were adults, while 8 were children under the age of 18.<sup>743</sup> Of the 95 deployments of spit and

736 Policing Board NI, 'Report on the Thematic Review of the Policing Response to COVID-19' (PBNI, 2020), at 12.

737 Correspondence from Police Service of NI to NI Human Rights Commission, 23 November 2020.

738 Ibid.

739 Ibid.

740 Ibid.

741 Ibid.

742 Ibid.

743 Police Service of NI, 'Equality Impact Assessment on the Use of Spit and Bite Guards', (PSNI, 2021), at 11.

bite guards, 84 were applied to males and 11 to females.<sup>744</sup> Between 16 March 2020 and 31 December 2020, spit and bite guards were deployed on 84 individuals, 68 of these deployments involved an individual with a disability.<sup>745</sup>

In March 2021, the Police Service of NI consulted on their Equality Impact Assessment on the use of spit and bite guards. The Police Service of NI identified that the Section 75 groups the use of spit and bite guards are most likely to have a differential or adverse impact on are men, children and young people and people with disabilities.<sup>746</sup> Amnesty International criticised the Police Service of NI for their disproportionate use of spit and bite guards on people with disabilities, noting:

*It is disturbing that in more than eight out of ten incidents, the PSNI has used spit hoods on people with disabilities.*<sup>747</sup>

The Children's Law Centre identified its concerns regarding the use of spit and bite guards on children, stating:

*Their use on children is even more concerning given that children who come in contact with police are more likely to have a disability, mental ill-health or a learning disability. A police officer using a spit hood on a child cannot know if a child has a learning disability or suffers from asthma.*<sup>748</sup>

In May 2021, the Commission responded to the Police Service of NI's consultation on spit and bite guards, echoing the recommendation from the Policing Board NI that spit and bite guards should be withdrawn from use and recommended that they should never be applied to children under the age of 18.<sup>749</sup> In the event that spit and bite guards are not withdrawn by the Police Service of NI, the Commission also made recommendations to improve data collection on their use and mitigate the impact of their use on the Section 75 groups identified in the Equality Impact Assessment.<sup>750</sup>

In October 2021, the Police Ombudsman for NI published its six month review into the use of Spit and Bite guards by the Police Service of NI. The review identified that the Police Ombudsman had made fourteen police recommendations to the Police Service of NI on the use of Spite and Bite guards, noting that they had been well received.<sup>751</sup> Recommendation 8 noted the Police Ombudsman's concerns surrounding the use of Spit and Bite guards on children and other vulnerable persons, noting that two of the last three deployments of guards on children had been on 14 year olds,

744 Ibid, at 12.

745 Ibid, at 37.

746 Police Service of NI, 'Equality Impact Assessment on the Use of Spit and Bite Guards', (PSNI, 2021), at 36.

747 Amnesty International UK, 'Northern Ireland: Chief Constable criticised for Spit Hoods roll out in defiance of Policing Board'.

748 Ibid.

749 NI Human Rights Commission, 'Submission to the Police Service of Northern Ireland's Consultation on its Equality Impact Assessment on the Use of Spit and Bite Guards', (NIHRC, 2021), at para 12.

750 Ibid, at para 3.

751 Police Ombudsman for Northern Ireland, 'The Police Ombudsman's Review of the Deployment of Spit and Bite Guards by the Police Service of Northern Ireland', (PONI, 2021), at 30.

“therefore, it could no longer be said that the deployments have been at the upper definition of a ‘child’”.<sup>752</sup>

In October 2021, the Police Service of NI gave an update on the progress of the Equality Impact Assessment, noting that the decision was made to maintain the status quo in terms of deployment of Spit and Bite guards. The Police Service of NI additionally identified that they were implementing policy and training changes based on the submission to the consultation on Spit and Bite guards, as well as recommendations made in the Police Ombudsman’s review.<sup>753</sup> In November 2021, the Police Service of NI acknowledged that they had delayed the final decision on the use of Spit and Bite guards and the publication of the Equality Impact Assessment in light of the NI Policing Board’s decision to commission a thematic review of Spit and Bite Guards, due for publication in early 2022.<sup>754</sup>

### Recommendations

The Commission remains concerned at the use of spit and bite guards. The Commission considers that the use of spit and bite guards has not yet been objectively justified and may be disproportionate to the need identified. In those circumstances, the Commission recommends that, instead of spit and bite guards, the Police Service of NI equip officers with good quality appropriate Personal Protective Equipment.

In the event that the Police Service of NI decide to continue to authorise and use guards, that decision should be supported by objective evidence of pressing need (i.e., that identifies an operational capability gap), which is reported to the NI Policing Board. In the event that a real risk to officers is established and a capability gap is evidenced, the decision to issue must be justified in accordance with human rights standards and proportionate.

In relation to individual decisions to use spit and bite guards, each use must be in accordance with human rights standards (including the ECHR and UNCRC). Each use must only be as a last resort, when all other options have been exhausted. Any use of such force should be guided by the principles of proportionality and absolute necessity. As soon as the pressing need diminishes, spit and bite guards should be withdrawn. Any decision to continue to use should be subject to a full Human Rights Impact Assessment and Equality Impact Assessment.

The Commission further recommends that spit and bite guards should only be issued to officers who have been trained, including in the risk to physical and mental health of their use. As soon as the risk has diminished, the guard must be immediately removed. A person should never be left alone while wearing a guard. Any indication of medical distress should be followed by a medical examination.

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752 Ibid, at 37.

753 Email correspondence from the Police Service of NI to NI Human Rights Commission, 11 October 2021.

754 Email correspondence from Police Service of NI to NI Human Rights Commission, 19 November 2021.

## Strip searches

In 2016, the NI High Court granted an order of certiorari quashing the policy of the NI Prison Service by which forced strip search procedures

are recorded on a video camera and then retained for a period of six years. The NI High Court found that “a search involving the removal of clothing engages Article 8 ECHR. Nakedness is inherently private and forcing it upon someone cannot but engage one’s right to privacy”.<sup>755</sup> The NI High Court found that the policy of video recording full searches of prisoners was a “manifestly insufficient” basis for interfering with Article 8 ECHR in this case.<sup>756</sup>

In 2017, video recording of full searches of prisoners was suspended. However, the NI Prison Service continues to believe that video recording of full searches helps to safeguard prisoners and prison staff and is considering options that may be available to reintroduce this practice in a way that is in line with Article 8 ECHR.

In terms of alternatives, the NI Prison Service has conducted an unsuccessful trial of a millimetre wave scanning equipment. The NI Prison Service has continued to examine the potential for search technologies to be used in prison establishments. On this basis the NI Prison Service has made an application to the Justification Application Centre in the Department for Business, Energy and Industrial Strategy under The Justification of Practices Involving Ionised Radiation Regulations 2004 (amended) for consideration.<sup>757</sup> The purpose of this application is to secure the necessary approvals to procure, install, deploy and operate X-Ray Body Scanners within NI Prison Service establishments to enhance existing search arrangements for prisoners, specifically with regards to the detection of illicit or unauthorised articles concealed inside the body. The NI Prison Service has advised that at present these articles are difficult to detect using the technology or procedures currently available to the NI Prison Service and present a significant risk to the health and wellbeing of prisoners, and to the safety, security and good order of prisons.<sup>758</sup>

### **Recommendation**

The Commission continues to call on the NI Prison Service and the Department of Justice to develop and implement less intrusive methods of searching persons than conducting strip searches, recorded or otherwise.

## Victims’ payments

The Victims’ Payment Board was established pursuant to the Victims’ Payment Regulations 2020<sup>759</sup> and determines applications under the

<sup>755</sup> *Flannigan’s Application* [2016] NIQB 27, at para 44.

<sup>756</sup> *Ibid.*, at para 48.

<sup>757</sup> Email correspondence from NI Prison Service to NI Human Rights Commission, 12 October 2021.

<sup>758</sup> *Ibid.*

<sup>759</sup> Regulation 3, Victims’ Payments Regulations 2020.

Troubles Permanent Disablement Payment Scheme. The purpose of the scheme is to acknowledge the harm suffered by those injured in the Troubles and promote reconciliation between people in connection with NI's past.<sup>760</sup> The scheme provides for payments to be made to, or in respect of, a person who has sustained an injury as a result of a Troubles-related incident.<sup>761</sup> To be eligible, the Troubles-related incident must have taken place on or after 1 January 1966 but before 12 April 2010 and caused a permanent injury.<sup>762</sup>

In June 2020, the (then) Commissioner for Victims and Survivors, Judith Thompson, penned an open letter to Prime Minister Boris Johnson and NI Executive demanding a resolution.<sup>763</sup> Minister of State for NI, Robin Walker MP, made it clear that in the UK Government's view "all costs for this scheme, including ongoing costs, should be funded by the NI Executive. It is a devolved matter and devolved matters are typically funded by the block grant".<sup>764</sup>

On 14 August 2020, the Secretary of State for NI, Brandon Lewis MP, issued guidance for the Victims' Payments Board. This guidance aims to support the independent Board when making decisions about applicants who have serious convictions or in other exceptional circumstances with regard to material evidence.<sup>765</sup> The Board is to make a decision on a case-by-case basis and can only decide that victims' payments are inappropriate if the person has a relevant conviction or if there are exceptional circumstances. The guidance provides that the Board can decide that payments are inappropriate due to a range of factors, including the harm caused to someone else by the offence for which the applicant has a relevant conviction for, the specific nature of the offence and length of sentence, the age at the time of offence, or the passage of time since that offence and the individual's behaviour since. However, the Secretary of State for NI has been clear that those injured at their own hand are excluded. The Secretary of State for NI also stated that in the UK Government's view:

*it is not appropriate for payments to be made to people who have a serious conviction for an offence that caused serious harm to others. Nor is it appropriate for payments to be made to people who have a recent conviction for a terrorist related offence, whether the offence is serious or not. In the unlikely event that the Board decides to award payments in such cases, despite this guidance being engaged, the [UK] Government will reserve the ability to exercise a power of intervention.*<sup>766</sup>

760 Regulation 5(6), Victims' Payments Regulations 2020.

761 Section 10, Northern Ireland (Executive Formation, etc) Act 2019.

762 Regulation 5(1)(d), Victims' Payments Regulations 2020.

763 Commissioner for Victims and Survivors, 'Press Release: Open Letter to Political Representatives from the Commissioner and Victims and Survivors Forum following evidence to the NI Affairs Committee', 24 June 2020.

764 UK Parliament Hansard, 'Response to Written Question: Terrorism - NI - Robin Walker MP - 64964', 30 June 2020.

765 NI Office, 'Guidance on Decision-making for the Victims' Payments Scheme' (NIO, 2020).

766 NI Office, 'Press Release: Secretary of State issues Victims' Payments Guidance', 14 August 2020.

On 21 August 2020, in a case challenging the delay in implementing the Victims' Payments Scheme, the NI High Court ruled that:

*the actions of the Executive Office in deliberately refusing to designate a Department and thus stymieing the implementation of the scheme in order to pressurise the Secretary of State for NI to make a different scheme which will be substantially directly funded by Westminster and which will have very different entitlement rules constitutes unlawful action on the part of the Executive Office.*<sup>767</sup>

On 24 August 2020, the Department of Justice was designated to administer the Victims' Payments Scheme. The Minister of Justice, Naomi Long MLA, confirmed that the Department of Justice is committed to "taking the scheme forward as quickly as possible".<sup>768</sup> The Department of Finance has committed £2.5 million for the establishment and initial operation of the Victims' Payments Scheme, but the Minister of Justice estimates that overall the scheme may cost up to £800 million.<sup>769</sup> It remains unclear as to where the required funding will come from. As the Minister of Justice has highlighted:

*notwithstanding the judgment, it is clear that there remains a lack of political agreement over aspects of the scheme and, in particular, there is an urgent need to resolve the source of funding for the payments. I am absolutely clear that the UK Government has a critical role to play in this regard and am committed to working with the Secretary of State, Treasury and Executive Colleagues to ensure that the necessary funding is in place to support delivery of this important scheme for victims.*<sup>770</sup>

In October 2020, work continued by the Department of Justice to open the scheme to applications in early March 2021. This includes the development of an IT system, the deployment and training of staff for administrative preparations, the development of a medical assessment process and the appointment of the Victims' Payments Board. The Minister of Justice has stressed that "not all of those issues fall within the direct control of the Department of Justice" and that the ability for the scheme to open is "subject to funding".<sup>771</sup>

The Minister of Justice confirmed that it will be a matter for the independent Board as to when the applications will be processed and first payments are made, but that "every effort will be made to ensure that the scheme can open for applications at the earliest opportunity and that payments are advanced as quickly as possible".<sup>772</sup>

767 *Re McNern* [2020] NIQB 57, at para 30(b).

768 Department of Justice, 'Press Release: Long welcomes designation of Department of Justice to administer Victims' Payments Scheme', 24 August 2020.

769 *Re McNern* [2020] NIQB 57, at para 32; 'Executive Office ordered to pay pension court costs', *BBC News*, 28 August 2020.

770 Department of Justice, 'Press Release: Long welcomes designation of Department of Justice to administer Victims' Payments Scheme', 24 August 2020.

771 NI Assembly Hansard, 'Oral Question: Victims' Payments Scheme - Sinead Bradley MLA - AQO 567/17-22', 7 September 2020; NI Assembly Hansard, 'Oral Question: Victims' Payments Scheme - Gary Middleton MLA - AQO 571/17-22', 7 September 2020; NI Assembly Hansard, 'Oral Question: Victims' Payments Scheme - Rosemary Barton MLA - AQO 572/17-22', 7 September 2020; NI Assembly Hansard, 'Oral Question: Victims' Payments Scheme - Alan Chambers MLA - AQO 574/17-22', 7 September 2020; NI Assembly Hansard, 'Response to Written Question - Victims' Payments Scheme - Naomi Long MLA - AQO 839/17-22', 6 October 2020.

772 *Ibid.*



The Minister of Justice highlighted that:

*I am concerned, however... that the Secretary of State [for NI] suggested that he would reserve the power to intervene in some decisions made by the Victims' Payment Board. It is critical that the Board is not subject to any external interference and that it can carry out its work independently. Any external intervention has the potential to undermine the operation of the Board and those arrangements are clearly set out in Regulations.<sup>773</sup>*

In August 2020, the Secretary of State for NI issued guidance to support the Board in decisions regarding applicants with serious convictions or where there are exceptional circumstances which make it inappropriate for a payment.<sup>774</sup>

In February 2021, after a legal challenge regarding the delay in implementing the scheme the Court of Appeal held that the Executive Office was under a legal duty to fund victims' payments and lump sums under the Victims Payments Regulations 2020 and gave the parties four weeks to find an agreed solution.<sup>775</sup>

On 8 March 2021, the former First Minister, Arlene Foster stated:

*Let me first say that the deputy First Minister and I remain entirely committed to delivering the scheme, which aims to go some way to acknowledging the suffering and trauma of victims and survivors who are living with significant disabilities. The recent court ruling has made it clear that there is a legal duty for victims' payments to be made, and it is important that we emphasise that to victims and survivors and the organisations that represent them. However, the important issue of the funding pressure on the block grant arising from the scheme remains to be resolved.<sup>776</sup>*

On 27 April 2021, Mr Justice McAlinden, President of the Victims' Payments Board, announced his intention to open the Troubles Permanent Disablement Payment Scheme for applications from 30 June 2021. He stated that:

*"The many victims deserve the recognition and payments to which they are entitled. The recent Court of Appeal decisions made it clear that the Executive Office was under a legal duty to make these payments and I am encouraged of the work carried out to ensure the full implementation of the scheme which the legislation envisages."<sup>777</sup>*

On 31 August 2021, the scheme opened to applications. Mr Justice McAlinden stated:

*It is a novel scheme and a key principle is to be responsive to the needs of victims. The Victims' Payments Board aims to ensure the*

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773 NI Assembly Hansard, 'Response to Written Question - Victims' Payments Scheme - Naomi Long MLA - AQO 839/17-22', 6 October 2020.

774 NI Office, 'Guidance on decision making for the Victims' Payment Scheme', (NIO, 2020).

775 *Re Brian Turley (Victims Payments)* [2021] NICA 10.

776 NI Assembly Hansard, NI Assembly: Victims' Payment Scheme: Update - Arlene Foster - Volume 136, No 6, 8 March 2021.

777 Judicial Communications Office, 'Press Release: Troubles Permanent Disablement Scheme to Open on 30 June', 27 April 2021.

*victims and survivors who have been waiting so long for the opening of the scheme are provided with the recognition they deserve.*<sup>778</sup>

### **Recommendations**

The Commission recommends that The Executive Office ensures the Victim Payment Scheme is provided with the appropriate funding and that the independence of the Victims' Payments Board is guaranteed.

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778 Victims' Payment Board, 'Press Release: Troubles Permanent Disablement Scheme Opens for Applications', 31 August 2021.

## Freedom from Slavery

In considering the right to be free from slavery, this section examines child, early and forced marriage; child sexual exploitation; children missing from care; and modern slavery and human trafficking.

The prohibition on slavery is found under the following treaties:

<b>ECHR</b>	Article 4
<b>UN CRC</b>	Article 34 Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography
<b>UN ICCPR</b>	Article 8
<b>Ireland/NI Protocol to the UK-EU Withdrawal Agreement</b>	Article 2

### Child, early and forced marriage

Reflecting its General Comments No 4<sup>779</sup> and 20<sup>780</sup>, in May 2016 the UN CRC Committee recommended that the UK Government and the NI Executive raise the minimum age of marriage to 18 years.<sup>781</sup> In 2019, the UN CEDAW Committee<sup>782</sup> and UN CAT Committee emphasised the need for the UK Government and the NI Executive to strengthen efforts and effectiveness in combating forced marriage, including preventative and protection measures.<sup>783</sup>

The Marriage (NI) Order 2003, which is a responsibility of the Department of Finance, permits the marriage of a child aged 16 or 17 years with the consent of their parents or legal guardians or the courts.

In 2018, there were 35 girls married in NI which increased to 54 girls in 2019.<sup>784</sup> There were 14 boys married in both 2018 and 2019.<sup>785</sup> In 2020, there were 24 girls and seven boys married in NI, these decreases are primarily attributed to the COVID-19 pandemic and associated lockdown restrictions.<sup>786</sup>

The Home Office has implemented a number of UK-wide measures for tackling forced marriage, including awareness raising campaigns.<sup>787</sup>

779 CRC/GC/2003/4, 'UN CRC Committee General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child', 1 July 2003.

780 CRC/C/GC/20, 'UN CRC Committee General Comment No 20: Implementation of the Rights of the Child during Adolescence', 6 December 2016.

781 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 19.

782 CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 14 March 2019, at para 59(b).

783 CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019, at para 57(f).

784 Statistics provided to NI Human Rights Commission by NI Statistics and Research Agency, 8 November 2019.

785 Statistics provided to NI Human Rights Commission by NI Statistics and Research Agency, 17 August 2020.

786 Statistics provided to NI Human Rights Commission by NI Statistics and Research Agency, 2 July 2021.

787 Home Office, 'Press Release: What the Government is doing to tackle forced marriage', 24 May 2019.

In November 2020, Pauline Latham MP introduced a Bill to the House of Commons to revoke parental or judicial consent which permits the marriage or civil partnership of a child and to criminalise child marriage or civil partnership under the age of 18.<sup>788</sup> However, the Bill failed to complete its passage through Parliament before the end of the session and has made no further progress.

In June 2021, after campaigners warned that children are increasingly being coerced into child marriage in England and Wales, the Ministry of Justice committed to raising the minimum legal age to 18 “as soon as legislative opportunity arises”.<sup>789</sup> It intends to consult with the Home Office on whether a new criminal offence is needed or whether the existing law on forced marriage could be amended.

In July 2021, the Commission wrote to the Minister of Finance to welcome the UK Government’s commitment to raise the minimum legal age of marriage to 18 in England and Wales and to seek an update from the Department of Finance regarding any plans to introduce similar legislation in NI.<sup>790</sup>

In November 2021, the Department of Finance launched a public consultation on changes to local marriage law.<sup>791</sup> As part of this consultation, the Department is seeking views on raising the minimum age at which people can legally marry or enter into a civil partnership: the consultation asks respondents to consider whether the minimum age should be raised to 18 from the current minimum age of 16 with parental consent, and whether child marriage creates a greater risk of forced marriage or any threat to life chances, particularly for girls. The Department noted that there have been recent calls from the UN Committee on the Rights of the Child to raise the age to 18 in jurisdictions which currently allow child marriage.<sup>792</sup>

## Recommendations

The Commission recommends that the Department of Finance introduce legislation repealing all legal provisions permitting the marriage of children in NI and increase the minimum age for marriage to 18 years, for both girls and boys.

The Commission further recommends that efforts to combat forced marriage are strengthened, including by sensitising parents on the need for full and free consent of their daughter or son, to her or his marriage.

788 House of Commons, Session 2019-21, Parliamentary Bills: Marriage and Civil Partnership (Minimum Age) (No.2) Bill, 16 November 2020.

789 Hannah Summers, ‘Government pledges to raise legal age of marriage to 18 in England and Wales’ Guardian News, 11 June 2021.

790 Correspondence from the NI Human Rights Commission to Department of Finance, 5 July 2021.

791 Department of Finance, ‘Belief Marriage and Minimum Age for Marriage or Civil Partnership – a public consultation’, November 2021.

792 Department of Finance, ‘Press Release: Consultation launched on changes to Marriage Law’, 15 November 2021.

## Children missing from care

In 2016, the UN CRC Committee expressed concerns about the practice of children in NI being placed in secure accommodation and recommended that the NI Executive:

*ensure that secure accommodation in NI is only used as a measure of last resort and for the shortest possible period of time, address the reasons for repeated or lengthy stays in such accommodation and develop alternatives to secure accommodation.*<sup>793</sup>

### Statistics

In 2019/2020, the Police Service of NI received 5,723 reports of children going missing in NI, which involved 1,562 individual children.<sup>794</sup> Of these, there were 2,300 missing persons reports (40 per cent) from Residential Children's Homes, relating to 205 individual children.<sup>795</sup> Compared to 2018/2019, this is 90 more missing person reports from Residential Children's Homes (previously 2,210) with the number of individual children reported going missing increasing by four per cent (from 201 children).<sup>796</sup> In 2019/2020, 16 children were reported missing from Residential Children's Homes 41 or more times, with the most frequent missing young person being reported 91 times.<sup>797</sup> This is an increase from 2018/2019 when 12 of the children that went missing from Residential Children's Homes were reported as such more than 50 times, with the most frequent missing young person being reported 63 times.<sup>798</sup> Local police officers have previously expressed concerns regarding a 'revolving door' effect where a young person is returned to residential care, after which they subsequently abscond again. It has been noted that there is a "particular link" between children going missing from care and child sexual exploitation.<sup>799</sup>

In 2020/21, the Police Service of NI received 4,732 reports of children going missing in NI, which involved 1,213 individual children.<sup>800</sup> Of these, there were 2,321 missing persons reports (49 per cent) from Residential Children's Homes, relating to 182 individuals.

### Multi Agency Work

Article 44 of the Children (NI) Order 1995 provides the circumstances under which a child can be placed in secure accommodation, including where they are likely to abscond and likely to suffer significant harm if they do abscond. However, reports have suggested that the use of secure accommodation does not deal with the underlying issue in respect of

793 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016.

794 Email from Police Service of NI to NI Human Rights Commission, 4 January 2021.

795 Email from Police Service of NI to NI Human Rights Commission, 14 October 2020.

796 Email from Police Service of NI to NI Human Rights Commission, 21 August 2020.

797 Email correspondence from Police Service of NI to NI Human Rights Commission, 14 October 2020.

798 Email from Police Service of NI to NI Human Rights Commission, 21 August 2020.

799 Safeguarding Board for NI, 'Getting Focused and Staying Focused, Looked After Children, Going Missing, and Child Sexual Exploitation, A Thematic Review' (QUB, 2015), at 25.

800 Email from Police Service of NI to NI Human Rights Commission, 16 June 2021.

going missing from care and that there is also a problem with accessing secure accommodation when it is needed.

The Commission continues to engage with the Police Service of NI and Health and Social Care Board NI on this issue to keep informed of developments. The Police Service of NI has work ongoing to identify and engage with the most frequent missing children. On a monthly basis, data is gathered for children who have been reported missing three or more times (in a rolling six months) and further information is added in terms of involvement as a victim or suspect in certain crime types. This information is sent to the local policing district to ensure a focus of engagement, prevention and early interaction.<sup>801</sup>

COVID-19 significantly impacted on children's homes where the focus was on keeping young people and staff safe and ensuring that these critical services could be maintained and remain operational. Supporting young people in children's homes to adhere to restrictions required significant negotiation, in-house diversion and collaborative working across the sector.<sup>802</sup> The joint Health Social Care Board and Police Service of NI Strategic Action Plan on Missing Children has been reviewed jointly by the agencies and provides a more focused delivery plan with a renewed joint approach to progressing delivery against agreed timescales.<sup>803</sup>

Work continues on the development of an NI Framework for Integrated Therapeutic Care. In June 2021, five Implementation Leads were appointed in each Trust area who will undertake initial preparatory work with a view to implementation commencing with an initial focus on residential care from January 2022.<sup>804</sup> Once implemented, the NI Framework for Integrated Therapeutic Care will aim to strengthen individual personal development and therapeutic plans for each child or young person. It will adopt a trauma informed and attachment-based practice to assessment, formulation and intervention, to better support collaborative working with young people and their support network. The framework is intended to extend its reach to provide continuity of intervention to young people transitioning from care and into post care life, and better prepare young people for transitions and beyond.<sup>805</sup>

The Police Service of NI and Health and Social Care representatives are engaging across NI, however, there is not yet consistency across all areas. Work is ongoing to establish the type and frequency of interface engagement and an agreement will be made regarding attendance and frequency of meetings in due course. The Police Service NI has issued via email, updated operational guidance on missing persons, which is emphasised in student officer training. There are plans to extend this training to qualified district officers. The Police Service of NI also has plans to expand disaggregation of available data to include smaller age brackets (for example 18-21 years old or 21-25 years old) and extend to statistics on drug use, missing persons, violent crime and sexual

801 Email from Police Service of NI to NI Human Rights Commission, 14 October 2020.

802 Email from Department of Health to NI Human Rights Commission, 5 October 2021.

803 Ibid.

804 Ibid.

805 Ibid.



exploitation. Data that is currently disseminated to local districts includes children who have repeatedly gone missing three or more times in a six month period with additional information, including reference to any involvement in violent crime, sexual crime or drugs.

Consideration has previously been given to including developing a contractual agreement between older children and the children's home as an example of an effective way of working within the pending regional guidance on missing children. Such agreements aim to provide the young person with an element of autonomy and teach them about responsibility, in preparation for the transition from children's homes into independent living. However, this has not been progressed as a separate or specific arrangement. Rather, the young person's pathway plan is used as the primary vehicle to address and plan for young people's transitions from a care placement into suitable appropriate living arrangements in the community. The pathway plan is based on assessed needs and risks and informs the support arrangements during and post transition.<sup>806</sup>

A Protocol on Children Missing from Home and Care continues to be developed, with timescales in place for formal consultation in late autumn, and a completion date of no later than March 2022.<sup>807</sup> Implementation will coincide with a programme involving awareness raising and training. An additional evaluative piece has been completed by Queen's University Belfast analysing the views of young people, staff and Police Service of NI on being missing, what it means and how best to respond to this issue. The findings of this research will be taken into account within the revised regional guidance on missing children and incorporated into joint Police Service of NI and Health and Social Care Trust training on this issue.

## Strategy

In November 2020, the Commission submitted its concerns to the UN CRC Committee highlighting that, while the Police Service of NI and the Health and Social Care Board are taking proactive steps to address these issues, the statistics and lack of clear commitments from the Executive on tackling the issue of children reported missing from care remain a concern.<sup>808</sup>

In February 2021, the Department of Health and the Department of Education published the new joint strategy 'A Life Deserved: "Caring" for Children and Young People in Northern Ireland'.<sup>809</sup> The strategy outlines a number of commitments which intend to strengthen the response to children who go missing from care, including the introduction of legislation to extend permanence options and strengthen care planning. Further commitments are given to expanding alternative placement options for looked after children.<sup>810</sup>

806 Email from Department of Health to NI Human Rights Commission, 5 October 2021.

807 Ibid.

808 NIHRC, Submission to the UN Committee on the Rights of the Child 88th Session on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland on compliance with the UN Convention on the Rights of the Child, November 2021.

809 Department of Health and Department of Education, 'A Life Deserved: "Caring" for Children & Young People in Northern Ireland', February 2021.

810 Ibid, at p.37.

## Facilities

The strategy commits to the establishment of a Regional Joint Care and Justice Campus, which would encompass the existing Regional Secure Care Centre and the Juvenile Justice Centre.<sup>811</sup> This proposal was consulted on in 2021. The Commission welcomed plans to ensure that being accommodated within the campus is a last resort and that effective steps are in place to avoid repeat admissions, as required by Article 37(b) UN CRC and Article 5 ECHR.<sup>812</sup> These steps include developing discharge plans, which are unique to the individual child and subject to review; introducing satellite step-down facilities; deciding on where a child is placed is based on an assessment of their individual needs; and ensuring to consider alternative options.

The Department of Health has since advised that, “providing suitably resourced alternatives to secure accommodation or support to young people on discharge will be subject to available resources”.<sup>813</sup> However, it is anticipated that an integrated Secure Care Centre will provide an opportunity to redirect some of the costs currently associated with the running of two centres to community-based provision. Nevertheless, plans to develop a step-down unit on the site of the Secure Care Centre will proceed as part of the overall Campus provision.<sup>814</sup> Further consideration will be given to more locally based step-down provision with HSC Trusts, to help support children and young people as close to their home and families as possible.

### Recommendation

The Commission remains concerned at the number of children reported as having gone missing from care. The Commission recommends that the relevant departments, led by the Department of Health, take immediate action to determine what steps need to be taken to protect children and thereafter monitor the effectiveness of protective measures.

### Child sexual exploitation

Between 2014 and 2019, the UN CRC Committee and UN CEDAW Committee have repeatedly raised the need to shift the burden of proof from the prosecution to the perpetrator in legislation governing specific sexual offences.<sup>815</sup> In particular:

*the Sexual Offences (NI) Order 2008, for certain grave offences of sexual exploitation of children between 13 and 16 years of age, such*

811 Department of Health and Department of Justice, Consultation on Establishment of a Regional Care and Justice Campus, (DoH and DoJ, 2020).

812 Letter from NI Human Rights Commission to Department of Health, 27 January 2021.

813 Department of Health and Department of Justice, ‘Establishment of a Regional Care and Justice Campus: Consultation Analysis’, (DoH, 2021).

814 Ibid.

815 CRC/C/OPSC/GBR/CO/1, ‘UN CRC Committee Concluding Observations on the Report Submitted by the UK of Great Britain and NI under Article 12, Paragraph 1, of the Optional Protocol to the UN CRC on the Sale of Children, Child Prostitution and Child Pornography’, 8 July 2014, at para 29; CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI’, 14 March 2019, at para 35(g).

*as meeting a child following sexual grooming, engaging in sexual activity with a child, arranging or facilitating a child sex offence, the defendant may claim that he/she believed the victim to be above 16 years.*<sup>816</sup>

In June 2018, the UK ratified the CoE Convention on the Protection of Children and Young People against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention). This imposes obligations on the UK Government and NI Executive to undertake preventative measures to combat child sexual exploitation and to take additional steps to raise awareness of the issue amongst children and those who work with children.

In Protocol Article 2, the UK Government commits to ensuring there is no diminution of the rights, safeguards and equality of opportunity protections contained in that chapter of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU, including the right of victims “to remember as well as contribute to a changed society”.<sup>817</sup> EU obligations underpinning the rights of child victims of sexual exploitation and abuse include the Directive on combatting sexual abuse and sexual exploitation of children<sup>818</sup> as well as other relevant EU laws which support victims.<sup>819</sup>

The Directive on combatting sexual abuse and sexual exploitation of children sets out a number of provisions which are aimed at setting out minimum rules in relation to criminal offences and tariffs in the areas of sexual abuse and exploitation of children, including effective, proportionate and dissuasive penalties. In addition, the Directive recognises that the best interests of the child is a primary consideration for child victims, in line with the EU Charter of Fundamental Rights and UN CRC. It also recognises the need for enhanced protections for victims, including, in recognition of the harm caused by these offences, assistance should be provided for as long as necessary for the child’s physical and psychological recovery, including into adulthood.

An Independent Inquiry into Child Sexual Exploitation in NI was initiated by the Ministers for Health, Justice and Education and its report was published in November 2014.<sup>820</sup> The recommendations address the need for legislative reform in a number of areas, including addressing a gap in protection under the Sexual Offences (NI) Order 2008.<sup>821</sup>

In June 2020, the Criminal Justice Inspection NI published its inspection report on child sexual exploitation, which considers the frontline response

816 CRC/C/OPSC/GBR/CO/1, ‘UN Committee on the Rights of the Child, Concluding Observations on the Report Submitted by the UK of Great Britain and NI under Article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography’, 8 July 2014, at para 27.

817 Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

818 Directive 2011/92/EU, ‘Parliament and Council Directive on combating the sexual abuse and sexual exploitation of children and child pornography’, 13 December 2011.

819 Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012; Directive 2011/36/EU ‘Council Directive on preventing and combating trafficking in human beings and protecting its victims’, 5 April 2011; Directive 2004/80/EC, ‘Council Directive relating to the compensation to crime victims’, 29 April 2004.

820 Kathleen Marshall, ‘Child Sexual Exploitation in NI Report of the Independent Inquiry’ (RQIA, 2014), at 149.

821 Ibid, at Recommendation 14.

and investigation of child sexual exploitation.<sup>822</sup> This report noted concern “that little was known about the perpetrators of child sexual exploitation and the criminal justice system was urged to develop its response in this respect”.<sup>823</sup> It found that:

*a review of a sample of files held by the Public Prosecution Service NI showed that where the Police Service of NI had passed files to prosecutors, evidence of case building and identification of factors pertinent to child sexual exploitation was at times good. However, the Public Prosecution Service NI needed to better support prosecutors to reflect how factors related to exploitation and grooming had been weighted in decisions. Myths and stereotypes including about children having ‘demonstrated affection’ required to be addressed in the planning of cases. Public Prosecution Service NI staff instructions specific to child sexual abuse and exploitation were needed.*<sup>824</sup>

It also found that “where cases did progress to court, support for children was required”.<sup>825</sup> It noted positive steps such as the National Society for the Prevention of Cruelty to Children Young Witness Service and Victim Support NI’s pilot Children’s Independent Sexual Violence Advocate service but highlighted that consideration should be given to the Gillen Review recommendations.<sup>826</sup> Also, that:

*within the Public Prosecution Service NI and the NI Courts and Tribunals Service, a tailored child safeguarding procedure to enhance internal governance and direction on this, including the considerations that the Equal Treatment Bench Book outlined, would be of benefit.*<sup>827</sup>

The Barnahus (children’s house) model was proposed as the preferred approach.<sup>828</sup>

In October 2020, following a consultation on proposals aimed at implementing the Independent Inquiry into Child Sexual Exploitation in NI’s recommendations,<sup>829</sup> the Minister of Justice, Naomi Long MLA, committed to legislative amendments. These focus on introducing provisions that remove terms such as ‘child prostitution’ from current legislation, legislate against adults masquerading as children online, and include live streaming in relevant sexual offences. These changes were to be included within the Justice (Miscellaneous) Provisions Bill which was due to be introduced to the NI Assembly in 2021.<sup>830</sup>

In March 2021, the Minister of Justice announced plans to widen the current abuse of trust legislation in NI through an amendment to the

822 Criminal Justice Inspection NI, ‘Child Sexual Exploitation in NI: An Inspection of the Criminal Justice System’s Response’ (CJINI, 2020).

823 Ibid, at 80.

824 Ibid, at 8.

825 Ibid.

826 Ibid.

827 Ibid.

828 Ibid.

829 Meeting between Department of Justice and NI Human Rights Commission, 23 October 2018.

830 Department of Justice, ‘Press Release: Measures to strengthen laws protecting children from sexual exploitation to be taken forward’, 20 October 2020.

Justice (Miscellaneous) Provisions Bill.<sup>831</sup> Legislative provision for abuse of positions of trust within statutory settings, such as education and health care, is provided for in the Sexual Offences (Northern Ireland) Order 2008. The proposed changes would widen the scope of the offence to include non-statutory settings.

In July 2021, the Minister of Justice introduced a re-drafted Justice (Sexual Offences and Trafficking Victims) Bill to the Assembly which, although more narrowly scoped, contains provisions for child sexual exploitation.<sup>832</sup> The Minister also advised of a planned amendment to the Bill that widens the scope of the offence to include the abuse of trust in non-statutory settings.<sup>833</sup> The Commission submitted a response to the Call for Evidence in September 2021, highlighting the importance of implementing all recommendations of the Independent Inquiry and the Criminal Justice Inspection report, including developing an approach modelled on 'Barnahus'.<sup>834</sup> The Commission welcomed the proposal for a legislative amendment to include the abuse of trust in non-statutory settings and recommended that the Committee for Justice ensure any new legislation extends the definition to include a broad range of relationships of trust, not only those in state care, to ensure consistency with the Lanzarote Convention.

The Police, Crime, Courts and Sentencing Bill was introduced to UK Parliament on 9 March 2021 and includes tougher measures to protect children from abusive adults in positions of trust in England and Wales.<sup>835</sup> Section 45 of the Bill aims to extend existing 'position of trust' offences contained within Section 21 of the Sexual Offences Act 2003 to additionally cover roles in sports and religious settings. The age of consent for sexual activity in the UK is 16, however, this rises to 18 where one person in a position of trust is involved. The Bill is proceeding through the committee stage in the House of Lords which commenced on 20 October 2021.

## Recommendations

The Commission recommends the Department of Justice introduce legislation urgently to reverse the burden of proof in cases concerning children as victims of sexual offences.

The Commission recommends that specialised training for professionals and measures reflective of the Barnahus Model are adopted throughout the criminal justice system.

831 Department of Justice, 'Long announces plans to strengthen abuse of trust legislation' 23 March 2021.

832 Justice (Sexual Offences and Trafficking Victims) Bill, NIA Bill 29/17-22.

833 Correspondence to the Committee for Justice from the Department of Justice, 25 June 2021.

834 NI Human Rights Commission, 'Response to Committee for Justice Call for Evidence on the Justice (Sexual Offences and Trafficking Victims) Bill', September 2021.

835 House of Commons, 'Police, Crime, Sentencing and Courts Bill - Bill 005 2021/2022', 9 March 2021.

The Commission recommends the Committee for Justice ensure that any new legislation regarding the abuse of trust extends the definition outlined at Article 18 of the Lanzarote Convention to include other relationships of trust, to ensure it does not just apply to children in state care.

## Modern slavery and human trafficking

In 2019, the UN CEDAW Committee recommended that the UK Government and NI Executive:

- a) *Ensure that the definition of human trafficking in its domestic legislation is in line with the internationally agreed definition as set out in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organised Crime (the Palermo Protocol);*
- b) *Adopt a comprehensive national strategy to combat trafficking in women and girls, as previously recommended;*
- c) *Continue to improve the National Referral Mechanism, including by implementing the reform package announced in October 2017, to ensure that victims of trafficking are properly identified and adequately protected and supported.<sup>836</sup>*

The UN CEDAW Committee further recommended that the UK Government and NI Executive:

- a) *Take effective measures to ensure that women in vulnerable situations have effective access to employment opportunities, housing and social security so that they do not need to resort to prostitution or “sex for rent”;*
- b) *Take effective measures to reduce demand for commercial sex, including by carrying out educational and awareness-raising measures targeted at men and boys and focused on combating all notions of subordination and objectification of women;*
- c) *Revise legislation to decriminalise women in prostitution and clear the criminal records of women who have been convicted for offences related to prostitution to enable them to seek alternative forms of employment;*
- d) *Ensure the availability of specialist services, which are adequately funded, inclusive and accessible, to assist women and girls to exit prostitution;*
- e) *Create educational and employment opportunities for women who wish to exit prostitution;*

<sup>836</sup> CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 14 March 2019, at para 34.



- f) *Undertake research into the prevalence and nature of prostitution in Scotland and NI, in addition to the research that is currently underway in England and Wales, to identify necessary changes to legislation and policy.*<sup>837</sup>

In 2019, the UN CAT Committee recommended that the UK Government and NI Executive:

- a) *Enhance its efforts to investigate claims of human trafficking and prosecute perpetrators and ensure that victims of trafficking obtain compensation, including by considering creating a civil remedy for victims of trafficking;*
- b) *Ensure access to sufficient protection and support for all victims of trafficking, and particularly ensure that the State party's establishment of a child trafficking protection fund results in improving the availability of specialist care and support for child victims of trafficking;*
- c) *In October 2021, the CoE Group of Experts on Action Against Trafficking recommended that the UK take further steps to improve the identification of trafficking victims, to make sure victims receive legal and psychological assistance and to ensure that more traffickers are convicted.*<sup>838</sup>

In Protocol Article 2, the UK Government commits to ensuring there is no diminution of the rights, safeguards and equality of opportunity protections contained in that chapter of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU, including the right of victims “to remember as well as contribute to a changed society”.<sup>839</sup>

EU obligations underpinning the rights of victims of trafficking include the Trafficking Directive<sup>840</sup> as well as other relevant EU laws which support victims.<sup>841</sup> The EU Trafficking Directive sets out a number of provisions which are particularly aimed at criminalisation of trafficking offences,<sup>842</sup> non-prosecution and non-application of penalties to victims,<sup>843</sup> investigation and prosecution of offences<sup>844</sup> and supporting victims, including child victims, of trafficking.<sup>845</sup>

837 Ibid, at para 36.

838 CoE, 'Press Release: Human Trafficking: UK urged to better identify and assist victims, convict traffickers', 20 October 2021.

839 Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity - Human Rights.

840 Directive 2011/36/EU 'Council Directive on preventing and combating trafficking in human beings and protecting its victims', 5 April 2011.

841 Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012; Directive 2011/92/EU, 'Parliament and Council Directive on combating the sexual abuse and sexual exploitation of children and child pornography', 13 December 2011; Directive 2004/80/EC, 'Council Directive relating to the compensation to crime victims', 29 April 2004.

842 Articles 2-7, Council Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, 5 April 2011.

843 Article 8, Council Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, 5 April 2011.

844 Articles 9-10, Council Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, 5 April 2011.

845 Articles 11-17, Council Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, 5 April 2011.

## National Referral Mechanism

The National Referral Mechanism is a framework operated by the National Crime Agency for identifying victims of human trafficking or modern slavery and ensuring they receive the appropriate support. In 2020, 128 potential victims of human trafficking were identified in NI, an increase from 91 in 2019.<sup>846</sup> The figure of 128 included 20 child victims. However, in the last five years, there have been no charges brought regarding human trafficking offences relating to children.<sup>847</sup> The reasons for exploitation included for criminal activity, labour and sexual exploitation.<sup>848</sup> The actual number of people in NI affected by modern slavery is unknown, as it often goes unreported and undetected within the community.<sup>849</sup>

## Nationality and Borders Bill

In October 2021, the Commission submitted written evidence to the Joint Committee on Human Rights raising concerns about Part 4 of the Nationality and Borders Bill on modern slavery. The Commission advised that UK Government must ensure that any changes to retained EU law as regards NI that fall within scope of Protocol Article 2, including changes to the EU Trafficking Directive,<sup>850</sup> do not result in a diminution of the rights, safeguards and equality of opportunity in the relevant part of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU.

In November 2021, the UN Special Rapporteur on trafficking of persons, UN Special Rapporteur on human rights of migrants, the UN Special Rapporteur on contemporary forms of slavery and the UN Special Rapporteur on human rights in countering terrorism jointly wrote to the UK Government expressing concerns about the compliance of Nationality and Borders Bill with the UK's international obligations "to prevent trafficking in persons, and assist and protect all victims of trafficking, without discrimination, as well as on the potential impact on the human rights of victims of trafficking and of contemporary forms of slavery".<sup>851</sup>

## Policy Developments

In October 2020, the Criminal Justice Inspection NI published its report on how the criminal justice system deals with modern slavery and human trafficking in NI.<sup>852</sup> The report identified that further work is required to better understand the nature and scale of modern slavery and human trafficking in NI and for a more effective legislative and strategic response to be developed. Specifically, the report "recommended that the full

846 Home Office, 'Modern Slavery: National Referral Mechanism and Duty to Notify Statistics UK, End of Year Summary, 2020', (Home Office, 2021).

847 Andrew Madden, '128 potential human trafficking victims identified in NI last year', *Belfast Telegraph*, 13 May 2021.

848 Home Office, 'National Referral Mechanism Statistics UK - End of Year Summary 2019: Data Tables' (HO, 2020), at Table 18.

849 Potential upsurge in modern slavery in NI', *ITV News*, 18 October 2018.

850 Directive 2011/36/EU 'Council Directive on preventing and combating trafficking in human beings and protecting its victims', 5 April 2011.

851 Letter from the UN Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally; UN Special Rapporteur on the human rights of migrants, Felipe González Morales; UN Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Tomoya Obokata; and UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin to the UK Government, 5 November 2021.

852 Criminal Justice Inspection NI, 'Modern Slavery and Human Trafficking: An Inspection of How the Criminal Justice System Deals with Modern Slavery and Human Trafficking in NI' (CJINI, 2020).

range of enforcement powers available elsewhere in the UK need to be replicated in NI”.<sup>853</sup>

In May 2020, the NI Local Government Association published guidance on tackling modern slavery for local councils in NI.<sup>854</sup>

In September 2020, the Independent Anti-Slavery Commissioner, Dame Sara Thornton, published her annual report. Unlike the rest of the UK, Trafficking and Exploitation Risk Orders are not included within legislation in NI. The Anti-Slavery Commissioner has urged the Minister of Justice, Naomi Long MLA, to “reconsider their value as evidence of effective use in England and Wales and Scotland emerges”.<sup>855</sup>

In October 2020, the Independent Anti-Slavery Commissioner, Sara Thornton, the Minister of Justice, Naomi Long MLA, and the Chief Inspector of Criminal Justice in NI, Jacqui Durkin, all spoke at a meeting of the Commission’s Business and Human Rights Forum.

In January 2021, the Public Prosecution Service launched a consultation on its revised Policy for Prosecuting Cases of Modern Slavery and Human Trafficking.<sup>856</sup> The Commission submitted a response to the consultation.

In February 2021, the Department of Justice launched a consultation process on measures to eradicate modern slavery from the supply chains of public and commercial sector organisations.<sup>857</sup> The Commission supported the proposal to extend the requirement of public bodies to publish a modern slavery statement to NI.<sup>858</sup>

In September 2021, the Commission provided written evidence to the Committee for Justice on the Justice (Sexual Offences and Trafficking Victims) Bill advising that the Department continue to ensure there is no diminution of victims’ rights in line with Protocol Article 2.<sup>859</sup> The Commission provided oral evidence on the Bill to the Committee in November.

## Modern Slavery Strategy

The Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (NI) 2015 places a requirement on the Department of Justice to produce an annual strategy to address offences related to slavery, servitude and forced or compulsory labour and human trafficking. In 2019, the Modern Slavery Strategy 2019-2020 was published.<sup>860</sup>

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853 Ibid, at 4.

854 NI Local Government Association, ‘Tackling Modern Slavery: Guidance for Councils’, (NILGA, 2020).

855 Independent Anti-Slavery Commissioner, ‘Independent Anti-Slavery Commissioner Annual Report 2019-2020’ (IASC, 2020), at para 2.3.3.

856 Public Prosecution Service for NI, ‘Policy for Prosecuting Cases of Modern Slavery and Human Trafficking Draft for Consultation’, (PPS, 2021).

857 Department of Justice, ‘Engagement with commercial sector businesses in Northern Ireland on legislative changes to section 54 of the Modern Slavery Act 2015 - Transparency in Supply Chains (TISC) in Northern Ireland’, (DoJ, 2021).

858 NI Human Rights Commission, ‘Correspondence to the Department of Justice on the Consultation on Transparency in Supply Chains in Northern Ireland’, 28 April 2021.

859 NI Human Rights Commission, ‘NIHRC Response to Committee for Justice Call for Evidence on the Justice (Sexual Offences and Trafficking Victims) Bill’ (NIHRC, 2021).

860 Department of Justice, ‘Northern Ireland Modern Slavery Strategy 2019-2020’, (DoJ, 2019).

In October 2020, the Department of Justice launched a public consultation on a draft Modern Slavery Strategy for NI 2021/2022.<sup>861</sup> The strategy aims to equip NI to eradicate modern slavery through a collaborative partnership between law enforcement agencies, front line professionals and the general public to raise awareness of human trafficking and slavery-like offences, support victims, and bring offenders to justice. The Commission provided a response to the consultation on the Modern Slavery Strategy.<sup>862</sup>

In May 2021, the Department of Justice published the NI Modern Slavery Strategy 2021/2022.<sup>863</sup> The Strategy reinforces the commitment of the Department of Justice and its partner organisations, statutory bodies and non-governmental groups, to identify and eradicate modern slavery and human trafficking.

### Independent Guardian Service

Article 21 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 defines the role of an Independent Guardian, while the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) (Independent Guardian) Regulations (NI) 2016 make provision for the appointment of Independent Guardians to assist, represent and support children who are believed to be victims of trafficking. Independent Guardians are required to undertake their role in the best interests of the child and have a responsibility to listen to, and represent, the voice of the child in all aspects of their life. Since 2018, this service has been provided by Barnardo's NI. The Health and Social Care Board is responsible for monitoring the contract, which involves receiving written quarterly monitoring information from the provider and carries out a formal contract monitoring visit and examination of the service on a yearly basis.<sup>864</sup>

Between April 2018 and May 2021, Barnardo's NI provided Guardians for 121 young people in NI who are unaccompanied or separated from a legal guardian and who are at risk of human trafficking; 23 per cent of young people supported by the Independent Guardians have been referred within the National Referral Mechanism.<sup>865</sup> Guardians' caseloads are capped at 12 children at any one time, and contact with each child is set at a minimum of once per week to ensure frequent contact and depth of knowledge about each case.<sup>866</sup>

861 Department of Justice, 'Draft Modern Slavery Strategy 2021/22', (DoJ, 2020).

862 NI Human Rights Commission, 'Response of the Northern Ireland Human Rights Commission to the Department of Justice consultation on 'Human trafficking and slavery: strengthening Northern Ireland's response'', (NIHRC, 2021).

863 Department of Justice, 'Modern Slavery and Human Trafficking Strategy 2021/2022', (DoJ, 2021).

864 Frank Field, Maria Miller and Baroness Butler-Sloss, 'Independent Review of the Modern Slavery Act Third interim report: Independent Child Trafficking Advocates (UK Gov, 2019), at para 1.1.5.

865 Barnardo's NI Independent Guardian Service, 'Consultation response to the Home Office New Plan for Immigration', May 2021.

866 Frank Field, Maria Miller and Baroness Butler-Sloss, 'Independent Review of the Modern Slavery Act Third interim report: Independent Child Trafficking Advocates, (UK Government, 2019), at para 2.4.1.

## Recommendations

The Commission recommends that the Department of Justice introduce Trafficking and Exploitation Risk Orders and that these are promptly provided for by legislation.

The Commission recommends that the Home Office embed consideration of Protocol Article 2 to the development and drafting of legislation and establish processes to ensure continued compliance with this obligation in NI.

The Commission recommends the root causes of human trafficking and exploitation are addressed. This includes research into the prevalence and nature of prostitution in NI, to identify necessary changes to legislation and policy.

The Commission recommends that trauma-informed, specialised, accessible support for victims of human trafficking and exploitation in NI is sufficiently and promptly available when required, and adequately funded, including effective access to social security benefits. This includes specific provision for specialised care and support for child victims of human trafficking, many of whom may have experienced complex trauma.

The Commission recommends the Department of Justice revise domestic legislation beyond the current position to decriminalise all women in prostitution in NI and clear the criminal records of women who have been convicted for offences related to prostitution to enable them to seek alternative forms of employment.

The Commission recommends trauma-informed specialist services, which are adequately funded, inclusive and accessible, to assist women and girls to exit prostitution.

The Commission recommends that women in vulnerable situations in NI have effective access to employment opportunities, housing and social security so that they are not vulnerable to prostitution or “sex for rent”.

The Commission further recommends effective steps are taken to reduce demand for commercial sex in NI, including by carrying out educational and awareness-raising measures targeted at men and boys and focused on combating all notions of subordination and objectification of women.

## Right to Liberty and Security of the Person

This section on the right to liberty and security of the person considers the following human rights issues: alternatives to imprisonment; definition of terrorism; imprisonment for fine default; imprisonment of children with adults; powers of arrest under the Terrorism Act 2000; remand of children; and women in prison.

The right to liberty and security of the person is protected under the following treaties:

<b>ECHR</b>	Article 5
<b>UN CRC</b>	Article 37(b)
<b>UN CRPD</b>	Article 14
<b>UN ICCPR</b>	Articles 9-11

### Alternatives to imprisonment

In June 2019, the UN CAT Committee recommended that the UK Government and NI Executive:

*continue its efforts to improve conditions of detention and alleviate overcrowding of penitentiary institutions and other detention facilities, including through the application of non-custodial measures. In that connection, the Committee draws the State party's attention to the UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) and the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).<sup>867</sup>*

### Statistics

The number of immediate custody prisoners in NI serving six to 12 months decreased from 179 in 2019/2020 to 123 in 2020/2021, and those serving three to six months decreased from 84 in 2019/2020 to 60 in 2020/2021.<sup>868</sup>

In 2017/2018, of the 19,292 adults released from custody 18.4 per cent reoffended and of the 1,115 young people released from custody 29.4 per cent reoffended within one year of release. Of those who received a supervised community disposal 34.9 per cent of adults and 63.1 per cent of young people reoffended within one year of completion.<sup>869</sup>

867 CAT/C/GBR/CO/6, 'UN Committee against Torture, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland', 7 June 2019, at para 21(a).

868 Department of Justice, 'Prison Populations 2020-21 Data Tables' (DoJ, 2021), at Table 4.

869 Department of Justice, 'Analytical Services Group: Adult and Youth Reoffending in NI (2017/18 Cohort)', (DoJ, 2020), at 1.



## Enhanced Combination Order

A pilot of an Enhanced Combination Order has been developed in NI. This Order offers the courts the option of issuing a community sentence as an alternative to a prison sentence of 12 months or less. The community sentence requires the individual to do unpaid work, victim-focused work, have a psychological assessment and to take part in programmes. The Order aims “to divert offenders from short-term custodial sentences by offering judges a more intensive community order with a focus on rehabilitation, reparation, restorative practice and desistance”.<sup>870</sup>

By 30 November 2018, 295 Enhanced Combination Orders had been issued to 293 individuals. The average length of an Order was 20.1 months. At the end of the first three years, 106 service users had successfully completed their Enhanced Combination Order, 150 were still actively engaged, 38 had been revoked and one had passed away. In terms of breaches, 45 were recorded, including 34 of the 38 participants who were revoked.<sup>871</sup>

In 2019, the Department of Justice published a cumulative impact assessment of Enhanced Combination Orders. It estimated that the longer-term cost saving associated with a custodial sentence was £3,523 per prison place.<sup>872</sup> It reported that Enhanced Combination Orders benefit the community, as the completion of unpaid work within local communities is one of the main requirements of such an Order.<sup>873</sup>

The number of custodial sentences of 12 months or less, awarded by courts involved in the Enhanced Combination Order pilot, decreased by 20.7 per cent between 2015 and 2017. Nine in ten service users agreed that the programme had helped them address their offending behaviour and they were unlikely to commit a further similar offence. Just over three quarters of service users agreed that taking part in Enhanced Combination Orders had increased their confidence; 60 per cent agreed it had helped them integrate back into their community and 53 per cent with their family, and 68 per cent reported that it had helped with family relationships.<sup>874</sup>

## Sentencing review

In May 2021, the Department of Justice published its Summary of Consultation Responses received from its 2020 consultation on the Development of an Adult Restorative Justice Strategy for NI.<sup>875</sup>

While restorative justice is used within youth justice, there is currently no comprehensive or strategic approach to its use for adults. According to the summary document, the consultation responses showed strong support for an adult restorative justice strategy for NI. The Department of

870 Probation Board NI, ‘Evaluation of the Enhanced Combination Order Pilot’, (PBNI, 2017).

871 Probation Board NI, ‘The Enhanced Combination Order October 2015 to November 2018’, (PBNI, 2019), at para 1.4.

872 Gareth Hetherington et al, ‘Problem Solving Justice - The Economic Impact of Enhanced Combination Orders’ (DoJ, 2019), at para 16.

873 Probation Board NI, ‘The Enhanced Combination Order October 2015 to November 2018’ (PBNI, 2019), at paras 1.4-1.6.

874 Ibid.

875 Department of Justice, ‘Development of an Adult Restorative Justice Strategy for Northern Ireland: Summary of Consultation Responses’ (DoJ, 2021).

Justice intends to publish a final Adult Restorative Justice Strategy and Action Plan during the course of 2021.<sup>876</sup>

### Recommendations

The Commission recommends that the Department of Justice, with the support of the NI Executive, introduce measures to ensure the wider use of non-custodial measures as an alternative to imprisonment, in particular as an alternative to short term custodial sentences. This includes continuing to utilise and monitor Enhanced Combination Orders in NI.

The Commission further recommends the Department of Justice promptly implements the findings of its consultation on sentencing and the potential for adult restorative justice.

### Imprisonment for fine default

In addition to the UN CAT Committee recommendations referred to above, in 2019 the UN CEDAW Committee recommended that the UK, including NI, continues “to develop alternative sentencing and custodial strategies, including community interventions and services, for women convicted of minor offences”.<sup>877</sup>

In 2018, the Justice Act (NI) 2016 (Part 1), which provides for a statutory framework for the collection and enforcement of fines, was commenced. The Fine Collection Service also became operational within the NI Courts and Tribunal Services. It has a range of powers to collect and enforce outstanding financial penalties.

The Commission notes that the imprisonment of persons for fine default has historically contributed significantly to the prison population in NI. There has been a 32.4 per cent decrease in fine default receptions, from 222 during 2019/2020 to 150 in 2020/2021.<sup>878</sup> Receptions of women for fine default decreased from 21 in 2019/2020 to 18 in 2020/2021.<sup>879</sup>

The Commission continues to raise the issue of imprisonment for fine default with UN Treaty bodies, including in its List of Issues submitted to the UN Human Rights Committee, in connection with the eighth periodic review on the UK’s compliance with the UN ICCPR.<sup>880</sup>

### Recommendation

The Commission notes the decrease in imprisonment for fine default, but continues to recommend that the Department of Justice introduce an end to imprisonment for fine default.

876 Department of Justice, ‘Development of an Adult Restorative Justice Strategy for Northern Ireland: Summary of Responses’, (DoJ, 2021) at 48.

877 CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI’, March 2019.

878 Department of Justice, ‘The NI Prison Population 2020/21’ (DoJ, 2021), at 2.

879 Ibid, at Table 7.

880 NI Human Rights Commission, ‘Submission to the UN Human Rights Committee Regarding the United Kingdom’s Eighth Periodic Report on Compliance with the International Covenant on Civil and Political Rights’ (NIHRC, 2020), at para 8.8.

## Imprisonment of children with adults

In 2016, the UN CRC Committee recommended that the UK Government and NI Executive “ensure that child detainees are separated from adults in all detention settings”.<sup>881</sup>

The Criminal Justice (Children) (NI) Order 1998, makes provision for a 15-17 year old offender, considered likely to injure him or herself or others to be detained in the Young Offenders Centre at Hydebank Wood College, which accommodates offenders up to 21 years of age. An administrative scheme has operated effectively to prevent the imprisonment of children at Hydebank Wood. However, the imprisonment of children alongside adults remains legally permissible.

In 2018, the Criminal Justice Inspection NI found that the regime at the Juvenile Justice Centre had been redesigned to include 17-year-olds and that they were being successfully managed by the Centre.<sup>882</sup>

The Department of Justice has committed to abolish provisions of the 1998 Order allowing for the imprisonment of children alongside adults. Before the suspension of the devolved institutions, it was planned that the reforms to the 1998 Order would be implemented by way of a proposed Department of Justice Children’s Bill.<sup>883</sup> In 2020, the Department of Justice indicated plans to consolidate all youth justice legislation into a single Children’s Bill, which will repeal all provisions allowing for children to be held in adult custody.<sup>884</sup> The Children’s Bill is expected to form part of the legislative programme for the early part of the next Assembly mandate (from 2022 onwards). The timing of this work is dependent on the completion of proposed Regional Care and Justice Campus, which the Departments of Health and Justice finished consulting on in January 2021.<sup>885</sup> The consultation analysis report, published June 2021, advises that the Departments will be proceeding to the second stage of the service design development process and will focus on finalising the range of proposals to enable implementation, however no timescale has been provided.<sup>886</sup>

### **Recommendation**

The Commission recommends that the Department of Justice promptly introduces legislation to the NI Assembly to remove the legal basis for the imprisonment of children alongside adults and that the NI Executive supports these measures.

881 CRC/C/GBR/CO/5, ‘UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 12 July 2016, para 79(e).

882 Criminal Justice Inspection NI, ‘An Announced inspection of Woodlands Juvenile Justice Centre’ (CJINI, 2018), at 6.

883 Declan McGeown, ‘Scoping Study Stakeholder Update’ (DoJ, 2017).

884 Email correspondence between NI Human Rights Commission and Department of Justice, 20 July 2020.

885 Department of Health and Department of Justice, ‘Consultation on Establishment of a Regional Care and Justice Campus’ (DoH, 2020).

886 Department of Health and Department of Justice, ‘Establishment of a Regional Care and Justice Campus: Consultation Analysis’, (DoH, 2021).

## Remand of children

In 2016, the UN CRC Committee noted that throughout the UK, including NI:

*the number of children in custody remains high, with disproportionate representation of ethnic minority children, children in care, and children with psycho-social disabilities, and detention is not always applied as a measure of last resort.*<sup>887</sup>

The UN CRC Committee recommended that the UK Government and NI Executive “establish the statutory principle that detention should be used as a measure of last resort and for the shortest possible period of time and ensure that detention is not used discriminatorily against certain groups of children”.<sup>888</sup>

In 2015, the UN Human Rights Committee made a similar concluding observation, which in addition recommended that “suitable bail packages are available to child defendants in NI”.<sup>889</sup>

In 2016, the then Minister of Justice, David Ford, announced key findings from an internal scoping study into children in the justice system.<sup>890</sup> His statement included a recommendation “to develop the disposals available to the judiciary and reduce the use of custody to make it truly a measure of last resort”.<sup>891</sup>

In 2020/21, the total number of admissions to the Juvenile Justice Centre was 269, which is 9.7 per cent lower than the 298 admissions in 2019/2020.<sup>892</sup> Of these, 207 (77 per cent) were related to the Police and Criminal Evidence Act 1984, 60 (22.3 per cent) to remand and 2 (0.7 per cent) were sentencing admissions. Since 2016/2017, the proportion of admissions attributed to remand have decreased from 35.1 per cent to 22.3 per cent in 2020/2021.<sup>893</sup>

In 2020/2021, there were 381 movements within the Juvenile Justice Centre, which included 162 (42.5 per cent) to remand. This included new admissions and internal change of status. The number of remand movements decreased by 8.4 per cent from 2019/2020.<sup>894</sup>

In 2020/2021, the total average daily population in the Juvenile Justice Centre was 11 children. Of these, nine are children on remand. In 2020/2021, there were total number of 3,896 custody days provided by the Juvenile Justice Centre, 36.9 per cent lower than in 2019/20 (6,177). Of

887 CRC/C/GBR/CO/5, ‘UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 12 July 2016, at para 77.

888 Ibid.

889 CCPR/C/GBR/CO/7, ‘UN Human Rights Committee Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland’, 17 August 2015, at para 23(c).

890 Minister of Justice, ‘Children in the Justice System: Scoping Study, Ministerial Statements – in the NI Assembly’, 14 March 2016.

891 Ibid.

892 Northern Ireland Statistics and Research Agency, ‘Northern Ireland Youth Justice Agency Annual Workload Statistics 2020/21’ (NISRA, 2021).

893 Ibid.

894 Ibid.

these 3,356 custody days (86.1 per cent) were attributed to children on remand.<sup>895</sup>

### Legislative changes

In 2017, the Department of Justice committed to introducing a Children's Bill in 2020. Reflecting findings of the internal scoping study:

*the intention is to use this Bill to consolidate all legislation pertaining to children in justice into one place. Our intention is also to repeal all orders relating to community and custodial disposals for under-18s and create one new community order and one or possibly two custodial orders. It is also likely to include provisions relating to the use of remand and of bail, including the possible introduction of a 'real prospects' test and the potential removal of the Juvenile Justice Centre as a Place of Safety.<sup>896</sup>*

The Children's Bill and the outlined additional measures are not due to be introduced until the new NI Assembly mandate in 2022.<sup>897</sup> They have also not been committed to within the New Decade, New Approach agreement.<sup>898</sup> In November 2020, the Minister of Justice, Naomi Long MLA, indicated her intentions to:

*strengthen the right to bail for children, and introduce specific conditions which must be met before a child can be remanded into custody, with a view to ensuring that custody is used as a last resort, in line with our international obligations.<sup>899</sup> However, the Minister has since instead introduced the Justice (Sexual Offences and Trafficking Victims) Bill, which has a smaller remit and therefore makes legislative change within this mandate unlikely.*

### Strategy

In 2021, the Department of Health and Department of Education published a strategy for children in care.<sup>900</sup> It commits to collaborative work between the Departments of Health and Justice to create a more welfare-orientated approach to looked after children and young people who interface with the youth justice system and build on the measures put in place to avoid unnecessary criminalisation by: tackling substance misuse and the causes of substance misuse; providing appropriate bail accommodation so that young people are not unnecessarily held in custody; and reviewing PACE and diversionary options.

### Review of facilities

In 2020, the Department of Health and Department of Justice consulted on proposals to establishment of a new integrated Regional Care and Justice Campus for NI, which would encompass the current Secure Care

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895 Northern Ireland Statistics and Research Agency, 'Northern Ireland Youth Justice Agency Annual Workload Statistics 2020/21' (NISRA, 2021).

896 Declan McGeown, 'Scoping Study Stakeholder Update' (DoJ, 2017).

897 Email correspondence between NI Human Rights Commission and Department of Justice, 20 July 2020.

898 NI Office, 'New Decade, New Approach' (NIO, 2020).

899 NI Assembly Hansard, 'Written Question - Custody of Children - Naomi Long MLA - AQO 992/17-22', 2 November 2020.

900 Department of Health and Department of Education, 'A Life Deserved: "Caring" for Children & Young People in Northern Ireland', (DOH and DE, 2021).

Centre at Lakewood and the Juvenile Justice Centre at Woodlands.<sup>901</sup> The Commission responded to the consultation and welcomed a number of proposals, particularly those aiming to ensure that being accommodated within the campus is a last resort and that repeat admissions are avoided.<sup>902</sup> However, the Commission noted the need for caution in adopting the proposed mixing of children in care and children within the criminal justice system, to ensure that children do not feel or are not actively criminalised and that any proposals must be driven by the best interests of the children affected. To partly address these concerns, the Commission recommended action is taken to raise the age of criminal responsibility, and highlighted issues regarding a lack of detail on how children of different genders or different age groups will be accommodated within the Regional Care and Justice Campus.

In response to concerns raised by the consultation, the Department advised it will develop detailed plans with input from stakeholders, to include the range of education, training, health and therapeutic services that will be available in the Secure Care Centre; the standards which will govern the Centre; and the staffing arrangements for the new Centre.<sup>903</sup> The Department also acknowledged that a needs-led model of practice, which clearly identifies the risks associated with the approach and the mitigation measures necessary to deal with identified risks, must be developed. It is acknowledged that further detail is required as to how the community services will operate in a coordinated way and the specific nature of any satellite provision as part of the Campus.

## Recommendations

The Commission notes the high number of children held in pre-trial detention in NI. The Commission welcomes the Department of Justice's proposed legislative amendments to enshrine the principle that a child should be held in pre-trial detention only as a measure of last resort and that suitable accommodation will be provided within a reasonable time if released on bail. The Commission recommends that the Department of Justice should promptly implement this. In addition, a range of non-custodial accommodation arrangements should be developed for children awaiting trial who cannot return to their homes.

## Women in prison

In 2019, the UN CEDAW Committee recommended that the UK Government and NI Executive:

- a) allocate sufficient resources to effectively implement the [England and Wales] Female Offender Strategy, and ensure that a similar strategy is also adopted in other administrations of the State party...*

901 Health and Social Care Board, 'Review of Regional Facilities for Children and Young People: Review Report' (HSCB, 2019), at 100.

902 Letter from NI Human Rights Commission to DoH Regional Facilities for Children and Young People Programme Team, 27 January 2021.

903 Department of Health and Department of Justice, 'Establishment of a Regional Care and Justice Campus: Consultation Analysis', (DoH, 2021).



- b) take further measures to improve the provision of mental health care in all prisons, taking into account the particular needs of women.*<sup>904</sup>

Additionally, the UN CEDAW Committee recommended that the UK Government and NI Executive:

- a) introduce a general time limit on immigration detention and implement alternatives to detention;*
- b) take immediate measures to end the detention of pregnant women and nursing mothers.*<sup>905</sup>

As noted above, in 2019 the UN CAT Committee recommended that the UK Government and NI Executive ‘continue its efforts to improve conditions of detention and alleviate overcrowding of penitentiary institutions and other detention facilities, including through the application of non-custodial measures.’<sup>906</sup>

### Statistics

Ash House block within Hydebank Wood College (prison for males aged 18-21) accommodates NI’s women prisoners. It can accommodate up to 71 prisoners. In 2020/2021, the average daily prison female population decreased from 74 in 2019/2020 to 55.<sup>907</sup>

In 2020/2021, female receptions into Hydebank Wood College decreased to 288 (from 409 in 2019/2020), female remand receptions decreased to 214 (from 276 in 2019/2020), and female receptions into immediate custody decreased to 53 (from 111 in 2019/2020).<sup>908</sup>

### Conditions

In 2021, the Department of Justice and NI Prison Service confirmed they remain committed to the development of a separate New Female Facility on the Hydebank Site and expenditure for the first phase has been approved by the Department of Finance.<sup>909</sup> The target date for the delivery of the New Female Facility, subject to the necessary funding being made available, is mid-2025.

In June 2020, the Criminal Justice Inspection NI published its report on Ash House Women’s Prison. Overall the findings were positive, however two key concerns were raised. First that, despite previous recommendations:

*governance of the use of force was not sufficiently robust. Too many reports did not explain why force had been necessary, they were not reviewed by managers quickly enough and body-worn camera*

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904 CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’, 14 March 2019, at para 57(c).

905 Ibid, at para 55(b).

906 CAT/C/GBR/CO/6, ‘UN Committee against Torture, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland’, 7 June 2019, at para 21(a).

907 Department of Justice, ‘The NI Prison Population 2020/21’, (DoJ, 2021), at 7.

908 Ibid, at Table 7.

909 Correspondence from Department of Justice to NI Human Rights Commission, 3 November 2021.

*and CCTV footage was not systematically reviewed. This was a key concern arising from this inspection.*<sup>910</sup>

Second, that:

*the strategy to reduce the supply of illicit drugs and prescribed medicines in the establishment was not sufficiently robust, given that they were easily available. Too many women were testing positive for drugs and when intelligence was acted on, finds of illicit substances were frequent. However, intelligence was not used sufficiently well, and the drugs supply reduction strategy needed to be made far more effective.*<sup>911</sup>

In terms of establishing a separate facility, the Criminal Justice Inspection NI found that “if properly supervised and managed” a small amount of properly controlled contact between male and female prisoners “can be of considerable benefit both to men and women”.<sup>912</sup>

In January 2021, the Department of Justice launched a consultation on a new strategy for supporting and challenging women and girls in contact with the justice system.<sup>913</sup> The Commission provided a response to the consultation. The Commission welcomed the strategy but recommended it be provided with ring fenced resources and include clear goals, targets and timelines to ensure improvement can be measured. The Commission also recommended that the strategy reference the need for the delivery of a separate custodial facility for women prisoners in NI and support for its completion, which was not mentioned in the consultation document. In October 2021, the Department published its response to the report summarising common themes highlighted by respondents.<sup>914</sup>

In November 2021, the Criminal Justice Inspection NI published its report ‘How the Criminal Justice System in Northern Ireland treats Females in Conflict with the Law’.<sup>915</sup> The report found that women and girls in NI are most commonly prosecuted and convicted of motoring, violence and theft offences. In 2019, they accounted for less than one fifth of court convictions but proportionately, more females were sent to prison for theft than males. The report also identified that women are most likely to receive short term prison sentences. The report highlighted that the criminal justice system needs to develop and deliver female focused interventions and outcomes that met their specific needs. This inspection report makes three strategic and five operational recommendations for improvement to help achieve the change required.

910 Criminal Justice Inspection NI, ‘Report on an Unannounced Inspection of Ash House Women’s Prison Hydebank Wood’, (CJINI, 2020), at 7.

911 Ibid.

912 Ibid, at 3.

913 Department of Justice, ‘Empowering Change in Women’s Lives: Strategy for supporting and challenging women and girls in contact with the justice system’, (DoJ, 2021).

914 Ibid.

915 Criminal Justice Inspection NI, ‘How the Criminal Justice System in Northern Ireland treats Females in Conflict with the Law’, (CJINI, 2021).

## Women immigration detainees

Women immigration detainees are held with men in Larne House. Larne House is NI's immigration removal centre. It holds up to 19 men and women. The Home Office can hold detainees here for up to five days, seven if removal directions have been set. Detainees arrive from Drumkeen House (short-term holding facility) in Belfast, police stations, prisons or directly from enforcement operations in the community. On departure, detainees are often transferred to immigration removal centres in Great Britain, removed from the UK or released into the community. Three rooms, on a single corridor, are designated for women detainees. This corridor is not separate from the rest of the facility and men can walk through to go to the dining room. Women can lock the doors to their rooms, which can be overridden by staff in the event of an emergency. Concerns were raised to the Commission that women were not able to lock their doors if they were under close observation (for example, if it was believed they were a threat to themselves). Communal areas are shared by men and women and there is no option for a gender-specific communal area.<sup>916</sup>

In 2019, 473 immigration detainees were held in Larne House across the year, of these 89 were women.<sup>917</sup>

### Recommendations

The Commission recommends that the Department of Justice expedite the delivery of a separate custodial facility for women prisoners in NI and calls on the NI Executive to provide any necessary support to ensure its completion.

The Commission recommends that effective steps are taken to ensure that women immigration detainees are safe and have the option of gender-specific communal areas.

### Definition of terrorism

In March 2020, the Independent Reviewer of Terrorism, Jonathan Hall QC, published a report on terrorism activity in 2018.<sup>918</sup> He expressed that “for all its imperfections, the definition of terrorism in the Terrorism Act 2000 is able to embrace different variations of terror”.<sup>919</sup> The Independent Reviewer noted that the definition is both ideology and threat neutral”.<sup>920</sup> However, he continued that “the treatment of new or existing types of behaviour as terrorism can have unforeseen consequences”<sup>921</sup> and that “this recognition that threats, even those capable of meeting the broad

916 HM Chief Inspector of Prisons, 'Report on an Unannounced Inspection of the Short-Term Holding Facility at Larne House' (NIPS, 2016), at Overview and para 1.12; Meeting with Larne House Visitors Group, 11 April 2018.

917 Home Office, 'Immigration Statistics Data Tables: Year Ending September 2020' (HO, 2020), at Table Dt\_01.

918 Jonathan Hall QC, 'The Terrorism Acts in 2018 - Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006' (Independent Reviewer of Terrorism Legislation, 2020), at paras 27-28.

919 Jonathan Hall QC, 'The Terrorism Acts in 2018 - Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006' (Independent Reviewer of Terrorism Legislation, 2020).

920 Jonathan Hall QC, 'The Terrorism Acts in 2018 - Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006' (Independent Reviewer of Terrorism Legislation, 2020), at para 28.

921 Jonathan Hall QC, 'The Terrorism Acts in 2018 - Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006' (Independent Reviewer of Terrorism Legislation, 2020), at para 28.

definition of terrorism in law, needed to reach a level of scale before being treated as terrorism in fact, remains relevant in the new threat-neutral world of counterterrorism".<sup>922</sup> In his 2021 report, the Independent Reviewer highlights that the "onus must therefore be on how the terrorism definition is applied".<sup>923</sup>

### Legislative reform

In 2019, the Counter-Terrorism and Border Security Act 2019 came into force. This Act strengthens the legal framework addressing those who show support for proscribed organisations and makes provision enabling persons at ports and borders to be questioned for national security and other related purposes. During the scrutiny of the now Act, a number of human rights concerns were raised around the lack of a definition of 'hostile activity' and moving criminal law into private spaces.<sup>924</sup>

On 29 April 2021, the Counter-Terrorism and Sentencing Act 2021, which extends to NI, was given royal assent. The Act introduces new measures including a 'Serious Terrorism Sentence' with a minimum custodial term of 14 years; increased maximum sentences; extended licencing and tariffs; removal of early release for terrorist prisoners; and a widened list of offences that can be classed as terror-connected and thereby trigger Registered Terrorist Offender notification requirements. Notably, the Act does not address the definition of terrorism.

### Recommendations

The Commission continues to recommend that legislation introduced for the purposes of counter-terrorism is human rights compliant. The Commission endorses the recommendations of both the UN Human Rights Committee and the Independent Reviewer of Terrorism calling for the Home Office to conduct and publish a review of the broad definition of terrorism.



### Powers of arrest under the Terrorism Act 2000

In 2015, the UN Human Rights Committee recommended that the UK Government:

*undertake a review of the exercise of arrest powers under section 41 of the Terrorism Act 2000 to ensure that the principles of necessity and proportionality are strictly observed when using such powers; ensure that any detention of suspects arrested under the Terrorism Act 2000 is based on an individualised determination that it is reasonable and necessary taking into account all the circumstances rather than on the nature of the crime; and, whilst ensuring public safety, make bail available to such persons, as recommended by the*

922 Jonathan Hall QC, 'The Terrorism Acts in 2018 - Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006' (Independent Reviewer of Terrorism Legislation, 2020), at para 29.

923 Jonathan Hall QC, 'The Terrorism Acts in 2019 - Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006' (Independent Reviewer of Terrorism Legislation, 2021), at para 2.63.

924 NI Human Rights Commission, 'Parliamentary Briefing Paper on Counter-Terrorism and Border Security Bill' (NIHRC, 2018); UK Joint Committee on Human Rights, 'Ten clauses Government Must Change in Counter-Terrorism and Border Security Bill', (JCHR, 2018).

*Joint Committee on Human Rights and the Independent Reviewer of Terrorism.*<sup>925</sup>

Under section 41 of the Terrorism Act 2000, a constable may arrest without a warrant a person whom he/she reasonably suspects to be a terrorist. In 2020/2021, 83 people were arrested under this provision, compared to 127 in 2019/2020.<sup>926</sup> Of the 83 people arrested, 13 people were subsequently charged.<sup>927</sup>

In 2021, the Independent Reviewer of Terrorism Legislation, Jonathan Hall QC, published a report on the terrorism acts in 2019. Referencing the 152 arrests made under section 41 of the Terrorism Act 2000 in NI for 2019, the Independent Reviewer noted that “this continues the trend observed in recent years namely that despite having only 3% of the UK population, NI accounts for 77% of the arrests made under section 41 of the Terrorism Act 2000”.<sup>928</sup>

### **Recommendation**

The Commission calls on the Home Office to conduct and publish a review of the exercise of arrest powers under section 41 of the Terrorism Act 2000 to ensure compliance with its human rights obligations.

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925 CCPR/C/GBR/CO/7, 'UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the UK of Great Britain and NI', 17 August 2015, at para 14(d).

926 PSNI Statistics Branch, 'Police Recorded Security Situation Statistics: 1 March 2020 to 28 February 2021' (PSNI, 2021), at 1.

927 Ibid, at 10.

928 Jonathan Hall QC, 'The Terrorism Acts in 2019: Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006, Independent Reviewer of Terrorism Legislation' (March 2021), at para 5.4.

## Right to Fair trial and the administration of justice

The following section looks at issues relevant to the right to a fair trial, including: access to justice; age of criminal responsibility; avoidable delay; closed material proceedings; compensation for a miscarriage of justice; non-jury trials; and cross-border justice arrangements.

The right to fair trial is protected under the following treaties:

<b>ECHR</b>	Articles 6-7
<b>UN ICCPR</b>	Articles 14-16
<b>Ireland/NI Protocol to the UK-EU Withdrawal Agreement</b>	Article 2

### Access to justice

In 2017, the UN CRPD Committee recommended that the UK Government and NI Executive ensure that “all persons with disabilities are provided with the right and adequate procedural accommodation within the justice system” and in addition “enable in particular deaf persons through the use of sign language interpreters to fully and equally participate as jurors in court proceedings”.<sup>929</sup>

In 2017, a review chaired by Sir John Gillen into civil justice and family justice recommended that steps are taken to develop the voice of the child and extend “the use of special measures and support for child and vulnerable witnesses to the family courts with pilot scheme for the use of registered intermediaries and the National Society for the Prevention of Cruelty to Children’s young witness service”.<sup>930</sup>

A Shadow Family Justice Board and Shadow Civil Justice Council were established to coordinate a draft plan for the implementation of the recommendations of Gillen’s report on civil justice and family justice.<sup>931</sup> In 2019, the Advocacy Training Board introduced written guidance on working with children and vulnerable adults, and held a series of lectures on the topic.<sup>932</sup>

In 2018, academic research called on the Department of Justice to change the law “to facilitate the full participation of Deaf sign language users as a member of the jury”.<sup>933</sup> It also urged that “deaf people’s needs should be mainstreamed into existing policy initiatives across the justice system” and that “deaf people should be involved in the development, design,

929 CRPD/C/GBR/CO/1, ‘UN CRPD Committee Concluding Observations on the Initial Report of the United Kingdom of Great Britain and NI’, 3 October 2017, at para 33.

930 Review of Civil and Family Justice, ‘Review Group’s Report on Family Justice’ (Office of the Lord Chief Justice, 2017).

931 Judiciary NI, ‘Civil and Family Justice Review’, 2017.

932 Shadow Family Justice Board, ‘Minutes of Seventh Meeting’, 10 October 2019.

933 Bronagh Byrne, Brent Elder and Michael Schwartz, ‘Implementing Article 13 of the UNCRPD: Enhancing Deaf People’s Access to Justice in Northern Ireland’, (DRILL, 2019), at 43.



implementation and monitoring of targeted or mainstreamed policy initiatives”.<sup>934</sup>

### Litigants in Person

In 2018, University of Ulster in conjunction with the Commission published research on the experience of individuals who take or defend civil and family law cases without legal representation and how this impacts their human rights.<sup>935</sup> The report included a number of recommendations for reforms to support litigants in person including the creation of a central information hub and specific training for members of the judiciary on supporting litigants in person.

The Department of Justice has added a new page to its website to assist those without representation<sup>936</sup> and has established a Litigants in Person reference group.<sup>937</sup> The Reference Group focuses primarily, but not exclusively, on family courts. The Group is comprised of past or current litigants in person (up to eight at present) and one person nominated from each of the following organisations or sectors: the Commission, Department of Justice, NI Courts and Tribunals Service, School of Law, Ulster University, Voluntary sector, a practising solicitor, a practising barrister, and a member of the Judiciary. The Reference Group meets quarterly and, has published seven progress reports.<sup>938</sup> At its most recent meeting in October 2021, the Reference Group discussed the Civil Justice Modernisation Plan and the Private Family Law Action Plan.

### Live Links

In 2020, the Department of Justice consulted on the use of live link technology in review of detention by a Superintendent from 24 to 36 hours and a Magistrate for up to 96 hours, under Articles 43 and 44 of the Police and Criminal Evidence (NI) Order.<sup>939</sup> The Commission provided a response to the consultation.<sup>940</sup> In October 2020, the Department of Justice published a summary of the consultation responses, which largely welcomed the proposed amendment “while stressing that the rights, voice and participation of the detainee must be maintained at all times”.<sup>941</sup> The Department of Justice had intended to include the proposed amendment to the use of live links within the Justice (Miscellaneous Provisions) Bill that was planned for introduction to the NI Assembly in 2021.<sup>942</sup> The Committee for Justice considered the Bill at its meeting on 22 April 2021.<sup>943</sup> However, since then the Justice Minister has instead introduced a

934 Bronagh Byrne, Brent Elder and Michael Schwartz, 'Implementing Article 13 of the UNCRPD: Enhancing Deaf People's Access to Justice in Northern Ireland', (DRILL, 2019), at 44.

935 Gráinne McKeever, Lucy Royal-Dawson, Eleanor Kirk and John McCord, 'Litigants in Person in NI: Barriers to Legal Participation', (UU, NIHRC and Nuffield Foundation, 2018).

936 Department for Justice, 'Information for Litigants in Person'; available at: <https://www.justice-ni.gov.uk/articles/information-litigants-person>.

937 Department of Justice, 'Terms of Reference: Litigants in Person Reference Group', (DoJ, 2019).

938 Department of Justice, 'Litigants in Person Reference Group Publications'. Available at: <https://justice-ni.gov.uk/publications/litigants-person-reference-group/>.

939 Department of Justice, 'Consultation on Proposals on the Use of Live Links for Police Detention/Interviews', (DoJ, 2020).

940 NI Human Rights Commission, 'Briefing Paper: Department of Justice Consultation on Proposals on the Use of Live Links for Police Detention/Interviews', (NIHRC, 2020).

941 Ibid, at para 3.2.

942 Ibid, at paras 3.3 and 3.4.

943 NI Assembly Hansard, 'Committee for Justice: Justice (Miscellaneous Provisions) Bill - Content at Introduction and Planned Departmental Amendments', 22 April 2021.

pared-back Justice Bill, focusing only on sexual offences and trafficking victims.<sup>944</sup>

### Recommendations

The Commission continues to raise concerns over access to justice. This includes recommending that the Department of Justice ensures that the substantial number of unrepresented litigants do not have their access to justice impaired.

The Commission recognises the work of the Litigants in Person Reference Group and recommends the Department of Justice promptly implements the recommendations contained in the 2018 Ulster University and Commission's research.

The Commission recommends that prior to roll out of 'live link' technology, the Department of Justice conducts a review to identify individuals for whom its use is not suitable for reviews, hearings or police interviews which addresses the particular considerations of children and young people, disabled people, people experiencing mental ill-health, older people and those who require an interpreter, along with other groups and set out the limited circumstances and appropriate safeguards for the use of video-link technology.

### Age of criminal responsibility

In 2016, the UN CRC Committee reiterated its recommendation that the UK Government and NI Executive "raise the minimum age of criminal responsibility in accordance with acceptable international standards".<sup>945</sup> This was supported by the UN CAT Committee in its 2019 concluding observations on the UK Government's implementation of the UN CAT.<sup>946</sup>

In 2019, the UN CRC Committee's General Comment No 24 stated:

*under Article 40(3) of the [UN CRC] Convention, State parties are required to establish a minimum age of criminal responsibility, but the article does not specify the age. Over 50 States parties have raised the minimum age following ratification of the [UN CRC] Convention, and the most common minimum age of criminal responsibility internationally is 14. Nevertheless, reports submitted by State parties indicate that some States retain an unacceptably low minimum age of criminal responsibility.*<sup>947</sup>

The age of criminal responsibility remains at ten years old in NI, as in England and Wales. However, the Age of Criminal Responsibility (Scotland) Act 2019 raised the age of criminal responsibility in Scotland to twelve.

944 Justice (Sexual Offences and Trafficking Victims) Bill.

945 CRC/C/GBR/CO/5, 'UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 79.

946 CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019, at para 23.

947 CRC/C/GC/24, 'UN CRC Committee General Comment No 24: Children's Rights in the Child Justice System', 18 September 2019, at para 21.

In 2011, a Department of Justice review concluded that “the minimum age should be increased to 12 forthwith and, following a period of review and preparation, perhaps to 14, which has some historical and current significance for criminal law in NI”.<sup>948</sup>

In August 2020, the Minister of Justice, Naomi Long MLA, wrote to other NI Executive Ministers seeking their views on raising the age of criminal responsibility in NI. Responses have been received from the Ministers for Communities, Finance and Infrastructure.<sup>949</sup> However no further progress has been made since. In May 2021, the Minister advised that the introduction of a legislative proposal to increase the minimum age of criminal responsibility in the forthcoming Justice (Miscellaneous Provisions) Bill was being considered, though this would require approval from the Executive.<sup>950</sup> However, the Minister has since instead introduced the Justice (Sexual Offences and Trafficking Victims) Bill, which has a smaller remit and therefore makes legislative change within this mandate unlikely. This was discussed with the Children’s Commissioner at a Justice Committee meeting in July 2021.<sup>951</sup>

## Recommendations

In line with the UN CRC Committee’s General Comment No 24, the Commission calls on the Department of Justice to introduce legislation to the NI Assembly, which raises the minimum age of criminal responsibility to 14 years old.

## Avoidable delay

In 2015, the UN Human Rights Committee recommended the introduction of “concrete measures to reduce avoidable delays in the criminal justice system in NI, including by introducing custodial time limits”.<sup>952</sup>

Custodial time limits were first introduced to England and Wales in 1991. The Criminal Justice Inspector for NI has stated that failure to introduce statutory custodial time limits in NI “consigns the justice process here to continuing unacceptable delay in processing cases”.<sup>953</sup>

In 2020/2021, the average time taken for a case to be dealt with, at all courts, was 193 days, an increase of 29.5 per cent from the previous year (149 days) and the highest figure recorded in the last five years.<sup>954</sup>

In 2012, the Criminal Justice Inspectorate NI recommended statutory time limits were introduced as a way of tackling avoidable delay.<sup>955</sup> In 2018, the Criminal Justice Inspectorate NI further recommended that:

948 Department of Justice, ‘A Review of the Youth Justice System in NI’ (DoJ, 2011), at 107.

949 Allan Preston, ‘Moves made to increase the age of criminality in NI’, *Belfast Telegraph*, 20 September 2020.

950 NI Assembly Hansard, ‘Written Question: Minimum Age of Criminal Responsibility – Rachel Woods MLA – AQW 18996/17-22’, 26 May 2021.

951 NI Assembly Hansard, ‘Committee for Justice: Children and Young People’s Justice Issues – NI Commissioner for Children and Young People’, 8 July 2021.

952 CCPR/C/GBR/CO/7, ‘UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the UK of Great Britain and NI’, 17 August 2015, at para 22.

953 NI Assembly Hansard, ‘Committee for Justice – Criminal Justice Inspector’, 25 June 2014.

954 Department of Justice, ‘Case Processing Time for Criminal Cases Dealt with at Courts in NI 2020/21’, (DoJ, 2021), at 1.

955 Criminal Justice Inspection NI, ‘Avoidable Delay: A Progress Report’ (CJINI, 2012), at para 4.7.

*once direct transfer to the Crown Court is established for murder and manslaughter cases, the Department of Justice should ensure that rape, serious sexual offences and child abuse offences be added to the list of specified offences under the Justice Act (NI) 2015.*<sup>956</sup>

In 2019, the Criminal Justice Inspection NI noted that delays “increase the likelihood that the victim withdraws support for the prosecution case”.<sup>957</sup> Sir John Gillen’s final report following an independent review into how the NI criminal justice system handles cases of serious sexual assault was also published. It made 26 recommendations designed to reduce delays.<sup>958</sup> Following the review, a Sexual Violence Reduction Group was established to oversee implementation of the Gillen Review’s recommendations.<sup>959</sup>

The New Decade, New Approach agreement includes a commitment that “the [NI] Executive will deliver committal reform to help speed up the criminal justice system, benefiting victims and witnesses”.<sup>960</sup> It also commits the NI Executive to “address the findings in recently published reports from Criminal Justice Inspection NI and the report of Sir John Gillen on the handling of serious sexual offences cases, and will deliver the necessary changes in case conduct and management”.<sup>961</sup>

In February 2020, the Minister of Justice, Naomi Long MLA, established an Implementation Team to co-ordinate phased actions aimed at addressing the Gillen report, as agreed by the Criminal Justice Board.<sup>962</sup> In June 2020, the Department of Justice published the Implementation Team’s plan.<sup>963</sup>

By 2021, the implementation plan includes a commitment to introduce separate legal advice and representation for complainants’ pre-trial, Case Progression Officers, Achieving Best Evidence interviews, improved disclosure, and a bespoke Indictable Cases Process that takes into account the unique nature of sexual offences cases.<sup>964</sup> By 2022, the implementation plan commits to removing the use of oral evidence as part of the committal process, and to introduce new arrangements whereby relevant cases can bypass the committal process entirely, thus ensuring that those cases are transferred to the Crown Court at an earlier stage. This is subject to the passage of the Criminal Justice (Committal Reform) Bill, which was formally introduced to the NI Assembly on 3 November 2020.<sup>965</sup> The Bill recently completed Committee Stage, with the Committee report published in June 2021.<sup>966</sup>

956 Criminal Justice Inspection NI, ‘Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in NI’ (CIJNI, 2018), at Recommendation 5.

957 Criminal Justice Inspection NI, ‘No excuse: Public protection inspection II: a thematic inspection of the handling of domestic violence and abuse cases by the criminal justice system in Northern Ireland’, (CIJINI, 2019), at 10.

958 Sir John Gillen, ‘Report into the Law and Procedures in Serious Sexual Offences in NI’ (DoJ, 2019), at 13-14.

959 Department of Justice, ‘Press release: Department of Justice welcomes report on serious sexual offending’, 9 May 2019.

960 NI Office, ‘New Decade New Approach’, (NIO, 2020), at 7.

961 Ibid, at 7-8.

962 Department of Justice, ‘Press Release: We must work together to deliver real change for victims of serious sexual assault: Long’ 3 February 2020.

963 Department of Justice, ‘Implementation Plan: The Gillen Review into the Law and Procedures in Serious Sexual Offences in NI’, (DoJ, 2020).

964 Ibid, at 6-7.

965 Criminal Justice (Committal Reform) Bill.

966 Committee for Justice, ‘Report on the Criminal Justice (Committal Reform) Bill’, (NIA, 2021).

## Recommendations

The Commission calls on the NI Assembly to progress the Committal Reform Bill as a matter of urgency, and to prioritise statutory custodial time limits and other concrete measures to reduce avoidable delay.

The Commission further calls on the Department of Justice to promptly and fully implement the recommendations of the Gillen Review into the NI criminal justice system handling of serious sexual assault cases.

## Closed material proceedings

In 2015, the UN Human Rights Committee recommended that the UK Government:

*ensures that any restrictions or limitation to fair trial guarantees on the basis of national security grounds, including the use of closed material procedures, are fully compliant with its obligations under the UN ICCPR, particularly that the use of closed material procedures in cases involving serious human rights violations do not create obstacles to the establishing of State responsibility and accountability as well as compromise the right of victims to a fair trial and an effective remedy.<sup>967</sup>*

The Justice and Security Act 2013 makes provision for closed material procedures in civil cases allowing for the introduction of sensitive security evidence to proceedings involving the UK Government, without disclosure to the claimant.

Section 12(1) of the Justice and Security Act 2013 requires the Secretary of State for Justice to prepare and lay before Parliament an annual report on the use of the closed material procedures. Between June 2019 and June 2020, there were six applications lodged for a declaration that a closed material procedures application may be made in proceedings and four declarations that a closed material procedure may be made in proceedings.<sup>968</sup> There were no revocations of declarations for closed material proceedings and no final judgments that are closed.<sup>969</sup>

The Draft NI (Stormont House Agreement) Bill, which the NI Office consulted upon throughout 2018, provides that in circumstances where the Secretary of State for NI seeks to prevent the disclosure of information on national security grounds within a family report appeal procedures are to proceed as closed material procedures (section 21(1)).<sup>970</sup> In its advice on the draft Bill the Commission emphasised that the discretion of the Secretary of State to prevent disclosure of information within a family

967 CCPR/C/GBR/CO/7, 'UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the UK of Great Britain and NI', 17 August 2015, at para 22.

968 Ministry of Justice, 'Report on the Use of Closed Material Procedure (From 25 June 2019 to 24 June 2020)', (MoJ, 2021), at 4-5.

969 Ibid, at 6-7.

970 NI Office, 'Consultation Paper: Addressing the Legacy of NI's Past' (NIO, 2018), at 37-38.



report should be used sparingly.<sup>971</sup> The Commission also recommended a number of additional procedural safeguards be used to enhance the confidence of the family members of victims.

In 2019, the NI Office published its analysis of the 17,000 responses it received to its public consultation on addressing the legacy of NI's past.<sup>972</sup> Many respondents raised concerns about the issue of closed material procedures, including the potential for distress to be caused to victims and survivors, and the interaction between closed material procedures and protections under Article 6 ECHR. The NI Office notes that some respondents highlighted the issue of accessibility and called for legal aid to be available for all. Others suggested widening the pool of special advocates to include lawyers with whom victims and survivors have already formed relationships. The NI Office also noted calls for the creation of a new tribunal to consider the release of sensitive information. However, other respondents voiced concerns that any resources spent on such a process could divert funding away from the core work of the Historical Investigations Unit.

In 2020, the UN Human Rights Committee asked the UK Government to “comment on information received about an exacerbated use of closed material procedures”.<sup>973</sup> In 2021, the UK Government responded with:

*The Justice and Security Act 2013 empowers senior courts to apply a “closed material procedure” in civil cases involving sensitive material, the disclosure of which would be damaging to national security. The process contains various judicial safeguards and its use is closely monitored by the UK government in the form of public annual reports to the UK Parliament. The statistics show that this closed material procedure was used in a very limited number of cases in NI in the past three years.*<sup>974</sup>

On 25 February 2021, the Lord Chancellor and Secretary of State for Justice made a Written Ministerial Statement to the UK Parliament to announce the establishment of the statutory review of the ‘closed material procedure’ provisions in the Justice and Security Act 2013.<sup>975</sup> The Review will be carried out by Sir Duncan Ouseley. A call for evidence to inform the Review was published in April 2021.<sup>976</sup> The Commission responded to this call in May 2021, highlighting how the issue of closed material procedures and the relationship to dealing with the past in NI remains important.<sup>977</sup> The reviewer is currently considering the submissions received and it is anticipated that his report will be laid in Parliament by the end of 2021.

971 NI Human Rights Commission, ‘Submission to NIO’s Consultation on Addressing the Legacy of NI’s Past’ (NIHRC, 2018).

972 Northern Ireland Office, ‘Addressing the legacy of Northern Ireland’s past: analysis of the consultation responses’, (NIO, 2019).

973 CCPR/C/GBR/QPR/8, UN Human Rights Committee List of issues prior to submission of the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland, 5 May 2020, at para 6.

974 UK Government, Response to the United Nations Human Rights Committee’s List of Issues on the Covenant on Civil and Political Rights (ICCPR), (UK Government, 2021).

975 Robert Buckland, ‘Written Statement: Statutory review of the “closed material procedure” provisions in the Justice and Security Act 2013’, Statement UIN HCWS803, 25 February 2021.

976 Ministry of Justice, ‘Call for Evidence: Statutory review of the closed material procedure’ provisions in the Justice and Security Act 2013’, (MOJ, 2021).

977 NI Human Rights Commission, ‘Response to the Ministry of Justice Review of the Closed Material Procedure in the Justice and Security Act 2013’, (NIHRC, 2021).



## Recommendations

The Commission advises that the UK Government limits the use of closed material procedures in cases involving serious human rights violations and at least ensures the removal of obstacles to ensuring accountability. This must not compromise the right of victims to a fair trial and an effective remedy.

The Commission recommends that the UK Government completes the current statutory review of the closed material procedure provisions without further delay, and that this review considers the circumstances of transitional justice in NI. Further, steps should be taken to ensure a comprehensive library for closed judgments is available and accessible to legal teams and judges in NI.

## Compensation for a miscarriage of justice

The Anti-social Behaviour, Crime and Policing Act 2014 redefined the test for a miscarriage of justice to require an applicant who has been wrongfully imprisoned to prove his or her innocence of a crime in order to obtain compensation.<sup>978</sup> This new test applies for all offences in England and Wales and for offences related to terrorism in NI. The new test is contained within the Criminal Justice Act 1988, section 133(1ZA).

The Commission had previously advised<sup>979</sup> that this approach was a disproportionate limitation of Article 14(6) UN ICCPR, which states:

*when a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributed to him.*

In 2015, the UN Human Rights Committee expressed concerns about the legislative test, recommending that the State Party should "review the new test for miscarriage of justice with a view to ensuring its compatibility with Article 14(6) of the Covenant".<sup>980</sup>

In January 2019, the UK Supreme Court considered an application that the Criminal Justice Act 1988, section 133 was unlawful, as it was contrary to the presumption of innocence within Article 6(2) ECHR.<sup>981</sup> By a majority of five-to-two, the Supreme Court dismissed the application that the provisions violated the ECHR and declined to make a declaration of incompatibility.<sup>982</sup> The lead judgment was given by Lord Mance, who, when

978 The Anti-social Behaviour, Crime and Policing Act 2014 amended section 133 of the Criminal Justice Act 1988.

979 NI Human Rights Commission, 'The 2013 Annual Statement: Human Rights in NI' (NIHRC, 2013), at 29.

980 CCPR/C/GBR/CO, 'UN Human Rights Committee Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland', 17 August 2015, at para 22(b).

981 *R (on the application of Hallam) v Secretary of State for Justice* [2019] UKSC 2.

982 *R (on the application of Hallam) v Secretary of State for Justice* [2019] UKSC 2.

considering whether the UK Supreme Court was bound by the reasoning of the ECtHR judgment in *Allen v UK*, did not feel that the ECtHR had set a clear precedent.<sup>983</sup> He stated “speaking for myself, I cannot regard the current state of ECtHR’s case law as coherent or settled on the points critical to this appeal”.<sup>984</sup>

### Recommendation

The Commission calls on the UK Government to review the test for a miscarriage of justice, in line with the UN Human Rights Committee’s concluding observation, to ensure its compatibility with Article 14(6) UN ICCPR.

### Non-jury trials

In 2013, the UN CAT Committee recommended that the UK Government should:

*take due consideration of the principles of necessity and proportionality when deciding the renewal of emergency powers in NI, and particularly non-jury trial provisions. It encourages the State party to continue moving towards security normalisation in NI and envisage alternative juror protection measures.*<sup>985</sup>

The Justice and Security (NI) Act 2007 makes provision for non-jury trials in NI. The provisions relating to non-jury trials are temporary and must be renewed every two years by way of an order approved in both Houses of Parliament. The relevant provisions have been extended on seven occasions since their establishment in 2007. In 2021, the Secretary of State for NI, noting that the UK Government continued to assess the threat level from NI related terrorism in NI to be severe, once again extended the provisions until 31 July 2023.<sup>986</sup>

Prior to the extension, the Secretary of State for NI, Brandon Lewis, held a public consultation seeking views on the extension.<sup>987</sup> In response, the Commission again raised concerns about the lack of clarity around the conditions whereby the use of non-jury trials will be discontinued, leading to a danger that non-jury trials, initially introduced as temporary measures in 2007 are becoming ‘normalised’ as a semi-permanent feature of NI’s criminal justice system. The Commission reiterated its recommendation that the Justice and Security Act 2007 will be revised to include a necessity provision, consistent with the recommendations of the UN CAT Committee in 2013. The Commission supported the NI Office’s commitment to establishing a working group, to explore practical measures that can be taken to further reduce the number of non-jury trials. The Commission further recommended that the NI Office hosts a focused consultation comprising a diverse group of stakeholders, to

983 *Allen v the United Kingdom* (2013) 63 EHRR 10.

984 *R (on the Application of Hallam) v Secretary of State for Justice* [2019] UKSC 2, at para 73.

985 CAT/C/GBR/CO/5, ‘UN Committee against Torture, Concluding observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 6 May 2013.

986 The Justice and Security (Northern Ireland) Act 2007 (Extension of Duration of Non-jury Trial Provisions) Order 2021.

987 NI Office, ‘Non-Jury Trials Justice and Security (Northern Ireland) Act 2007 - Public Consultation’, (NIO, 2021).

facilitate constructive engagement on the conditions needed to end non-jury trials in NI.<sup>988</sup>

Following the public consultation process, and recommendations made by responses,<sup>989</sup> the NI Office set up a working group with the objectives of identifying practical measures which could help reduce the number of non-jury trials taking place, and identifying elements indicating that non-jury trials should no longer be deemed necessary.<sup>990</sup> The Commission was invited to sit on the working group, which held its first meeting in July 2021.<sup>991</sup> The NI Office intends to provide a report to the Independent Reviewer of the Justice and Security Act (NI) Act 2007, reflecting the discussions of the working group by December 2021.

The Commission has raised the issue of non-jury trials in its list of issues submitted to the UN Human Rights Committee for its consideration in advance of the UK's eighth periodic report on compliance with the ICCPR.<sup>992</sup>

### Recommendations

In light of the UK Government's assessment of the continuing severe threat from terrorism in NI, the Commission respects the decision to continue provision for non-jury trials only if and when absolutely necessary.

Moreover, the Commission recommends the implementation of effective measures to ensure the principles of necessity and proportionality are fully reflected within any authorisation. The Commission welcomes the working group on non-jury trials.

The Commission further recommends that the NI Office takes practical measures to determine the conditions whereby the use of non-jury trials will be discontinued.

### Cross-border justice arrangements

In April 2021 the House of Commons NI Affairs Committee published its report following an inquiry on cross-border cooperation on policing, security and criminal justice after Brexit.<sup>993</sup> The Commission submitted evidence to the Committee in October 2020 which highlighted the human rights and data protection standards when sharing data, the need to establish an effective and efficient UK-EU extradition arrangement in the absence of the European Arrest Warrant, to ensure continued cross-

988 Correspondence from the NI Human Rights Commission to the Secretary of State for NI, 11 February 2021.

989 NI Office, Consultation Response: Non-Jury Trials Justice and Security (Northern Ireland) Act 2007, (NIO, 2021).

990 'Non-Jury Trials Working Group Meeting', NI Office, 27 July 2021.

991 Correspondence from the NI Office to NI Human Rights Commission, 9 July 2021.

992 NI Human Rights Commission, Submission to the UN Human Rights Committee Regarding the United Kingdom's Eighth Periodic Report on Compliance with the International Covenant on Civil and Political Rights, (NIHRC, 2020), at paras 11.16-11.18.

993 NI Affairs Committee, 'Cross-Border Cooperation on Policing, Security and Criminal Justice after Brexit'. (NIAC 2021).

border arrangements to ensure victims' rights and the rights of accused persons are upheld.<sup>994</sup>

In June 2021, the Government responded to the recommendations set out in the report and highlighted a number of significant developments which had either occurred, or which will occur, in relation to cross-border policing, security and criminal justice after Brexit. This included a commitment to work with domestic and EU partners to monitor the operation of the new extradition arrangements under the Trade and Cooperation Agreement and to take steps to address any issues that should arise; a commitment to work with EU and Irish law enforcement partners to strengthen international law enforcement cooperation to tackle shared threats in the absence of access to Schengen Information System II;<sup>995</sup> and a commitment to ongoing cooperation in the areas of information-sharing initiatives, bio-metric data, criminal record data, bi-lateral cooperation with Ireland in tackling crime, the establishment of robust data protection standards and the development of cross-agency cooperation in NI to tackle crime.<sup>996</sup>

The Trade and Cooperation Agreement has introduced a number of changes.<sup>997</sup> The Commission welcomes the commitment in the Trade and Cooperation Agreement to ensure criminal justice cooperation is based on respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the ECHR.<sup>998</sup>

While the UK is not part of the European Arrest Warrant system, the Trade and Cooperation Agreement does allow for a fast-track system which enables the extradition of either UK or EU nationals.<sup>999</sup> However, unlike the European Arrest Warrant, which was based on the principle of mutual judicial recognition, this new system will likely be more restrictive in practice as it also revives the 'dual criminality' requirement, meaning that an offence must exist in both jurisdictions before an extradition request can be granted.<sup>1000</sup> The Commission welcomes that the UK and EU have agreed data adequacy agreements to allow for the sharing of some information but regrets that access to information sharing tools such as Schengen Information System II has been lost.<sup>1001</sup>

In August 2021, the Irish Supreme Court submitted a request for a preliminary ruling to the CJEU on the legality of continuing extradition proceedings to the UK under the Withdrawal Agreement and the Trade

994 NI Human Rights Commission, 'Submission to NI Affairs Committee Inquiry on Cross-border Cooperation on Policing, Security and Criminal Justice after Brexit', (NIHRC, 2020).

995 Schengen Information System (SIS II), is a European database which provides alerts on the movement of people or objects of interest as they cross EU borders. Regulation 1987/2006, 'European Parliament and European Council Regulation on the Establishment, Operation and Use of the Second Generation Schengen Information System (SIS II)', 28 December 2006.

996 NI Affairs Committee, 'Cross-border co-operation on policing, security and criminal justice after Brexit: Government Response to the Committee's Fourth Report of Session 2019-21', (NIAC, 2021).

997 Part Three of the Trade and Cooperation Agreement relates to Law Enforcement and Judicial Cooperation.

998 Article 524, Trade and Cooperation Agreement 2020.

999 See Title VII, Part Three, Trade and Cooperation Agreement.

1000 Section 12 of the European Union (Future Relationship) Act 2020 has repealed sections 64 and 65 of the Extradition Act 2003 which previously contained a waiver in relation to the requirement of dual criminality.

1001 Commission Implementing Decision pursuant to Regulation (EU) 2016/679 on the adequate protection of personal data by the United Kingdom, C(2001) 4800, 28 June 2021; and Commission Implementing Decision pursuant to Regulation (EU) 2016/680 on the adequate protection of personal data by the United Kingdom, C(2001) 4801, 28 June 2021.

and Cooperation Agreement.<sup>1002</sup> In November 2021, the CJEU ruled that the surrender mechanism established by the UK-EU Withdrawal Agreement and the Trade and Cooperation Agreement related to the investigation, detection and prosecution of criminal offences and the execution of criminal penalties which strengthen the security of the UK and the EU and could be included in those agreements without the need for Ireland to opt in to that procedure. Therefore, a European Arrest Warrant issued on or before 31 December 2020, where the requested person has not been arrested until after that date, is binding on Ireland.<sup>1003</sup>

### Recommendations

The Commission recommends that highest standards of victims' rights and rights of accused persons are central to cross-border criminal justice cooperation.

The Commission recommends that, in the absence of CJEU oversight of the extradition process, the UK and EU establish clear safeguards within the Trade and Cooperation Agreement oversight mechanisms to ensure that human rights will be safeguarded.

The Commission recommends that the UK and the EU work to ensure that loss of access to criminal justice data-sharing arrangements do not result in unreasonable delays in investigations and proceedings.

The Commission further recommends that in the absence of the European Arrest Warrant, effective and efficient UK-EU extradition arrangements are put in place with robust human rights and legal safeguards for accused persons and for victims of crimes.

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1002 *Saqlain v The Governor of Cloverhill Prison & Others, Shahzad v The Governor of Mountjoy* [2021] IESC 45; Reference for a preliminary ruling 3 August 2021, *SN and SD v Governor of Cloverhill Prison*, C-479/21.

1003 *Governor of Cloverhill Prison and Others*, Case C-479/21, 16 November 2021, at paras 68-71.

## Right to Private and family life

This section considers a wide range of human rights issues related to the right to a private and family life. These include: access to financial support for unmarried couples; alternative care arrangements for children; anonymity for children and pre-charge proceedings; biometric data; climate change and environmental regulation; the Health and Social Care (Control of Data Processing) Act 2016; the rehabilitation of offenders; stop and search; and visitation in care homes.

The right to private and family life is protected under the following treaties:

<b>ECHR</b>	Article 8 Article 12
<b>UN CRC</b>	Article 16 Article 20 Article 21
<b>UN CRPD</b>	Article 19 Article 22
<b>UN ICCPR</b>	Article 17 Article 23
<b>UN ICESCR</b>	Article 10(1)

### Access to financial support for unmarried couples

In 2018, the UK Supreme Court ruled that the requirement that couples are married in order to access Widowed Parent's Allowance was in violation of the right to private and family life under Article 8 ECHR and was also discriminatory, contrary to Article 14 ECHR.<sup>1004</sup>

In 2019, the Work and Pensions Committee published a report, noting the continued delay in remedying the position and meeting its stated aim of "making bereavement benefits more accessible as quickly as possible".<sup>1005</sup>

In July 2020, the Parliamentary Under-Secretary of State for Employment, Mims Davies MP, announced the UK Government's intention to lay a Remedial Order to remove the human rights incompatibilities by extending entitlement to Widowed Parent's Allowance and Bereavement Support Allowance to cohabitants with children.<sup>1006</sup> In May 2021, an amendment to the Queen's Speech on Bereavement Support Payment and Sanctuary Schemes for unmarried couples was debated in the UK

<sup>1004</sup> *In the matter of an application by Siobhan McLaughlin for Judicial Review* [2018] UKSC 48.

<sup>1005</sup> House of Commons Work and Pensions Committee, *Bereavement Support Payment - First Report of Session 2019–20*, (WPC, 2019), at para 75.

<sup>1006</sup> UK Parliament Hansard, 'Response to Written Question: Bereavement Benefits - Mims Davies MP - 76930', 27 July 2020.



Parliament. It noted the failure of the Government to act when the Courts find that Government policy is incompatible with the human rights law and called on the Government to bring forward measures to fully remedy those incompatibilities. The amendment however was defeated by 366 votes to 265.<sup>1007</sup> On payments to bereaved parents, a Department of Work and Pensions spokesperson said “[w]e understand how vital this support is to families. As we have said, we will be taking forward the legislative process to extend Bereavement Support Payment and Widowed Parent’s Allowance to unmarried couples with children, and we are carefully considering the detail and implementation which we will outline in due course.”<sup>1008</sup>

On 15 July 2021 a draft remedial order was laid by Baroness Stedman-Scott, Minister of the Department of Work and Pensions, allowing cohabiting partners with children to access Widowed Parent’s Allowance and Bereavement Support Payment.<sup>1009</sup> Under the draft, a surviving partner with children will only have to have lived with the deceased on the date of death and the changes will apply retrospectively from 30 August 2018. The remedial order will be considered by parliament and once approved backdated payments will be made in lump sums. It is expected that claims will not be able to be made until spring 2022.

The Joint Committee for Human Rights invited submissions on the proposed draft and the Commission responded with its recommendations in September 2021.<sup>1010</sup> These recommendations included that Siobhan McLaughlin, as the applicant in the original legal challenge, be granted a full remedy from the date of her partner’s death. The Commission further highlighted that that the Department for Work and Pensions should consider extending the benefit to co-habiting partners who do not have children, or to those whose children have reached majority and to consider extending the benefit to all children, including those whose parents might be divorced or live apart. The Joint Committee’s Report was published on 12 November 2021 and agreed with many of the Commission’s recommendations, including extending the benefit to those who do not have children, to make ex gratia payments in order to fully recompense those bereaved before the McLaughlin case and to make the payments further back to February 2016, the date of the High Court decision in McLaughlin, rather than the UK Supreme Court case.<sup>1011</sup> The Commission welcomes these recommendations. The UK Government has 60 days to consider the matter and issue its own findings.

### Commission’s case

In 2018, the Commission issued proceedings on behalf of an individual who was denied access to her late partner’s pension by the Ministry of Defence, on the grounds that they were not married. The Commission argues that there is no objective and justifiable reason for treating the

1007 UK Parliament Hansard, ‘A Plan for the NHS and Social Care’, 19 May 2021.

1008 Heather Stewart, ‘Cross-party MPs aim to force government to rectify rights breaches’, *The Guardian*, 12 May 2021.

1009 Draft Bereavement Benefits (Remedial) Order 2021.

1010 NI Human Rights Commission, ‘Submission to Joint Committee for Human Rights on the Proposal for a draft Bereavement Benefits (Remedial) Order 2021’ (NIHRC, September 2021).

1011 Joint Committee for Human Rights, ‘Proposal for a draft Bereavement Benefits Remedial Order 2021: discrimination against cohabiting partners’, 12 November 2021.

individual differently to a married woman in her circumstances and that the failure to make provision for her, and others like her, is in violation of the right to private and family life under Article 8 ECHR, the right to peaceful enjoyment of possessions under Article 1 of the First Protocol ECHR and is discriminatory contrary to Article 14 ECHR.

On 19 April 2021, the court dismissed the Defendant's application to have the claim struck out and an appeal has been lodged by the Ministry of Defence. A date for the hearing of the appeal is awaited.

### Recommendations

The Commission welcomes the draft Bereavement Benefits (Remedial) Order 2021, though notes that it will only have limited retrospective effect so some applicants may not be fully compensated. The Commission recommends that the Order should be retrospective to the date of the High Court judgment for those families who made claims based on the judgment.

The Commission remains concerned that access to certain social security benefits and pensions on the grounds of marriage/civil partnership discriminates against those who are unmarried, with particular ill-effect on women, children and same sex couples. The Commission recommends that the Department for Work and Pensions widens the criteria for social security benefits and pensions to allow couples in long term, cohabiting relationships access to these benefits.



### Alternative care arrangements for children

In 2016, the UN CRC Committee raised concern at the increase in the number of children in care throughout the UK:

*cases where early intervention measures have not been carried out in a timely manner, parents have not been provided with adequate family support and the best interests of the child have not been properly assessed in the decision of taking a child into care. Children have reportedly been removed from their biological families owing to the family's economic situation or because a foster family may provide a more beneficial environment for the child.*<sup>1012</sup>

The UN CRC Committee recommended that the NI Executive:

*ensure that secure accommodation in NI is only used as a measure of last resort and for the shortest possible period of time, address the reasons for repeated or lengthy stays in such accommodation and develop alternatives to secure accommodation.*<sup>1013</sup>

1012 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016.

1013 Ibid, at para 53.

The UN CRC Committee also recommended that the NI Executive and Assembly “expedite the approval and enactment of the Adoption and Children Bill in NI”.<sup>1014</sup>

## COVID-19

On 7 May 2020, the Children’s Social Care (Coronavirus) (Temporary Modification of Children’s Social Care) Regulations (NI) 2020 came into force. These regulations temporarily altered the statutory requirements for reviewing placements of children with parents, foster carers, adoption parents, children’s care homes and secure accommodation. The regulations also extended the deadlines for dealing with complaints linked to children’s care arrangements. The regulations allowed for such temporary measures for a maximum period of six months, subject to review. In September 2020, the Department of Health and health and social care trusts were on track to return operations for child care arrangements back to normal by the end of that month.<sup>1015</sup> However, in October 2020, the regulations were renewed for a further six months until 21 May 2021 in response to an increasing strain on the health and social care trusts due to a second wave of COVID-19.<sup>1016</sup> In April 2021, the Department launched a two-week consultation to extend modifications for a further six months due to the ongoing threat posed by the pandemic.<sup>1017</sup> However, after a number of respondents to the consultation raised concerns about the repeated extension of the regulations - including the Commission, NI Commissioner for Children and Young People and Children’s Law Centre - the Department of Health decided not to proceed with any of the modifications.<sup>1018</sup> Therefore the regulations ceased to have effect from 7 May 2021 and the usual statutory duties across social care children’s services resumed.

## Statistics

At 31 March 2021, 3,530 children and young people were provided accommodation by an authority for a continuous period of more than 24 hours in the exercise of the authority’s social services function.<sup>1019</sup>

This is the highest number recorded since the introduction of the Children (NI) Order 1995 and an increase of 4 per cent (from 3,383) in the number of children in care compared to 2019/2020. This represented a rate of 80.0 children per 10,000 population under 18.<sup>1020</sup>

In terms of duration in care, 747 (21 per cent) had been in care for less than a year at 31 March 2021 and 2,442 (31 per cent) had been in care for at least five years.<sup>1021</sup>

1014 Ibid.

1015 Letter from Department of Health to NI Assembly Committee for Health, 27 October 2020.

1016 Letter from Department of Health to NI Assembly Committee for Health, 27 October 2020; Children’s Social Care (Coronavirus) (Temporary Modification of Children’s Social Care) (Amendment) Regulations (NI) 2020.

1017 Department of Health, ‘Consultation on proposals to extend modifications to children’s social care regulations’ (DoH, 2021).

1018 Department of Health, ‘Proposals to extend modifications to children’s social care legislation: summary and analysis of responses’, (DoH, 2021).

1019 Information Analysis Directorate, ‘Children’s Social Care Statistics for NI 2020/21’ (DoH, 2021), at Section 3.

1020 Ibid.

1021 Ibid.

Of the 3,530 children and young people in care at 31 March 2021, 53 per cent were boys, 47 per cent were girls, and 13 per cent were recorded as having a disability. In terms of age, 113 (five per cent) were under one, 710 (22 per cent) were between one and four, 1,264 (36 per cent) were between five and 11, 908 (26 per cent) were between 12 and 15, and 535 (15 per cent) were 16 and over.<sup>1022</sup>

Additionally, 2,857 (81 per cent) were fostered, 317 (9 per cent) were placed with parents, 199 (6 per cent) were placed in residential care and 157 (4 per cent) in other placements.<sup>1023</sup>

The Children's Services Co-operation Act (NI) 2015 places a statutory obligation on certain public authorities and other persons to contribute to the well-being of children and young persons and requires the NI Executive to adopt a Children and Young Persons Strategy, which was published in 2019.<sup>1024</sup>

### Adoption reform

The legislation governing adoption in NI is over 30 years old. Following a consultation in 2017, the Adoption and Children (NI) Bill was formally introduced to the Assembly in September 2021. In August 2021, the Committee for Health issued a call for evidence on the draft Bill. The Commission submitted a response welcoming the proposed reforms and highlighting areas for further consideration, such as clarity around measures to ensure non-discrimination against same-sex couples, the availability of short break services and the allocation of resources.<sup>1025</sup>

### Foster care

Minimum Kinship Care Standards have been in place since 2012 and are subject to regular review,<sup>1026</sup> however, the Department of Health stated in 2013 that it would update fostering standards in NI.<sup>1027</sup> The Foster Placement (Children) Regulations (NI) 1996 remain untouched. Unlike in the rest of the UK, these regulations do not include minimum standards for foster care or a statutory requirement for foster care to be inspected.

In 2020, the Fostering Network reported that the approval process for foster care placements is extremely lengthy and that this is particularly a problem with placements arranged by the health and social care trusts in NI.<sup>1028</sup>

In February 2021, the Department of Health and the Department of Education launched the new joint strategy 'A Life Deserved: "Caring" for Children and Young People in Northern Ireland' which makes more than 60 commitments aimed at delivering improvements in wellbeing for children and young people who are already in care, at risk of entering

1022 Information Analysis Directorate, 'Children's Social Care Statistics for NI 2020/21' (DoH, 2021), at Section 3.

1023 Ibid.

1024 Department of Education, 'Children and Young People's Strategy 2019 - 2029' (DoE, 2019).

1025 NI Human Rights Commission, 'Submission to Committee for Health on the Adoption and Children Bill', 8 October 2021.

1026 Department of Health, 'Minimum Care Standards, NI' (DoH, 2019).

1027 Regulatory and Quality Improvement Authority, 'Review of Statutory Fostering Services Overview Report' (RQIA, 2013), at para 1.1.

1028 Meeting between NI Human Rights Commission and the Fostering Network, 12 May 2020.

care and those children and young people who have recently left care.<sup>1029</sup> Commitments include a number of measures targeted at addressing issues with foster care arrangements, such as: additional specialist foster carers; new legislation which will strengthen panel assessment and decision making arrangements for foster carers, and establish a review mechanism of such approval decisions; and a new approach to regional recruitment and retention of foster carers. It is advised an implementation plan will support the delivery and be used to report progress, however the implementation plan has not been published and there is no indication of timeframe for the commitments outlined.

### **Secure accommodation**

Article 44 of the Children (NI) Order 1995 makes provision for a child to be held in secure accommodation, meaning accommodation provided for the purpose of restricting liberty, under strict circumstances.

In October 2020, the Department of Justice and Department of Health jointly consulted on proposals to introduce a Regional Care and Justice Campus for NI, which would encompass the current Secure Care Centre at Lakewood and the Juvenile Justice Centre at Woodlands.<sup>1030</sup> In its response to the consultation, the Commission welcomed plans to ensure that being accommodated within the campus is a last resort and that effective steps are in place to avoid repeat admissions, as required by Article 37(b) UN CRC and Article 5 ECHR.<sup>1031</sup> These steps include: developing discharge plans, which are unique to the individual child and subject to review; introducing satellite step-down facilities; deciding on where a child is placed is based on an assessment of their individual needs; and ensuring to consider alternative options.

In the consultation analysis report, the Departments advise that, “providing suitably resourced alternatives to secure accommodation or support to young people on discharge will be subject to available resources”.<sup>1032</sup> However, it is anticipated that an integrated Secure Care Centre will provide an opportunity to redirect some of the costs currently associated with the running of two centres to community-based provision. Plans to develop a step-down unit on the site of the Secure Care Centre will proceed as part of the overall Campus provision. Further consideration will be given to more locally based step-down provision with Health and Social Care Trusts, to help support children and young people as close to their home and families as possible. The Departments are now working together to develop more detailed plans before proceeding to the implementation phase.<sup>1033</sup>

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1029 Department of Health and Department of Education, ‘A Life Deserved: “Caring” for Children & Young People in Northern Ireland’, February 2021.

1030 Department of Health and Department of Justice, Consultation on Establishment of a Regional Care and Justice Campus, (DoH and DoJ, 2020).

1031 Letter from the NI Human Rights Commission to Department of Health, 27 January 2021.

1032 Department of Health and Department of Justice, ‘Establishment of a Regional Care and Justice Campus: Consultation Analysis’, (DoH, 2021).

1033 Ibid.

## Recommendations

The Commission recommends the expedition of the Adoption and Children Bill in NI. In doing so, the Commission calls on the Department of Health to ensure that the Bill introduces a framework for adoption which is modelled on the UN CRC and places the best interests of the child as the paramount consideration in all decisions.

In relation to foster care, the Commission recommends that standards are developed and implemented by the Department of Health without further delay. Further, the approval process for foster placements should be reviewed with the view to shorten the length of time.

The Commission recommends that the Department of Health guarantees that secure accommodation is used as a measure of last resort and for the shortest possible period of time in practice.

The Commission further recommends that any changes to the structure of the regional facilities for children and young people are in the best interests of the children affected and effectively addresses the different needs of different groups of children, avoiding the criminalisation of looked after children.

## Anonymity: children and pre-charge proceedings

Section 44 of the Youth Justice and Criminal Evidence Act 1999 prevents anyone under 18 allegedly involved in an offence from being named in the media.<sup>1034</sup> However, unlike in England and Wales, NI has not enacted this provision. Article 22 of the Criminal Justice (Children) (NI) Order 1998 places reporting restrictions for minors in post-charge and court scenarios, but not for minors who are pre-charge.

In 2020, a challenge was brought on behalf of a child hacker who was named in the press. In 2015, the applicant, who was then 15 years old, was arrested and interviewed by the Police Service of NI as a suspect in an alleged cyber-crime involving the hacking of customer details retained by the company Talk-Talk. Shortly after his arrest, details of the applicant's identity, including his name, age, place of residence and photograph, were published by various media outlets. The applicant sought a declaration that the Department of Justice's failure to enact section 44 of the Youth and Justice Criminal Evidence Act was unlawful and to not extend the protection of Article 22 of the Criminal Justice (Children) (NI) Order 1998 to pre-charge minors was unfair. The applicant also sought to obtain an order requiring the Department of Justice to immediately enact legislation to provide for reporting restrictions in pre-charge situations. The NI High Court found that the applicant, who was in a pre-charge situation, was "not in a relevantly analogous situation to children who actually appear

1034 This provision applies in England, Wales and NI.



before a court” and that there was “nothing unfair or irrational in the State’s approach”.<sup>1035</sup>

### Recommendation

The Commission recommends that the Department of Justice amends the existing legislation to ensure that all children in NI allegedly involved in an offence are granted anonymity at every stage of the criminal justice process, including the pre-charge stages.

### Biometric data

The current law on DNA and fingerprint retention in NI is the Police and Criminal Evidence (NI) Order 1989. In 2008, the ECtHR found that the provisions relating to DNA retention in the Police and Criminal Evidence (NI) Order were in violation of the Article 8 ECHR.<sup>1036</sup> The Criminal Justice Act (NI) 2013 was enacted in order to rectify this violation; however, the sections in relation to DNA retention were not commenced pending political agreement on how these sections would affect legacy investigations.

In January 2019, the Commission settled a legal challenge against the Police Service of NI on the basis that it would produce a formal policy on biometric data retention which would expressly take into account Article 8 ECHR and provide clear guidance to the public as to how they can apply for their biometric data to be destroyed.<sup>1037</sup>

In February 2020, the ECtHR gave judgment in the case of *Gaughran v UK*, finding that the policy of indefinite retention was a disproportionate interference with the applicant’s rights, in breach of Article 8 ECHR:

*the indiscriminate nature of the powers of retention of the DNA profile, fingerprints and photograph of the applicant as person convicted of an offence, even if spent, without reference to the seriousness of the offence or the need for indefinite retention and in the absence of any real possibility of review, failed to strike a fair balance between the competing public and private interests... Accordingly, the respondent State has overstepped the acceptable margin of appreciation.*<sup>1038</sup>

In 2020, with a view to addressing the ECtHR’s ruling, the Department of Justice consulted on proposals to amend the legislation governing the retention of DNA and fingerprints in NI.<sup>1039</sup> The Department of Justice proposed amending the Criminal Justice Act (NI) 2013 to end indefinite retention, instead using the 75, 50 and 25 year model for retaining DNA and fingerprints of convicted individuals. It is also proposed that

<sup>1035</sup> *In the Matter of an Application by JKL (A Minor) to Apply for Judicial Review and In the Matter of a Decision of the Department of Justice* [2020] NIQB 29, at paras 70 and 72.

<sup>1036</sup> *S and Marper v UK* [2008] ECHR 1581.

<sup>1037</sup> NI Human Rights Commission, ‘Press release: Human Rights Commission secures settlement in DNA fingerprint retention case’, 9 January 2019.

<sup>1038</sup> *Gaughran v UK* [2020] ECHR 144, at 96.

<sup>1039</sup> Department of Justice, ‘Consultation on proposals to amend the legislation governing the retention of DNA and fingerprints in Northern Ireland’, (DoJ, 2020).

this new approach would include a review system that would be put in regulations, which have yet to be published. The Commission responded to this consultation, welcoming the removal of indefinite retention, but raising concerns that the proposed alternative lengths of retention and the lack of plans to consider such retention on a case-by-case basis were disproportionate.<sup>1040</sup>

In October 2020, revised proposals from the Department of Justice following the consultation responses were considered by the NI Assembly Committee for Justice.<sup>1041</sup> The Commission has provided further advice to the Department of Justice and Committee for Justice in light of the revised proposals.<sup>1042</sup> Amongst the Commission's recommendations was that the introduction and implementation of proposals relating to the retention of DNA and fingerprints in NI fully and effectively addresses the specific issues raised in the *Gaughran v UK* judgment. Otherwise, the provisions are unlikely to strike the fair balance between public and private interests required under Article 8 ECHR.

As part of the execution of judgments process, in March 2021, the Council of Europe Committee of Ministers considered the *Gaughran v UK* case and the actions the UK Government is taking to comply with the judgment.<sup>1043</sup> The UK Government highlighted the Department of Justice consultation and confirmed that "proposals will be introduced to the NI Assembly at the earliest available legislative opportunity".<sup>1044</sup> Given the absence of agreement and a legislative framework in NI, legislation was introduced which extends the permitted retention of conflict related material from October 2020 until October 2022.<sup>1045</sup>

Justice Minister, Naomi Long, had planned to address the issue of retention of biometric data through legislation as part of a proposed Justice (Miscellaneous) Provisions Bill. However, in June 2021 the Minister announced that the Bill will now progress in a pared-back form as the Justice (Sexual Offences and Trafficking Victims) Bill, following approval of the NI Executive. The Bill was introduced to the Assembly in July 2021 and did not include provisions on biometric data retention. It is unlikely that any legislative reform on this issue will be passed by the NI Assembly before the end of its current legislative mandate.

Following this announcement, the Commission wrote to the Minister setting out its continuing concerns that this will continue an ongoing breach in light of the *Gaughran v UK* judgment.<sup>1046</sup> The Commission has also written to the Police Service of NI in respect of how it intends to

1040 NI Human Rights Commission, 'Submission to Department of Justice Consultation on Proposals to Amend the Legislation Governing the Retention of DNA and Fingerprints in NI', (NIHRC, 2020).

1041 NI Assembly Hansard, 'Committee for Justice: Proposals to Amend Legislation Governing the Retention of DNA and Fingerprints - Department of Justice', 15 October 2020.

1042 NI Human Rights Commission, 'Submission to Department of Justice Consultation on Proposals to Amend the Legislation Governing the Retention of DNA and Fingerprints in NI', (NIHRC, 2020).

1043 DH-DD(2021)202, 'Action plan (15/02/2021) - Communication from the United Kingdom concerning the case of *Gaughran v. the United Kingdom* (Application No. 45245/15)', 18 February 2021.

1044 DH-DD(2021)202, 'Action plan (15/02/2021) - Communication from the United Kingdom concerning the case of *Gaughran v. the United Kingdom* (Application No. 45245/15)', 18 February 2021.

1045 The Protection of Freedoms Act 2012 (Destruction, Retention and Use of Biometric Data) (Transitional, Transitory and Saving Provisions) (Amendment) Order 2020.

1046 Correspondence from the NI Human Rights Commission to the Justice Minister, July 2021.

ensure compliance with Article 8 ECHR, in light of the Gaughran judgment and pending any legislative reform.<sup>1047</sup>

The Police Service of NI has confirmed that, in light of biometric provision no longer being included in the Justice (Sexual Offences and Trafficking Victims) Bill, that interim measures would be implemented. This includes the reinstatement of the Biometric Ratification Committee to determine all applications for deletion in line with the Police and Criminal Evidence (NI) Order 1989. The Police Service of NI intends to consult with the Commission in respect of its Biometric Service Instruction and ensure publication of this for members of the public.<sup>1048</sup>

As of 5 November 2021, approximately 207,189 individuals' fingerprints and 199,537 DNA profiles are held by the Police Service of NI.<sup>1049</sup>

### Recommendation

The Commission recommends the Department of Justice commence the DNA retention sections of the Criminal Justice Act (NI) 2013 without further delay. Following the Commission's previous litigation, it continues to recommend the Police Service of NI ensure its policy on biometric data retention is human rights compliant, effectively implemented and expeditiously published in accessible formats.

## Climate change and environmental regulation

The Climate Change Act 2008 is the basis for the UK's approach to tackling and responding to climate change. It provides for emission targets, establishment of a UK-wide Committee on Climate Change, and a UK Climate Change Risk Assessment every five years. Responsible departments across the UK are required to produce their own national adaptation programmes and policies, this includes the Department of Agriculture, Environment and Rural Affairs in NI.

In Scotland, the Climate Change (Scotland) Act 2009, sets Scotland-specific targets for reducing greenhouse gas emissions and creates a statutory framework for achieving this. In Wales, the Well-being of Future Generations (Wales) Act 2015 requires public authorities to consider the long-term impact of decisions, including on climate change. The Environment (Wales) Act 2016 provides Welsh Ministers with the powers to put in place Wales-specific statutory emission reduction targets.

In 2010, a Cross Departmental Working Group on Greenhouse Gas Emissions was introduced in NI to consider climate change mitigation and adaptation. It was reconstituted as the Cross-Departmental Working Group on Climate Change. This group includes departmental analysts and is to produce an annual progress report. The last annual progress report was in 2016.<sup>1050</sup>

1047 Correspondence from the NI Human Rights Commission to the Chief Constable of the Police Service of NI, August 2021.

1048 Correspondence from the Chief Constable of the Police Service of NI to the Chief Commissioner of the NI Human Rights Commission, 5 November 2021.

1049 Ibid.

1050 Cross-Departmental Working Group on Climate Change, 'Annual Progress Report', (DoE, 2016).

In 2020, the UK-wide Committee on Climate Change stated that “our current analysis does not show a credible pathway for NI to reach Net Zero greenhouse gas emissions as part of its contribution to the UK Net Zero target. We therefore do not recommend that NI set a Net Zero target for all greenhouse gases. Instead, NI should aim for at least an 82 per cent reduction in all greenhouse gases by 2050.”<sup>1051</sup>

The New Decade, New Approach agreement includes a commitment to “bring forward a Climate Change Act to give environmental targets a strong legal underpinning” and to “establish an Independent Environmental Protection Agency to oversee this work and ensure targets are met”.<sup>1052</sup>

The Climate Change Bill (No.1) was introduced to the NI Assembly via a Private Member’s Bill by Clare Bailey MLA. The Bill is intended to enable the mitigation of the impact of climate change in NI; establish a legally binding net-zero carbon target for NI; provide for the establishment and powers of the NI Climate Commissioner and NI Climate Office; guarantee existing environmental and climate protections; and for connected purposes. The Bill passed its second reading in May 2021 and is at Committee Stage. In October 2021, the Agriculture and Environment Minister, Edwin Poots, opposed the proposed targets, claiming it would have a disproportionately detrimental impact on agri-food, NI’s biggest emitting sector.<sup>1053</sup>

The Minister introduced the separate Climate Change (No.2) Bill in July 2021. The Executive’s bill has a less stringent target and a longer time frame than the first Climate Bill and does not seek to establish a separate independent mechanism to oversee targets as this would be carried out by the Climate Change Committee. It proposes targets for a 48 per cent reduction in NI greenhouse gas emissions by 2030, a 69 per cent reduction by 2040 and an 82 per cent reduction by 2050. It also seeks to impose climate change reporting duties on public bodies. The Bill passed its second reading in September 2021 and is at Committee Stage.

In June 2021, the Committee on Climate Change published a report warning of greater risks of flooding, summer droughts and wildfires as a result of rising temperatures in NI. The report is completed every five years to assist government in deciding climate adaptation plans. It found while NI’s risks were similar to those around the UK, less reliable evidence and fewer climate policies “increased the uncertainty” around future impacts.<sup>1054</sup>

## Climate justice

In 2015, the St Julian’s Declaration on Climate Justice<sup>1055</sup> was unanimously adopted by the Commonwealth Forum of National Human Rights Institutions. This Declaration promotes the approach that:

1051 Climate Change Committee, ‘The Sixth Carbon Budget: The UK’s path to Net Zero’, December 2020, at 230.

1052 NI Office, ‘New Decade, New Approach’ (NIO, 2020), at 44.

1053 ‘NI Climate bill would devastate rural economy – Poots’, *BBC News*, 7 October 2021.

1054 Climate Northern Ireland, ‘Evidence for the third UK Climate Change Risk Assessment (CCRA3): Summary for Northern Ireland’, June 2021.

1055 Commonwealth Forum of National Human Rights Institutions, ‘St Julian’s Declaration on Climate Justice’ (25 November 2015).

*human rights obligations and commitments have the potential to inform and strengthen international and national policy-making in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes. The concept of climate justice, which links human rights and development, provides a new approach to look at these issues and creates a platform to discuss a sustainable climate agenda.*<sup>1056</sup>

It commits the signatory national human rights institutions, including the Commission, to take proactive steps to promote and encourage implementation of this approach within the respective jurisdictions.

### **Environmental regulator**

In 2008, the ECtHR found that legislation amending powers of entry and associated powers interfere with the right to private and family life and must be formulated with sufficient precision to afford adequate legal protection against arbitrariness.<sup>1057</sup>

The Environmental Better Regulation (NI) Act 2016, inter alia, provides for a review of powers of entry and associated powers relating to the protection of the environment and for the repeal or rewriting of such powers and for safeguards in relation to them. The Act is an enabling piece of legislation which grants the Department of Agriculture, Environment and Rural Affairs the power to introduce secondary legislation which may amend primary legislation.<sup>1058</sup>

NI remains the only part of the UK not to have an independent environmental regulator. In 2019, the Department of Agriculture, Environment and Rural Affairs consulted on an Environment Strategy for NI.<sup>1059</sup> It did not include reference to establishing an independent environmental regulator.

The New Decade, New Approach agreement includes a commitment to “establish an Independent Environmental Protection Agency to oversee this work and ensure targets are met”.<sup>1060</sup>

### **Intergovernmental Panel on Climate Change**

On 10 August 2021 the Intergovernmental Panel on Climate Change, the UN body tasked with assessing the science related to climate change, published their sixth assessment report, stating that human activity is changing the climate in unprecedented and in some cases irreversible ways.<sup>1061</sup> However, the report notes that a catastrophe can be avoided if the world acts fast, and there is hope that deep cuts in emissions of greenhouse gases could stabilise rising temperatures.<sup>1062</sup> The UN

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1056 Commonwealth Forum of National Human Rights Institutions, ‘St Julian’s Declaration on Climate Justice’, 25 November 2015.

1057 *S and Marper v the United Kingdom* (2008) ECHR 1581.

1058 Committee for the Environment, ‘Report on the Environmental Better Regulation Bill’, (CCC, 2015).

1059 Department of Agriculture, Environment and Rural Affairs, ‘Environment Strategy for NI: Public Discussion Document’, (DAERA, 2019).

1060 NI Office, ‘New Decade New Approach’, (NI Office, 2020), at 44.

1061 IPCC, ‘Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change’, August 2021.

1062 Ibid.



Secretary-General António Guterres said the report “is a code red for humanity”. Echoing the scientists’ findings, the UN Secretary General said “If we combine forces now, we can avert climate catastrophe. But, as today’s report makes clear, there is no time for delay and no room for excuses. I count on government leaders and all stakeholders to ensure COP26 is a success.”<sup>1063</sup>

NI’s Infrastructure Minister Nicola Mallon called the report a “frightening wake-up call”.<sup>1064</sup> The Minister said she would raise the climate change report with Executive ministers. The Executive has agreed to hold a special meeting to discuss climate change ahead of the UN COP26 climate conference in Glasgow in October.<sup>1065</sup>

### Climate change litigation

The first case on climate change to be lodged with the ECtHR is that of *Duarte Agostinho and Others v. Portugal*, a complaint by six young people against 34 Council of Europe States.<sup>1066</sup> The applicants claim non-compliance of these States with their positive obligations under Articles 2 and 8 ECHR, read in light of the Paris Agreement on the Climate.<sup>1067</sup> The ECtHR, in October 2020, upheld a request for the cases to be examined urgently. A hearing date is awaited.

The ECtHR is also considering the case of *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*.<sup>1068</sup> The applicants are a group of older women who allege that the state is not doing enough to cut greenhouse gas emissions, exposing them to life-threatening heatwaves in violation of the right to life and the right to private and family life enshrined in Articles 2 and 8 ECHR. This is one of the first cases before the Court that raises the question of states’ positive obligations to limit the irreversible consequences of climate change in order to ensure the realisation of human rights standards established under the ECHR. The European Network of National Human Rights Institutions submitted a third-party intervention, which underlines states’ responsibility to combat climate change effectively in order to protect the right to life, and invites the Court to confirm decisions from apex courts in Germany and the Netherlands, which have found that states are obligated to safeguard the right to life and physical integrity by cutting emissions to limit global warming.<sup>1069</sup> The Commission is a member of the European Network’s Legal Working Group which developed the submission.

In October 2021, the UN CRC Committee considered a number of individual complaints, submitted by 15 children against Argentina, Brazil, France, Germany and Turkey, on the impact of climate change. The Committee published an open letter to the complainants, explaining why it found the complaints inadmissible due to non-exhaustion of

1063 UN, ‘Press Release: Secretary-General Calls Latest IPCC Climate Report ‘Code Red for Humanity’, Stressing ‘Irrefutable’ Evidence of Human Influence’, 9 August 2021.

1064 Jayne McCormack, ‘Climate change: UN report is a ‘frightening wake-up call’, *BBC News*, 10 August 2021.

1065 ‘Climate change: NI Executive to hold special meeting’, *BBC News*, 12 August 2021.

1066 *Duarte Agostinho and Others v. Portugal and 33 other States*, Application No. 39371/20.

1067 ECtHR, ‘Duarte Agostinho and Others v. Portugal and 33 other States: Purpose of the case’, 30 November 2020.

1068 *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, (2021), Application No.53600/20.

1069 ENNHRI, ‘Third Party Intervention: *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*’, (2021), 53600/20, October 2021.



domestic remedies.<sup>1070</sup> The Committee confirmed the importance of their applications despite the outcome, and confirmed that it would be pursuing a General Comment on Children's rights and the environment with a special focus on climate change.<sup>1071</sup>

### **COP26 Summit**

A new global agreement, the Glasgow Climate Pact,<sup>1072</sup> was reached at the COP26 summit. The new agreement aims for governments across the world to take action to reduce the worst impacts of climate change by further reductions in greenhouse gases.

Whilst the agreement has been broadly welcomed, there remains some concerns over whether the agreement goes far enough to avoid the potential effects of climate change.

It was agreed countries will meet next year to pledge further cuts to emissions of carbon dioxide in order to try to keep temperature rises within 1.5°C,<sup>1073</sup> which scientists say is required to prevent a "climate catastrophe". However, current pledges, if met, may only limit global warming to about 2.4°C.<sup>1074</sup>

World leaders pledged to significantly increase money to help poor countries cope with the effects of climate change and make the switch to clean energy and introduce a trillion dollar a year fund from 2025. Leaders from more than 100 countries - with about 85 per cent of the world's forests - promised to stop deforestation by 2030. A scheme was also agreed by more than 100 countries to cut 30 per cent of methane emissions by 2030.<sup>1075</sup>

There was also an explicit plan to reduce use of coal in energy generation - which is responsible for 40 per cent of annual CO<sub>2</sub> emissions. However, countries agreed a weaker commitment to 'phase down' rather than 'phase out' coal after an intervention by China and India.<sup>1076</sup>

### **Recommendations**

The Commission recommends that NI-specific legislation and statutory targets are expeditiously developed and implemented, as in Scotland and Wales.

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1070 Petition Submitted under Article 5 of the Third Optional Protocol to the United Nations Convention on the Rights of the Child, *Sacchi v. Argentina* (Sept. 23, 2019).

1071 UN Committee on the Rights of the Child, 'Open letter to the authors of the petition of complaint to the United Nations Committee on the Rights of the Child', 11 October 2021.

1072 Glasgow Climate Pact, Conference of the Parties serving as the meeting of the Parties to the Paris Agreement Third session Glasgow, 31 October to 12 November 2021, FCCC/PA/CMA/2021/L.16.

1073 COP26 - The Negotiations Explained, UN Climate Change Conference 2021. Available at: <https://ukcop26.org/wp-content/uploads/2021/11/COP26-Negotiations-Explained.pdf>.

1074 'What was agreed at the Glasgow climate conference?', *BBC News*, 16 November 2021.

1075 Ibid.

1076 Ibid.

The Commission recommends that the Department of Environment, Agriculture and Rural Affairs ensures that secondary legislation enacted under the Environmental Better Protection Act 2016 is fully compliant with international human rights obligations and is subject to robust oversight.

The Commission recommends that an independent environmental regulator is promptly introduced in NI by the Department of Environment, Agriculture and Rural Affairs.

## Health and Social Care (Control of Data Processing) Act 2016

The Health and Social Care (Control of Data Processing) Act 2016 provides a statutory framework, including safeguards, which provides for the use of health and social care information for the benefit of health and social care research.<sup>1077</sup>

During passage of the then Bill, the Commission advised that the ECtHR has held that the protection of medical data falls within the ambit of the right to private and family life, protected by Article 8 ECHR, and that laws which interfere with the right to private and family life must be formulated with sufficient precision to afford adequate legal protection against arbitrariness and indicate with sufficient clarity the scope of discretion conferred on the competent authorities.<sup>1078</sup> The 2016 Act makes provision for a Committee to authorise the processing of confidential information, this is a key safeguard against arbitrariness.

In 2021, work continues on developing the Encompass programme.<sup>1079</sup> Encompass is a single digital health and social care record, whereby all health and care records are brought together in digital form. An information governance work stream is being established, which will consider access to medical data for secondary purposes.

In response to a written question, in May 2021, the Health Minister advised:

*The complex work to develop regulations for consideration by the Health Committee and the full Assembly has restarted. Health officials intend to include discussion on Secondary use of Patient Identifiable Information within the planned public engagement on a “Data Strategy for the use of Health and Social Care information”. The initial phase of this work will be a consultation with key stakeholders. Draft regulations will be brought to the Assembly for formal consideration once consultations have concluded. Analysis of the efficient and effective delivery of health and social care services is already undertaken on a daily basis using anonymised, non-attributable data,*

1077 Section 2(1), Health and Social Care (Control of Data Processing) Act (NI) 2016.

1078 NI Human Rights Commission, ‘Advice on the Health and Social Care (Control of Data Processing)’, (NIHRC, 2015), at para 14.

1079 Health and Social Care Board, ‘What is Encompass?’, Available at: <http://www.hscboard.hscni.net/encompass/>.

*in line with best practice in the production of statistics and use of sensitive, confidential personal healthcare data.*<sup>1080</sup>

## Recommendations

The Commission recommends that the Department of Health urgently establish a Committee to authorise the processing of confidential information under the Health and Social Care (Control of Data Processing) Act 2016 to ensure adequate legal protection against arbitrariness.

## Rehabilitation of offenders

In 2004, the UN Sub-Commission on the Promotion and Protection of Human Rights, in a resolution concerning discrimination against convicted persons who have served their sentence urged States “to examine their treatment of convicted persons after they have served their punishment and to cease any official or unofficial practices of discrimination”.<sup>1081</sup>

Research carried out in 2015 by the NI Data Lab<sup>1082</sup> concluded that NIACRO’s Jobtrack project, which was aimed at increasing the employability of people who had offended, had the effect of reducing reoffending by 24 per cent.

In 2016, the ECtHR affirmed in *Murray v the Netherlands* “that the principle of rehabilitation, that is, the reintegration into society of a convicted person, is reflected in international norms and has not only been recognised but has over time also gained increasing importance in the Court’s case-law under various provisions of the Convention.”<sup>1083</sup>

In January 2021, the NI Department of Justice launched a public consultation on proposals to reform rehabilitation periods in NI.<sup>1084</sup> The purpose of this consultation was to gather views on the proposals to reduce the length of time that it will take for some convictions to become spent; and to allow more sentences to be included in the rehabilitation of offenders scheme in NI. In March 2021, the Commission responded to the consultation and supported the proposals to reform legislation governing the rehabilitation of offenders in NI.<sup>1085</sup> The Commission further recommended that the Department of Justice’s approach to a two-part rehabilitation be examined further and should take into account the rehabilitation experiences in Scotland and Wales, that the Department consider a review mechanism to comply with Article 8 ECHR, that consideration be given to conflict-related convictions that pre-date the Good Friday/Belfast Agreement and that ex-prisoners and other

1080 NI Assembly Hansard, ‘Response to Written Question – Health Related Rights – Colm Gildernew MLA – AQW 17042/17-22’, 4 May 2021.

1081 Sub-Commission on Human Rights Resolution 2004/28.

1082 Northern Ireland Statistics Research Agency, ‘Reoffending Analysis for a Sample of Offenders who Completed the NIACRO Jobtrack Programme During 2010/11’, May 2015.

1083 *Murray v The Netherlands* (2016) ECHR 408, at para 102.

1084 Department of Justice, ‘Rehabilitation of Offenders - a consultation on proposals to reform rehabilitation periods in Northern Ireland’, 8 January 2021.

1085 NI Human Rights Commission, ‘Submission to Rehabilitation of Offenders Reform consultation’, March 2021.

relevant stakeholders be consulted with on the future development of the legislation.<sup>1086</sup>

In 2020, the Commission initiated legal action against the Department of Justice to challenge the legality of article 6(1) of the Rehabilitation of Offenders (NI) Order 1978 on behalf of the applicant who was convicted in 1980 for various offences totalling a sentence of five years. Despite the passage of time with no further involvement in the criminal justice system, the applicant was still required to declare this conviction.

In November 2021, Mr Justice Colton, made a declaration to the effect that Article 6(1) of the Rehabilitation of Offenders (NI) Order 1978 is incompatible with Article 8 ECHR by reason of failing to provide a mechanism by which certain categories of offenders can apply to have their conviction considered to be spent.<sup>1087</sup>

The Court held that the legislation as it stands creates an ongoing interference with the applicant's Article 8 ECHR rights which are not proportionate. Further, that protecting the public and ensuring confidence in the justice system could be achieved by less restrictive measures which would enable the applicant to have his conviction deemed to be spent. Mr Justice Colton stated that:

*it would be both practicable and proportionate to devise a system of administrative review which would enable persons such as the applicant to apply to have their conviction deemed to be spent. The court considers that there must be some circumstances in which an appropriate Tribunal could reliably conclude that an individual's conviction should be deemed to be spent. That system of review would involve consideration of such matters as the circumstances of the conviction, the length of sentence, the period of time since the conviction was imposed, the conduct of the individual since the conviction and his current personal circumstances.*<sup>1088</sup>

NIACRO and Unlock provided supporting affidavits in the applicant's case.

The Minister has indicated, in response to a written question, that it is her intention "to develop a statutory rule for planned introduction to the Assembly early in the New Year. The instrument will amend Article 6(1) of the 1978 Order to both reduce current rehabilitation periods and to increase the range of sentences capable of becoming spent."<sup>1089</sup>

1086 Ibid, at p.3.

1087 *In the matter of an application by JR 123* [2021] NIQB 97, at para 102.

1088 Ibid, at para 98.

1089 NI Assembly Hansard, 'Written Question: Recent High Court Judgment' - Sinéad Ennis MLA - AQW 25017/17-22, 10 November 2021.

## Recommendations

The Commission welcomes the recent NI High Court judgment and recommends that the Department of Justice takes steps to amend the Rehabilitation of Offenders (NI) Order 1978 to introduce a system for review of criminal records. This mechanism should take a human rights based approach and be developed in collaboration with stakeholders.

## Stop and search

In 2015, the UN Human Rights Committee called for implementation as a matter of priority of “the recommendation of the Policing Board to the Police Service of NI concerning the inclusion in the Police Service of NI’s recording form of community background of persons stopped and searched under the Justice and Security (NI) Act 2007”.<sup>1090</sup>

In 2016, the UN CRC Committee recommended that the NI Executive:

- a) *prohibit the use of non-statutory stop and search checks against children;*
- b) *ensure that the statutory use of the stop and search checks is proportionate, taking into consideration the age and maturity of the child, and non-discriminatory;*
- c) *regularly collect, analyse and publish data relating to the use of stop and search checks on children, disaggregated by age, sex, disability, geographic location, ethnic origin and socioeconomic background.*<sup>1091</sup>

## Statistics

Between July 2020 and June 2021, under the Justice and Security (NI) Act 2007, section 21 powers to stop and question were used 552 times, a 30 per cent decrease compared to the previous 12 months. Section 24 powers to stop and search for munitions were used 4,085 times, a 10 per cent decrease from 2019/2020.<sup>1092</sup>

In 2020/2021, under the Terrorism Act 2000, section 43 powers to stop and search a person reasonably believed to be a terrorist were used 34 times, an increase of 13 per cent compared to the previous 12 months. Section 43A powers to stop and search a vehicle reasonably believed to be used for terrorism were used four times, a decrease of 50 per cent from 2019/2020. Section 47 powers to stop and search without reasonable suspicion where a senior police officer reasonably believes an act of terrorism will take place were not used, which is the same as in the previous 12 months.<sup>1093</sup>

<sup>1090</sup> CCPR/C/GBR/CO/7, ‘UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the UK of Great Britain and NI’, 17 August 2015, at para 11(b).

<sup>1091</sup> CRC/C/GBR/CO/5, ‘UN CRC Committee Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and NI’, 12 July 2016, at para 38.

<sup>1092</sup> NI Statistics and Research Agency, ‘Use of Stop and Search Powers by the Police in NI: 1 July 2020 to 30 June 2021’, (NISRA, 2021), at 4.

<sup>1093</sup> Ibid.

Between July 2020 and June 2021, under all legislative stop, search and questioning powers a total number of 27,041 persons were stopped, three per cent more than the previous three months.<sup>1094</sup> 3,029 persons aged 13 – 17 were stopped, while 62 children aged 12 years and under were stopped.<sup>1095</sup>

## Monitoring

In February 2020, the Court of Appeal NI considered whether the Police Service of NI's Code of Practice for Monitoring Community Background imposes insufficient safeguards to ensure that the impugned powers are not exercised arbitrarily. The Court of Appeal noted that:

*although there is no specific methodology required under the Code for the monitoring of community background we accept that the monitoring and supervision requirements of the Code establish a duty on the part of the Police Service NI to devise a methodology of enabling such monitoring and supervision... The evaluation of the pilot by the Police Service NI has tended to suggest that the best option may be assessment by the individual police officers of community background. We understand that such an option has not yet been implemented but we are satisfied that the requirements of the Code are that some proportionate measure is put in place in order to ensure that there can be adequate monitoring and supervision of the community background of those being stopped and searched.*<sup>1096</sup>

The Court of Appeal agreed with the High Court that, taking into account the scheme as a whole, it was satisfied that there were “sufficient safeguards to protect the individual against arbitrary interference”, but found a breach of Article 8 ECHR on the basis that the Police Service NI did not record the basis for the search.<sup>1097</sup>

Following this ruling, the Independent Reviewer of the Justice and Security (NI) Act 2007, David Seymour, reported that:

*the Court of Appeal in Ramsey has now made it clear that the Code establishes a legal duty on the Police Service NI to devise a methodology for monitoring the community background of those who are stopped and searched under the Justice and Security (NI) Act... if the issue of community monitoring is to be taken forward [there would be benefit in], refining and publishing an analysis of the impact of General Data Protection Regulation on the Police Service NI's ability to record the community background of those who are stopped and searched under the Justice and Security (NI) Act.*<sup>1098</sup>

1094 NI Statistics and Research Agency, 'Use of Stop and Search Powers by the Police in NI: 1 July 2020 to 30 June 2021', (NISRA, 2021), at 1.

1095 Ibid, at 7.

1096 *In the Matter of an application by Stephen Ramsey* (No 2) [2020] NICA 14, at paras 55-58.

1097 Ibid, at para 68.

1098 David Seymour, 'Report of the Independent Reviewer Justice and Security (Northern Ireland) Act 2007: Twelfth Report - 1 August 2018-31 July 2019' (NIO, 2020), at paras 7.30-7.44.



In his most recent report, David Seymour noted that the PSNI are considering how to respond to this part of the judgment, and have established a working group, but that progress is slow.<sup>1099</sup>

### Recommendations

The Commission recommends that the Department of Justice and Police Service of NI ensures that all use of stop and search has a statutory footing, is non-discriminatory and is proportionate, including taking into consideration the age and maturity of the child.

The Commission calls on the Police Service of NI to collect, analyse and publish data relating to the use of stop and search, including on children. This data should be disaggregated by age, sex, disability, geographic location, ethnicity, religion, nationality and socioeconomic background, which requires the Police Service of NI to expedite the development and implementation of a suitable methodology for recording the community background of individuals stopped and searched under the Terrorism Act 2000 and the Justice and Security (NI) Act 2007 throughout NI.

### Visitation in care homes

During the COVID-19 pandemic, restrictions have been placed on visiting care homes. However, there have been concerns that many residents are still unable to receive safe face-to-face visits with family members despite the roll out of the vaccination programme, regular testing and other precautions having been put in place. The Commissioner for Older People for NI expressed concerns of possible breaches of human rights as a result of older people in care homes still being denied visits from families for many months.<sup>1100</sup>

The Health Committee has conducted an inquiry into the impact of COVID-19 on care homes, publishing its findings in February 2021. In respect of visitation, it heard evidence on the negative and sometimes traumatic impact of the restrictions on the physical and mental wellbeing of residents and carers.<sup>1101</sup> The Committee recommended that “safe and meaningful visiting be facilitated and resourced through the identification, development and implementation of innovative measures”.<sup>1102</sup> It further recommended the inclusion of residents and families in the decision making to ensure the needs and particular circumstances of each resident is considered.<sup>1103</sup>

The Department of Health commissioned the Public Health Agency to develop guidance to support a safe approach to increasing visitation. This

1099 David Seymour, ‘Report of the Independent Reviewer Justice and Security (Northern Ireland) Act 2007: Thirteenth Report - 1 August 2019-31 July 2020’ (NIO, 2021), at paras 5.6-5.9, 7.15.

1100 Commissioner for Older People for Northern Ireland, ‘Press Release: Commissioner says denial of care home visits a breach of human rights’ 10 March 2021.

1101 Committee for Health, ‘Inquiry Report on the Impact of COVID-19 in Care Homes’, 1 February 2021, at para 14.

1102 Ibid, at p.9, recommendation 1.

1103 Ibid, at p.9, recommendation 2.

revised guidance was published in May 2021 to facilitate increased visiting in all care settings.<sup>1104</sup>

In July 2021, the Commission wrote to the Minister for Health in respect of the Department's decisions not to relax visitation arrangements.<sup>1105</sup> Following a formal evidence review on 14 October 2021, the present position has been moved to the 'gradual easing' phase of the pathway. A further review has been scheduled for November 2021.

### **Recommendations**

The Commission recommends that the Department of Health continues to review the possibility of relaxing visitation restrictions in care homes, taking account of the impact of these on residents and carers.

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1104 Department of Health, 'COVID-19: Visiting in Care Settings in Northern Ireland', available at: <https://www.health-ni.gov.uk/covid-19-visiting-guidance>.

1105 Correspondence from the NI Human Rights Commission to the Health Minister, July 2021.

## Freedom of Religion and belief, expression, association and right to participate in public and political life

This section considers issues including blasphemy, defamation, freedom of expression of journalists, parades and protests, and the participation of women in public and political life.

The right to freedom of thought, conscience and religion; freedom of expression; freedom of association and the right to participate in public life are protected under the following treaties:

<b>ECHR</b>	Articles 9-11 Protocol 1, Article 3
<b>UN CEDAW</b>	Article 3
<b>UN CRC</b>	Articles 13-15
<b>UN CRPD</b>	Article 19 Article 21 Article 29
<b>UN ICCPR</b>	Articles 18-22 Article 25
<b>Ireland/NI Protocol to the UK-EU Withdrawal Agreement</b>	Article 2

### Blasphemy

In 2008, the Criminal Justice and Immigration Act 2008 abolished the common law offence of blasphemy in England and Wales. In 2011, the UN Human Rights Committee welcomed this development as a positive measure to ensure compliance with Article 19 UN ICCPR on the right to freedom of expression and opinion<sup>1106</sup>

In 2018, the Constitution of Ireland was amended to remove blasphemy as an offence.<sup>1107</sup> In 2020, the Scottish Government introduced the Hate Crime and Public Order (Scotland) Bill<sup>1108</sup>, which included a provision abolishing the offence of blasphemy.

The common law offences of blasphemy and blasphemous libel remain on the statute books in NI and, whilst a prosecution has not occurred since

<sup>1106</sup> CCPR/C/GC/34, 'UN Human Rights Committee General Comment No 34: Freedoms of Opinion and Expression', 12 September 2011.

<sup>1107</sup> Thirty-seventh Amendment of the Constitution (Repeal of offence of publication or utterance of blasphemous matter) Act 2018.

<sup>1108</sup> Hate Crime and Public Order (Scotland) Bill.

1855, an individual may be subject in law to prosecution for committing either of these offences.<sup>1109</sup>

In 2019, the civil society organisation Humanists UK launched a campaign to abolish the offences of blasphemy and blasphemous libel in NI.<sup>1110</sup> Humanists UK reported that Sinn Féin, the Social Democratic and Labour Party, the Alliance Party, the Green Party, and the People Before Profit Alliance committed to repeal the legislation. However, the UUP was still developing policy on the matter and the DUP opposed repealing it.<sup>1111</sup> In 2020, the Commission met with Humanists UK to discuss the campaign.

In 2021, the Minister for Justice Naomi Long provided the following response to a written question on whether she is considering legislation to abolish the common law offence of blasphemy in NI:

*I am committed to freedom of and from religion and am fully supportive of removing such archaic and unused offences from the law. I am currently considering whether it will be possible for me to legislate to abolish the common law offence of blasphemy in Northern Ireland at this time, in light of the very heavy legislative agenda which is already developed for the remainder of this mandate.*<sup>1112</sup>

## Recommendations

The Commission recommends that the Department of Justice introduce legislation to the NI Assembly to abolish the common law offence of blasphemy and blasphemous libel to ensure compatibility with Article 19 UN ICCPR.

## Defamation

In 2008, the UN Human Rights Committee raised concerns that the:

*practical application of the law of libel [in the UK] has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as 'libel tourism'.*<sup>1113</sup>

The UN Human Rights Committee recommended that the UK Government and NI Executive should:

*re-examine its technical doctrines of libel law, and consider the utility of a so-called 'public figure' exception, requiring proof by the*

1109 BJAC Valentine, 'Booklet of Criminal Offences in NI' (LSNI 2016).

1110 Humanists UK, 'Repealing blasphemy laws'. Available at: <https://humanism.org.uk/campaigns/human-rights-and-equality/freedom-of-speech-and-expression/repealing-northern-irelands-blasphemy-laws/>.

1111 Ibid.

1112 NI Assembly Hansard, 'Written Answers: Blasphemy Legislation - Naomi Long MLA - AQW 14245/17-22', 17 February 2021.

1113 CCPR/C/GBR/CO/6, 'UN Human Rights Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 21 July 2008.

*plaintiff of actual malice in order to go forward on actions concerning reporting on public officials and prominent public figures.*<sup>1114</sup>

The Defamation Act 2013 addressed this recommendation in the rest of the UK. However, the 2013 Act does not extend to NI.

In 2016, the Department of Finance published a report recommending that “to a significant extent, measures equivalent to the provisions of the Defamation Act 2013 should be introduced into NI law”.<sup>1115</sup> It particularly recommended the introduction of a new defence of honest opinion, which would be similar to section 3 of the Defamation Act 2013.

In 2017, Sir John Gillen’s Review of Civil and Family Justice in NI recommended that the 2011 Pre-Action Protocol on Defamation was reformed.<sup>1116</sup>

In 2019, a report on progress on libel legislation in NI stated that “there is no evidence that defamation law in NI has inhibited either media scrutiny of local politics or the dissemination of scientific research”.<sup>1117</sup> It also reported:

*little evidence of libel tourism in NI. In 2010-2018, there were, on average, 35 Queen’s Bench writs for defamation per annum ranging from 19 in 2017 to 54 in 2010. In the period 2014-2018, there were, on average 30 Queen’s Bench writs for defamation in NI. As NI’s current law provides that a claim can be summarily dismissed when no ‘real or substantial’ tort has occurred, libel tourism would not be straight forward.*<sup>1118</sup>

On 7 June 2021, Mike Nesbitt MLA introduced a Private Member’s Bill before the NI Assembly which would replicate the reforms under the Defamation Act 2013.<sup>1119</sup> The Commission provided advice to the Committee in November 2021.<sup>1120</sup>

## Recommendations

The Commission welcomes the introduction of the Defamation Bill to the NI Assembly and the move to replicate the reforms under the Defamation Act 2013. The Commission recommends that in scrutinising the Bill, the NI Assembly ensures NI’s defamation law strikes a fair balance between the right to freedom of expression and the right to private life.

1114 CCPR/C/GBR/CO/6, ‘UN Human Rights Committee Concluding Observations of the Human Rights Committee on the Sixth Periodic Report of the UK of Great Britain and NI’, 21 July 2008.

1115 Andrew Scott, ‘Reform of Defamation Law in NI: Recommendations to the Department of Finance’ (LSE, 2016).

1116 Office of the Lord Chief Justice, ‘Review of Civil and Family Justice in NI: Review Group’s Report on Civil Justice’ (OLCJ, 2017).

1117 NI Office, ‘Report Pursuant to Section 3(17-20) of the NI (Executive Formation etc) Act 2019’ (NIO, 2019), at 9.

1118 Ibid.

1119 NI Assembly Hansard, ‘Defamation Bill - Bill 25/17-22’, (7 June 2021).

1120 Correspondence from the NI Human Rights Commission to the Committee for Finance, 18 November 2021.

## Freedom of expression of journalists

In July 2020, the NI High Court published its judgment on whether the search warrants issued against journalists Barry McCaffrey and Trevor Birney were lawful. The search warrants were for the suspected theft of confidential documents from the Police Ombudsman NI, relating to a police investigation into the 1994 murder of six men at Loughinisland, Co Down.<sup>1121</sup> The High Court confirmed “that on the basis of the material that has been provided to us we see no overriding requirement in the public interest which could have justified an interference with the protection of journalistic sources in this case”.<sup>1122</sup> In November 2020, a settlement was reached where the Police Service of NI agreed to pay £875,000 in damages and to delete the seized material.<sup>1123</sup>

In April 2020, a journalist working for the Irish News was warned by the Police Service of NI of a threat against them.<sup>1124</sup> In May 2020, further threats were issued against journalists working for the Sunday Life and Sunday World.<sup>1125</sup> On 20 May 2020, an open letter was published by #StandUpforJournalism, which included the First and deputy First Minister for NI and the Commission’s Chief Commissioner as signatories. The open letter calls “for the immediate withdrawal of all threats against journalists in NI and for the freedom of press to be respected and protected”.<sup>1126</sup> However, in November 2020, a journalist working for the Belfast Telegraph was warned of threats by the Ulster Defence Association against them.<sup>1127</sup>

In February 2021, it was reported that a Sunday World journalist was targeted with threats. A BBC Panorama documentary team also received threats.<sup>1128</sup> Following this, graffiti appeared in a number of locations in East Belfast with the name of another NI journalist.<sup>1129</sup> Following the reports, the Commission released a press statement condemning the threats made to Sunday World and to BBC Panorama journalists.<sup>1130</sup> The Commission also raised the issue of press intimidation and threats in NI with the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in March 2021, who agreed to publicise the issue in her advocacy efforts for the safety of journalists at the UN Human Rights Council and globally.<sup>1131</sup>

1121 ‘Loughinisland: Journalists arrested over documents investigation’, *BBC News*, 31 August 2018.

1122 *In the Matter of an Application by Fine Point Films and Trevor Birney for Judicial Review and the in the Matter of an Application by Barry McCaffrey and the in the Matter of an Application by Police Service of NI and Durham Constabulary for Search Warrants* [2020] NIQB 55, at para 55.

1123 Rory Carroll, ‘Police Service NI to pay £875,000 in damages to makers of Troubles documentary’, *The Guardian*, 27 November 2020.

1124 Gerry Moriarty, ‘Threats against NI journalists broadly condemned’, *The Irish Times*, 20 May 2020.

1125 *Ibid.*

1126 ‘Stand Up for Journalism: Initiative condemning threats against NI reporters receives widespread support’, *Belfast Telegraph*, 20 May 2020.

1127 ‘Belfast Telegraph journalist warned of UDA threat’, *BBC News*, 26 November 2020.

1128 Reporters without Borders, ‘News: Safety of journalists remains active concern in Northern Ireland as BBC Panorama team is threatened’, 11 February 2021.

1129 Stephen Moore, ‘Chilling sight: Sinister threats made against Sunday World journalist’, *Sunday World*, 12 February 2021.

1130 NI Human Rights Commission, ‘Press release: Human Rights Commission condemns threats to journalists’, 17 February 2021.

1131 NI Human Rights Commission, ‘Letter to Irene Khan, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’, 3 March 2021.



## Recommendations

The Commission stresses that any limitation of journalists' freedom of expression must be human rights compliant. Information allegedly establishing the involvement of State agents in non-human rights compliant conduct should not be arbitrarily withheld from the public and journalists and human rights defenders should not face intimidation or reprisals for disclosing such information.

The Commission further recommends that the Department of Justice ensures the right to a fair trial and right to an effective remedy for journalists facing allegations are fulfilled, respected and protected. Additionally, the Commission recommends that journalists have effective protection to report on issues of public importance.

## Parades and protests

In 2013, the then UN Special Rapporteur on peaceful assembly, parades and association, Maina Kiai, called for a “political resolution of the issues – such as parades, flags and emblems – that still make the enjoyment of freedom of peaceful assembly problematic in NI”.<sup>1132</sup>

### COVID-19

In May and June 2020, there were a series of anti-racism protests in NI in response to the global ‘Black Lives Matter’ movement. At that time, the existing iteration of the Health Protection (Coronavirus, Restrictions) (NI) Regulations, aimed at preventing the spread of COVID-19, prohibited gatherings in public spaces of more than two people with limited exceptions. The regulations also provided the Police Service of NI with the powers to restrict freedom of movement and protests for this purpose. The Police Service of NI issued a number of fines to ‘Black Lives Matter’ protestors under these regulations.<sup>1133</sup> However, subsequent protests by the NI Cenotaph Protection Group reportedly took place without fines being issued.<sup>1134</sup>

In November 2020, the Policing Board NI, in its review of the Police Service of NI’s response to COVID-19, acknowledged that there was an “apparent inconsistency in approach to the enforcement of all large gatherings of people during April, May and June 2020”.<sup>1135</sup> The Policing Board NI recommended that the Police Service of NI should report to the Board on any lessons learnt; hold discussions with organisers “to ensure peaceful protests are facilitated and that both sides understand the positive obligations of the police and the key role of the organisers”; create an Independent Advisory Group on protests; and hold a seminar

<sup>1132</sup> A/HRC/23/39/Add.1, ‘Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai, on his Mission to the UK (14-23 January 2013)’, 17 June 2013, at para 96.

<sup>1133</sup> ‘Coronavirus: Anti-racism rallies in Belfast and Londonderry’, *BBC News*, 6 June 2020.

<sup>1134</sup> Jonathan Bell, ‘Police Ombudsman to probe difference in PSNI approach to Black Lives Matter rallies and Belfast cenotaph protest’ *Belfast Telegraph*, 17 June 2020.

<sup>1135</sup> Policing Board NI, ‘Report on the Thematic Review of the Policing Response to COVID-19’ (PBNI, 2020), at 56.

with key stakeholders, including the Commission, to assist “with ensuring a consistent approach to all protests”.<sup>1136</sup>

In December 2020, the Police Ombudsman NI issued a report following its investigation of the use of police powers in relation to large public gatherings during this period. The report found that the “PSNI failed to balance Human Rights with the public health considerations and requirements of the Regulations”.<sup>1137</sup> The Police Ombudsman recommended that the Police Service of NI “consider adopting a human rights based approach to policing of protests based on the four principles: participation, empowerment, equality and non-discrimination and accountability” and further that they “develop human rights based assessments, evidencing the identification of relevant rights, balancing competing rights and risks to include appropriate measures to address PSNI’s obligations and mitigate identified risks”.<sup>1138</sup>

## Framework

The Stormont House Agreement proposed that responsibility for parades and related protests should, in principle, be devolved to the NI Assembly.<sup>1139</sup> Yet, the Parades Commission for NI remains answerable to the Secretary of State for NI. It also proposed that the Office of Legislative Counsel, working in conjunction with the now Executive Office, should produce a range of options on how the remaining key issues which include the Code of Conduct, criteria and accountability could be addressed in legislation. The Executive Office was to bring forward proposals to the NI Executive by June 2015.<sup>1140</sup> In November 2015, an update was provided in ‘A Fresh Start’, which stated that a discussion paper was being prepared for the Executive, which “will outline options in relation to the model and operation of the regulation of parades and related protests and the key outstanding issues of contention such as code of conduct, criteria and accountability. OFMDFM will bring this paper forward to the Executive.”<sup>1141</sup> This remains the position in 2021.<sup>1142</sup>

## Statistics

In 2020/2021, the Parades Commission for NI was notified of 690 Protestant/Unionist/Loyalist, 30 Catholic/Republican/Nationalist and 393 “other” parades.<sup>1143</sup> Of these, 52 Protestant/Unionist/Loyalist, one Catholic/Republican/Nationalist, and six “others” were considered ‘sensitive’, in that they have the potential to raise concerns and community tensions.<sup>1144</sup> There was a reduction (2,680) in the number of notified parades and parade-related protests in 2020-21 when compared to the previous year; the COVID-19 pandemic meant that there was no traditional

1136 Policing Board NI, ‘Report on the Thematic Review of the Policing Response to COVID-19’ (PBNI, 2020), at 56.

1137 Police Ombudsman for NI, ‘Statutory Report: An Investigation into Police Policy and Practice of Protests in NI’, (PONI, 2020), at p.14.

1138 Ibid, at pp 81-2.

1139 NI Office, ‘Stormont House Agreement’, (NIO, 2014), at para 17.

1140 Ibid, at para 18.

1141 NI Office, ‘A Fresh Start’, 17 November 2015, at 34.

1142 Correspondence from the Executive Office to NI Human Rights Commission, October 2021.

1143 Parades Commission for NI, ‘Annual Report and Financial Statements for the Year Ended 31 March 2021’, (PCNI, 2021), at Table 1.

1144 Ibid.

parading season in 2020 with the vast majority of parade organisers cancelling their annual parades.<sup>1145</sup>

### Recommendations

The Commission has consistently advised all those participating or responsible for the regulation of parades and protests that a broad range of human rights and State obligations are engaged. Human rights law, in particular the jurisprudence of the ECtHR, is a valuable resource for resolving disputes relating to parades, protests and related adjudicative processes. Furthermore, it is sufficiently flexible to accommodate alternative mechanisms for resolution which seek to develop innovative compromise agreements.

The Commission recommends that responsibility for parades and protests is devolved to the NI Assembly, in line with the Stormont House Agreement.

In addition, The Executive Office should work in conjunction with the Office of Legislative Counsel to produce a range of options on how issues relating to parades and protests, including a Code of Conduct could be addressed in legislation, in line with the Stormont House Agreement.

### Participation of women in public and political life

In 2019, the UN CEDAW Committee recommended the UK Government and NI Executive:

*take specific targeted measures, including temporary special measures, to improve the representation of women, including “Black, Asian and Minority Ethnic” women and women with disabilities, in Parliament, the judiciary and decision-making positions in the Foreign Service and its diplomatic missions.*<sup>1146</sup>

The UN CEDAW Committee further recommended that the UK Government and NI Executive:

*ensure the inclusion of the provisions of the [UN CEDAW] Convention, the ECHR and the “acquis communautaire” (or “EU acquis”) in its domestic legislation, and utilise the human rights framework and the empowerment of women as a strategic tool to tackle the current challenges.*<sup>1147</sup>

Specific to NI, the UN CEDAW Committee called on the NI Executive:

*to take measures to address the low representation of women in political and public life in NI, including by ensuring the*

<sup>1145</sup> Parades Commission for NI, 'Annual Report and Financial Statements for the Year Ended 31 March 2021', (PCNI, 2021), at 10.

<sup>1146</sup> CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 14 March 2019, at para 37.

<sup>1147</sup> Ibid, at para 21(b).

*implementation of Section 43A of the Sex Discrimination (NI) Order 1976 enabling the use of gender quotas.*<sup>1148</sup>

The UN CEDAW Committee also recommended:

*with reference to the Committee's general recommendation No 30 (2013) on women in conflict prevention, conflict and post-conflict situations, the Committee recommends that the State party take concrete measures to ensure the effective participation of women in post-conflict reconstruction and peacebuilding processes in NI, in line with Security Council Resolution 1325 (2000), including by:*

- a) addressing the obstacles to their participation, including intimidation by paramilitary groups, as noted in 2014 inquiry by the All-Party Parliamentary Group on Women, Peace and Security;*
- b) Guaranteeing women's participation in the context of the transitional justice mechanisms envisaged in the draft NI (Stormont House Agreement) Bill.*<sup>1149</sup>

Protocol Article 2 provides specific, enhanced protection against discrimination as enshrined in the six directives listed in Annex 1 of the Protocol, including the equal treatment directives which protect against gender discrimination and which cover employment and vocational training,<sup>1150</sup> access to goods and services,<sup>1151</sup> and social security.<sup>1152</sup> NI equality 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.<sup>1153</sup>

In Protocol Article 2, the UK Government commits to ensuring there is no diminution of the rights, safeguards and equality of opportunity protections contained in that chapter of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU. This Chapter includes the “right of women to full and equal political participation” and the “right to equal opportunity in all social and economic activity, regardless of ... gender”. To the extent that additional EU obligations fall within scope of Protocol Article 2, such as the Parental Leave Directive<sup>1154</sup> and the Pregnant Worker's Directive,<sup>1155</sup> there should be no regression of rights, safeguards and equality of opportunity following the UK withdrawal from the EU.

1148 CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 14 March 2019, at para 37.

1149 Ibid, at para 39.

1150 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.

1151 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.

1152 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.

1153 Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

1154 Directive 2010/18/EU, 'Council Directive implementing the revised Framework Agreement on parental leave', 8 March 2010.

1155 Directive 92/85/EEC, 'Council Directive on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding', 19 October 1992.

## Public life

The NI Executive set a target of 50/50 gender representation within public appointments by 2020/2021.<sup>1156</sup> At 1 January 2021, 50.3 per cent employed by NI Civil Service were women, an increase from 47.9 per cent in 2000 and slightly down from the years 2014 to 2020.<sup>1157</sup> Within the most senior grades, female representation has increased since 2000 (11.3 per cent). However, it decreased from 41.5 per cent in 2020 to 41.4 per cent in 2021.<sup>1158</sup> In November 2020, Jenny Pyper was appointed as the interim Head of the NI Civil Service, the first woman to hold the post.<sup>1159</sup> In June 2021, Jayne Brady was appointed as the new permanent Head of the NI Civil Service.<sup>1160</sup>

## Judicial appointments

In 2021, two (25 per cent) NI High Court judges, two (50 per cent) Coroners, and no NI Justices of Appeal were women.<sup>1161</sup> In June 2021, Mrs Justice Siobhan Keegan was appointed as Lady Chief Justice, following Sir Declan Morgan's retirement as Lord Chief Justice. She is the first woman to hold the position of the most senior judge in NI.<sup>1162</sup>

In 2019, representation of women in the NI courts was 28.1 per cent, which is lower than in the 45.7 per cent in the legal professional generally.<sup>1163</sup> Representation of women holding legal positions in Tribunals was 48.6 per cent.

## Political life

Women, particularly minority women, remain under-represented in political life in NI. Women account for four of NI's 18 Members of Parliament, 38 of 90 Member of Local Assembly and 122 of 426 Councillors (26 per cent). Two of NI's five main political parties have women leaders.

The Sex Discrimination (NI) Order 1976, section 43A allows political parties to take positive measures to reduce inequality between men and women elected to Parliament, the NI Assembly, District Councils and the European Parliament.<sup>1164</sup> This provision has not been utilised.

A lack of accessible information to empower minority women is a barrier; not only to stand for election, but to vote and engage with elected representatives. The information available is not adequately available in

<sup>1156</sup> NI Statistics and Research Agency, 'Public Appointments Annual Report for NI 2016/17' (TEO, 2018).

<sup>1157</sup> NI Statistics and Research Agency, 'Equality Statistics for NI Civil Service', (NISRA, 2021), at 6.

<sup>1158</sup> Ibid.

<sup>1159</sup> The Executive Office, 'Press Release: Interim Head of the Civil Service announced', 27 November 2020.

<sup>1160</sup> The Executive Office, 'Press Release: New Head of the Civil Service announced', 10 June 2021.

<sup>1161</sup> Judiciary NI, 'Judiciary of NI'. Available at: <https://judiciaryni.uk/about-judiciary/judicial-members>

<sup>1162</sup> NI Judicial Appointments Commission, 'NIJAC warmly welcomes the approval of the appointment of the Honourable Mrs Justice Keegan as the first Lady Chief Justice of NI', 17 June 2021.

<sup>1163</sup> NI Statistics and Research Agency, 'The Judiciary in NI: 2019' (NIJAC, 2020), at 2.

<sup>1164</sup> Section 43A, Sex Discrimination (NI) Order 1976. The provisions have been extended to 2030 by section 105(3) of the Equality Act 2010.

different formats and languages, which means that it can be inaccessible. This particularly affects disabled and migrant women.<sup>1165</sup>

## Funding

The Gender Equality Strategy Expert Panel Report highlighted continuing issues with resourcing of the Women's Sector.<sup>1166</sup> Women that attend women's community groups have previously expressed distress at the funding cuts that are placing the continuation of such groups and their activities under threat. One woman spoke of how she believed her local women's group had "saved my life"; other women spoke of how such groups had assisted with depression, provided a sense of belonging and support, and improved confidence.<sup>1167</sup>

## UN Security Council Resolution 1325

Paramilitary activity is having a particular impact on women within the affected communities, who live in fear of such groups. In practice, this intimidation (which can include threats to life) is preventing women from accessing funding, to engage with peace initiatives and to be empowered to participate in public and political life.<sup>1168</sup> Women's involvement with such opportunities is protected by the UN Security Council's Resolution 1325.

In 2015, academics developed Gender Principles for Dealing with the Legacy of the Past in NI.<sup>1169</sup> However, there has been a lack of development of this area at a UK and local government level. Notably, Ireland's National Action Plan on Women, Peace and Security makes specific provision for NI<sup>1170</sup> but the UK's National Action Plan does not.<sup>1171</sup>

## Recommendations

Recognising recent progress, the Commission remains concerned over the continued under-representation of women in public and political life. The Commission recommends effective steps are taken to ensure women's participation in public and political life is proportionate to NI's population.

The Commission recommends that all existing and future gender equality strategies and policies, including the Gender Equality Strategy for NI led by the Department for Communities, identify and address effectively the barriers hindering women's access to high positions in the civil service and in the judiciary.

1165 Roundtable discussions with NI women's policy groups and NI women's community groups, October 2017, November 2017, February 2018 and March 2018.

1166 Department for Communities, 'Gender Equality Strategy Expert Advisory Panel Report', (DfC, 2021).

1167 'Féile an Phobail and Equality Commission for NI: What Every Women Wants - Equality!', An Chultúrlann, 8 August 2018.

1168 Roundtable discussions with NI women's policy groups and NI women's community groups, October 2017, November 2017, February 2018 and March 2018.

1169 Legacy Gender Integration Group, 'Gender Principles for Dealing with the Legacy of the Past', (LGIG, 2015).

1170 Government of Ireland, 'Women, Peace and Security: Ireland's Third National Action Plan for the Implementation of UNSCR 1325 and Related Resolutions 2019-2024', (Government of Ireland, 2019).

1171 HM Government, 'UK National Action Plan on Women, Peace and Security 2018-2022', (HM Government, 2018).



The Commission recommends taking specific targeted measures, including temporary special measures, to improve the representation of women, including in particular Black, Asian and Minority Ethnic women and women with disabilities, in Parliament, NI Assembly and NI Executive and the judiciary. For example, the Commission recommends political parties utilise the Sex Discrimination (NI) Order 1976, Section 43A.

The Commission recommends that in the development of any laws or policies to address the continued under representation of women in public and political life, the Department for Communities considers the extent to which any change engages Protocol Article 2 and ensure that there is no diminution to the rights and safeguards which fall within its scope.

The Commission recommends that sufficient ring-fenced, long-term funding is available and accessible for women's community groups.

Furthermore, the Commission recommends that the NI Office, and the UK Government more broadly, guarantees the effective participation of NI women in peace building and political processes, including effectively implementing UN Security Council Resolution 1325, Legacy Gender Integration Group's gender principles and the Stormont House Agreement. The Commission also recommends paramilitary intimidation, as a barrier to women's participation in post-conflict reconstruction and peacebuilding processes in NI, is addressed in line with UN Security Council Resolution 1325.

## Right to Work and to just and favourable conditions of work

Within this section, the following issues are considered: accessible childcare; the Armed Forces Covenant; children in the Armed Forces; the gender pay gap; and employment equality.

The right to work is protected under the following treaties:

<b>UN CEDAW</b>	Article 11
<b>UN CERD</b>	Article 5(d)
<b>UN CRPD</b>	Article 27
<b>UN ICESCR</b>	Articles 6-7
<b>European Social Charter</b>	Articles 1-6 Article 19
<b>Ireland/NI Protocol to the UK-EU Withdrawal Agreement</b>	Article 2

### Accessible childcare

In 2016, the UN ICESCR Committee recommended that the UK Government and NI Executive “increase its efforts to ensure the availability, accessibility and affordability of childcare services throughout the State Party, particularly in Scotland and NI”.<sup>1172</sup> The UN CRC Committee also recommended that the UK Government and NI Executive “review the system of shared parental leave and modify it with a view to improve the equal sharing of responsibilities within the family and in the society”.<sup>1173</sup>

In 2017, the UN CRPD Committee recommended that the UK Government and NI Executive develop and implement policies “securing sufficient and disability-sensitive childcare as a statutory duty across the State party”.<sup>1174</sup>

In 2019, the UN CEDAW Committee expressed concern that “childcare costs remain excessive, particularly in NI, which constitutes an obstacle for women to enter and progress in the workplace”.<sup>1175</sup> The UN CEDAW Committee recommended that the UK Government and NI Executive:

- a) *ensure the availability of affordable and accessible childcare facilities and/or arrangements throughout the State party, in particular NI;*
- b) *consider removing the 26-week waiting period for employees to apply for flexible working arrangements;*

<sup>1172</sup> E/C.12/GBR/CO/6, ‘UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and NI’, 14 July 2016, at para 44.

<sup>1173</sup> CRC/C/GBR/CO/5, UN Committee on the Rights of the Child, ‘Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and NI’, 12 July 2016, at para 50-51.

<sup>1174</sup> CRPD/C/GBR/CO/1, UN CRPD Committee, ‘Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland’, 3 October 2017, at para 21.

<sup>1175</sup> CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’, 14 March 2019, at para 46.

- c) *provide further incentives for men to take parental leave, such as non-transferrable leave, and encourage men to participate equally in childcare responsibilities.*<sup>1176</sup>

## COVID-19

In March 2020, to stop the spread of COVID-19, schools and childcare facilities were closed, which due to the lack of alternative childcare available, impacted on parents/guardians' ability to work. The potential loss of wages and limited paid parental leave available risked increasing household poverty. This applied particularly to parents of disabled children, as childcare for children with disabilities is extremely limited even in ordinary circumstances. Some schools remained open for the purpose of providing childcare and education for children of key workers. However, there was a lack of childcare provision for pre-school ages, unlike in Wales, where free childcare was rolled out for children of key workers aged under five years old.<sup>1177</sup> Childcare for key workers employed outside school hours was also difficult to source. There was also an initial lack of clarity around whether parents were expected to continue to pay childcare fees to childcare providers that were not operating during COVID-19.<sup>1178</sup>

Since June 2020, the Minister of Education has announced a number of funding streams providing support to the childcare sector, including the COVID-19 Childcare Sector Support Scheme (April to June 2020), the Childcare Recovery Support Fund (July to August 2020) and the Childcare Temporary Closure Support Fund (September to December 2020).<sup>1179</sup> Since 29 June 2020 access to childcare has been available to any parent who needs it.<sup>1180</sup>

## Childcare provision

In 2016, it was reported that “the cost of childcare remains high [in NI] and it is higher than other parts of the UK”.<sup>1181</sup> The cost of childcare in NI continues to rise. In 2020, families could expect to pay, on average, around £169 a week for a full-time childcare place, an increase of £3 on the 2019 average of £166 a week.<sup>1182</sup>

The New Decade, New Approach agreement committed to giving “immediate priority to developing arrangements to deliver extended, affordable, responsive, high quality provision of early education and care initiatives for families with children aged 3-4”.<sup>1183</sup> Yet there remains no statutory duty in NI akin to that on local and public authorities in England, Scotland and Wales to provide adequate childcare provision. The scheme implemented in England whereby all working parents of three and four year olds have access to up to 570 hours free childcare per year has not

1176 CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 14 March 2019, at para 45.

1177 Welsh Government, 'Coronavirus: Childcare for Under Five Year Olds Parents Guidance' (Welsh Government, 2020).

1178 NI Assembly Hansard, 'Written Answers: Update on Childcare Strategy - Peter Weir MLA - AQO 507/17-22', 24 July 2020.

1179 NI Assembly Hansard, 'Written Question: Childcare sector - Catherine Kelly MLA - AQW 6874/17-22', 21 September 2020.

1180 Department of Health, 'Coronavirus (COVID-19): advice about childcare', available at: <https://www.health-ni.gov.uk/publications/coronavirus-covid-19-advice-about-childcare>.

1181 Equality Commission for NI, 'Gender Equality: Policy Priorities and Recommendations' (ECNI, 2016), at para 8.9.

1182 Employers for Childcare, Northern Ireland Childcare Survey 2020, (EfC, 2021).

1183 NI Office, New Decade New Approach, (NI Office, 2020), at 40.

been implemented in NI. A separate scheme providing up to 30 hours free childcare for three to four year olds per week is available in England for working parents that earn a certain amount. This scheme is not available in NI.<sup>1184</sup>

### Childcare strategy

The last and only childcare strategy for NI expired in 1992. In 2015, the NI Executive consulted on a draft childcare strategy, but the consultation did not result in a new childcare strategy being adopted.<sup>1185</sup>

The New Decade, New Approach agreement committed to publishing a childcare strategy. A timeline for producing this strategy was due to be published by April 2020, this is yet to be provided.

In July 2020, the (then) Minister of Education, Peter Weir MLA, advised that the “design, planning and phased implementation [of a childcare strategy] will take a number of years and may require primary legislation” and that any advances in moving this forward have been delayed by having to re-direct staff resources due to COVID-19. A funding bid submitted by the Department of Education indicates that it is not expected that the childcare strategy will progress until at least 2021/2022, with implementation in 2022/2023.<sup>1186</sup> In June 2021, the Minister of Education advised that the preparatory work will hopefully resume in autumn 2021, subject to available resources and any ongoing work relating to the pandemic.<sup>1187</sup>

On 13 July 2020, Regulation 37(3) of the Universal Credit Regulations (NI) 2016 was amended to provide that “relevant childcare” may include care provided outside NI in some circumstances.<sup>1188</sup> Consequently, a person who resides and works in NI, or resides in NI and works in Ireland may be entitled to the childcare costs element of Universal Credit, where childcare provided in Ireland is approved by an organisation accredited by the Secretary of State for NI or in accordance with legislation in Ireland.

In May 2021, the Executive approved a request by the Minister for Communities for amendments to existing Universal Credit Regulations.<sup>1189</sup> In October, the Universal Credit (Northern Ireland) Regulations 2016 were amended to allow childcare payments made by the Department through the Adviser Discretion Fund to be used in the calculation of the person’s childcare costs element.<sup>1190</sup> The Fund is a grant fund available to help remove barriers to employment that prevent people moving towards and into employment. From 12 April 2021, people can avail of a non-repayable grant up to £1,500 in a 12 month period. Previously this limit was set at £300.

1184 Gov.uk, ‘Help with childcare costs: 15 hours free childcare for 3 and 4-year-olds’. Available at: <https://www.gov.uk/help-with-childcare-costs/free-childcare-and-education-for-2-to-4-year-olds>.

1185 The Executive Office ‘Towards a Childcare Strategy - a consultation’, (TEO, 2015).

1186 NI Assembly Hansard, ‘Written Questions – Childcare Strategy – Rachel Woods MLA – AQW 8101/17-22’, 2 October 2020.

1187 NI Assembly Hansard, ‘Written Question: Update on Childcare Strategy – Chris Lyttle MLA – AQW 19669/17-22’, 3 June 2021.

1188 The Universal Credit (Miscellaneous Amendments) Regulations (NI) 2020.

1189 Department for Communities, ‘Press Release: Minister Hargey paves the way for upfront childcare costs’ 21 May 2021.

1190 Department for Communities, ‘Press Release: Communities Minister removes significant barrier to employment for parents’, 25 October 2021.

## Recommendations

The Commission recommends that the Department of Education ensures that childcare facilities and/or arrangements in NI are available, affordable and accessible.

The Commission recommends that the Department of Education develops and publishes a Childcare Strategy for NI, with a costed action plan and suitable resources allocated. This should include involving parents and representative organisations at every stage of the process. The Strategy should include a flexible and accessible model that operates outside traditional working hours to meet the needs of those working shift patterns, as is the case for many parents in NI.

The Commission also recommends that the Department of Education works with the NI Assembly to introduce statutory arrangements to deliver extended, affordable, responsive, high quality provision of early education and care initiatives for families with children, using the provision available in other parts of the UK as a starting point.

## Armed Forces Covenant

In 2020, the New Decade, New Approach agreement made four commitments to veterans, including a commitment to introduce UK-wide legislation to further incorporate the Armed Forces Covenant and support its implementation; to appoint a NI Veterans' Commissioner; to initiate a review of the Aftercare Service in NI; and to ensure the work of the War Memorials Trust is better promoted and understood in NI.<sup>1191</sup>

The Armed Forces Bill,<sup>1192</sup> which will enshrine the Armed Forces Covenant in law, was introduced in the House of Commons in early 2021; much of the Bill extends to NI. In April 2021, the Select Committee on the Armed Forces Bill published its final report.<sup>1193</sup> In May 2021, the Queen's Speech referenced the Government's commitment to "honour and strengthen the Armed Forces Covenant" by placing it in law in the Armed Forces Bill. The Bill is currently progressing through the House of Lords.<sup>1194</sup>

The Armed Forces Liaison Forum was reconvened in March 2021 following a two year absence; the NI Veteran's Commissioner addressed the first meeting, where he highlighted the physical and mental health needs of veterans and the reference to the same within the Covenant.<sup>1195</sup>

The New Decade, New Approach agreement also committed to initiate a review of the Aftercare Service in NI. In March 2021, the then-Minister for Defence People and Veterans, Johnny Mercer MP, told the Public Bill

<sup>1191</sup> NI Office, 'New Decade, New Approach' (NIO, 2020), at 49.

<sup>1192</sup> UK Parliament, Armed Forces Bill 2021, January 2021.

<sup>1193</sup> Select Committee on the Armed Forces Bill, Special Report: The Armed Forces Bill, HC1281, House of Commons Committees, April 2021.

<sup>1194</sup> Prime Minister's Office, The Queen's Speech 2021, (UKG, 2021).

<sup>1195</sup> Northern Ireland Veterans Commissioner, 'Press Release: Commissioner welcomes reconvening of Armed Forces Liaison Forum', 10 March 2021.

Committee during the second sitting debate on the Armed Forces Bill that:

*My Department recognises that the delivery of veterans' welfare support in Northern Ireland has grown in a specific way. However, I can provide assurance that a review of the aftercare service has commenced and will establish the potential of the aftercare service to support better our veterans UK-wide in the welfare structure. For that reason, it is imperative that, before further commitments are made, the review is allowed to conclude and bring forward its recommendations on long-term service delivery for veterans in Northern Ireland.*<sup>1196</sup>

### Recommendation

The Commission recommends that the UK Government, and The Executive Office, ensure that work continues to realise and implement the four commitments to Armed Forces veterans outlined in the New Decade, New Approach agreement, in co-operation with relevant arms-length bodies including the NI Veterans' Commissioner and the War Memorials Trust.

### Children in the armed forces

In 2016, the UN CRC Committee recommended that the UK Government “consider reviewing its position and raise the minimum age for recruitment into the armed forces to 18 years in order to promote the protection of children through an overall higher legal standard”.<sup>1197</sup>

The law of the UK permits the recruitment of children between the ages 16 and 18 to the Armed Forces, provided it is voluntary and there are safeguards in place.<sup>1198</sup> The UK continues to be the only country in Europe that routinely recruits 16 and 17 year olds into the armed forces. In 2019, the British Medical Journal highlighted that such recruitment adversely affects the child's mental and physical health.<sup>1199</sup> In 2021, Carol Monaghan MP moved a new clause to the Armed Forces Bill to increase the recruiting age to 18; this was defeated on division.<sup>1200</sup>

In its most recent List of Issues prior to submission of the state report in February 2021, the Committee of the Rights of the Child asked the UK to describe the measures taken to implement its previous recommendations regarding the implementation of the Optional Protocol on the involvement of children in armed conflict, including measures to ensure that the

1196 UK Parliament Hansard, 'House of Commons: Public Bill Committees, Armed Forces Bill (Second Sitting) - Johnny Mercer MP', 31 March 2021.

1197 CRC/C/GBR/CO/5, 'UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at paras 85(a)-(d).

1198 Article 3, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

1199 British Medical Journal, 'Stop recruiting children, UK Armed Forces urged', 25 February 2019.

1200 UK Parliament Hansard, 'Public Bill Committee: Armed Forces Bill (first sitting)', 25 March 2021.



minimum age of recruitment of children into the armed forces is 18 years<sup>1201</sup> The UK is due to submit its report in response by June 2022.

### Recommendation

The Commission recommends the Ministry of Defence raises the minimum age of recruitment to the Armed Forces from 16 to 18 to ensure the protection of children.

### Gender pay gap

In 2016, the UN ICESCR Committee recommended that the UK Government and NI Executive “adopt effective measures to eliminate the persistent gender pay gap”.<sup>1202</sup>

In 2019, the UN CEDAW Committee recommended that the UK Government and NI Executive “ensure that the provisions regarding mandatory pay gap reporting in the Employment Act (NI) 2016 is brought into effect in NI”.<sup>1203</sup>

The UN CEDAW Committee further recommended that the UK Government encourages “employers to publish a narrative with their gender pay gap data to understand the reasons behind the gender pay gap and to take appropriate remedial measures”.<sup>1204</sup>

Protocol Article 2 provides specific, enhanced protection against discrimination as enshrined in the six directives listed in Annex 1 of the Protocol, including the Equal Treatment Directive which protects against discrimination in employment on the grounds of gender.<sup>1205</sup> NI equality law must keep pace with any changes made by the EU to these rights to improve the minimum levels of protection available, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.<sup>1206</sup>

### Statistics

Each year Price Waterhouse Coopers publishes its annual ‘Women in Work Index’ which analyses female economic empowerment across 33 Organisation for Economic Co-operation and Development (OECD) countries. In 2019, it reported that “since 2000, NI has made the most progress in closing its gender pay gap, reducing it by 13 percentage points. The region now has the smallest gender pay gap as well as the lowest female unemployment rate”.<sup>1207</sup> This is reportedly due to having greater concentration of public sector employment, which tends to have

1201 CRC/C/GBR/QPR/6-7, ‘UN CRC Committee List of issues prior to submission of the combined sixth and seventh reports of the United Kingdom of Great Britain and Northern Ireland’, 4 March 2021, at para 33.

1202 E/C.12/GBR/CO/6, ‘UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI’ 14 July 2016, at para 27(b).

1203 CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of UK of Great Britain and NI’, 8 March 2019.

1204 Ibid.

1205 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.

1206 Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

1207 Price Waterhouse Cooper, ‘Women in Work Index’ (PWC, 2019).

more balanced gender representation at all levels and smaller pay gaps.<sup>1208</sup> The 2021 Index recorded NI as the third top performing UK region for women's empowerment.<sup>1209</sup>

These recent reports highlight that generally women are disproportionately impacted by COVID-19 because of existing gender inequalities in society, and the disruptive impact of the pandemic on service sectors with high levels of female employment. The unemployment rate rose across the OECD in 2020, with women losing their jobs at a faster rate than men. COVID-19 is also amplifying the unequal burden of unpaid care and domestic work carried by women. Caring responsibilities have already caused more women than men to exit the workforce. The longer this higher care burden on women lasts, the more likely women are to leave the labour market permanently - not only reversing progress towards gender equality, but also stunting economic growth.<sup>1210</sup>

However, research by the NI Assembly indicated that the gender pay gap is much greater in the private sector where men earn 20.4 per cent more, compared to 1.6 per cent more within the public sector.<sup>1211</sup> The research also highlighted that the pay gap varies depending on context. In terms of gross annual pay, women earn 30.9 per cent less than men. For hourly pay men earn 10.1 per cent more than women. The NI Statistics and Research Agency reports that calculating the gender pay gap is affected by the 'part-time effect'. In other words, the inclusion of part-time employees increases the gender pay gap as part-time employees earn less on average than full-time employees and a higher proportion of part-time employees are women.<sup>1212</sup>

In November 2020, the NI Statistics and Research Agency's NI Annual Survey of Hours and Earnings report was published. Section 3 of the report related to the gender pay gap. Key findings from the report included that 2020 was the 11th year where full-time working females in NI earned at least as much as full-time working males on average; full-time females earned 46p more per hour than full-time males (£13.28 compared to £12.82); NI is the only region in the UK where full-time females earned more than full-time males; and, considering all employees, regardless of working pattern, female hourly pay is below male pay on average due to the higher proportion of female part-time employees.<sup>1213</sup>

## Legal framework

The Employment Act (NI) 2016 seeks, inter alia, to eliminate the gender pay gap, by creating reporting requirements and requiring the adoption of action plans by employers with a gender pay gap and by the former Office of the First and deputy First Minister (now The Executive Office). Regulations are required to give effect to the relevant provisions of the 2016 Act stipulating which employers it is applicable to and the scope of

1208 Price Waterhouse Cooper, 'PwC Women in Work Index 2018: Closing the gender pay gap', (PwC, 2018).

1209 Price Waterhouse Cooper, 'Women in Work 2021: the impact of COVID-19 on women in work', (PwC, 2021).

1210 Ibid.

1211 NI Assembly Research and Information Service, 'NI Gender Pay Gap - 2020 Update'.

1212 Ibid.

1213 NI Statistics and Research Agency, 'Northern Ireland Annual Survey of Hours and Earnings', (NISRA, 2020).

their reporting requirements. In 2021, mandatory reporting is not yet in place.

## Gender Equality Strategy

The Expert Advisory Panel for the Gender Equality Strategy published its report in March 2021. The report included a section on ‘Gender Pay Gap Reporting, Low Pay Levels and Pay Transparency’ and made a number of recommendations on the gender pay gap for the purpose of developing the Gender Equality Strategy.<sup>1214</sup> The Commission is represented on the co-design group developing this work, and a consultation is expected early in 2022.

## Pay Transparency

In March 2021, the EU Commission issued a proposal for a new Directive on gender pay transparency.<sup>1215</sup> The Commission and Equality Commission for NI are undertaking further research to explore the extent to which this proposed Directive amends or replaces the Equal Treatment Directive<sup>1216</sup> in Annex 1 of the Protocol.

### Recommendations

The Commission recommends that both the gender pay gap and insecure, low paid employment of women are effectively addressed and monitored by the Department for the Economy. This includes ensuring that the provisions regarding mandatory pay gap reporting in the Employment Act (NI) 2016 are brought into effect in NI.

The Commission recommends that the Executive Office commit to ensuring that to the extent that the Pay Transparency Directive amends or replaces the Equal Treatment Directive, the law in NI is amended to keep pace with that change.

The Commission also recommends that employers should publish a narrative with their gender pay gap data to understand the reasons behind the gender pay gap and to take appropriate remedial measures.

## Employment equality

In Protocol Article 2, the UK Government commits to ensuring there is no diminution of the rights, safeguards and equality of opportunity protections contained in that chapter of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU. It also provides specific, enhanced protection against discrimination as enshrined in the six directives listed in Annex 1 of the Protocol.

<sup>1214</sup> Department for Communities, ‘Gender Equality Strategy Expert Advisory Panel Report’, (DfC, 2021).

<sup>1215</sup> EU Commission proposal for a Directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms (COM(2021) 93).

<sup>1216</sup> 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.

Four of the Annex 1 Directives cover the area of employment equality on grounds of race and ethnicity, sexual orientation, religion and belief, disability, age and gender:

- *Racial Equality Directive*,<sup>1217</sup>
- *Employment Equality (Framework) Directive*,<sup>1218</sup>
- *Equal Treatment Directive*,<sup>1219</sup>
- *Self-Employment Equal Treatment Directive*.<sup>1220</sup>

NI equality law must keep pace with any changes made by the EU to these rights to improve the minimum levels of protection available, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.<sup>1221</sup>

The UK Government has confirmed that these standards represent the minimum standard of protection against discrimination in NI. It has made the commitment to dynamically align with the Annex 1 Directives to “provide a reassurance that, at the very least, the minimum standard of rights protection required by the listed directives will continue to be relevant in NI” and this will “ensure NI will not fall behind minimum European Standards in anti-discrimination law”.<sup>1222</sup>

In addition to the Annex 1 Directives, there are a number of other EU obligations which underpin the rights and safeguards in the relevant part of the Belfast (Good Friday) Agreement. The Parental Leave Directive<sup>1223</sup> and the Pregnant Workers Directive<sup>1224</sup> and other safeguards for part-time workers,<sup>1225</sup> agency workers<sup>1226</sup> and technical regulations which cover employment may also fall within scope of Article 2.<sup>1227</sup>

In June 2021 the Commission and Equality Commission for NI wrote to the head of the NI Civil Service highlighting a recent EU Commission Report on the Race Equality Directive and the Employment Equality (Framework) Directive highlighting recent legal and other developments.<sup>1228</sup> The Commissions underlined that these developments were of particular

1217 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.

1218 Directive 2000/78/EC, ‘EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation’, 27 November 2000.

1219 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.

1220 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.

1221 Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

1222 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.

1223 Directive 2010/18/EU, ‘Council Directive implementing the revised Framework Agreement on parental leave’, 8 March 2010.

1224 Directive 92/85/EEC, ‘Council Directive on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding’, 19 October 1992.

1225 Directive 97/81/EC, ‘Council Directive concerning the Framework Agreement on part-time workers’, 15 December 1997.

1226 Directive 2008/104/EC, ‘EU Parliament and Council Directive on temporary agency work’ 19 November 2008.

1227 The Commission is currently undertaking an extensive research exercise to form a view as to which EU obligations underpin the rights and safeguards in the relevant part of the Belfast (Good Friday) Agreement.

1228 EU Commission Report to the EU Parliament and Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘the Racial Equality Directive’) and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (‘the Employment Equality Directive’) - COM/2021/139, (EU Commission, 2021).

significance in relation to the ongoing review of the Race Relations (NI) Order 1997.

### **Recommendation**

The Commission recommends that in the development of any laws or policies in the area of employment, the Department for the Economy considers the extent to which any change engages Protocol Article 2 and ensures that there is no diminution to the rights and safeguards which fall within its scope and that NI law keeps pace with any changes to the Annex 1 Directives.

## Right to an Adequate standard of living and to social security

This section considers a number of issues related to the right to an adequate standard of living. This includes: an anti-poverty strategy; carers; child poverty; the crisis fund; homelessness; reduction in asylum financial support; social housing; social security; Travellers' accommodation; and the Unauthorised Encampments (NI) Order 2005.

The rights to an adequate standard of living and the right to social security are protected under the following treaties:

<b>UN CEDAW</b>	Article 14
<b>UN CRC</b>	Articles 26-27
<b>UN CRPD</b>	Article 28
<b>UN ICESCR</b>	Article 9 Article 11
<b>European Social Charter</b>	Articles 12-14
<b>Ireland/NI Protocol to the UK-EU Withdrawal Agreement</b>	Article 2

### Anti-poverty strategy

In 2015, the NI High Court ruled that the NI Executive had failed to adopt an identifiable strategy setting out how it proposes to tackle poverty, social exclusion and patterns of deprivation based on objective need in furtherance of its obligation to do so under the NI Act 1998, section 28E.<sup>1229</sup>

In 2016, the UN ICESCR Committee, recommended that an anti-poverty strategy was adopted in NI.<sup>1230</sup> In April 2019, Professor Philip Alston, the UN Special Rapporteur on Extreme Poverty, published a report on his visit to the UK, warning that “in NI, the suspension of the devolved coalition government forecloses the possibility of any major efforts to tackle poverty and results in an accountability vacuum”.<sup>1231</sup>

The New Decade, New Approach agreement renewed the commitment to developing an anti-poverty strategy.<sup>1232</sup> In October 2020, the Department for Communities published an indicative timetable for the development and publication of the anti-poverty strategy.<sup>1233</sup> Development of this strategy adopted a co-design approach, which included appointing an Expert Advisory Panel and undertaking ongoing engagement with a

1229 *Brian Gormally's Application* [2015] NIQB 59.

1230 E/C.12/GBR/CO/6, 'UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 14 July 2016, at para 48.

1231 A/HRC/41/39/Add.1, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Visit to the UK of Great Britain and NI', 23 April 2019, at para 87.

1232 NI Office, 'New Decade, New Approach' (NI Office, 2020), at 9.

1233 Department for Communities, 'Social Inclusion Strategies'. Available at: <https://www.communities-ni.gov.uk/articles/social-inclusion-strategies>.



Co-Design Group and cross-departmental working group made up of key stakeholders. The Expert Panel was tasked with gathering evidence to inform the Strategy and provided a report to the Department for Communities in December 2020, which was published online in March 2021.<sup>1234</sup> The timetable for delivery of the Strategy, including the public consultation, will be confirmed following the next Social Inclusion Strategies Ministerial Steering Group meeting, which is planned for late 2021.<sup>1235</sup>

Following an increase in 2018/19<sup>1236</sup>, in 2019/20 there was a decrease in the number of children, individuals and working age adults in both absolute and relative poverty, but the numbers of pensioners in both absolute and relative poverty increased on the 2018/19 estimate.<sup>1237</sup>

### **Recommendation**

The Commission stresses that the continued failure of the NI Executive to introduce an anti-poverty strategy in NI based on objective need is unacceptable and should be remedied urgently. The Commission recommends that the Anti-Poverty Strategy is introduced without further delay.

### **Asylum financial support**

In 2016, the UN ICESCR Committee recommended that the UK Government “increase the level of support provided to asylum seekers, including through the daily allowance, in order to ensure that they enjoy their economic, social and cultural rights, in particular the right to an adequate standard of living”.<sup>1238</sup> The UN ICESCR Committee further encouraged the UK Government “to ensure that asylum seekers are not restricted from accessing employment while their claims are being processed”.<sup>1239</sup>

In March 2019, the UN CEDAW Committee, recalling its General Recommendation No 32 (2014) on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, recommended that the UK Government “take measures to enable asylum-seeking and refugee women to access employment and appropriate housing”.<sup>1240</sup>

Asylum seekers are not able to work in the UK, including NI. Section 95 of the Immigration and Asylum Act 1999, provides for support for asylum seekers and their dependents who appear to the Home Secretary to be destitute or who are likely to become destitute (section 95 support). In

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1234 Anti-Poverty Strategy Expert Advisory Panel, ‘Recommendations for an Anti-Poverty Strategy’, (DfC, 2020).

1235 Email correspondence from the Department for Communities to the NI Human Rights Commission, October 2021.

1236 Department for Communities, ‘Poverty Bulletin: Northern Ireland 2018/19’, (DfC, 2020).

1237 Department for Communities, ‘Poverty Bulletin: Northern Ireland 2019/20’, (DfC, 2021).

1238 E/C.12/GBR/CO/6, ‘UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’, 14 July 2016, at para 25.

1239 Ibid, at para 25.

1240 CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’, 14 March 2019, at para 55(c).

2020, this support was increased from £37.75 to £39.60 per week.<sup>1241</sup> This was further increased by 3p per week in October 2020.<sup>1242</sup> Additional money to buy healthy food is provided to asylum seekers that are pregnant or a mother of a child under 3. The amount (between £3 and £5 per week) depends on the individual's situation. An asylum seeker can apply for a one-off maternity payment if their baby is due in eight weeks or less, or if the individual's baby is under six weeks old.<sup>1243</sup> At June 2021, 810 asylum seekers were in receipt of Section 95 support in NI. Of those, 20 were in receipt of subsistence only and 790 in dispersed accommodation.<sup>1244</sup>

The Immigration Act 2016 amended the Asylum and Immigration Act 1999 by creating a new power to support rejected asylum seekers who can demonstrate that they are destitute and face a genuine obstacle to leaving the UK at the point their appeal rights have been exhausted.<sup>1245</sup> The 2016 Act made amendment to the 1999 Act so that persons who have children in their household at the time their asylum claim and any appeal is finally rejected will no longer be treated as though they were still asylum seekers and so will no longer be eligible for support under section 95. Those refused asylum will be given somewhere to live and £35.39 per person on a payment card for food, clothing and toiletries. They will not be given any money and will not be given the payment card if they do not take the offer of somewhere to live. Those refused asylum can apply for a one-off £250 maternity payment if the baby is due in eight weeks or less, or if the baby is under six weeks old.<sup>1246</sup>

Research published by the British Red Cross exploring life under COVID-19 restrictions found that people seeking asylum spoke of difficulties making their asylum support payments of £39.63 per week stretch to cover their living costs, particularly when they were forced to shop in local, more expensive shops as a result of restrictions due to the pandemic.<sup>1247</sup> The research also found that their ability to spend this money was restricted as the ASPEN card, which is how asylum support payments are made, cannot be used online.

Further, research published by the NI Commissioner for Children and Young People, in October 2021, found that children are suffering due to their parent's or carer's immigration status and as a result are plunged into extreme poverty, facing homelessness and destitution.<sup>1248</sup> The research also found that this situation had been exacerbated by the COVID-19 pandemic, further widening the inequality gap for children and their parents.<sup>1249</sup>

1241 Regulation 2, Asylum Support (Amendment) Regulations 2018.

1242 British Red Cross, *The Longest Year: life under local restrictions*, 2021, at 24.

1243 Gov.UK, 'What You'll Get'. Available at: <https://www.gov.uk/asylum-support/what-youll-get>.

1244 Office for National Statistics, 'Immigration Statistics: Asylum and Protection - Section 95 support by local authority', (ONS, 2021).

1245 Schedule 11, Immigration Act 2016.

1246 Gov.UK, 'What You'll Get'. Available at: <https://www.gov.uk/asylum-support/what-youll-get>.

1247 British Red Cross, *The longest year: life under local restrictions*, Northern Ireland Briefing, February 2021.

1248 NI Commissioner for Children and Young People, 'NICCY, 'A Hostile Environment: Children and families affected by immigration status and NI Recourse to Public Funds', October 2021, at p.42.

1249 Ibid.

In its response to the NI Affairs Committee Inquiry into the experience of minority ethnic and migrant people in NI, the Commission highlighted that people whose immigration status is based on having ‘no recourse to public funds’ have not been effectively provided for, noting that the reliance on local authority provision as an alternative source of support is a problem in NI where local councils do not have responsibility for housing, social services or education.<sup>1250</sup>

### Recommendations

The Commission recommends the UK Home Office increase the level of support provided to asylum seekers, including through the daily allowance, to ensure their economic, social and cultural rights, in particular the right to an adequate standard of living. The Commission also calls on the UK Home Office to review the restrictions placed on asylum seekers which prevent the taking up of work while claims are being processed.

The Commission recommends that the UK Home Office ensure that ASPEN cards can be used online.

### Carers

There were up to 212,000 unpaid carers in NI before the COVID-19 pandemic, and the pandemic has resulted in millions of new carers across the UK, including 98,000 new to caring in NI.<sup>1251</sup> Carer support in NI is valued at £4.6 billion per year, yet carers often bear additional financial costs alone. In a survey carried out by Carers NI, 39 per cent of respondents reported that they were struggling to make ends meet, with over two thirds reporting that they were using their own income to pay for caring responsibilities.<sup>1252</sup>

Research published in June 2021 highlighted how the COVID-19 pandemic has had a significant impact on carers’ ability to access breaks, with many carers now exhausted and worried about how they will continue to care without increased support.<sup>1253</sup> 79 per cent of carers in NI reported not being able to take a break from caring during the pandemic, and 72 per cent of carers in NI said that their mental health worsened because of a lack of breaks while caring during the COVID-19 pandemic. More than a quarter (29 per cent) of carers reported needing more support than before the pandemic because the needs of the person they look after had increased, or their own health had deteriorated; just 9 per cent were confident that the support they relied on would continue in the future. Many carers highlighted that due to the pandemic, some support services had reduced or stopped completely, leaving them without the support they usually relied upon.<sup>1254</sup>

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1250 NI Human Rights Commission, ‘Submission to the NI Affairs Committee Inquiry into the experience of minority ethnic and migrant people in Northern Ireland’, May 2021.

1251 Carers NI, ‘Caring Behind Closed Doors: Six Months On’, Carers NI, October 2020.

1252 Carers NI, ‘State of Caring: A Snapshot of Unpaid Care in Northern Ireland’, Carers NI, 2019.

1253 Carers Week, ‘Breaks or Breakdown: Carers Week 2021 Report’, Carers Week, June 2021.

1254 Ibid.

Research published by the NI Commissioner for Children and Young People, in August 2021, also highlighted how continued social isolation, even when others could go out, further impacted on feelings of loneliness, and poor mental health.<sup>1255</sup> Young carers spoke about increased social isolation and expressed anxiety about a return to normal life, including in the context of where a parent or sibling may be shielding, and there was reference to an increase in caring responsibilities over the course of lockdown.<sup>1256</sup>

In February 2021, the Commission provided a response to the Department for Communities in response to its Equality Impact Assessment of the Draft Budget 2021/2022, in which it recommended that the NI Executive commit to an uplift to the Carer's allowance to support carers with the additional impact of COVID-19 on their caring responsibilities.<sup>1257</sup>

The current Carers Strategy, 'Caring for Carers', was published by the then-DHSSPS in 2006.<sup>1258</sup> This strategy has not been updated since. In 2014, the Commission published a report exploring the human rights of carers, making a number of recommendations.<sup>1259</sup> NI is also still without a Loneliness Strategy, despite loneliness frequently cited as a concern for carers.<sup>1260</sup>

## Recommendations

The Commission recommends that an up-to-date NI Carers Strategy and action plan is promptly developed, implemented and monitored by the Department of Health. This should include ensuring that carers and their representative organisations are involved at every stage of the process. Furthermore, the Commission recommends that the strategy includes concrete steps for providing accessible support to unpaid carers, taking into account specific needs, such as for young or older carers.

The Commission recommends that the Department of Health commits to an uplift to the Carer's Allowance to support carers with the additional impact of COVID-19 and its legacy on their caring responsibilities.

## Child poverty

In 2016, the UN ICESCR Committee urged the UK Government and NI Executive "to develop a comprehensive child poverty strategy and reinstate the targets and reporting duties on child poverty. In that regard,

1255 NI Commissioner for Children and Young People, 'A New and Better Normal', August 2021, at 82.

1256 Ibid, at 91.

1257 NI Human Rights Commission, 'Submission to the Department for Communities in Response to Their Equality Impact Assessment of the Draft Budget 2021/2022', February 2021.

1258 DHSSPS NI, 'Caring for Carers: recognising, valuing and supporting the caring role', January 2006.

1259 NI Human Rights Commission, 'The Human Rights of Carers in Northern Ireland', November 2014.

1260 Carers NI, 'Caring Behind Closed Doors: Six Months On', October 2020; NI Commissioner for Children and Young People, 'A New and Better Normal', August 2021.

the Committee draws the attention of the State party to its statement on poverty and the UN ICESCR".<sup>1261</sup>

The UN CRC Committee also noted that "the rate of child poverty remains high...and affects children in Wales and NI the most".<sup>1262</sup> The UN CRC Committee recommended that the NI Executive:

*set up clear accountability mechanisms for the eradication of child poverty, including by re-establishing concrete targets with a set time frame and measurable indicators, and continue regular monitoring and reporting on child poverty reduction in all parts of the State party; and*

*conduct a comprehensive assessment of the cumulative impact of the full range of social security and tax credit reforms introduced between 2010 and 2016 on children, including children with disabilities and children belonging to ethnic minority groups.*<sup>1263</sup>

## COVID-19

In March 2020, the (then) Minister for Communities, Carál Ní Chuilín MLA, and the Minister of Education, Peter Weir MLA, announced plans to provide direct payments to families in receipt of Free School Meals during term-time school closures due to COVID-19.<sup>1264</sup> 97,000 children have benefitted from this scheme. In June 2020, the Minister of Finance, Conor Murphy MLA, allocated funds for a summer food scheme, which extended Free School Meals during the school holidays.<sup>1265</sup> The Minister of Education has not committed to continue Free School Meals during school holiday periods as standard stating that children going hungry during school holiday periods "while it may be exacerbated this year by COVID-19, it is something that causes concern during every holiday period" and that it requires "a cross-departmental effort to address this issue including consideration of the continuation of the scheme".<sup>1266</sup> In November 2020, the NI Executive agreed to extend the free school meal scheme over school holidays until Easter 2022.

## Statistics

The annual NI Poverty Bulletin revealed in 2018/2019 that 107,000 (24 per cent) of children in NI were living in relative poverty before housing costs and 92,000 (21 per cent) were living in absolute poverty before housing costs.<sup>1267</sup> This was the first increase in absolute child poverty since 2013/14.<sup>1268</sup> These figures have seen minor decreases in the 2019/20 bulletin, with approximately 100,000 (22 per cent) children in NI recorded

1261 E/C.12/GBR/CO/6, 'UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016, at para 48.

1262 Ibid, at para 70(a).

1263 Ibid, at para 70(e).

1264 Department of Education, 'Press Release: Ministers take action in relation to Free School Meals payment', 26 March 2020.

1265 Department of Finance, 'Press Release: Murphy allocates funds for Health, Childcare and Free School Meals', 30 June 2020.

1266 NI Assembly Hansard, 'Response to Written Questions: Free School Meals - Peter Weir MLA - AQW 7681/17-22', 8 October 2020.

1267 Robbie Meredith, 'Free school meals: Meals to be funded during holidays until 2022', BBC News, 20 November 2020.

1268 Department for Communities, 'Poverty Bulletin: Northern Ireland 2018/19' (DFC, 2020) at 3.

as living in relative poverty and approximately 75,000 (17 per cent) living in absolute poverty.<sup>1269</sup>

## Targets

The Welfare Reform and Work Act 2016 repealed the duty to meet time-bound targets on child poverty as originally set out in the Child Poverty Act 2010 (now Life Chances Act 2010). These targets have been replaced by a statutory duty to publish an annual report on the extent and educational attainment of children in poverty. These changes extend to NI.

## Child Poverty Strategy

In March 2019, the current Child Poverty Strategy expired.<sup>1270</sup> The New Decade, New Approach agreement committed to publishing a Child Poverty Strategy.<sup>1271</sup>

In September 2020, then Minister for Communities, Carál Ní Chuilín MLA, announced that the existing child poverty strategy has been extended to May 2022.<sup>1272</sup> This was to allow work to continue on the development of the Executive's anti-poverty strategy using a co-design approach; the Minister considered that there may be scope to take child poverty forward within the wider anti-poverty strategy. The Department of Communities established an Expert Panel, Co-Design Working Group and cross-departmental working group for the purposes of drafting the anti-poverty strategy. In March 2021, the Expert Advisory Panel published a report setting out key recommendations about the themes and key actions the strategy should include.<sup>1273</sup> The timetable for delivery of the strategy, including the public consultation, will be confirmed following the next Social Inclusion Strategies Ministerial Steering Group meeting which is planned for late 2021.<sup>1274</sup>

## Recommendation

The Commission recommends that a comprehensive up-to-date strategy that tackles child poverty in NI specifically is developed by Department for Communities and implemented alongside an effective action plan. The Commission recognises that this recommendation could be taken forward as a standalone strategy or a key issue within the broader Anti-Poverty Strategy.

1269 Department for Communities, 'Northern Ireland Poverty Bulletin 2019-20' (DfC, 2021).

1270 NI Executive, 'The Executive's Child Poverty Strategy' (NI Executive, 2016).

1271 NI Office, 'New Decade, New Approach' (NIO, 2020), at 27.

1272 Department for Communities, 'Press Release: Minister announces extension to Child Poverty Strategy', 11 September 2020.

1273 Department for Communities, 'Report of the Expert Advisory Panel: Recommendations for an Anti-Poverty Strategy', (DfC, 2021).

1274 Email correspondence from the Department for Communities to NIHRC, October 2021.



## Crisis fund

In 2016, the UN ICESCR Committee called on the UK Government and NI Executive to:

*take steps to introduce measures to guarantee targeted support to all those living in poverty or at risk of poverty, in particular persons with disabilities, persons belonging to ethnic, religious or other minorities, single-parent families and families with children, and adopt an anti-poverty strategy in NI.*<sup>1275</sup>

In 2016, NI Community of Refugees and Asylum Seekers reported that Home Office, Jobs and Benefits Office and Her Majesty's Revenue and Customs practices make refugees extremely vulnerable in the transition from asylum support "as they have to negotiate a confusing range of government agencies that do not always consult with each other".<sup>1276</sup>

The Crisis Fund, which is managed by the Executive Office, aims "to help minority ethnic individuals with no other means of support through emergency situations, such as vulnerable migrants, refugees and asylum seekers and other vulnerable groups".<sup>1277</sup> It is not a permanent arrangement, but has proved to be "critical in alleviating short-term hardships for destitute asylum seekers and refugees".<sup>1278</sup>

In 2020/21, the Crisis Fund supported 1,178 people, including 753 children, from 66 countries.<sup>1279</sup> The primary causes of destitution that could lead to someone applying to the Crisis Fund were asylum issues (including No Recourse to Public Funds), benefits issues and employment issues.<sup>1280</sup> The Crisis Fund continues to be managed by the Red Cross when available.

In response to the pandemic and the overall need for a Crisis Fund to support the most vulnerable migrants, asylum seekers and refugees, The Executive Office launched the procurement process earlier than any year previously and the contract was awarded in May 2021. In addition to the Crisis Fund running for longer over the financial year, The Executive Office also doubled the amount of funding available in 2021/22 for the Fund to £202,000.<sup>1281</sup>

In 2021, in its response to the NI Affairs Committee Inquiry into the experience of minority ethnic and migrant people in NI, the Commission reiterated its recommendation that the Crisis Fund be put on a permanent footing, and that the UK Government and NI Executive address the causes of destitution.<sup>1282</sup>

<sup>1275</sup> E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016, at para 48.

<sup>1276</sup> NI Community of Refugees and Asylum Seekers, 'The Effects of Destitution on Refugees in NI' (NICRAS, 2016), at 6.

<sup>1277</sup> NI Executive, 'Press Release: Junior Ministers Jennifer McCann and Jonathan Bell today outlined the benefits of the new Crisis Fund for vulnerable minority ethnic people,' 4 February 2015.

<sup>1278</sup> Fiona Murphy and Ulrike Vieten, 'Asylum Seekers' and Refugee's Experiences of Life in NI: Report of the First Study on the Situation of Asylum Seekers and Refugees in NI - 2016' (QUB, 2017), at 65.

<sup>1279</sup> Email correspondence from the Executive Office to the NI Human Rights Commission, October 2021.

<sup>1280</sup> Ibid.

<sup>1281</sup> Ibid.

<sup>1282</sup> NI Human Rights Commission, 'Submission to the NI Affairs Committee Inquiry into the experience of minority ethnic and migrant people in Northern Ireland', May 2021.

## Recommendations

The Commission recommends that the Executive Office place the Crisis Fund on a permanent footing, with guaranteed funding.

The Commission continues to recommend that the UK Government and NI Executive address the causes of destitution in the first instance, rather than rely on a discretionary fund to address destitution when it emerges. The Commission calls on the UK Government and NI Executive to introduce measures to guarantee targeted support to all those living in poverty or at risk of poverty, including asylum seekers, refugees, migrants and other vulnerable groups.

## Homelessness

In 2016, the UN ICESCR Committee urged the UK Government and NI Executive:

*to take immediate measures, including by allocating appropriate funds to local authorities, to reduce the exceptionally high levels of homelessness, particularly in England and NI, and to ensure adequate provision of reception facilities, including emergency shelters, hostels and reception, as well as social rehabilitation centres.*<sup>1283</sup>

The UN ICESCR Committee also urged the UK Government and NI Executive to:

*take specific measures to deal with the inability of renters in the private rental sector to pay rents on account of the limits imposed on housing allowance and to effectively regulate the private rental sector, including through security of tenure protection and accountability mechanisms.*<sup>1284</sup>

Furthermore, the UN ICESCR Committee recommended the UK Government and NI Executive:

*to adopt all necessary measures to avoid the criminalisation of 'rough sleeping' in the State Party and to develop appropriate policies and programmes to facilitate the social reintegration of homeless persons. In this respect, the Committee draws the attention of the State Party to its General Comment No 4 (1991) on the right to adequate housing.*<sup>1285</sup>

## COVID-19

In March 2020, the Department for Communities agreed with the NI Housing Executive and Housing Associations that any social housing tenant facing difficulties paying rent during COVID-19 would not be

<sup>1283</sup> E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016, at para 52.

<sup>1284</sup> Ibid, at para 50(b).

<sup>1285</sup> Ibid, at para 52.

evicted.<sup>1286</sup> In May 2020, the Private Tenancies (Coronavirus Modifications) Act 2020 came into force. The Act protects private tenants from eviction during the period of the health crisis by extending the notice to quit period from four to 12 weeks. The Act was originally due to only apply for six months, however it has since been subject to extensions; most recently, in August 2021, the emergency period was extended to 4 May 2022.<sup>1287</sup>

In May 2021, the Minister for Communities Deirdre Hargey announced a £9m investment to fully fund the Housing Executive's COVID Reset Plan on homelessness.<sup>1288</sup> 'The Way Home' aims to safeguard homeless people against COVID-19, and to enable homeless services to work effectively and respond safely during the pandemic.<sup>1289</sup>

### Statistics

In 2019/2020, 11,323 households were accepted as statutorily homeless in NI.<sup>1290</sup> This figure does not include the number of households that presented to the NI Housing Executive as homeless and had their applications rejected or the unknown number of homeless that do not apply in the first place. Civil society organisations refer to such cases as the 'hidden homeless' and have raised specific concerns about the lack of support for this category of homelessness.

According to a November 2020 Street Count, a total of 18 people were estimated to be sleeping rough in NI. This represents a 50 per cent decrease from the 2019 figure of 36.<sup>1291</sup>

In 2017, a five-year homelessness strategy was published.<sup>1292</sup> It aims to prevent homelessness, to ensure that households experiencing homelessness are supported to find suitable accommodation and support solutions as quickly as possible, and to ensure a cross-departmental and inter-agency approach to ending homelessness. It acknowledges "how failing to prevent homelessness costs the public purse thousands of pounds more per individual than would be the case were timely interventions to take place".<sup>1293</sup>

In November 2021, Minister Hargey said that her focus is on preventing homelessness. The Minister was speaking ahead of an expected consultation on the Housing Executive's new five-year homelessness strategy 'Ending Homelessness Together'. Minister Hargey said her response to homelessness must build on lessons learned during the pandemic.<sup>1294</sup>

1286 Department for Communities, 'Press Release: Housing support crucial in this crisis - Hargey', 27 March 2020.

1287 Correspondence from the Department for Communities, 'The Private Tenancies (Coronavirus Modifications) (No.2) Regulations (Northern Ireland) 2021', 31 August 2021.

1288 Department for Communities, 'Press Release: 'Homelessness action plan fully funded - Minister Hargey', 18 May 2021.

1289 Northern Ireland Housing Executive, 'The Way Home: Homelessness Response to COVID-19', (NIHE, 2020).

1290 NI Statistics and Research Agency, 'NI Housing Statistics 2019-20' (DfC, 2020), at 1.

1291 Northern Ireland Housing Executive, '2020 Rough Sleeping Count/Estimates', (NIHE, 2020).

1292 NI Housing Executive, 'Ending Homelessness Together: Homelessness Strategy for NI 2017-22' (NIHE, 2016).

1293 Ibid, at 17.

1294 Department for Communities, 'Press Release: Prevention to remain focus in addressing homelessness - Hargey', 2 November 2021.

## Recommendations

The Commission recommends that the Department for Communities leads a collaborative cross-departmental approach to address the causes and impact of homelessness, including working with partners in the voluntary and community sector to identify effective early intervention models.

Further, the Commission welcomes the extension to the Private Tenancies (Coronavirus Modifications) Act 2020 and recommends that the long-term impact of the pandemic is reflected in future homelessness policy.

The Commission recommends that a collaborative approach is taken between statutory, voluntary and community sectors to eliminate all forms of homelessness. The Commission urges that any further deaths of rough sleepers in NI are prevented by providing effective, timely and collaborative intervention.

## Social housing

In 2016, the UN ICESCR Committee urged the UK Government and NI Executive to:

*adopt all necessary measures to address the housing deficit by ensuring a sufficient supply of housing, in particular social housing units, especially for the most disadvantaged and marginalised individuals and groups, including middle-and-low-income individuals and households, young people and persons with disabilities.*<sup>1295</sup>

In addition, the UN ICESCR Committee urged the NI Executive to “intensify its efforts to address the challenges to overcome persistent inequalities in housing for Catholic families in North Belfast, including through meaningful participation of all actors in decision-making processes related to housing”.<sup>1296</sup>

### Housing supply

At 31 March 2020, the total number of applicants on the social housing waiting list was 38,245, an increase from 37,859 in the previous year.<sup>1297</sup> Of these applicants, 27,745 were in housing stress, where they had 30 or more points under the Common Selection Scheme.<sup>1298</sup>

In 2015, it was reported that there is an overall requirement of 190,000 new dwellings needed in NI between 2008 and 2025, an annual figure of 11,200.<sup>1299</sup> Current targets fall short of this, with an increase of 8,841 social housing stock between 2018/2019 and 2019/2020. In 2019/2020,

<sup>1295</sup> E/C.12/GBR/CO/6, ‘UN ICESCR Committee, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI’ 14 July 2016, at para 50(a).

<sup>1296</sup> Ibid, at para 50(e).

<sup>1297</sup> Department for Communities, ‘NI Housing Statistics 2019-2020’ (DfC, 2020), at 1; Department for Communities, ‘NI Housing Statistics 2018-19’ (DfC, 2019), at 5.

<sup>1298</sup> Department for Communities, ‘NI Housing Statistics 2019-2020’ (DfC, 2020), at 1.

<sup>1299</sup> NI Housing Executive, ‘NI Housing Market Review and Perspectives 2015-2018’ (NIHE, 2015), at 23.

the total social housing stock was 807,812, an increase from 798,971 in 2018/2019.<sup>1300</sup>

The housing strategy for NI expired in 2017.<sup>1301</sup> In New Decade, New Approach, the NI Executive committed to “including housing as a specific priority in the Programme for Government”, which “will be augmented with a new outcome and indicators to provide specific focus on ensuring every household has access to a good quality, affordable and sustainable home that is appropriate for its needs”.<sup>1302</sup> It also committed to “enhance investment and agree a target for new social and affordable home starts and tackle the maintenance backlog for NI Housing Executive properties”.<sup>1303</sup> It further committed to “examine options to remove historical debt from the NI Housing Executive and exclude it from having to pay Corporation Tax” and to “set a long-term trajectory for the rental charges for NI Housing Executive homes which is sustainable and is affordable to tenants”.<sup>1304</sup>

The New Decade, New Approach includes a commitment to reclassify housing associations in order to “enable housing associations to continue building new social housing and intermediate housing, including the Co-ownership Housing Scheme after March 2020”.<sup>1305</sup> In August 2020, the Housing (Amendment) Act (NI) 2020, which delivers on this commitment and ends the statutory right to buy scheme for Housing Associations was given Royal Assent.

In 2020, it was also announced that the NI Housing Executive’s landlord arm would become independent, enabling it to borrow money for the purpose of building social housing.<sup>1306</sup>

The Programme for Government draft Outcomes Framework, published for consultation in early 2021, explicitly referenced housing as a priority area under three of the outcomes.<sup>1307</sup> In 2021, in response to an Assembly question, Communities Minister Deirdre Hargey MLA confirmed that 2,403 new social homes were started in 2020/21 – almost 30 per cent more than the target for the year.<sup>1308</sup> She also announced a new three-year Social Housing Development Programme 2021/22 – 2023/24. The Minister said:

*I am committed to ensuring more social homes are built and allocated where they are needed and I am pleased to have delivered on a ‘New Decade New Approach’ commitment to enhance the level of investment in new social housing, with £162m being made available for 2021/22 – an increase of c£26m from 2020/21. Equality and rights*

1300 Department for Communities, ‘NI Housing Statistics 2019-2020’ (DfC, 2020), at 1; Department for Communities, ‘NI Housing Statistics 2018-19’ (DfC, 2019), at 1.

1301 Department for Social Development, ‘Facing the Future: Housing Strategy for NI’ (DfSD, 2012).

1302 NI Office, New Decade New Approach, (NIO, 2020), at 9 and 39.

1303 Ibid, at 9.

1304 Ibid.

1305 Ibid.

1306 Department for Communities, ‘Press Release: Time to secure the long term future of the Housing Executive – Ní Chuilín’, 3 November 2020.

1307 NI Executive, ‘Programme for Government: draft Outcomes Framework’, 2021.

1308 NI Assembly Hansard, ‘Oral Question: Social Housing Provision – Colm Gildernew MLA – AQO 2000/17-22’, 10 May 2021.

*are the basis of my approach. Housing, and having a place to call home, is a fundamental right.*<sup>1309</sup>

In the same answer, the Minister said “Housing stress levels here are totally unacceptable. Our housing system is in need of transformative change.”<sup>1310</sup> In May 2021, the Department for Communities launched a consultation on new housing supply strategy call for evidence.<sup>1311</sup> The Commission responded to this consultation, in which it recommended a rebalancing of housing provision in NI, with an increased focus on the provision of publicly owned social housing and increased regulation of the private rented housing sector.<sup>1312</sup>

In November 2021, Minister Hargey further confirmed her commitment to delivering more social housing, stating that the investment she has directed to the social housing development programme represents 64 per cent of her entire capital budget.<sup>1313</sup>

## Segregation

In 2017, the Equality Commission for NI found that the Catholic household reference person applicants continue to experience longest waiting times for social housing in NI as a whole and that “while median waiting times had increased for all groups, more substantive increases were noted for households with a ‘Catholic’ or ‘Other’ religion household reference person”.<sup>1314</sup>

The Shared Housing Programme completed the 10th Shared Neighbourhood in 2019-20, meeting the target set in the Together: Building a United Community Strategy, and providing 483 new homes.<sup>1315</sup> The Executive Office stated that the focus is now on delivering good relations schemes within these areas.

The Community Cohesion Strategy includes segregation/integration as a theme.<sup>1316</sup> It contains a number of actions including: supporting research into segregated and shared housing and updating the Mapping Segregation report; facilitating and encouraging mixed housing schemes in the social and affordable sector. The Strategy also commits to developing programmes of action to address issues of residential segregation and integration across three years, as well as developing legacy programmes targeting young champions in neighbourhoods.<sup>1317</sup> The Cohesion Strategy has since been extended for a further year.<sup>1318</sup>

1309 NI Assembly Hansard, ‘Oral Question: Social Housing Provision – Colm Gildernew MLA – AQO 2000/17-22’, 10 May 2021.

1310 Ibid.

1311 Department for Communities, ‘Consultation on the new housing supply strategy call for evidence’, (DfC, 2021).

1312 NI Human Rights Commission, ‘Response to public consultation on new housing supply strategy call for evidence’, July 2021.

1313 Department for Communities, ‘Press Release: Delivering more social housing a priority – Hargey’, 3 November 2021.

1314 Equality Commission for NI, ‘Statement on Key Inequalities in Housing and Communities in NI: Full Statement’ (ECNI, 2017), at para 1.9.

1315 The Executive Office, ‘Together: Building a United Community Strategy – Annual Update 2019/20’ (TEO, 2021).

1316 NI Housing Executive for, ‘Community Cohesion Strategy 2015-2020’ (NIHE, 2015).

1317 Ibid, at 34.

1318 Email correspondence from NI Housing Executive to the NI Human Rights Commission, October 2021.



Despite these actions, people continue to be intimidated out of their homes.<sup>1319</sup> Public authorities have been criticised for not addressing the root of the problem and not having a strategy in place that offers mitigation measures.<sup>1320</sup> Between April 2015 and October 2018, 2,017 households presented themselves as homeless due to intimidation.<sup>1321</sup> In 1,488 of these cases the reason cited was intimidation from paramilitaries and another 135 cases were linked to sectarianism.<sup>1322</sup> In a wide-ranging statement on social housing in November 2020, the then Minister for Communities confirmed that she did not intend to proceed with a previous proposal to remove intimidation points, but that the mechanisms for such prioritisation need to prevent abuse and provide robust verification.<sup>1323</sup> The Minister advised that officials are investigating options for an alternative proposal, including consideration of a statutory body to independently manage this verification process.

### Data Collection

The Equality Commission for NI's assessment of the Facing the Future: Housing Strategy for NI 2012-2017 and Building Successful Communities found that, despite monitoring guidance for public authorities, there is a lack of robust housing and communities data relating to a number of equality grounds.<sup>1324</sup> In 2019, the Equality Commission for NI further reiterated its calls for improved data collection to address gaps and for data to be disaggregated, noting that "These shortfalls limit the ability to draw robust conclusions about inequalities, and/or progress in addressing the same, across the full range of equality categories and groups."<sup>1325</sup>

### Recommendations

The Commission recommends an up-to-date housing strategy for NI is introduced and implemented by the Department for Communities without further delay.

The Commission recommends that paramilitary and sectarian intimidation leading to families being forced out of their homes is promptly and robustly eradicated, with a collaborative approach taken by the Department for Communities, the Department of Justice, and The Executive Office.

1319 'Cregagh: Family forced to move after 'sectarian threat', *BBC News*, 2 August 2021.

1320 Brett Campbell, 'Belfast families living in fear on mixed estate where Catholics forced to flee', *Belfast Telegraph*, 29 September 2017.

1321 Donna Deeney and Adrian Rutherford, 'Exclusive: 2,000 households forced out of their homes - paramilitaries blamed for 73 per cent of cases', *Belfast Telegraph*, 3 January 2019.

1322 Ibid.

1323 Minister for Communities, 'Housing Statement from Communities Minister Carál Ni Chuilín', 3 November 2020.

1324 Equality Commission for NI, 'Investigation Report under Schedule 9 of the NI Act 1998: Department for Social Development - Housing Policy Proposals' (ECNI, 2015).

1325 Equality Commission for NI, 'Equality in Housing and Communities: Policy Recommendations' (ECNI, 2019).

The Commission recommends that the Department for Communities intensifies efforts to address the challenges to overcome persistent inequalities in housing, particularly for Catholic families in North Belfast, including through meaningful participation of all actors in decision-making processes related to housing.

The Commission recommends that the NI Housing Executive collect and publish disaggregated equality data to assess, monitor and allow for evaluation of Department actions to address housing inequalities in NI.

## Social security

In 2016, the UN ICESCR Committee, drawing attention to its General Comment No 19 on the right to social security, called upon the UK Government to:

- a) *review the entitlement conditions and reverse the cuts in social security benefits introduced by the Welfare Reform Act 2012 and the Welfare Reform Work Act 2016;*
- b) *restore the link between the rates of State benefits and the costs of living and guarantee that all social benefits provide a level of benefit sufficient to ensure an adequate standard of living, including access to health care, adequate housing and food;*
- c) *review the use of sanctions in relation to social security benefits and ensure that they are used proportionately and are subject to prompt and independent dispute resolution mechanisms;*
- d) *provide in its next report disaggregated data on the impact of the reforms to social security on women, children, persons with disabilities, low-income families and families with two or more children.*<sup>1326</sup>

The UN ICESCR Committee also recommended that the UK Government and NI Executive:

*conduct a comprehensive assessment of the cumulative impact of these measures on the enjoyment of economic, social and cultural rights by disadvantaged and marginalised individuals and groups, in particular women, children and persons with disabilities, that is recognised by all stakeholders.*<sup>1327</sup>

Following on from the findings of its Inquiry, in August 2017 the UN CRPD Committee recommended that the UK Government and NI Executive should:

*carry out a cumulative impact assessment, with disaggregated data, about the recent and coming reforms on the social protection for persons with disabilities, and in close collaboration with organisations*

<sup>1326</sup> E/C.12/GBR/CO/6, 'UN ICESCR Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 14 July 2016, at paras 41-42.

<sup>1327</sup> Ibid, at para 19.

*of persons with disabilities define, implement and monitor measures to tackle retrogression in their standard of living and use it as a basis for policy development across the State party.*<sup>1328</sup>

The UN CRPD Committee further recommended that the UK Government and NI Executive:

*ensure that public budgets take into account the rights of persons with disabilities, that sufficient budget allocations are made available to cover the extra costs associated with living with a disability and that appropriate mitigation measures, with appropriate budget allocations, are in place for persons with disabilities affected by austerity measures.*<sup>1329</sup>

In 2019, the UN CEDAW Committee recommended that the UK Government “take effective measures to ensure that women in vulnerable situations have effective access to... social security so that they do not need to resort to prostitution or ‘sex for rent’”.<sup>1330</sup>

The UN CEDAW Committee further recommended that the UK Government “repeal the two-child tax credit limit”.<sup>1331</sup>

### **Mitigation package**

In 2015, the Fresh Start Agreement committed to implementing the social security reforms legislated for by the UK Parliament in the Welfare Reform and Work Act 2012. The agreement also included funding for a package of measures, worth up to £585 million over four years (to the end of March 2020), paid for by NI Executive funds, to ‘mitigate’ some of the social security changes.

In 2019, civil society organisations expressed grave concern about the imminent ‘cliff edge’ if the mitigation package would come to an end in March 2020. The majority of mitigations cannot be extended without legislative provision.

In 2019, the Commission published its Cumulative Impact Assessment report of tax and social security reforms implemented between 2010 and 2017, which demonstrated the need for mitigations in NI.<sup>1332</sup> Similar assessments have been conducted in England, Wales and Scotland.

In March and June 2020, the Department for Communities extended the social security reform mitigation package through agreement with the Department of Finance under the Budget Act (NI) 2020 and Budget (No 2) Act 2020. The current arrangements are in place until December 2020 and are being kept under review in the absence of amendments to the Welfare Reform (NI) Order 2015.<sup>1333</sup>

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1328 CRPD/C/15/4, ‘UN CRPD Committee Inquiry Concerning the UK of Great Britain and NI Carried Out By the Committee Under Article 6 of the Optional Protocol to the Convention: Report of the Committee’, 24 October 2017, at para 114(a).

1329 Ibid, at para 114(d).

1330 CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI’, 14 March 2019, at para 36(a).

1331 Ibid, at para 52(b).

1332 NI Human Rights Commission, ‘Cumulative Impact Assessment of Tax and Social Security Reforms’, (NIHRC, 2019).

1333 NI Assembly Hansard, ‘Oral Questions: Welfare Mitigations Schemes Primary Legislation – Cara Hunter MLA – AQO 594/17-22’, 8 September 2020; Email from Cliff Edge Coalition to NI Human Rights Commission, 29 September 2020.

In September 2020, the then Minister for Communities, Carál Ní Chuilín MLA, confirmed that she intends to introduce primary legislation to amend as a matter of urgency the Welfare Reform (NI) Order 2015 to provide for an extension of social security mitigation payments for people affected by the bedroom tax.<sup>1334</sup> It is also the Minister for Communities' intention to address the two-child tax credit and bedroom cap in future legislation and regulations.<sup>1335</sup> The Minister for Communities also confirmed that any changes will be developed through co-design.<sup>1336</sup>

In January 2021, the Department for Communities consulted on its Equality Impact Assessment on the Executive's draft budget for 2021/2022. The Department identified that the Executive and all Departments were dealing with the challenges of a constrained draft budget in light of the COVID-19 pandemic and economic fallout.<sup>1337</sup> The Department noted that no additional funding had been allocated for the Independent Advice Sector to support welfare changes, which equates to a £1.5 million reduction in funding.<sup>1338</sup> The Department identified that no budget allocation had been approved for the Department's New Decade New Approach bids, which included a range of new mitigations that were recommended by the Commission.<sup>1339</sup> Additionally, the Department noted that no funding allocation had been provided for Housing Transformation, a revitalisation programme aiming to secure the NI Housing Executive's social housing stock.<sup>1340</sup> The Equality Impact Assessment also identified that certain Section 75 groups would be disproportionately impacted by the reduced budget, including people with disabilities, people of different ages, women and persons with dependents.<sup>1341</sup>

The Commission submitted a response to the Department for Communities' consultation on its Equality Impact Assessment. The Commission made a number of recommendations to the Department, including to ensure that "decisions regarding the budget for 2021/2022 should reflect the best use of the maximum available resources and uphold the principle of non-retrogression".<sup>1342</sup>

In June 2021, the Communities Minister appeared before the Committee for Communities to provide an update on her efforts to extend existing welfare mitigation schemes. The Minister stated "the extension of welfare mitigation schemes is critical to providing certainty for the many people who rely on welfare mitigation payments introduced to offset cuts to benefits as part of Westminster's welfare reforms".<sup>1343</sup>

Following a further briefing to the Committee in October 2021, the Chair advised the Committee would write to the Executive Office asking for the

1334 Ibid.

1335 Ibid.

1336 Letter from Minister for Communities, Carál Ní Chuilín MLA, to NI Human Rights Commission, 30 June 2020.

1337 Department for Communities, 'Equality Impact Assessment', (DfC, 2021).

1338 Ibid, at para 6.19.

1339 Ibid, at para 6.18.

1340 Ibid, at para 6.21.

1341 Ibid.

1342 NI Human Rights Commission, 'Submission to the Department for Communities in Response to Their Equality Impact Assessment of the Draft Budget 2021-22', (NIHRC, 2021), at 3.

1343 Department for Communities, 'Press Release: Communities Minister Hargey addresses Committee on welfare mitigations', 17 June 2021.

issue to be added to the Executive's agenda for decision.<sup>1344</sup> In November 2021, the Minister confirmed to the Assembly that proposals to extend welfare mitigations in NI have been blocked from NI Executive discussion 40 times.<sup>1345</sup> The Minister highlighted that the legislation is ready and the money in place for the plans, some of which had to be returned.<sup>1346</sup> The Minister announced an extension to welfare mitigations for a further three years, with a plan to review these protection schemes within the next three years.<sup>1347</sup> The Minister stated that these measures would ensure that "low-paid workers, families and vulnerable people will continue to be protected from the 'bedroom tax' and the effects of Tory government welfare cuts".<sup>1348</sup> The Minister also announced the appointment of an Independent Advisory Panel to review welfare mitigation measures in NI, which will be chaired by the former Chief Commissioner of the Northern Ireland Human Rights Commission Les Allamby.<sup>1349</sup> The Panel is expected to produce a final report by February 2022.

### Specific concerns for NI

In 2019, the House of Commons NI Affairs Committee and Work and Pensions Committee published its inquiry report into social security policy in NI, which acknowledged a number of the concerns set out below.<sup>1350</sup>

The Social Size Criteria for housing benefit, commonly known as bedroom tax is a particular issue in NI due to the lack of suitable alternative accommodation for tenants wishing to avoid this tax. The NI Audit Office warns that "current social housing stock remains unsuitable, with many thousands of social tenants under-occupying, and will therefore, be subject to reductions in benefits post 2020".<sup>1351</sup> The NI Housing Executive agrees that there is a "clear mismatch between the size and type of social housing stock required to avoid Social Sector Size Criteria deductions and the profile of the existing stock".<sup>1352</sup> The Department for Communities acknowledges "the unavailability of smaller dwellings in the social rented sector will mean that many claimants affected by the Social Sector Size Criteria policy will be unable to move property to avoid any reduction in their benefit entitlement".<sup>1353</sup>

The average family size in NI is 2.96 children. Yet, since April 2017, new claimants have generally not been able to claim Child Tax Credit for third or subsequent children or qualifying young persons born on or after 6 April 2017, save in limited circumstances.<sup>1354</sup> This also applies to Universal Credit. Concerns have been raised with one of the exemptions namely, a child being born as a result of rape or non-consensual conception

1344 Jayne McCormack, 'Bedroom tax: NI mitigation extensions "blocked 39 times"', *BBC News*, 21 October 2021.

1345 NI Assembly Hansard, 'Oral Answers to Questions: Welfare Mitigations Legislation: Update', 1 November 2021, at p.31.

1346 Ibid.

1347 Department for Communities, 'Press Release: Communities Minister Hargey announces welfare protections extension', 15 November 2021.

1348 Ibid.

1349 Department for Communities, 'Press Release: Communities Minister commissions welfare mitigations review', 16 November 2021.

1350 Northern Ireland Affairs Committee, 'Joint inquiry into Northern Ireland's welfare policy launched', 11 April 2019.

1351 NI Audit Office, 'Welfare Reforms in NI' (NIAO, 2019), at para 6.37.

1352 NI Housing Executive, 'Welfare Reform in NI: A Scoping Report' (NIHE, 2019), at 45.

1353 Department for Communities, 'Review of Welfare Mitigation Schemes' (DfC, 2019), at para 10.5.

1354 Gov.UK, 'Child Tax Credits: Exceptions to the 2 Child Limit'. Available at: <https://www.gov.uk/guidance/child-tax-creditexceptions-to-the-2-child-limit>.



where the mother no longer lives with the rapist.<sup>1355</sup> This exemption risks stigmatising the child. Women's Aid Federation NI has also stated "this ill-thought out law will be devastating and re-traumatising for victims of rape who need to access child tax credits. The policy is discriminatory towards women, and towards poor women in particular".<sup>1356</sup>

Furthermore, specific to NI, the law obligates anyone that is aware of a crime to report it to the police or face prosecution.<sup>1357</sup> Despite the Attorney General of NI's guidance issued in 2018 that this is unlikely, fears remain within civil society that the non-reporting of a rape declared through this process will lead to prosecution of the mother, support network or an employee involved in processing the claim.<sup>1358</sup> In October 2020, the UK Supreme Court heard the Child Poverty Action Group's appeal concerning the lawfulness of the two-child tax credit limit, after failing with its challenge in part on human rights grounds in the Court of Appeal.<sup>1359</sup> In July 2021, the Supreme Court unanimously dismissed the appeal.<sup>1360</sup> The Child Poverty Action Group have identified that consideration will now be given to taking a challenge to the ECtHR.<sup>1361</sup>

Household payments are the default for Universal Credit. Separate Universal Credit payments are permitted in exceptional circumstances. However, the burden is on the claimant to declare their circumstances.<sup>1362</sup> Separate payments are not available for online applicants.<sup>1363</sup> Claimants can apply for Universal Credit online or in person. The majority of new Universal Credit claimants are using the online process. Within the online process, an applicant is only able to provide one bank account per application. The Department for Communities NI has responsibility for managing social security in NI, but it must use the computer system provided by the UK Department for Work and Pensions. This computer system is under review, which is to be completed by 2023. On completion of the review, new Universal Credit claimants will be able to choose whether their benefit is paid in a single payment to an individual's bank account or a joint bank account, or if the payments are separated across two bank accounts. However, in the interim claimants must apply for separate payments in person. It was reported that there is a lack of awareness amongst staff and the wider community that separate payments are an option and even when applying in person that new claimants may be directed to the online application process.

1355 UK Government, 'Child Tax Credit: Support for a maximum of 2 children', Available at: Child Tax Credit: support for a maximum of 2 children - GOV.UK ([www.gov.uk](http://www.gov.uk)).

1356 Women's Aid Federation NI, 'Press Release: Women's Aid NI statement on 2-child tax credit rule and 'rape clause', 30 March 2017.

1357 Section 5, Criminal Law Act (NI) 1967.

1358 Attorney General for NI, 'No 14 Human Rights Guidance for the Public Prosecution Service: The Application of Section 5 of the Criminal Law Act (NI) 1967 to Rape Victims and Those to Whom They Make Disclosures in Connection with a Claim for Social Security, Child Tax Credit or Anonymous Registration on the Electoral Roll' (AGNI, 2018); Roundtable discussions with NI women's policy groups and NI women's community groups, October 2017, November 2017, February 2018 and March 2018.

1359 *SC and Others v Secretary of State for Work and Pensions* [2019] EWCA Civ 615.

1360 *R (SC and Others) v Secretary of State for Work and Pensions* [2021] UKSC 26.

1361 Child Poverty Action Group, 'Two Child Limit Challenge', Available at: <https://cpag.org.uk/welfare-rights/legal-test-cases/two-child-limit-challenge>.

1362 Department for Work and Pensions, 'Universal Credit: Further Information for Families'. Available at: <https://www.gov.uk/government/publications/universal-credit-and-your-family-quick-guide/universal-credit-further-information-for-families>; Roundtable discussions with NI women's policy groups and NI women's community groups, October 2017, November 2017, February 2018 and March 2018.

1363 Women's Policy Group Meeting, Dungannon, 12 December 2018.



## Personal Independence Payment

Personal Independence Payment replaces Disability Living Allowance. The application and assessment process for determining the outcome of Personal Independence Payment claims has been called into question.

In 2017, the England and Wales High Court ruled that changes to the Personal Independence Payment mobility descriptors unlawfully discriminated against claimants with poor mental health, thus violating Articles 8 and 14 ECHR.<sup>1364</sup>

In 2018, the Department for Communities commissioned an independent review on how the Personal Independence Payment assessment is working in NI.<sup>1365</sup> The independent review found that there were a number of issues in relation to accessibility.<sup>1366</sup> In 2019, the Commission, jointly with the Equality Commission for NI, as the UN CRPD Independent Mechanism for NI, found that there had been some concrete steps to reform the Personal Independence Payment process, but that the recommendations of the independent review and UN CRPD Committee had not been fully implemented.<sup>1367</sup>

In December 2020, the Department for Communities published its second independent review of the assessment process for the Personal Independence Payment.<sup>1368</sup> The independent review found that, while some claimants have noticed improvements in the process since the first review, “the current process is not a positive experience for everyone, and is still viewed by many with mistrust and suspicion. Evidence gathered during the course of this review suggests more work needs to be done”.<sup>1369</sup> The Department published its response to the independent review, accepting the majority of its recommendations in full, with the exception of recommendations 6, 9 and 11, which it partially accepted.<sup>1370</sup>

In June 2021, the NI Public Service Ombudsman published a report on the Department for Communities and Capita’s processes for gathering further evidence when determining Personal Independence claims.<sup>1371</sup> The Department administers claims for Personal Independence Payments, while Capita is a private sector contractor that assesses disability claims. The report made a number of findings, one of which noted that the Department’s repeated failure to ensure that Capita’s Disability Assessors appropriately completed requests for further evidence from health professionals resulted in a missed opportunity “to gather specific, appropriate and useful evidence”.<sup>1372</sup> The overall investigation made a

<sup>1364</sup> *RF v Secretary of State for Work and Pensions and Others* [2017] EWHC 3375.

<sup>1365</sup> Walter Radar, ‘Personal Independence Payment: An Independent Review of the Assessment Process’, (DfC, 2018).

<sup>1366</sup> Department for Communities, ‘Review of the Personal Independence Payment Assessment Process: Department for Communities’ Interim Response’ (DfC, 2018).

<sup>1367</sup> Independent Mechanism for NI, ‘Report on the Department for Communities Response to Independent Review of PIP Process and Compliance with Recommendations of the UN CRPD Committee’ (NIHRC and ECNI, 2019).

<sup>1368</sup> Marie Cavanagh, ‘Personal Independence Payment: a Second Independent Review of the Assessment Process’, (DfC, 2020), at 9.

<sup>1369</sup> *Ibid.*

<sup>1370</sup> Department for Communities, ‘The Second Independent Review of the Personal Independence Payment Assessment Process Department for Communities’ Response’, (DfC, 2020).

<sup>1371</sup> NI Public Service Ombudsman, ‘PIP and the Value of Further Evidence: An Investigation by the Northern Ireland Public Ombudsman into Personal Independence Payment’, (NIPSO, 2021).

<sup>1372</sup> *Ibid.*, at 82.

finding of “systemic maladministration having identified repeated failures which are likely to reoccur if left unremedied”.<sup>1373</sup> The Communities Minister responded to the report, noting that the Department will ‘carefully consider all the recommendations of the report’.<sup>1374</sup>

### COVID-19 Uplift

In 2020, as a response to the COVID-19 pandemic, the UK Government introduced a temporary £20 per week uplift to Universal Credit Payments, with the uplift set to end 6th October 2021.<sup>1375</sup> In August 2021, Ministers from Scotland, Wales and NI wrote to the Secretary of State for Work and Pensions, Thérèse Coffey, to call for the £20 uplift to remain in place. The letter questions the Department for Work and Pensions’ assertion that the decision not to make the £20 uplift permanent is to encourage people into work.<sup>1376</sup> Communities Minister, Deirdre Hargey, noted “the uncertainties resulting from the global pandemic continue and it is essential that measures are put in place to provide adequate support”.<sup>1377</sup> The official end of the £20 uplift went ahead on the 6 October 2021, however, the date at which the money will stop being paid to recipients will vary depending on which day they usually receive Universal Credit payments.<sup>1378</sup>

### Recommendations

The Commission recommends social security is accessible, promptly available and guarantees an adequate standard of living to recipients. The Commission calls on the Department of Work and Pensions to review the entitlement conditions and reverse the cuts in social security benefits introduced by the Welfare Reform Act 2012 and the Welfare Reform and Work Act 2016 to this end. In the interim, the Commission recommends that a comprehensive and secure mitigation package is implemented for as long as necessary in NI, led by the Department for Communities with support from the NI Executive.

The Commission recommends the cumulative impact of social security reforms, particularly on women, children, persons with disabilities, low-income families and families with two or more children, is regularly monitored and effective steps taken to address any identified concerns.

The Commission recommends the two-child tax credit limit/Universal Credit limit is repealed by the Department of Work and Pensions and that separate Universal Credit payments are made the primary option.

<sup>1373</sup> Ibid, at 6.

<sup>1374</sup> Department for Communities, ‘Press Release: Communities Minister Commits to Further Improvements in PIP Delivery’, 17 June 2021.

<sup>1375</sup> ‘Universal credit: When will the £20 increase stop?’, *BBC News*, 27 August 2021.

<sup>1376</sup> Department for Communities, ‘Press Release: Communities Minister Hargey and Scottish and Welsh ministers call for reversal of UC £20 uplift decision’, 27 August 2021.

<sup>1377</sup> Department for Communities, ‘Press Release: Communities Minister Hargey addresses Committee on welfare mitigations’, 17 June 2021.

<sup>1378</sup> ‘Universal Credit: End of the £20 boost explained’, *BBC News*, 6 October 2021.

The Commission recommends that the accessibility and assessment issues with Personal Independent Payment are promptly and effectively remedied.

The Commission recommends that the Department for Communities considers moving the assessment for Personal Independent Payment in-house, ensuring that the relevant staff are effectively trained.

## Travellers' accommodation

In Protocol Article 2, the UK Government commits to ensuring there is no diminution of the rights, safeguards and equality of opportunity protections contained in that chapter of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU, including the right “to equal opportunity in all social and economic activity, regardless of ... ethnicity”.<sup>1379</sup> Protocol Article 2 also provides specific, enhanced protection against discrimination as enshrined in the six directives listed in Annex 1 of the Protocol, including the Racial Equality Directive which protects against discrimination on the grounds of race and ethnicity across a range of areas, including employment and vocational training, access to goods and services, education and social security.<sup>1380</sup>

In 2018, the Commission published its investigation report into Travellers' accommodation in NI.<sup>1381</sup>

Thirteen systemic issues were identified, including: that existing law and practice did not provide for sufficient, habitable and culturally adequate Travellers' accommodation; inadequacy of current Travellers' sites; discrimination; the disproportionate impact of the Unauthorised Encampments (NI) Order 2005 on Traveller communities; the general lack of disaggregated data on Travellers' accommodation; insufficient resources available for developing and maintaining Traveller-specific accommodation; and ineffective and inadequate efforts made for participation of Travellers in decision-making processes.<sup>1382</sup>

The Commission made 45 recommendations aimed at addressing the investigation's findings.<sup>1383</sup> In 2019, the Commission published a 12 month progress report, which noted mixed progress.<sup>1384</sup> Only three recommendations had been effectively implemented and no steps had been taken to ensure effective implementation of six recommendations. On the other 36 recommendations, various degrees of progress had been made but some substantial outstanding issues persisted.<sup>1385</sup> In April 2021, the NI Housing Executive wrote to the Commission to outline

1379 Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

1380 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.

1381 NI Human Rights Commission, 'Out of Sight, Out of Mind: Travellers' Accommodation in NI' (NIHRC, 2018).

1382 Ibid.

1383 Ibid.

1384 NI Human Rights Commission, 'Implementation of Travellers' Accommodation Recommendations', (NIHRC, 2019).

1385 Ibid.

its response to recommendations and indicating implementation of the recommendations relevant to the Housing Executive.<sup>1386</sup>

In 2020, the NI Housing Executive published its draft Irish Traveller Accommodation Strategy for consultation.<sup>1387</sup> The Commission provided a response to the consultation, which highlighted the need to be careful about the language used, to make full use of available data sources and to ensure the needs of specific groups of Travellers' are addressed.<sup>1388</sup> The new Strategy was subsequently launched in July 2021.<sup>1389</sup>

In 2020, following a recommendation to do so, the Department for Communities completed a comprehensive review of the 20-year-old Design Guide on Travellers' Sites, which included focused consultation with the relevant statutory bodies, local councils, interest groups, members of the Traveller communities and their advice and advocacy groups.<sup>1390</sup> In October 2020, the Department for Communities published a revised Design Guide for Travellers' Sites in NI, which has been updated to include current health and safety requirements, fire safety guidance, legal and technical advice in relation to fitness standards, service provisions, adaptations and advice on site licencing. It is intended to support the provision of appropriate, cost-effective facilities for Travellers living in NI.<sup>1391</sup>

The Department for Communities published a consultation on a new housing supply strategy call for evidence in 2021, in which it highlighted that access to appropriate accommodation for Irish Travellers is limited.<sup>1392</sup> In its response, the Commission recommended that any housing strategy should ensure sufficient sites for Travellers to set up accommodation, recognising the cultural rights of the Irish Traveller Community to live their traditional lifestyle, and that these sites have sufficient access to essential utilities.<sup>1393</sup>

## Recommendations

The Commission continues to call for full and ongoing implementation of the remaining recommendations in its investigation report.

The Commission recommends that the Department for Communities develops long-term strategies to ensure that implemented recommendations continue to be adhered to.

1386 Correspondence from the NI Housing Executive to the NI Human Rights Commission, 13 April 2021.

1387 NI Housing Executive, 'Irish Traveller Accommodation Strategy: 2020-2025' (NIHE, 2020).

1388 Letter from NI Human Rights Commission to NI Housing Executive, 16 September 2020.

1389 NI Housing Executive, Irish Travellers Accommodation Strategy 2021-2026, July 2021.

1390 Department for Communities, 'Design Guide for Travellers' Sites in NI'. Available at: <https://www.communities-ni.gov.uk/publications/design-guide-travellers-sites-northern-ireland>.

1391 Department for Communities, 'Design Guide for Travellers' Sites NI' (DfC, 2020).

1392 Department for Communities, 'Consultation on the new housing supply strategy call for evidence', (DfC, 2021), at 24.

1393 NI Human Rights Commission, 'Response to public consultation on new housing supply strategy call for evidence' July 2021.

## **Unauthorised Encampments (NI) Order 2005**

In 2016, the UN ICESCR Committee expressed concern at how the Unauthorised Encampments (NI) Order 2005 “makes Roma/Gypsies and Irish Travellers liable to be evicted from their homes, to have their homes destroyed and then to be imprisoned and/or fined” and has recommended that this is legislation repealed.<sup>1394</sup>

In 2018, use of the Unauthorised Encampments (NI) Order 2005 was considered by the Commission as part of its Travellers’ accommodation investigation. The Police Service of NI reported that the powers under the legislation are used sparingly. Some representatives of the Police Service of NI and civil society organisations believe the 2005 Order bears more heavily on Traveller communities.<sup>1395</sup> The Commission’s investigation confirmed that the 2005 Order “has a disproportionate impact on the Traveller communities and threatens their nomadic culture”.<sup>1396</sup>

The Department for Communities accepts that the powers under the 2005 Order has a particular impact on Travellers in NI, but states that annual monitoring of the impact “indicates that the provisions of the 2005 Order have been applied sensitively, pragmatically and proportionately and are effective in balancing the rights of the Irish Travellers, landowners and the settled community”.<sup>1397</sup> For example, the NI Housing Executive operates a co-operation policy. This policy permits Travellers to set up an unauthorised encampment on public land for which there is no current or immediate use and permits them to occupy the land provided it does not create a public health or traffic hazard and the land is maintained in a reasonable and orderly manner. The NI Housing Executive emphasises that the policy is not a substitute for permanent or transit sites, but is intended to act as a way of dealing with a humane requirement.<sup>1398</sup> The NI Housing Executive Irish Travellers Accommodation Strategy 2021-26 notes that the number of unauthorised encampments operating in NI has significantly reduced over the years, with the NI Housing Executive aware of only one at the time of the strategy’s publication in July 2021.<sup>1399</sup>

In 2019, the Department for Communities re-confirmed it had no plans to repeal the 2005 Order, and highlighted that any proposed change to legislation would require the approval of the Minister for Communities and NI Executive and the agreement of the NI Assembly.<sup>1400</sup>

In its response to the 2021 Department for Communities consultation on a new housing supply strategy call for evidence,<sup>1401</sup> the Commission highlighted that the limited provision of Traveller-specific accommodation and the existence of the Unauthorised Encampments (NI) Order 2005

1394 E/C.12/GBR/CO/6, ‘UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI’, 14 July 2016, at paras 49 and 50(d).

1395 NI Human Rights Commission, ‘Out of Sight, Out of Mind: Travellers’ Accommodation in NI’ (NIHRC, 2018), at 288.

1396 Ibid.

1397 Letter from Leo O’Reilly, Permanent Secretary of Department for Communities to the NI Human Rights Commission, 18 May 2018.

1398 NI Housing Executive, ‘Our Cooperation Policy for Travellers’. Available at: [http://www.nihe.gov.uk/index/advice/advice\\_for\\_travellers/co-operation\\_policy.htm](http://www.nihe.gov.uk/index/advice/advice_for_travellers/co-operation_policy.htm).

1399 NI Housing Executive, ‘Irish Travellers Accommodation Strategy 2021-26’, (NIHE, 2021), at 43.

1400 NI Human Rights Commission, ‘Implementation of Travellers’ Accommodation Recommendations’ (NIHRC, 2019), at 9.

1401 Department for Communities, ‘Consultation on the new housing supply strategy call for evidence’, (DfC, 2021).

leaves Travellers vulnerable to homelessness; the Commission therefore called on the Department to recognise the cultural rights of the Irish Traveller Community to live their traditional lifestyle and to provide appropriate sites for Traveller accommodation with sufficient access to essential utilities.<sup>1402</sup>

### **Recommendation**

The Commission continues to recommend that the Unauthorised Encampments (NI) Order 2005 is repealed by the Department for Communities.

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1402 NI Human Rights Commission, 'Response to public consultation on new housing supply strategy call for evidence', July 2021.



## Right to Health

This section on the right to health explores a number of relevant issues, including: access to healthcare for irregular migrants; emergency healthcare; access to reproductive healthcare; mental capacity; mental health; oral health; and relationships, sexuality and gender identity education.

The right to the highest attainable standard of health is protected under the following treaties:

<b>UN CRPD</b>	Article 25
<b>UN ICESCR</b>	Article 12
<b>European Social Charter</b>	Article 11
<b>Ireland/NI Protocol to the UK-EU Withdrawal Agreement</b>	Article 2

### COVID-19 vaccines

At present, vaccinations are not mandatory in NI.<sup>1403</sup> In January 2021, the Department of Health published its plans for the deployment of the COVID-19 vaccine in NI, using a mixture of delivery models across the adult population.<sup>1404</sup>

In July 2021, the Minister for Health, Robin Swann MLA, announced that vaccines would be offered to children and young people over the age of 12.<sup>1405</sup> COVID-19 boosters are now being offered to frontline health and social care workers, those over the age of 40, those living in care homes or with underlying health conditions.<sup>1406</sup>

In England, from November 2021 all care home workers and anyone entering a care home must be fully vaccinated or exempt.<sup>1407</sup> In a statement to the House of Commons, the Secretary of State for Health and Social Care, Sajid Javid MP, announced that all those who work in the NHS and social care in England will have to be fully vaccinated against COVID-19.<sup>1408</sup>

In November 2021, the Department of Health announced plans for a public consultation on mandatory COVID-19 and flu vaccination for new recruits to health and social care in NI.<sup>1409</sup> The Minister highlighted that “there are compelling arguments that mandatory vaccination for existing health

1403 Public Health Agency NI, ‘COVID Vaccine’. Available at: <https://www.publichealth.hscni.net/covid-19-coronavirus/northern-ireland-covid-19-vaccination-programme/covid-19-vaccination-programme>.

1404 Department of Health, ‘Press release: Vaccination programme published’, 12 January 2021.

1405 Department of Health, ‘Press release: JCVI updates vaccination guidelines’, 19 July 2021.

1406 Department of Health, ‘Press release: COVID vaccine boosters – key points’, 2 November 2021; Department of Health, ‘Expansion of Booster Programme Welcomed’, 15 November 2021.

1407 Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021.

1408 ‘COVID-19 Update’, HC Deb, 9 November 2021.

1409 Department of Health, ‘Press release: Public consultation planned on vaccination for new recruits’, 9 November 2021.

and social care staff in Northern Ireland could be counter-productive – potentially destabilising an already fragile workforce.”<sup>1410</sup>

### Vaccine Certification

In April 2021, the Grand Chamber of the ECtHR considered the issue of mandatory childhood vaccinations in the context of the right to private and family life. It held that there was no breach of Article 8 ECHR and that the Czech authorities “did not exceed their margin of appreciation and so the impugned measures can be regarded as being “necessary in a democratic society”.”<sup>1411</sup> A further application on the issue of the compulsory COVID-19 vaccination of firefighters has been lodged with the ECtHR.<sup>1412</sup>

In July 2021, the Department of Health launched the COVIDCert NI app to allow individuals to show proof of vaccination for the purposes of international travel.<sup>1413</sup> On 1 November, the Department updated the app to allow users to display a domestic use certificate in addition to the existing certificate for travel.<sup>1414</sup> It was proposed that this certificate would facilitate the voluntary use of vaccine certification in hospitality and entertainment settings.

On 17 November 2021, the NI Executive voted in favour of mandatory COVID vaccine passports to be introduced in NI from 29 November.<sup>1415</sup> The measure will apply for access to hospitality and entertainment venues and to large events.<sup>1416</sup>

### Recommendation

The Commission recommends that the development of any legislation to introduce mandatory vaccination or require the use of vaccine certification should be accompanied by a Human Rights Impact Assessment and sufficient time should be provided to enable scrutiny.



### Access to healthcare for irregular migrants

In 2016, the UN ICESCR Committee recommended that the UK Government and NI Executive “take steps to ensure that temporary migrants and undocumented migrants, asylum seekers, refused asylum seekers... have access to all necessary health-care services”.<sup>1417</sup>

The UN CRC Committee also recommended that the UK Government and NI Executive ensure that migrant, refugee and asylum-seeking children

1410 Ibid.

1411 *Vavříčka and Others v. the Czech Republic*, Applications nos. 47621/13 and 5 others, (8 April 2021) at paras 310-11.

1412 ECtHR, ‘Press Release: Notice of application before Court concerning compulsory vaccination of certain workers imposed by French law on health crisis: *Thevenon v France* (application no.46061/21)’, 7 October 2021.

1413 Department of Health, ‘Press Release: Northern Ireland’s vaccine certification App set to go live’, 23 July 2021.

1414 Department of Health, ‘Press Release: Domestic use verification app launched’, 1 November 2021.

1415 Department of Health, ‘Press Release: Swann welcomes certification decision’, 17 November 2021.

1416 Jayne McCormack, ‘COVID-19: Stormont ministers vote for Covid passports’, *BBC News*, 17 November 2021.

1417 E/C.12/GBR/CO/6, ‘UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and NI’, 14 July 2016, at para 56.

are provided with “sufficient support... to access basic services [including health care]”.<sup>1418</sup>

The UN CERD Committee also reaffirmed that the UK Government and NI Executive “should take effective measures to ensure the accessibility and availability of quality health-care services to persons belonging to ethnic minorities, through its jurisdiction”.<sup>1419</sup>

In 2019, the UN CEDAW Committee highlighted the “obstacles faced by women from marginalised groups... to access healthcare services, including as a result of their inability to provide identity documentation, proof of address or immigration status”.<sup>1420</sup> It recommended that the UK Government and NI Executive “strengthen the implementation of programmes and policies aimed at providing effective access to healthcare by women from marginalised groups, particularly asylum-seeking and refugee women, migrant women, Gypsy and Traveller women, and victims of trafficking”.<sup>1421</sup>

Since 2012, a number of the Health and Social Care Trusts in NI offer the NI New Entrants Service. It is the first point of contact to the health services for new migrants, including asylum seekers; it offers initial health assessments, health promotion advice, and information on accessing health services in NI.<sup>1422</sup>

Since 2015, all asylum seekers who have made an application to be granted temporary protection, asylum or humanitarian protection are entitled to free primary, secondary and emergency healthcare.<sup>1423</sup> This includes asylum seekers who have exhausted the appeals process and remain in NI. However, the Commission has received reports that there are a number of barriers to migrants, including irregular migrants, accessing healthcare. Delays in the Home Office issuing asylum registration cards and HC2 certificates required to register and receive full support for many health care services have been reported. There are difficulties in migrants, including irregular migrants, travelling to healthcare appointments as financial support is provided by vouchers which cannot be used for transport. Due to delays in the decision-making process, pregnant migrant women, including irregular migrants, do not receive financial support until late in their pregnancy. Furthermore, there have been reports of access to translation and interpretation services being a barrier.<sup>1424</sup>

After the withdrawal of the UK from the European Union, EU, EEA and Swiss citizens living in the UK must now apply for settled status, through the EU Settlement Scheme, to ensure they have leave to remain in the

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1418 CRC/C/GBR/CO/5, ‘UN CRC Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and NI’, 12 July 2016, at paras 77-78.

1419 CERD/C/GBR/CO/21-23, ‘UN CERD Committee, Concluding Observations on the Twenty-first to Twenty-third periodic Reports of the United Kingdom of Great Britain and NI’, 26 August 2016, at para 31.

1420 CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’, 14 March 2019, at para 49.

1421 Ibid, at para 50.

1422 Belfast Health and Social Care Trust, ‘Screening service for new entrants to NI’, 24 May 2012.

1423 Provision of Health Services to Persons Not Ordinarily Resident Regulations (NI) 2015; Health and Personal Services (General Medical Services Contracts) (Amendment) Regulations (NI) 2015.

1424 NI Human Rights Commission, ‘Submission to the UN ICESCR Committee’s 58th Session on the Sixth Periodic Report of the UK’s Compliance with ICESCR’ (NIHRC, 2016), at paras 49.1-49.5.

UK.<sup>1425</sup> The deadline to apply for the EU Settlement Scheme was 30 June 2021. Should EU, EEA and Swiss citizens not apply for settled status, they risk being viewed as irregular migrants and may lose access to healthcare among other benefits.<sup>1426</sup> Concerns have been raised regarding the accessibility of the EU Settlement Scheme, particularly for more vulnerable members of the community, including young people who have grown up in care, victims of modern slavery and members of the Roma community.<sup>1427</sup> In March 2021, the High Court rejected a legal bid by the Joint Council for the Welfare of Immigrants to extend the application deadline to allow more people to apply for the scheme.<sup>1428</sup> In May 2021, the Home Office released guidance on reasonable grounds for failing to meet the June 2021 deadline pertaining to late applications in certain circumstances.<sup>1429</sup>

In August 2021, the Home Office gave assurances that the rights of late applicants to the EU Settlement Scheme and the rights of their joining family members would be temporarily upheld. The Home Office noted that it had “put in place comprehensive arrangements to enable those with reasonable grounds for missing the deadline to apply to the EUSS”.<sup>1430</sup> The Independent Monitoring Authority subsequently welcomed the announcement from the Home Office but warned that greater clarity was needed for public authorities to ensure that these rights were protected in practice.<sup>1431</sup>

Everyone in NI is entitled to free emergency healthcare at the point of service, including irregular migrants.<sup>1432</sup> Since 1 January 2020, EU and EEA citizens resident in NI who did not apply or receive settled or pre-settled status may find themselves in a position where they become irregular migrants, where they would not have otherwise been. It is important that information regarding the right to emergency healthcare is communicated to irregular migrants to ensure they are able to access this type of healthcare when they need it.<sup>1433</sup>

## Recommendations

The Commission recommends effective steps are taken to identify and minimise procedural barriers to migrant women accessing healthcare. This includes introducing guidance for healthcare professionals on providing effective access.

1425 UK Government, ‘Stay in the UK (‘settled status’): Step by Step’. Accessed at: <https://www.gov.uk/eusetledstatus>.

1426 Amelia Gentleman, ‘High court rejects bid to extend UK’s EU settlement scheme’, *The Guardian*, 11 March 2021.

1427 The Migration Observatory, ‘Vulnerable EU citizens are at risk of becoming “irregular migrants” after Brexit’. Available at: <https://migrationobservatory.ox.ac.uk/press/vulnerable-eu-citizens-are-at-risk-of-becoming-irregular-migrants-after-brex/>.

1428 Amelia Gentleman, ‘High court rejects bid to extend UK’s EU settlement scheme’, *The Guardian*, 11 March 2021.

1429 Home Office, ‘EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members’, (HO, 2021).

1430 Home Office, ‘Press Release: Temporary protection for more applicants to the Settlement Scheme’, 6 August 2021.

1431 Independent Monitoring Authority, ‘Press Release: Home Office asked to clarify the rights of EU citizens applying late to the EU Settlement Scheme’, 27 September 2021.

1432 NI Direct, Health and medical emergencies services for visitors to Northern Ireland. Available at: <https://www.nidirect.gov.uk/articles/health-and-medical-emergencies-services-visitors-northern-ireland>.

1433 Tamara Hervey, ‘Brexit, Health and its Potential Impact on Article 2 of the Ireland/Northern Ireland Protocol’, (publication pending).

The Commission continues to recommend that an amendment or policy direction is required to ensure that the full set of General Practitioner services, including access to a General Practitioner list (subject to discretion) is genuinely available to any person.

The Commission recommends that Home Office provide further guidance to ensure that applicants to the scheme and healthcare professionals are aware of the rights of people with pending and late applications to the EU Settlement Scheme.

### Emergency healthcare

In 2015, the Commission published its inquiry report into emergency healthcare in NI. The report made 26 recommendations, which included that the Department of Health develop dedicated Emergency Department minimum care standards rooted in human rights and provide a benchmark for patient experience within Emergency Departments.<sup>1434</sup> These standards have yet to be developed.

In 2019, a Joint Equality, Good Relations and Human Rights Forum was established by the Health and Social Care Trusts. The forum aims to facilitate effective and robust partnership with statutory agencies and foster ongoing relationships between the Commission, Health and Social Care Trusts, Equality Commission for NI and Community Relations Council on the mainstreaming of equality and human rights legislation and principles into health and social care policy and developments.<sup>1435</sup> The Forum continues to act as an information sharing resource between Trusts, the Department of Health and wider public authorities in the field. It has led to training initiatives such as the Commission's 2021 business plan objective to design and deliver a regional human rights training session in partnership with the Health and Social Care Trusts on residential care for vulnerable adults.

The New Decade, New Approach agreement committed to “reconfigure hospital provision to deliver better patient outcomes, more stable services and sustainable staffing”.<sup>1436</sup> This included making improvements to “urgent and emergency care” by the end of 2020.<sup>1437</sup> Implementation of this commitment has been subject to delay due to COVID-19.

The COVID-19 Urgent and Emergency Care Action Plan ‘No More Silos’ was published in October 2020.<sup>1438</sup> It builds upon the learning from the review of urgent and emergency care, to be published as a separate report, and focuses on ten key actions to ensure that urgent and emergency care services can be safely maintained and improved throughout the pandemic.

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1434 NI Human Rights Commission, ‘Press Release: A&E Inquiry Findings Published’, 27 May 2015.

1435 Belfast Health and Social Care Trust, ‘Equality Bites: 2019’ (BHSCT, 2019).

1436 NI Office, ‘New Decade, New Approach’ (NIO, 2020).

1437 Ibid.

1438 Department of Health, ‘COVID-19 Urgent & Emergency Care Action Plan: No More Silos’, October 2020.

The Minister for Health, Robin Swann MLA, said in May 2021 in response to a written question that:

*In addition to existing Ministerial standards and indicators of care, there has been significant work into protecting standards of care in Emergency Departments in recent years, including the development of a “Compassion and Care in the ED” toolkit, new complaints procedures in each Trust, and the development of escalation plans for each Trust which take a stepped approach during times of increased demands. It is also worth noting that we are currently in a period of significant reform of urgent and emergency care in NI. The forthcoming Review of Urgent and Emergency Care will set out a proposed integrated urgent and emergency care system which will deliver a safer, more effective service to patients.*<sup>1439</sup>

The Minister also indicated that “the groups and organisations involved in the co-design and co-production of the Review of Urgent and Emergency Care were drawn from a range of sectors and professional groups”.<sup>1440</sup>

The Minister previously advised that the Department of Health would publish the Review of Urgent and Emergency Care early in 2021, and it would include a chapter on mental health and addiction services. The Minister said “a key principle of the review is ensuring that patients receive the right care, first time.”<sup>1441</sup> However, more recently the Minister reiterated that the pandemic had impacted the timeline for this review, and outlined emergency measures put in place:

*The timeline for the review of urgent and emergency care has been significantly impacted COVID-19, with key staff leading the review playing a significant role in the pandemic response. However, I remain committed to publishing the findings of the review as soon as possible, ahead of a full public consultation.*

*The Department’s COVID-19 urgent and emergency care action plan, ‘No More Silos’, took learning from the review to identify 10 key actions to ensure that urgent and emergency care services across primary and secondary care can be maintained and improved in an environment that is safe for patients and for staff.*

*Learning from the implementation of No More Silos will be made available when my Department consults on the findings of the review. This will help inform the development of a new model of urgent and emergency care which can ensure that patients are able to access the right care, in the right place and at the right time.*<sup>1442</sup>

1439 NI Assembly Hansard, ‘Written Question: Assessment of the NI Human Rights Commission Annual statement on health-related rights – Colm Gildernew MLA – AQW 17042/17-22’, 4 May 2021.

1440 NI Assembly Hansard, ‘Written Question: Groups and organisations involved in the co-design and co-production of the (i) Cancer Recovery Plan; and (ii) Review of Emergency and Urgent Care – Colm Gildernew MLA – AQW 17417/17-22’, 8 June 2021.

1441 NI Assembly Hansard, ‘Written Question: plans for mental health services or specialisms within the review of urgent and emergency care – Órlaithí Flynn MLA – AQW 11906/17-22’, 23 December 2020.

1442 NI Assembly Hansard, ‘Written Question: an update into the review of urgent and emergency care – Emma Rogan MLA – AQW 14900/17-22’, 9 March 2021.



## Recommendation

The Commission calls on the Department of Health to expedite implementation of recommendations from its investigation into emergency healthcare, in particular the introduction of dedicated Emergency Department minimum care standards.

## NHS waiting lists

The right to the highest attainable standard of physical and mental health<sup>1443</sup> includes an entitlement “to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health” extending to “timely and appropriate health care”.<sup>1444</sup>

The UN CESCR Committee has identified that the right to the highest attainable standard of health must be progressively realised to the maximum available resources of the State.<sup>1445</sup> Progressive realisation creates an obligation on State Parties to move expeditiously and effectively towards securing the highest attainable standard of health.<sup>1446</sup>

In 2019, a Nuffield research report into reform of the health and social care system identified a number of factors that are hindering efforts to improve health and social care in NI.<sup>1447</sup> These included a lack of leadership was creating barriers, a lack of ambition to tackle waiting times in comparison to the rest of the UK, and the lack of integration of the health and social care sectors.<sup>1448</sup>

The report also highlighted that NI’s health service is exceptionally slow at providing patients with planned care, compared to health services elsewhere in the UK. A person in NI is at least 48 times as likely as a person in Wales to wait more than a year for care.<sup>1449</sup>

A judicial review of NHS waiting times in NI has been initiated by two women who are challenging the failure to provide primary medical services. The application was granted leave in January 2021 and is likely to be heard in January 2022. The Commission provided a letter of support to the NI High Court in respect of the leave application.

## COVID-19

On 9 June 2020, the Minister for Health published ‘The Strategic Framework for Rebuilding HSC Services’ which sets out a comprehensive assessment of the impact of COVID-19 across key services and sets out at a strategic level, an action plan for rebuilding services.<sup>1450</sup>

1443 Article 12, ICESCR.

1444 E/CN.4/2000/4, CESCR, General Comment 14: The right to the highest attainable standard of health (11 August 2000), at para 11.

1445 E/CN.4/2000/4, CESCR, General Comment 14: The right to the highest attainable standard of health (11 August 2000), para 12; and CESCR, General Comment 3: The nature of States parties’ obligations (art. 2, para 1, of the Covenant) (1990).

1446 CESCR, General Comment 3: The nature of States parties’ obligations (art. 2, para 1, of the Covenant) (1990), at para 9.

1447 Dyan, M. and Heenan D, Change or Collapse: lessons from the drive to reform health and social care in Northern Ireland (Nuffield Trust, 2019).

1448 Ibid, at p2.

1449 Ibid, at p8.

1450 Department of Health, ‘Rebuilding Health and Social Care Services’, June 2020.

In a statement to the NI Assembly, the Health Minister announced that his approach to rebuilding Health and Social Care services has two key elements: first, the development of a 'Rebuilding Health and Social Care Services Strategic Framework' which sets out the mission for the immediate future to incrementally increase service capacity as quickly as possible across all programmes of care, within the prevailing COVID-19 conditions. Secondly, establishing a new Management Board for Rebuilding Health and Social Care Services. The Management Board consists of senior Departmental officials, Trust chief executives and senior officials from other key arm's-length bodies and is to give clear direction to the Health and Social Care Board, the Public Health Agency, the Health and Social Care Trusts and the Business Services Organisation.<sup>1451</sup>

In July 2020, the Department of Health released a policy statement establishing a regional service delivery model for day case elective care procedures in NI.<sup>1452</sup> Elective care are procedures planned in advance rather than emergency care and the new model will be a regionally planned service delivery model for day case elective care procedures.

In April 2021, Health Minister Robin Swann identified that it could take five to ten years to return NHS waiting times to an acceptable level.<sup>1453</sup> In June 2021, the Minister unveiled a £700m plan to address waiting lists over five years.<sup>1454</sup>

Since the COVID-19 pandemic began, NHS waiting times have continued to increase in NI. In August 2021, Department of health statistics show that 53 per cent (184,873) of patients were waiting more than 52 weeks for a first consultant-led outpatient appointment, compared with 56.6 per cent (189,753) at 31 March 2021, and 44.1 per cent (136,633) at 30 June 2020. In addition, 33.4 per cent (48,543) of patients were waiting more than 26 weeks for a diagnostic test compared with 37.4 per cent (51,259) at 31 March 2021 and 35.1 per cent (52,393) at 30 June 2020.<sup>1455</sup>

### General Practice Funding

On 15 October 2021, the Health Minister announced a package of £5.5m to support general practice in NI over the challenging winter period.<sup>1456</sup> £3.8 million has been allocated to additional patient care and a further £1.7 million is being made available to improve telephony infrastructure and accessibility in order to free up telephone lines and staff time.

The Minister stated:

*Even prior to the COVID-19 pandemic, primary care services were coming under increasing pressure. Figures in 2019 indicated patient contacts were almost 15m per year, up from an estimated 12.7m in 2014. At the same time, GP workforce, as measured in Whole Time*

1451 Department of Health, 'Press Release: Minister launches Strategic Framework for rebuilding services', 9 June 2020.

1452 Department of Health, 'Policy Statement: the establishment of a regional service delivery model for daycase elective care procedures in Northern Ireland', July 2020.

1453 NI Assembly Hansard, 'Ministerial Statement: Health and Social Care Trust Rebuild Plan', 13 April 2021.

1454 Department of Health, 'Press Release: Minister unveils £700m plan for tackling waiting lists', 15 June 2021.

1455 Department of Health, 'Pres Release: Publication of the Quarterly Northern Ireland Inpatient, Day Case, Outpatient and Diagnostic Waiting Times Statistics - Position at 30 June 2021', 26 August 2021.

1456 Department of Health, 'Press Release: Health Minister announces vital package of support for general practice', 15 October 2021.

*Equivalent, decreased by 8 per cent. The pandemic has accelerated a trend that was already underway to make greater use of technology to help manage the increasing demand in primary care.*

*It is important to emphasise that if people have symptoms or an unexplained illness or have any reason to be concerned, they should in the first instance contact their GP who will be able to provide advice. GPs want anyone who has a health concern to feel reassured that they will be able to get an appointment and see a GP if necessary. Every effort is being made to ensure that patients get the services they need.<sup>1457</sup>*

### Children's services

In October 2021, the NI Commissioner for Children and Young People published a review of the length of time children and young people are waiting to access appointments, diagnosis and treatment.<sup>1458</sup> The report, 'More than a Number: A Rights Based Review of Child Health Waiting Lists in Northern Ireland' outlined that waiting for healthcare adversely impacts a child's educational, emotional and physical well-being.<sup>1459</sup>

The Report highlighted that the inpatient and day case waiting times have increased year on year between 2017 and 2021, with 9,481 children waiting for a first appointment at April 2021.<sup>1460</sup> Further, the number of children waiting over 52 weeks has been increasing steadily, however, between April 2020 and April 2021, which covers the pandemic period, the number of children waiting over 52 weeks jumped from 8,832 to 17,194, equating to a 95 per cent increase.<sup>1461</sup> As of April 2021, 510 children had been waiting over four years for a consultant led outpatient appointment. The total number of children waiting for all outpatient appointments is 54,328.<sup>1462</sup> 23,520 had been waiting more than 52 weeks, of these 24 had been referred for a red flag appointment in which cancers are suspected confirmed.<sup>1463</sup>

The NI Commissioner for Children and Young People recommended a full review of the child health system to ensure that health and social care reform is based on an up-to-date understanding of need across the system. It further recommended a rights-based approach to the delivery of child health and social care services, including the application of a child rights assessment framework in the development or review of plans and proposals to ensure that children's rights are fully considered in all decision-making processes.<sup>1464</sup>

<sup>1457</sup> Department of Health, 'Press Release: Health Minister announces vital package of support for general practice', 15 October 2021.

<sup>1458</sup> NI Commissioner for Children and Young People, 'More than a number: a rights based review of child health waiting lists in Northern Ireland', October 2021.

<sup>1459</sup> Ibid at p.4.

<sup>1460</sup> Ibid, at p.34.

<sup>1461</sup> Ibid, at p.35.

<sup>1462</sup> Ibid, Table 2, at p.39.

<sup>1463</sup> Ibid, Table 7, at p.44.

<sup>1464</sup> NI Commissioner for Children and Young People, 'More than a number: a rights based review of child health waiting lists in Northern Ireland', October 2021.

## Recommendation

The Commission notes the increasing level of waiting times, in particular since the beginning of the COVID-19 pandemic. The Commission recommends that the Department of Health take urgent steps to ensure timely and adequate access to healthcare in NI.

## Access to reproductive healthcare

In 2018, in addition to recommending the adoption of legislation to decriminalise termination of pregnancy in NI and to legalise access to termination services in certain circumstances,<sup>1465</sup> the UN CEDAW Committee recommended that the UK Government and NI Executive:

*adopt evidence-based protocols for healthcare professionals on providing legal abortions particularly on the grounds of physical and mental health and ensure continuous training on the protocols...*

*provide information on sexual and reproductive health services, including on all methods of contraception and access to abortion services;*

*ensure the accessibility and affordability of sexual and reproductive health services and products; [and]*

*provide women with access to high-quality abortion and post-abortion care in all public health facilities and adopt guidance on doctor-patient confidentiality in that area.*<sup>1466</sup>

In 2019, the UN CAT Committee supported this by recommending that the UK Government and NI Executive:

*ensure that all women and girls in the State party, including in NI, have effective access to termination of pregnancy in situations in which its continuation is likely to result in severe pain and suffering, such as when the pregnancy is the result of rape or incest or in cases of fatal foetal impairment, in addition to cases in which the life or health of the pregnant person is at risk. The State party should also ensure that women and girls in NI have effective access to post-abortion health care and that neither patients nor their doctors face criminal sanctions or other threats for seeking or providing such care.*<sup>1467</sup>

On 31 March 2020, in line with the NI (Executive Formation etc) Act 2019, abortion was legalised on the following grounds: on request up to 12 weeks and where there is a risk of injury to the physical or mental health of the pregnant woman up to 24 weeks.<sup>1468</sup> Abortion is also permitted on the grounds of immediate necessity, a risk to life or grave permanent

<sup>1465</sup> 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 paras 85(a), 85(b) and 85(c).

<sup>1466</sup> Ibid, at para 85(d), 86(a), 86(b) and 86(c).

<sup>1467</sup> CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic report of the UK of Great Britain and NI', 7 June 2019, at para 47.

<sup>1468</sup> Abortion (NI) (No 2) Regulations 2020, Regulations 3-4.

injury to physical or mental health of the pregnant woman, a diagnosis of a severe foetal impairment or fatal foetal abnormality.<sup>1469</sup>

### **Commissioning of Abortion Services**

The Department of Health has not commissioned or funded the required healthcare services to implement the Abortion (NI) Regulations 2020 or subsequent Abortion (NI) (No 2) Regulations 2020. The Department of Health has also not provided guidance or public information on the provision of services in general or to cover services during the pandemic, particularly given travel restrictions imposed by COVID-19.

In April 2020, the Health Minister brought a paper to the NI Executive which identified options for the provision of an emergency Early Medical Abortion service in NI, as legal advice from central government and in NI had made it clear that it would not be possible for women in NI to avail of the emergency service in England. The paper was discussed by the NI Executive, on 6 April 2020, without agreement being reached either on the options proposed.<sup>1470</sup>

The Health Minister issued a further paper to the NI Executive in May 2020 advising of the developments, including correspondence from the Chief Medical Officer, the remote services now operating through Informing Choices and Trusts, and the service operated by the British Pregnancy Advisory Service.

The Minister of Health invited the NI Executive to note the position and again requested authority to establish an Early Medical Abortion Service, as set out in the previous paper.<sup>1471</sup> To date this paper has not been discussed by the NI Executive and the authority requested by the Minister has not been provided.

At the start of April 2020, in an initial response to the lacuna, the independent charity British Pregnancy Advisory Service extended its 'telemedicine option' to NI for a short period, but this option quickly ceased following an intervention questioning the legality of the provision by the Department of Health.<sup>1472</sup>

Clinicians, managers within the Trusts and others formed the NI Abortion and Contraception Taskforce to set up a service. Between mid-April and start of June 2020, Health and Social Care Trusts in NI guided by the regulations gradually started providing certain services within their existing resources and without formal support from the Department of Health. The Trusts in NI took the view that while this approach is not appropriate or sustainable in the longer term, the service was necessary particularly given the restrictions on travel due to COVID-19 and the impact this has had on women accessing services in other parts of the

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1469 Abortion (NI) (No 2) Regulations 2020, Regulations 5-7.

1470 Correspondence from the Department of Health, Departmental Solicitor's Office to the NI Human Rights Commission, 4 December 2020.

1471 Ibid.

1472 British Pregnancy Advisory Service, 'Pills by Post - Remote Abortion Pill Treatment'. Available at <https://www.bpas.org/abortion-care/abortion-treatments/the-abortion-pill/remote-treatment/>; Meeting between Informing Choices and NI Human Rights Commission, 7 August 2020.

UK and Ireland.<sup>1473</sup> This is with the knowledge that women, girls and transgender men that do not meet the criteria of the Trusts' services are still expected to travel to England or Ireland to access termination services, with increased uncertainty and stress due to COVID-19 risks and restrictions.

Between the start of June and early October 2020, termination services up to ten weeks were available in all Health and Social Care Trusts in NI and for a brief period between ten and twelve weeks in some Trusts. When operating, these services are facilitated by Informing Choices NI, who operate the Central Access Point.<sup>1474</sup> In person consultation with a doctor is required and the first pill must be taken at the clinic, with the second pills taken at home. Termination services for medical reasons up to 24 weeks or without gestational time limit, in line with the Abortion Regulations, are mainly performed by the Belfast Health and Social Care Trust.

From October 2020, a number of Health and Social Care Trusts temporarily suspended their services. From 5 October 2020 to 4 January 2021, the Northern Health and Social Care Trust suspended its termination services as staff had to transfer back into other sexual and reproductive health care services, which were temporarily suspended due to the pandemic.<sup>1475</sup> From 5 January 2021 to 1 February 2021, the South Eastern Health and Social Care Trust ceased providing a service due to staffing issues.<sup>1476</sup> On the 23 April 2021, it was announced that the Western Health and Social Care Trust would cease their Early Medical Abortion service due to staffing issues.<sup>1477</sup> When Trusts have suspended their services the remaining Trusts have not had the resources to take referrals from women and girls in those Trust areas. Those women and girls are forced to access termination services in England through the Central Booking System, pay for a service in Ireland or access unregulated services.

Until April 2021, the British Pregnancy Advisory Service has operated the Central Booking System for women and girls living in NI requiring treatment in England. From April 2021, Marie Stopes International operate the Central Booking System. From April 2020 to April 2021, the British Pregnancy Advisory Service estimated over 300 bookings were made for women and girls living in NI.<sup>1478</sup>

As a consequence of the limited or non-availability of services, many women and girls, depending on their gestation, personal circumstances and where they live in NI, have to continue to travel to the UK and Ireland or access unregulated services. This has been further complicated by travel restrictions due to the COVID-19 pandemic and puts women and girls' health at risk.

1473 Meetings between NI Human Rights Commission, Health and Social Care Trusts and Royal Colleges of Healthcare Professionals, August-October 2020.

1474 Informing Choices NI, 'Press Release: Informing Choices NI to Provide Central Access Point to Local Abortion Services', 15 April 2020.

1475 Informing Choices, 'Press Release: Northern Trust Resumes Early Medical Abortion Service' 4 January 2021.

1476 Amnesty International NI, 'Press Release: Northern Ireland: Abortion services cease at South Eastern Trust following Health Department failure', 5 January 2021.

1477 Eimear McGovern, 'NI health trust pauses abortion service referrals due to shortage of nurses', *Belfast Telegraph*, 23 April 2021.

1478 NI Human Rights Commission, 'Monitoring Report on Reproductive Healthcare Provision in NI', (NIHRC, 2021).



The Department of Health confirmed that regionally, from the 31 March 2020 to the 31 March 2021, there had been 1373 notifications to the Department of Health of early medical abortions under the new provision provided by the health and social care trusts.<sup>1479</sup>

On 1 October 2021, Informing Choices NI withdrew their Central Access Point into early medical abortion services.<sup>1480</sup> The service had operated outside of a commissioned framework for 18 months, however, no further funding was provided through the Department of Health.<sup>1481</sup> From 4 October, it is understood that the British Pregnancy Advisory Service is offering a partial service.

### Monitoring Project

In its consultation on the proposals for the new framework for abortion services in NI, the NI Office referenced the work of the Commission to monitor implementation of the UN CEDAW recommendations on ensuring access to abortion services locally.

The Commission committed to fulfilling this objective through conducting a reproductive healthcare project and the basis of this report is to:

*monitor the provision of reproductive healthcare services in NI, following the introduction of a new legal framework for abortion, and engage with the Department of Health in accordance with the NI (Executive Formation etc) Act 2019.*<sup>1482</sup>

In May 2021, the Commission published its Monitoring Report on Reproductive Healthcare Provision in NI.<sup>1483</sup> The monitoring project aimed to establish the extent to which the Department of Health and other relevant public authorities are fulfilling their obligations to provide reproductive healthcare provision in NI, in accordance with their human rights obligations and the NI (Executive Formation etc) Act 2019. Over the course of the project the Commission met with the Department of Health, stakeholders involved in the provision of termination services and civil society organisations both in support of and against termination services. On the basis of its findings, the Commission concluded that the UN CEDAW recommendations have not been fully implemented in NI and highlighted two overarching issues. First, the lack of commissioning and funding of abortion services, and second, the lack of guidance on implementation of the Abortion Regulations.<sup>1484</sup>

### Commission's Legal Case

In December 2020, the Commission initiated judicial review proceedings against the Secretary of State for NI, the NI Executive and the Department of Health in respect of the ongoing failure to commission and fund abortion services in NI, and the lack of guidance to health and social care

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1479 Correspondence from the Department of Health to the NI Human Rights Commission, 12 April 2021.

1480 Informing Choices NI, 'Press Release: Informing Choices NI withdraw central access point into early medical abortion services', 1 October 2021.

1481 Ibid.

1482 NI Human Rights Commission, 'Our Business Plan 2020-2021', (NIHRC, 2020).

1483 NI Human Rights Commission, 'Monitoring Report on Reproductive Healthcare Provision in NI', (NIHRC, 2021).

1484 NI Human Rights Commission, 'Monitoring Report on Reproductive Healthcare Provision in NI', (NIHRC, 2021), at 6.1.

trust on the provision of services. The Commission argued that this is in breach of the Secretary of State's obligations under the NI (Executive Formation etc) Act 2019 and Article 8 ECHR. The hearing took place in May 2021 and judgment was issued on 14 October 2021 by Mr Justice Colton.<sup>1485</sup>

The NI High Court held that the Secretary of State was in breach of his obligations under s.9 of the NI (Executive Formation etc) Act 2019, but did not make Declarations against the other respondents.<sup>1486</sup>

The Court found that it was "most dispiriting to learn that it appears to be the view of the Minister that the Executive Committee will simply not make a decision unless forced to do so by way of direction or judicial review".<sup>1487</sup> The Court also recognised the emotive nature of the subject and also some potential legal complexities arising from the 2020 Regulations but finds that "it should not necessary for the court to mandate something by way of judicial review in circumstances where those in public office are not prepared to comply with their legal obligations because they disagree with the relevant law".<sup>1488</sup>

The Commission has written to the NI Executive and Minister for Health in respect of the judgment.<sup>1489</sup>

### Abortion (NI) Regulations 2021

The Secretary of State for NI introduced the Abortion (NI) Regulations 2021 in March 2021. These empower him to direct a relevant person, which includes the First and deputy First Ministers, a Minister or a Department, for the purpose of implementing the recommendations in paragraphs 85 and 86 of the UN CEDAW report.<sup>1490</sup>

On the 22 July 2021, the Secretary of State for NI, made a statement to Parliament issuing a direction to the Department of Health, the Minister of Health, the Health and Social Care Board, and to the First and deputy First Minister, to commission and make abortion services available in NI as soon as possible, and no later than 31 March 2022 and to ensure immediate support for interim services of early medical abortion.<sup>1491</sup>

The Secretary of State outlined:

*I am now directing the Department of Health to secure the commissioning and availability of the relevant healthcare services. The direction also includes an immediate requirement for the Department of Health to continue to support the Central Access Point provided by Informing Choices NI who are key to providing Early Medical Abortion services. I have chosen to impose a deadline for the availability of commissioned services of 31 March 2022 to account for*

1485 *Re Northern Ireland Human Rights Commission for Judicial Review* [2021] NIQB 91.

1486 *Ibid*, at para 115.

1487 *Ibid*, at para 103.

1488 *Ibid*, at para 104.

1489 Correspondence between the NI Human Rights Commission and the NI Executive and Department of Health, November 2021.

1490 Abortion (NI) Regulations 2021, section 2.

1491 Brandon Lewis MP, 'The Abortion Services Directions 2021', Statement UIN HCWS238, 22 July 2021.

*the Department of Health's estimate that it would take 8-12 months to make fully commissioned CEDAW compliant services available.*<sup>1492</sup>

The Commission welcomed that the Secretary of State issued this direction and view it as an important step in securing the full provision and funding of abortion services for women and girls in NI.

On 30 July 2021, the First Minister Paul Givan MLA vowed to resist the government direction and advised that he was taking legal advice on the matter.<sup>1493</sup>

The Society for the Protection of Unborn Children Pro-life Limited has launched a legal challenge against the Secretary of State for NI. It is arguing that the Abortion (NI) Regulations 2021 are unlawful, giving the Secretary of State a greater power than he has under Section 26 of the Northern Ireland Act 1998 and that the Secretary of State's powers are not exercisable when legislative and executive powers are being exercised by the NI Assembly. In addition, it is argued that the 2021 Regulations are unlawful in that they are incompatible with Protocol Article 2 and that they permit abortion on the grounds of disability.

The Commission was granted permission to intervene in the case, alongside the Equality Commission for NI and Christian Action, Research, and Education (CARE). Judgment in the case is awaited.

### **Severe Fetal Impairment**

On 2 June 2020, the NI Assembly debated a motion put forward by the DUP, "that this Assembly welcomes the important intervention of disability campaigner Heidi Crowter and rejects the imposition of abortion legislation to all non-fatal disabilities, including Down's syndrome". An amendment was added by Sinn Féin "that this Assembly welcomes the important intervention of disability campaigner Heidi Crowter and the specific legislative provision in the abortion legislation that goes beyond fatal foetal abnormalities to include non-fatal disabilities, including Down's syndrome". The DUP's motion was carried, by 46 votes to 40, and Sinn Féin's amendment was rejected, by 32 votes to 52.<sup>1494</sup>

A challenge to the Abortion Act 1967 was heard in the High Court in England in July 2021. This case focused on the application, to Down's Syndrome cases, of section (1)(d) of the Abortion Act 1967, which permits abortion to be carried out up to birth in cases of disability of the unborn child where there is a "substantial risk" that the child would be born "seriously handicapped". The Court rejected the arguments posed by the applicants that s.1(d) was incompatible with Articles 2, 3, 8 and 14 ECHR.<sup>1495</sup>

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1492 Ibid.

1493 Enda McClafferty, 'NI abortion: Givan Vows to resist commissioning order', *BBC News*, 29 July 2021.

1494 NI Assembly Hansard, 'Abortion Legislation: Non-fatal disabilities', 2 June 2020.

1495 *R (Crowter and Ors) v Secretary of State for Health and Social Care* [2021] EWHC 2536 (Admin), at paras 71, 83, 135 and 147.

## Severe Fetal Impairment Abortion Amendment Bill

In February 2021, Paul Givan MLA sponsored a Bill to amend the Abortion (Northern Ireland) (No. 2) Regulations 2020 to remove the ground for an abortion in cases of severe fetal impairment.

The Speaker of the House requested the advice of the Commission, following a motion on 15 March 2021. The Health Committee also sought the advice of the Commission on the Bill and the Commission provided a response to the Bill in May 2021. This advice highlighted concerns that the Bill, if passed, would be in breach of both UN CEDAW and the ECHR, by leaving women in a situation of having to travel in order to have an abortion or continue with a pregnancy against her wishes.<sup>1496</sup> The Commission has also recommended that Non Invasive Prenatal Testing is offered alongside information, timely specialist referrals and counselling where necessary to ensure that women in NI are afforded as much information, support and time as possible to make an informed decision about the continuation of their pregnancy. The Commission provided oral evidence to the Committee for Health on the Bill and also its monitoring report on access to Reproductive Healthcare Services on 3 June 2021.

The Committee voted in favour of the Bill on 21 October 2021, with support from both the DUP and UUP, while Alliance and People Before Profit members voted against and Sinn Féin and SDLP members abstained.<sup>1497</sup> The Health Committee published its report on the Severe Fetal Impairment Abortion Amendment Bill in November 2021.<sup>1498</sup> The Committee called for the full implementation of commissioned services as set out in the Abortion (Northern Ireland) (No. 2) Regulations 2020 and noted its concern regarding women who are forced to travel to Great Britain to avail of healthcare services.<sup>1499</sup>

## Safe Access Zones

The UN CEDAW Inquiry report recommendation 86(g) requires that the NI Executive “protect women from harassment by pro-life protesters by investigating complaints and prosecuting and punishing perpetrators.”<sup>1500</sup> The Abortion (No.2) 2020 Regulations do not address this recommendation.

Informing Choices NI and Health and Social Care Trusts confirmed that the location of clinics where termination services can be accessed in NI have been intentionally kept out of the public domain. At first, it was reported that a combination of this approach and COVID-19 restrictions on public gatherings helped to ensure that the same problems faced by MSI Reproductive Choices, when it had offices in NI, did not initially arise. However, before the service was suspended in October 2020, it was reported that protestors had started to gather outside the location of the

1496 NI Human Rights Commission, ‘Response to Severe Fetal Impairment Amendment Bill’, May 2021.

1497 NI Assembly, ‘Official Report: Minutes of Evidence – Health Committee’, 21 October 2021.

1498 NI Assembly, ‘Committee for Health Report on the Severe Fetal Impairment Abortion (Amendment) Bill’, 19 November 2021.

1499 Ibid, at paras 1122-12.

1500 CEDAW/C/OP.8/GBR/1, ‘UN CEDAW Committee Inquiry Concerning the United Kingdom of Great Britain and Northern Ireland under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women’, 6 March 2018.

clinic within the Northern Health and Social Care Trust carrying graphic placards and being verbally abusive towards staff.<sup>1501</sup>

The Commission's monitoring report recommended measures are taken to create safe or buffer zones to ensure that effective laws are in place and fully implemented to enable complaints of such harassment to be effectively investigated and that perpetrators are dealt with in accordance with such laws.<sup>1502</sup>

In September 2021, Clare Bailey MLA introduced a Private Member's Bill to the NI Assembly which aims to "introduce safe access zones around registered pregnancy advisory bureaux and clinics, in which anti-termination activity could not take place".<sup>1503</sup> The purpose of the Bill is to ensure women, girls and transgender men have "access to sexual and reproductive healthcare services without impediment or harassment, while carefully balancing the right to freedom of assembly".<sup>1504</sup> The Commission has provided evidence to the Health Committee on the Bill.<sup>1505</sup>

## Recommendations

The Commission recommends that the Secretary of State take the required legislative action to ensure the recommendation on accessing safe abortion services locally under the UN CEDAW recommendations is implemented.

The Commission further recommends that, supported by the NI Executive, the Department of Health commission and fund abortion services including referral arrangements in order to fully legally comply with the Abortion (NI) (No2) Regulations 2020.

The Commission advises that the Severe Fetal Impairment Abortion Amendment Bill is in breach of the State's obligations to provide access to abortion in circumstances of serious fetal impairment. The Commission recommends the introduction of Non Invasive Prenatal Testing for women in NI.

The Commission recommends steps are taken to ensure women and girls are protected from harassment when accessing family planning information and abortion services in line with the UN CEDAW Inquiry recommendations. This includes enabling the creation of safe or buffer zones as required, and ensuring that effective laws are in place to enable complaints of such harassment to be effectively investigated, and that perpetrators are dealt with in accordance with such laws.

1501 NI Human Rights Commission, 'Monitoring Report on Reproductive Healthcare Provision in NI', (NIHRC, 2021).

1502 Ibid, at para 5.103.

1503 NI Assembly, 'Pro-Forma for Development of a Members' Bill - Safe Access Zones Bill (Public Health and Well Being)' (NI Assembly, 2020), at 2.

1504 Ibid.

1505 NI Human Rights Commission, 'Response to the Committee for Health Call for Evidence: Abortion Services (Safe Access Zones) Bill', November 2021.

## Oral health

In 2007, the oral health strategy for NI was published. It expired in 2013.<sup>1506</sup> There is currently no commitment to introduce an up-to-date oral health strategy for NI.

In 2019, the NI Affairs Committee published a report on health funding in NI. It found that NI has some of the worst children's dental health outcomes in the UK and that tooth decay is the number one reason for child hospital admissions in NI.<sup>1507</sup> In 2017/2018, 4,724 children had teeth extracted under a general anaesthetic in NI.<sup>1508</sup> The NI Affairs Committee recommended that the "Department of Health commit to develop a new oral health strategy for NI in collaboration with the dental profession to be published in draft by early 2021".<sup>1509</sup>

Under the Barnett Formula, the soft drinks industry levy has provided £15 million in additional funds to NI. However, these funds are not ring-fenced.<sup>1510</sup>

The British Dental Association reports that poor oral health affects children's participation in education,<sup>1511</sup> affects employment prospects for working-age adults,<sup>1512</sup> and can lead to a higher risk of health problems and malnutrition for older people.<sup>1513</sup> Older people in particular have increasingly complex oral care needs that are not being adequately met, which is a particular issue for older people in care homes.<sup>1514</sup> With the impact of COVID-19 and suspended routine care in care homes they expect to see a backlog of oral health issues in care settings. As well as accumulating a debt of oral health problems among children.<sup>1515</sup>

In 2019, British Dental Association NI held a conference at Stormont, calling for a new strategy for oral health provision in NI. Subsequently there was announcement by the Department of Health to establish two new Oral Health Options groups for child oral health and the oral health of older people.<sup>1516</sup> Seen as a step forward in the process of updating the 2007 Oral Health Strategy for NI. Due to the outbreak of COVID-19 the groups were put on hold; however, in March 2021 the British Dental Association reported that work has recommenced.<sup>1517</sup>

1506 Department of Health, Social Services and Public Safety, 'Oral Health Strategy for NI' (DHSSPS, 2007).

1507 NISRA, Hospital statistics: acute episode based activity 2017/18, (NISRA, 2018).

1508 Information provided by the British Dental Association to the NI Human Rights Commission, 2019.

1509 House of Commons NI Affairs Committee, 'Health Funding in NI' (NIAC, 2019), at viii.

1510 Response to Freedom of Information request to Department of Finance from the British Dental Association, 18 May 2018.

1511 Office of National Statistics, 'Children's Dental Health Survey 2013: NI Report' (ONS, 2015), at 35.

1512 House of Commons NI Affairs Committee, 'Health Funding in NI' (NIAC, 2019), at para 151.

1513 National Health Service, 'The Health Risks of Gum Disease'. Available at: <https://www.nhs.uk/live-well/healthy-body/health-risks-of-gum-disease/>.

1514 Letter from the British Dental Association to Permanent Secretary at Department of Health, Richard Pengelly, 18 December 2018.

1515 British Dental Association, 'Press Release: Northern Ireland: Building better oral healthcare after COVID', 18 March, 2021.

1516 British Dental Association, 'Press Release: Moving the agenda forward: prioritising oral health in Northern Ireland', 6 November 2019.

1517 British Dental Association, 'Press Release: Updates from week commencing 15 March 2021: Northern Ireland: Building better oral healthcare after COVID-19', 9 March 2021.



In May 2021, British Dental Association presented evidence to the NI Health Committee meeting on the Health and Social Care Board Bill.<sup>1518</sup> The Bill will dissolve the Regional Health and Social Care Board which British Dental Association believe presents a unique context to overhaul how dentistry and oral health is administered within the Department of Health. It will have direct implications for dentists and oral health.

In October 2021, Health Minister Robin Swann met with the British Dental Association.<sup>1519</sup> The Minister acknowledged the need to ensure that the regulatory framework within which dental practices operate, continues to support patient safety and high quality service delivery. The Minister committed to reducing the frequency of Regulatory Quality Improvement Authority inspections of individual dental practices. The Minister intends to make relevant legislative changes following further discussion and engagement with key stakeholders.

### Recommendations

The Commission recommends that an up-to-date oral health strategy for NI is promptly developed, implemented and monitored by the Department of Health, through engagement with affected individuals and their representative organisations at every stage.

The Commission further recommends that adequate funding for oral health-related programmes is ringfenced through the Soft Drinks Industry Levy.

### Relationships, sexuality and gender identity education

In 2016, the UN CRC recommended the NI Executive:

*Ensure that meaningful sexual and reproductive health education is part of the mandatory school curriculum for all schools, including academies, special schools and youth detention centres, in all areas of the State party. Such education should provide age-appropriate information on: confidential sexual and reproductive health-care services; contraceptives; the prevention of sexual abuse or exploitation, including sexual bullying; the support available in cases of such abuse and exploitation; and sexuality, including that of lesbian, gay, bisexual, transgender and intersex children.*

In 2018, the UN CEDAW Committee's Inquiry into the impact of restrictive access to termination of pregnancy for women and girls in NI, found that "NI youth are denied the education necessary to enjoy their sexual and reproductive health and rights"<sup>1520</sup> and "that access to abortion services and contraceptives are not statutory requirements of the advisory curriculum".<sup>1521</sup>

1518 British Dental Association, 'Press Release: Northern Ireland: Representing you at the Assembly's Health Committee meeting', 28 May 2021.

1519 Department of Health, 'News: Constructive and positive meeting with British Dental Association', 21 October 2021.

1520 CEDAW/C/OP.8/GBR/1, 'UN CEDAW Committee Inquiry Concerning the United Kingdom of Great Britain and NI under Article 8 of the Optional Protocol to the UN CEDAW', 6 March 2018, at para 19.

1521 Ibid, at para 44.

The UN CEDAW Committee stated that:

*these factors point to State negligence in pregnancy prevention through failure to implement its recommended curriculum on Relationship and Sexuality Education and ensure age-appropriate, culturally sensitive, comprehensive and scientifically accurate sexuality education.*<sup>1522</sup>

In terms of access to reproductive health services and contraceptives, the UN CEDAW Committee noted:

*the centralised and limited availability of facilities in NI providing information, counselling and services in family planning, and particularly about options to access legal abortions in or outside NI. Furthermore, medical professionals are neither trained nor encouraged to provide information on abortion options and rely on this information being provided by non-governmental entities.*<sup>1523</sup>

This resulted in women having difficulties in obtaining modern forms of contraception.<sup>1524</sup>

The UN CEDAW Committee recommended that the NI Executive:

*make age-appropriate, comprehensive and scientifically accurate education on sexual and reproductive health and rights a compulsory component of curriculum for adolescents, covering prevention of early pregnancy and access to abortion, and monitor its implementation.*<sup>1525</sup>

In 2019, the UN CEDAW Committee reiterated this recommendation in its concluding observations on the UK.<sup>1526</sup>

The current structure of the curriculum based on the Education (Curriculum Minimum Content) Order (NI) 2007 sets out the minimum content for each area of learning at each key stage, thus enabling a degree of flexibility for schools. Relationships and sexuality education is a statutory component of key stages three and four<sup>1527</sup>; however, a school can provide such education in line with its ethos.<sup>1528</sup>

In 2015, the Council for the Curriculum, Examinations and Assessment introduced updated guidance on relationship and sexuality education for post-primary schools. A 'Relationships and Sexuality Hub' has also been developed, which contains materials for schools to choose from regarding such education. Women's Aid also delivers 'Helping Hands', a preventative education programme funded by the Department of Education, to some NI primary schools.<sup>1529</sup> However, this programme is not mandatory.

1522 Ibid.

1523 Ibid.

1524 Ibid, at para 46.

1525 Ibid, at para 86(d).

1526 CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 14 March 2019, at para 41(c).

1527 Education (NI) Order 2006.

1528 NI Curriculum, 'Relationships and Sexuality Education Guidance: An Update for Post-Primary Schools', (NI Curriculum, 2019).

1529 Women's Aid, 'Primary Schools'. Available at: <https://www.womensaidni.org/about-us/our-work/preventative-education/working-with-children-in-primary-schools/>.

Furthermore, in 2019, the Education Authority published its non-statutory guidance for supporting transgender pupils in schools, education other than at school centres, and youth services.<sup>1530</sup>

The framework for schools' delivery of relationship, sexuality and gender identity education is significantly less clear than, for example, in England and elsewhere in the UK where the public sector equality duty also applies to schools. Engagement with civil society organisations also indicates that the lack of a standardised approach across schools in NI is seeing a disparity regarding the effectiveness of relationship, sexuality and gender identity education that pupils in NI are receiving.<sup>1531</sup>

### Policy Developments

The Gillen Review made specific reference to the need for comprehensive relationship and sexual education, recognising the role that this plays in prevention of sexual offences as well as in achieving justice in trials that take place.<sup>1532</sup>

The New Decade New Approach agreement made a number of commitments to implement the Gillen Review recommendations and reform of education.<sup>1533</sup>

In November 2020, the NI Commissioner for Children and Young People's report on the Statement on Children's Rights in NI noted the need to focus on raising standards and improving access to the curriculum for all pupils including access to Relationships and Sexuality Education.<sup>1534</sup>

The Department for Communities, in developing its social inclusion strategies including both the Gender Equality Strategy and LGBTQI+ Strategy, adopted a co-design approach, which included appointing an Expert Advisory Panel. The Expert Panel was tasked with gathering evidence to inform the strategy. The Expert Panel Reports were published by the Department for Communities in March 2021 and both made recommendations that inclusive relationship and sexuality education should be taught in a comprehensive and standardised way across all schools and that the subject should not be dependent on school ethos.<sup>1535</sup>

In March 2021, a NI Assembly debate on a Strategy to Prevent Violence against Women and Girls resulted in cross-party support for a motion calling on the NI Executive "to introduce standardised, comprehensive relationships and sexuality education in our schools" as part of any forthcoming strategy.<sup>1536</sup>

In April 2021, Raise Your Voice, a civil society organisation working on tackling sexual harassment and sexual violence across NI published an

1530 Education Authority, 'Guidance for Schools, EOTAS Centres and Youth Service on Supporting Transgender Young People' (EA, 2019).

1531 Meeting between Informing Choices and NI Human Rights Commission, 7 August 2020; Roundtable with Civil Society Organisations on NI Human Rights Commission's Monitoring of Reproductive Healthcare Services and Education on NI, 2 September 2020; Meeting between Brook and NI Human Rights Commission, 30 September 2020.

1532 Department of Justice, 'Gillen Review: Report into the law and procedures in serious sexual offences in Northern Ireland Part 1', (DoJ, 2019).

1533 NI Office, New Decade New Approach, (NI Office, 2020), at p8.

1534 NI Commission for Children and Young People, 'Statement on Children's Rights in Northern Ireland 2', (NICCY, 2020).

1535 Robbie Meredith, 'Sex education in NI schools is insufficient, says expert panel', *BBC News NI*, 13 March 2021.

1536 NI Assembly Hansard, 'Strategy to prevent violence against women and girls - Sinead Bradley MLA', 23 March 2021.

open letter to the then NI Minister for Education, calling for the urgent introduction of compulsory, comprehensive, statutory and standardised relationships and sexuality education in all schools across NI. The letter welcomed the input of expert panels for both the Gender Equality Strategy and the LGBTQI+ Strategy, calling for significant improvements in how this subject is approached. The letter received hundreds of signatures from a wide range of stakeholders including civil society organisations and several MLAs.<sup>1537</sup>

### Monitoring project

Section 9(1) of the NI (Executive Formation etc) Act 2019 states that “the Secretary of State must ensure that the recommendations in paragraphs 85 and 86 of the UN CEDAW report are implemented in respect of NI”. These recommendations include the provision of education on sexual and reproductive health and “non-biased, scientifically sound and rights-based counselling and information on sexual and reproductive health services”.<sup>1538</sup>

In October 2021, the Commission commenced research for the publication of the second monitoring report on relationship and sexuality education. The project will run the course of the financial year and is expected to be completed by April 2022 and will include engagement with key stakeholders involved in the provision of relationship and sexual education.

### Recommendations

The Commission recognises that the NI (Executive Formation etc) Act 2019 creates a statutory duty on the Secretary of State to provide for age appropriate, scientifically accurate education on sexual and reproductive health and rights as a compulsory component of the curriculum for adolescents covering the prevention of early pregnancy and access to terminations.

The Commission recommends that concrete steps are taken by the Department of Education and other relevant public authorities to fully implement these obligations in line with the UN CEDAW Committee’s recommendations.



### Mental capacity

In 2016, the UN CRC Committee recommended that the NI Executive:

*review current legislation on mental health to ensure that the best interests and the views of the child are taken duly into account in cases of mental health treatment of children below the age of 16, in particular with regard to hospitalisation and treatment without consent.*<sup>1539</sup>

1537 Raise your Voice, ‘Open letter call for comprehensive RSE’, 8 April 2021.

1538 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 86(a) and 86(d).

1539 CRC/C/GBR/CO/5, ‘UN Committee on the Rights of the Child Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland’, 3 June 2016, at para 60(e).

In 2017, the UN CRPD Committee recommended that the UK Government and NI Executive:

*abolish all forms of substituted decision-making concerning all spheres and areas of life by reviewing and adopting new legislation in line with the Convention to initiate new policies in both mental capacity and mental health laws. It further urges the State party to step up efforts to foster research, data and good practices of, and speed up the development of supported decision-making regimes.*<sup>1540</sup>

## COVID-19

The Coronavirus Act 2020 enabled temporary modifications to the commenced aspects of the Mental Capacity Act (NI) 2016, primarily deprivation of liberty safeguards. The temporary provisions relaxed some of the statutory requirements of these safeguards during the COVID-19 pandemic, to ensure that persons can still be deprived of liberty during the pandemic crisis when staff availability may be significantly reduced.<sup>1541</sup> The details were set out in the Mental Capacity Act (NI) 2016 Emergency Code of Practice Coronavirus Act 2020, which confirms that “the provisions in the Coronavirus Act are permissive and do not remove the normal procedures. Rather they provide an alternative when the normal procedures cannot be followed”.<sup>1542</sup> The Health and Social Care Trusts were required to monitor the use of the modified provisions and provide a report to the Department of Health within three months of the emergency ending.<sup>1543</sup>

On 10 July 2020 the Mental Capacity (Deprivation of Liberty) (Amendment) Regulations (Northern Ireland) 2020 were revoked with the effect that the temporary amendments to the Mental Capacity (Deprivation of Liberty) (No. 2) Regulations (Northern Ireland) 2019 were stopped.<sup>1544</sup>

## Legislative framework

In 2016, the Mental Capacity (NI) Act 2016 received royal assent. It provides a single legislative framework governing situations where a decision needs to be made in relation to the care, treatment (for a physical or mental illness) or personal welfare of a person aged 16 or over.

The Act is a welcomed development and has been described as innovative in its emphasis on supported decision making. However, it continues to make provision for substitute decision making. It also does not apply to children under 16 years old.

The majority of the Act is also yet to be commenced. In 2019, the first phase of the Act came into operation with the commencement of the

<sup>1540</sup> CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI', 29 August 2017, at para 30.

<sup>1541</sup> Department of Health, 'Press Release: Coronavirus and temporary regulations', 1 April 2020.

<sup>1542</sup> Department of Health, 'Mental Capacity Act (NI) 2016 Emergency Code of Practice Coronavirus Act 2020' (DoH, 2020), at 1.

<sup>1543</sup> Department of Health, 'Mental Capacity Act (NI) 2016 Emergency Code of Practice Coronavirus Act 2020' (DoH, 2020), at para 28.

<sup>1544</sup> *Ibid*, at para 28.

research provisions and provisions in relation to deprivation of liberty, offences and money and valuables in residential care and nursing homes.

### Recommendations

The Commission recommends the Mental Capacity (NI) Act 2016 is commenced in full without further delay. However, the Commission recommends that the required legislative steps are taken to address issues with substitute decision making.

The Commission recommends that similar legislative protections concerning mental capacity are introduced for under 16 year olds in NI, subject to recognition of evolving capacity.

### Mental health

In 2016, the UN ICESCR Committee recommended that the UK Government and NI Executive ensure that “sufficient resources are allocated to the mental health sector”.<sup>1545</sup>

### Statistics

In 2017, poor mental health was the largest cause of disability in NI and is estimated to be 20-25 per cent higher in NI than in the rest of the UK.<sup>1546</sup> The legacy of violence and socio-economic factors are cited as major contributors to the high levels of mental health, with deprivation being a major predictor of area level mental wellbeing. Despite the evidence of substantial levels of need, the proportion of expenditure dedicated to mental health out of the total healthcare budget in NI is significantly low compared to elsewhere in the UK. NI remains the lowest at approximately eight per cent dedicated to mental health out of the total healthcare budget.<sup>1547</sup> In addition to adequate funding, civil society representatives report that there needs to be a focus on early intervention.<sup>1548</sup>

In 2019, there were 209 recorded suicides in NI.<sup>1549</sup> This was lower than in 2018 when the figure reached its highest recorded at 307 deaths from suicide in NI.<sup>1550</sup> Statistics show there is a much higher number of male deaths from suicide. In 2019, there were 157 male deaths and 52 female deaths from suicide.<sup>1551</sup>

The Programme for Government 2016-21 Measurement Annex General Health Questionnaire (GHQ12) is designed to detect the possibility of psychiatric morbidity in the general population. In 2018/19, 18 per cent of NI Health Survey respondents scored highly, over four, in the GHQ12 measure, which signify possible mental health problem.<sup>1552</sup>

1545 E/C.12/GBR/CO/6, ‘UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and NI’, 14 July 2016, at para 58.

1546 Jennifer Betts and Janice Thompson, ‘Mental Health in NI’ (RAISE, 2017).

1547 Lesley-Ann Black and Keara McKay, ‘Suicide Statistics and Strategy in NI: Update’ (RAISE, 2019).

1548 Roundtable discussion with civil society representatives, 23 September 2020.

1549 NI Statistics and Research Agency, ‘Suicides in Northern Ireland 2019’, (NISRA, 2021).

1550 NI Statistics and Research Agency, ‘Suicide Deaths 2018’ (NISRA, 2020), at Table 2.

1551 NI Statistics and Research Agency, ‘Suicides in Northern Ireland 2019’, (NISRA, 2021).

1552 NI Statistics and Research Agency, ‘PFG 2016-21 Measurement Annex - % of population with GHQ12 scores  $\geq 4$  (signifying possible mental health problem)’, (NISRA, 2018).



## Policy framework

In 2018, the NI Commissioner for Children and Young People published its rights based review into mental health services provided for children and young people in NI.<sup>1553</sup> In February 2020, the NI Commissioner for Children and Young People published its first monitoring report analysing the NI Executive's response to the recommendations set out in the review.<sup>1554</sup> Regarding progress to date, the NI Commissioner for Children and Young People has expressed particular concern in relation to funding for effectively implementing the recommendations and a continued lack of progress on effective data collection and addressing delays related to Child and Adolescent Mental Health Services.<sup>1555</sup>

In September 2019, the Department of Health published a new suicide prevention strategy for NI known as Protect Life 2. The strategy includes a specific action to support, encourage and procure community-based suicide prevention services.

The New Decade, New Approach agreement committed to publishing a Mental Health Strategy.<sup>1556</sup> On the 19 May 2020, the Department for Health published The Mental Health Action Plan.<sup>1557</sup> The Action Plan was to address immediate service improvement requirements but also acts as precursor to the new Strategy. It contains 38 actions which will improve mental health services going forward. In June 2021, Minister for Health, provided an update on the Implementation of Mental Health Action Plan stating that substantial progress has been made against the actions contained in the Action Plan.<sup>1558</sup> The progress update highlights key achievements including: the creation of a Mental Health Champion; approval of the business case and securing of £4.7m funding for the development of a specialist perinatal mental health community service model; the establishment of the Children and Adolescent Mental Health Service and Forensic Mental Health Managed Care Networks; and the launch of a Mental Health Innovation Fund.

In June 2020, Professor Siobhán O'Neill was appointed interim Mental Health Champion for NI. This role includes being a public advocate for mental health, a consensus builder to integrate mental health and wellbeing across government, an adviser to senior stakeholders and a challenger of decisions and policies related to mental health.<sup>1559</sup> The key themes for Professor O'Neill's term as Interim Mental Health Champion are: Prevention and Early Intervention, Suicide Prevention, Children and Young People, Drugs and Alcohol, and Service Improvement.<sup>1560</sup> In September 2021, Professor O'Neill was confirmed in post as the Mental Health Champion for NI, following an external recruitment process.<sup>1561</sup>

1553 NI Commissioner for Children and Young People, 'Still Waiting: A Rights Based Review of Mental Health Services and Support for Children and Young People' (NICCY, 2018).

1554 NI Commissioner for Children and Young People, 'Still Waiting: Monitoring Report' (NICCY, 2020).

1555 Ibid.

1556 NI Office, New Decade New Approach, (NI Office, 2020).

1557 Department of Health, Mental Health Action Plan, (DoH, 2020).

1558 Department of Health, 'Press Release: Update on Implementation of Mental Health Action Plan', 11 June 2021.

1559 University of Ulster, 'Press Release: Professor Siobhán O'Neill appointed interim Mental Health Champion for NI', 24 June 2020.

1560 Professor Siobhán O'Neill's website. Available at: <https://www.profsiobhanoneill.com/mental-health-champion>

1561 Department of Health, 'Press Release: Mental Health Champion appointed', 8 September 2021.

In December 2020, the Department for Health announced a consultation exercise on a draft Mental Health Strategy 2021-2031.<sup>1562</sup> The draft Strategy sets out a new vision for mental health in NI, as well as 29 high-level actions to take forward significant strategic change over the next decade. In March 2021, the Commission responded to the consultation exercise and recommended the Department ensure a human rights-based approach to developing the strategy.<sup>1563</sup> In June 2021, the Health Minister Robin Swann MLA, launched the new Mental Health Strategy 2021 – 2031 setting the strategic direction for mental health in NI.<sup>1564</sup> The Strategy consists of 35 actions across three themes. In August 2021, the Health Minister Robin Swann announced a new regional Mental Health Crisis Service in line with a commitment in the Mental Health Action Plan.<sup>1565</sup>

In February 2021, the Health Minister launched a pre-consultation for suicide prevention and post-vention services.<sup>1566</sup> The pre-consultation was undertaken by the Public Health Agency. In 2021, a new Regional Suicide Prevention Care Pathway was launched which aims to identify and respond to patients at risk of suicide as quickly as possible. It is initially being piloted in the South Eastern Health and Social Care Trust. The pathway has been developed as part of the Towards Zero Suicide initiative.<sup>1567</sup>

In May 2021, the Health Minister announced a £10m fund for vital support to mental health charities. The grant scheme, entitled the Mental Health Support Fund, will be administered and managed by Community Foundation NI, and will be open to community and voluntary sector organisations with charitable purposes offering services for people with mental ill health throughout NI.<sup>1568</sup> This will be part of a phased roll out of services that the Public Health Agency will commence.

### Perinatal Mental Health

In January 2021, the Health Minister approved funding for a New Perinatal Mental Health Delivery Model for the development of a new specialist perinatal mental health service for NI. In May 2021, the Minister provided an update on progress on provision of perinatal services and stated that “the investment is reflective of my determination to develop and implement new multidisciplinary community perinatal teams in each of the five Health and Social Care Trusts as well as a Regional Team”.<sup>1569</sup> The Minister also advised that the Public Health Agency would soon be starting work on a business case for a dedicated mother and baby unit for NI.<sup>1570</sup>

1562 Department of Health, 'Mental Health Strategy 2021-2031 Consultation Document', (DoH, 2020).

1563 NI Human Rights Commission, 'Response to Public Consultation on the Draft Mental Health Strategy 2021 – 2031 for Northern Ireland', (NIHRC, 2021).

1564 Department of Health, 'Press Release: Minister of Health publishes new 10 year Mental Health Strategy', 29 June 2021.

1565 Department of Health, 'News: New regional mental health crisis service', 24 August 2021.

1566 Department of Health, 'Press Release: Minister Swann welcomes pre-consultation for suicide prevention and post-vention services', 15 February 2021.

1567 Department of Health, 'News: Suicide Prevention Care Pathway launched', 10 September 2021.

1568 Department of Health, 'Press Release: Fund will provide vital support to mental health charities', 10 May 2021.

1569 Department of Health, 'Press Release: Swann outlines progress on provision of perinatal services', 6 May 2021.

1570 Ibid.

## Commission's amicus curiae

In October 2020, the Commission made an amicus curiae intervention in a mental health case before the NI High Court, in which it considered the lawfulness of releasing an individual who had been convicted of a criminal offence and subsequently detained as a result of a Hospital Order under the Mental Health (NI) Order 1986. The Trust sought to have conditions imposed upon the individual's discharge; however, drawing from recent UK Supreme Court jurisprudence,<sup>1571</sup> the Review Tribunal did not consider that it had the power to authorise a conditional discharge as it amounted to a deprivation of liberty, Article 5 ECHR.

The Commission made written submissions based upon the right to freedom from inhuman or degrading treatment or punishment, Article 3 ECHR, the right to liberty and security of person, Article 5 ECHR and the right to private and family life, Article 8 ECHR. In November 2020, Justice Keegan gave judgment recognising the gap in the law, that the Review Tribunal does not have the power to direct a conditional discharge from detention with conditions amounting to a deprivation of liberty, where the patient has capacity.<sup>1572</sup> In February 2021, the case was dismissed by mutual agreement of both parties. Justice Keegan noted that this case raised points on practice and wider public interest in the Mental Capacity Act (NI) 2016. Additionally, this case proves the importance of hearing evidence from medical professionals in such cases.

### Recommendations

The Commission recommends that the Department of Health introduces a dedicated mental health care budget that effectively addresses objective need, including Child and Adolescent Mental Health Services.

The Commission recommends that the Department of Health, supported by the NI Executive, ensures a sufficient budget is allocated to the mental health strategy to ensure ongoing effective implementation and outcomes measurement.

The Commission recommends that the Department of Justice considers the lacuna identified by the NI High Court regarding the powers of the Review Tribunal.

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1571 *Secretary of State for Justice v MM* [2018] UKSC 60.

1572 *In the matter of a Health and Social Care Trust and Mr O and Mr R*, [2020] NIFam 23

## Right to Education

The following section explores a number of human rights issues related to the right to education. This includes: academic selection; bullying in schools; the educational needs of specific groups of children; integrated education; shared education; special educational needs; and the use of restraint in educational settings.

The right to education is protected under the following treaties:

<b>ECHR</b>	Protocol 1, Article 2
<b>UN CRC</b>	Article 28
<b>UN CRPD</b>	Article 24
<b>UN ICESCR</b>	Article 13
<b>Ireland/Ni Protocol to the UK-EU Withdrawal Agreement</b>	Article 2

### Academic selection

In 2016, the UN CRC Committee recommended that the NI Executive “abolish the practice of unregulated admission tests to post-primary education in NI”.<sup>1573</sup>

Unregulated academic selection continues in NI, despite some delays and cancellations due to COVID-19.<sup>1574</sup>

### COVID-19

The disruption to education caused by COVID-19 prompted a number of calls for academic selection to be suspended in 2020. In May 2020, the NI Commissioner for Children and Young People wrote to the Board of Governors and principals of selective post-primary schools urging them to not use academic selection for admitting pupils this upcoming school year.<sup>1575</sup> In June 2020, the Catholic Principals’ Association called for transfer tests to be scrapped until 2021.<sup>1576</sup>

In May 2020, a number of grammar schools announced they would not use academic selection for their 2021 intake.<sup>1577</sup> The then Minister of Education, Peter Weir MLA, responded that there was no “viable alternative to put in its place”.<sup>1578</sup> The Minister further stated that:

*my concern is partly driven by a belief that if there is no opportunity for academic selection we will move, whether it is in the short term or the long term, much more to the situation that we see in England and*

1573 CRC/C/GBR/CO/5, ‘UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 12 July 2016, at para 72(a).

1574 ‘Transfer tests: Exams put back until January 2021’, *BBC News*, 2 September 2020.

1575 Grainne Connolly, ‘Schools urged to avoid transfer tests after lockdown’, *Q Radio*, 27 May 2020.

1576 John Toner, ‘Coronavirus: Catholic heads call for suspension of selection tests in Northern Ireland’, *Belfast Telegraph*, 15 June 2020.

1577 ‘Five grammar schools will not use academic selection’, *ITV*, 29 May 2020.

1578 Robbie Meredith, ‘Transfer tests: Education Minister rejects test suspension call’, *BBC News*, 19 May 2020.

*other places. Selection will happen in some shape or form, because there will always be schools that are oversubscribed and some that are undersubscribed.*<sup>1579</sup>

In May 2020, the Association of Quality Education and Post Primary Transfer Consortium announced plans to delay the pending post-primary transfer tests by two weeks.<sup>1580</sup> In June 2020, a judicial review was taken by parents claiming that the postponement of the transfer test of at least two weeks further discriminated against disadvantaged families.<sup>1581</sup> Consequently, the transfer tests were then postponed to January and February 2021, however, these were later cancelled due to uncertainty about the duration of the extended lockdown period.<sup>1582</sup>

As a result, almost all grammar schools in NI did not use any academic criteria to select pupils for September 2021.<sup>1583</sup> Parents of primary seven pupils were asked to name at least four schools they wanted their children to transfer to, in order of preference, and the process was managed online through the Education Authority. However, it was the individual Boards of Governors that made decisions on which pupils were admitted based on their criteria. The Education Authority advised almost 85 per cent of pupils would get a place in their first-preference school, while more than 98 per cent would be placed in a school that was listed among their choices.<sup>1584</sup>

## Developments

The effect of academic selection in NI has not been thoroughly examined by the Department of Education since 2000.<sup>1585</sup> Independent research indicates that unregulated post-primary academic selection is damaging children's mental health,<sup>1586</sup> and that it has significant social, educational and economic consequences for pupils and "magnifies inequalities" for specific disadvantaged groups of children.<sup>1587</sup> A recent briefing paper produced by researchers at the Ulster University Unesco Education Centre found that academic selection "is traumatic for many children, creating damage which often endures into adulthood", and that the evidence indicates that "the current arrangements for school transfer at age 11 contribute to the social and financial costs of a stressful process that serves to benefit a few (generally already privileged) pupils while damaging the life-chances of a large proportion of the school population."<sup>1588</sup>

1579 NI Assembly Hansard, 'Ad Hoc Committee on the COVID-19 Response: Ministerial Statement - Education', 22 May 2020.

1580 Robbie Meredith, 'Transfer tests: Education Minister rejects test suspension call', *BBC News*, 19 May 2020.

1581 Alan Erwin, 'Parents in legal battle over NI transfer test delay', *Belfast Telegraph*, 16 June 2020.

1582 Robbie Meredith, 'COVID-19: February AQE transfer test has been cancelled' *BBC News*, 13 January 2021.

1583 Robbie Meredith, 'Transfer tests: More than 23,500 children find out school places' *BBC News*, 13 June 2021.

1584 Ibid.

1585 Leanne Henderson et al, 'Educational Underachievement in NI' (Stranmillis University College, 2020), at 19; Tony Gallagher and Alan Smith, 'The Effects of the Selective System of Secondary Education in NI' (DoE, 2000).

1586 Participation and the Practice of Rights, 'Could make or break a child: the state of human rights and academic selection in NI', (PPR, 2019).

1587 Leanne Henderson et al, 'Educational Underachievement in NI' (Stranmillis University College, 2020), at 6.

1588 Ulster University UNESCO Centre, 'Transforming Education in Northern Ireland, Briefing Paper: Academic Selection and the Transfer Test', March 2021.

## Recommendations

The Commission recommends that a non-selective system of post-primary school admission is introduced by the Department of Education in consultation with schools, parents and children, and that the two tier system of education in NI is abolished.

## Bullying in schools

In 2016, the UN CRC Committee recommended that the UK Government and NI Executive:

- a) *intensify its efforts to tackle bullying and violence in schools, including through teaching human rights, building capacities of students and staff members to respect diversity at school, improving students' conflict resolution skills, conducting regular monitoring of incidences of bullying at school, and involving children in the initiatives and monitoring aimed at eliminating bullying;*
- b) *in the light of the recommendations resulting from the day of general discussion on digital media and children's rights, train children, teachers and families on the safe use of information and communication technologies, raise awareness among children on the severe effects that online bullying can have on their peers, and increase the involvement of social media outlets in the efforts to combat cyber-bullying.*<sup>1589</sup>

Protocol Article 2 also provides specific, enhanced protection against discrimination as enshrined in the six directives listed in Annex 1 of the Protocol, including the Racial Equality Directive which protects against discrimination on the grounds of race and ethnicity in the area of education.<sup>1590</sup> NI equality law must keep pace with any changes made by the EU to these rights to improve the minimum levels of protection available, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.<sup>1591</sup>

The Addressing Bullying in Schools (NI) Act 2016 introduced a statutory definition of bullying and places duties on grant-aided schools to take steps to prevent bullying and to record bullying incidents. In April 2021, the Department of Education signed a commencement order which will bring the Act into effect from 1 September 2021.<sup>1592</sup> This is to allow schools time to update their policies to align with necessary requirements and enable them to consult with parents, carers, pupils and staff. The Act places a duty on boards of governors to determine the detailed measures that are to be taken at schools in order to prevent bullying and to ensure

1589 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and NI', 12 July 2016, at para 48(a) and 48(b).

1590 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.

1591 Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

1592 Department of Education, 'Press Release: Schools to implement Addressing Bullying Act' 21 April 2021.



that the measures are properly implemented and kept under periodic review.<sup>1593</sup>

There is evidence that specific groups of children in NI feel particularly affected by bullying. For example, of 532 lesbian, gay, bisexual and transgender post-primary pupils surveyed in 2016, 255 (48 per cent) had experienced bullying as a result of their sexual orientation or gender identity, with 287 (54 per cent) feeling unsupported by the school and 239 (45 per cent) stating that school was not a safe place to be.<sup>1594</sup> In 2018, the NI Anti-Bullying Forum developed a 'Supplement for Effective Responses to Bullying Behaviour' in order to support schools when responding to bullying incidents involving lesbian, gay, bisexual and transgender children and young people or those who are perceived to be lesbian, gay, bisexual and transgender.<sup>1595</sup> The document sets out relevant safeguarding policies, proactive strategies to help prevent bullying of lesbian, gay, bisexual and transgender young people and details of how to respond appropriately to these incidents.

### Recommendations

The Commission recommends that the implementation of the newly commenced Addressing Bullying in Schools (NI) Act 2016 is monitored for effectiveness.

The Commission recommends that specific measures are taken by the Department of Education and the Education Authority to address bullying experienced by particular groups of children in NI, such as by lesbian, gay, bisexual and transgender pupils. This includes ensuring that children, all teachers and other education providers are trained on how to identify, address and remedy the impacts of bullying, including online bullying.

### Educational needs of specific groups of children

In 2016, the UN CRC Committee raised concerns that:

- a) *substantial inequalities persist in educational attainment, particularly for boys, children living in poverty, Roma, Gypsy and Traveller children, children with disabilities, children in care and newcomer children;*
- b) *among children subject to permanent or temporary school exclusions, there is a disproportionate number of boys, Roma, Gypsy and Traveller children, children of Caribbean descent, children living in poverty and children with disabilities.*<sup>1596</sup>

1593 NI Assembly Hansard, 'Oral Question: Addressing Bullying in Schools Act (Northern Ireland) 2016 - Jonathan Buckley MLA - AQO1732/17-22', 15 March 2021.

1594 Public and Corporate Economic Consultants, 'Department of Education: Post Primary School Experiences of 16-21 Year Olds' (PACEC, 2016), at 3.

1595 Northern Ireland Anti-Bullying Forum, 'Effective Responses to Bullying Behaviour (ERTBB): Supplement for Supporting Schools when Responding to Bullying Incidents Involving Lesbian, Gay, Bisexual and Transgender (LGBT) Children and Young People', (NIABF, 2018).

1596 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016.

In 2019, the UN Special Rapporteur on Racism, E Tendayi Achiume, reported on her visit to the UK that:

*race and ethnicity continue to have a significant impact on educational outcomes. The circumstances confronting Gypsies, Roma and Travellers are especially dire. In 2016–2017, Gypsy/Roma children, as well as children Travellers of Irish Heritage, had the highest rates of both temporary (“fixed period”) and permanent exclusions in England. In secondary schools, over half of Traveller of Irish Heritage and 45 per cent of Gypsy/Roma pupils had fixed period exclusions. In special schools, such exclusions affected 51.24 per cent of Travellers of Irish Heritage and 31.94 per cent of Black Caribbean pupils.*<sup>1597</sup>

Protocol Article 2 also provides specific, enhanced protection against discrimination as enshrined in the six directives listed in Annex 1 of the Protocol, including the Racial Equality Directive which protects against discrimination on the grounds of race and ethnicity in the area of education.<sup>1598</sup> NI equality law must keep pace with any changes made by the EU to these rights to improve the minimum levels of protection available, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.<sup>1599</sup>

In 2019, the Department of Education issued a public consultation on the effectiveness of the current Supporting Newcomer Pupils Policy 2009.<sup>1600</sup> The Commission made a series of recommendations highlighting relevant human rights standards to use in drafting the revised policy.<sup>1601</sup> The response highlighted the need for a robust and well-resourced revised policy that recognises the interplay between other departmental strategies, such as: support for home languages; mental health services; free school meals; support for asylum seekers; EU Settlement Scheme. The consultation closed in October 2019 and its outcome is awaited.

In 2020, the CoE’s Committee of Ministers adopted a Recommendation that calls on its 47 Member States to include the history of Roma and/or Travellers in school curricula and teaching materials.<sup>1602</sup>

In 2020/21, 1,106 Irish Traveller children were enrolled in NI schools (an increase of 18 from 2019/20), with an attendance rate of 74 per cent and 67 per cent receiving Free School Meals.<sup>1603</sup> There were 779 Roma children enrolled in NI schools (an increase of 74 from 2019/20), with an attendance rate of 79 per cent and 28 per cent receiving Free School Meals.<sup>1604</sup> While the attendance rates were consistent with those seen in 2019/20, the numbers receiving Free Schools Meals decreased when

1597 A/HRC/41/54/Add.2, ‘Visit to the UK of Great Britain and Northern Ireland - Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance’, 27 May 2019, at para. 23.

1598 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.

1599 Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

1600 Department of Education, ‘Public Consultation: Supporting Newcomer Pupils’ (DE, 2019).

1601 NI Human Rights Commission, ‘Response to Department of Education’s consultation on Supporting Newcomer Children’ (NIHRC, 2019).

1602 CM/Rec(2020)2, ‘CoE Committee of Ministers Recommendation on the Inclusion of the History of Roma and/or Travellers in School Curricula and Teaching Materials’, 1 July 2020.

1603 Northern Ireland Statistics and Research Agency, ‘Irish traveller & Roma pupils in education: 2020-2021 Key Statistics’, (DE, 2021).

1604 Ibid.

compared to 2019/20, when 77 percent of Irish Traveller children and 46 per cent of Roma children were in receipt.<sup>1605</sup> Additionally, there were 17,664 children from migrant families enrolled in schools in NI (an increase of 273 from 2019/20), equating to 5 per cent of total school enrolments.<sup>1606</sup>

Civil society organisations have highlighted the need for increased cultural awareness within NI schools and for history lessons taught in school to be representative of the school population.<sup>1607</sup>

The New Decade, New Approach agreement established an Expert Panel on Educational Underachievement to examine the links between persistent educational underachievement and socio-economic background.<sup>1608</sup> In its final report published in 2021, the Expert Panel highlighted that:

*Children from the Traveller community, Roma children and children looked after have some of the lowest levels of attainment of all equality groups. A combination of early intervention, a whole-school approach to nurture and schools having the scope (and budget) to provide a differentiated curriculum bespoke to their pupils' specific needs are essential in addressing these inequalities.*<sup>1609</sup>

The panel also noted the need for teachers to be up-skilled in a range of areas, including “supporting children most at risk of underachievement including children looked after, traveller, Roma and newcomer children”.<sup>1610</sup>

In 2021, the Department of Health launched a consultation on proposals for a new regional model of service for separated and unaccompanied asylum seeking children in NI.<sup>1611</sup> The Commission highlighted findings from Barnardo's NI 'A New Life for Me' report<sup>1612</sup> and made a specific recommendation that the Department of Health collaborates with the Department of Education on initiatives to assist long-term settlement and integration of separated and unaccompanied asylum seeking children in NI.<sup>1613</sup>

## Recommendations

The Commission recommends that the Department of Education takes action to improve the educational engagement and school attendance rates of Traveller and Roma children. This includes engaging with children, parents and representative organisations of Traveller and Roma communities for their views and taking those views on board.

<sup>1605</sup> Department of Education and NISRA, 'Irish Traveller and Roma pupils in education 2019/20', (DoE and NISRA, 2020).

<sup>1606</sup> Department of Education, 'Newcomer Pupils 2001/02 to 2019/20' (DoE, 2020).

<sup>1607</sup> Roundtable with civil society organisations, 23 September 2020.

<sup>1608</sup> NI Office, New Decade New Approach, (NIO, 2020), at 40.

<sup>1609</sup> Expert Panel on Educational Underachievement, 'A Fair Start: Final Report and Action Plan' (DE, 2021) at v.

<sup>1610</sup> Ibid, at 65.

<sup>1611</sup> Department of Health, 'Regional Model of Service for Separated and Unaccompanied Asylum Seeking Children in NI' (DoH, 2021).

<sup>1612</sup> Barnardo's NI, 'A New Life for Me: Integration Experiences of Syrian Refugee Children and their Families' (Barnardo's NI, 2020).

<sup>1613</sup> NI Human Rights Commission, 'Submission to DoH Consultation on proposals for a new regional model of service for separated and unaccompanied asylum seeking children in Northern Ireland' (NIHRC, 2021).

The Commission further recommends that the Department of Health collaborates with the Department of Education on initiatives to assist long-term settlement and integration of separated and unaccompanied asylum seeking children in NI.

The Commission recommends that the Education Authority develops and delivers training to promote cultural awareness within NI schools, and that history lessons are representative of the school population as standard.

## Integrated education

In 2016, the UN CRC Committee recommended that the UK Government and NI Executive “actively promote a fully integrated education system”.<sup>1614</sup>

There are currently 65 grant-aided integrated schools in NI, made up of 38 grant-maintained integrated schools and 27 controlled integrated schools.<sup>1615</sup> In September 2020, of 3,032 pupils who applied for an integrated school, 2,310 were offered a place.<sup>1616</sup> In 2020/21, there were a total of 24,861 pupils educated in integrated education, an increase of 600 on the previous year.<sup>1617</sup>

In February 2021 the Minister of Education advised that, under the Education Reform (Northern Ireland) Order 1989, 25 schools in NI have transformed to become Integrated Schools, made up of 20 primary schools and five post-primary schools.<sup>1618</sup>

In September 2021, Seaview Primary School in Glenarm reopened as an integrated school, becoming the first Catholic school in NI to formally change to integrated status.<sup>1619</sup> The Education Authority did not initially back the plans as there is already an integrated primary school in nearby Carnlough.<sup>1620</sup> However, the decision document published by the Department of Education said that pupil numbers in Seaview Primary had risen from 42 to 80 in the two years since plans for it to become an integrated school were first revealed.<sup>1621</sup> In a ballot, parents of pupils at Seaview Primary overwhelmingly backed the school’s move to become integrated, from a total of 45 entitled to vote, 42 votes were cast (93.3 per cent turnout) with 40 votes in favour of the Transformation (95.3 per cent).<sup>1622</sup>

1614 CRC/C/GBR/CO/5, ‘UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 12 July 2016, at para 72(e).

1615 Department of Education website, ‘Integrated Schools’ (DE, 2021).

1616 NI Council for Integrated Education, ‘Integrated Education on the Up: Impact Report 1 April 2019-31 March 2020’ (NICIE, 2020), at 7.

1617 NISRA and Department of Education, ‘Integrated education in Primary and Post-primary schools: 2020-2021 Key Statistics’ (DE, 2021).

1618 NI Assembly Hansard, ‘Oral Question: Update on Applications for Transformation to Integrated Schools – Trevor Lunn MLA – AQO 915/17-22’, 17 February 2021.

1619 Robbie Meredith, ‘Catholic Seaview Primary School reopens with integrated status’, *BBC News*, 1 September 2021.

1620 Robbie Meredith, ‘Seaview Primary: Catholic school to transform to integrated in NI first’ *BBC News*, 15 March 2021.

1621 Department of Education, ‘DP 648 - Seaview Primary School: Transform to Controlled Integrated Status - Approved’ (DE, 2021).

1622 Ibid.

On 1 June 2021, Kellie Armstrong MLA introduced an Integrated Education Bill to the Assembly, which would require education bodies to apply a presumption that any new school would be an integrated school in appropriate circumstances and require the Department of Education to develop an Integrated Education Strategy. The Commission provided advice to the Committee for Education in respect of its call for evidence. The Commission welcomed the Bill for widening the statutory definition of integrated education, placing the ethos for integration on a statutory footing and requiring the Department of Education to actively promote an integrated education system.<sup>1623</sup>

In a research report, 'It Didn't End in 1998', conducted by the Centre for Children's Rights at Queen's University Belfast in partnership with the Commission for Victims and Survivors, it was noted that while Shared Education has been an important step towards mixing within the school environment, more fundamental and structural changes are required.<sup>1624</sup> It recommends increasing the provision and funding of integrated education, particularly given the increasing demand and oversubscription, and reiterates the UNCRC Concluding Observations in 2016 that "a fully integrated education system" is actively promoted.

### Recommendation

The Commission welcomes the introduction of the Integrated Education Bill and recommends that the Department of Education promptly takes action to ensure integrated education provision in NI meets demand, including providing greater support to schools that self-nominate to transition to an integrated school.

### Shared education

In 2016, the UN CRC Committee recommended that the UK Government and NI Executive "carefully monitor the provision of shared education, with the participation of children, in order to ensure that it facilitates social integration".<sup>1625</sup>

In addition, the UN ICESCR Committee recommended:

*that the State party take all necessary measures to reduce the attainment gaps, particularly among children belonging to low-income families, including by reconsidering the austerity programmes adopted and effectively implementing measures aimed at reducing de facto discrimination and segregation of students based on their religion, national or social origin, as well as their economic background.*<sup>1626</sup>

<sup>1623</sup> NI Human Rights Commission, 'NIHRC Submission to the Committee for Education on the Integrated Education Bill', October 2021.

<sup>1624</sup> The Centre for Children's Rights and the Commission for Victims and Survivors, 'It Didn't End in 1998: Examining the Impacts of Conflict Legacy Across Generations' (QUB, 2021)

<sup>1625</sup> CRC/C/GBR/CO/5, 'UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 73.

<sup>1626</sup> E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016, at, at para 64.

In 2016, the Shared Education Act (NI) 2016 received royal assent. It places an obligation on the Department of Education to promote ‘shared education’, which is defined in the Act as:

*the education together of - (a) those of different religious belief, including reasonable numbers of both Protestant and Roman Catholic children or young persons; and (b) those who are experiencing socio-economic deprivation and those who are not, which is secured by the working together and co-operation of two or more relevant providers.*<sup>1627</sup>

In accordance with section 7 of the Act, the second biennial report laid before the NI Assembly revealed that 61 per cent of NI’s Primary, Post Primary, and Special schools were involved in shared education.<sup>1628</sup>

The Department of Education states that the UK leaving the EU will have no impact on current funding.<sup>1629</sup> However, EU Peace IV funding for Shared Education programmes is due to cease in June 2022.<sup>1630</sup> Civil society organisations have expressed concerns as to how these programmes will be funded in the future.<sup>1631</sup> In February 2021, the Minister of Education advised that the Departments of Education in both NI and Ireland provide match funding for the Peace IV Shared Education Programme.<sup>1632</sup>

### Recommendation

The Commission recommends that long-term, secure funding for shared education is guaranteed in NI. The Commission further recommends that the Department of Education ensures that any potential negative impact on funding of shared education due to the UK leaving the EU will be adequately mitigated.

### Special educational needs

In 2016, the UN CRC Committee, with reference to its General Comment No 9 on the rights of children with disabilities, recommended that the UK Government and NI Executive:

*adopt a human rights-based approach to disability, set up a comprehensive strategy for the inclusion of children with disabilities... [and] set up comprehensive measures to further develop inclusive education, ensure that inclusive education is given priority over the placement of children in specialised institutions and classes and make mainstream schools fully accessible to children with disabilities.*<sup>1633</sup>

<sup>1627</sup> Section 2, Shared Education Act (NI) 2016.

<sup>1628</sup> Department of Education, ‘Shared Education 2nd Report to the NI Assembly’ (DoE, 2020), at para 3.19.

<sup>1629</sup> Ibid.

<sup>1630</sup> Ibid, at para 6.3.

<sup>1631</sup> Roundtable discussion with civil society organisations, 23 September 2020.

<sup>1632</sup> NI Assembly Hansard, ‘Written Question: EU Funding after Brexit - Pat Sheehan MLA - AQW13979/17-22’ 15 February 2021.

<sup>1633</sup> CRC/C/GBR/CO/5, ‘UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 12 July 2016, at para 56(b).



## COVID-19

The Temporary Modification of Education Duties Notice (NI) 2020 and its subsequent iterations temporarily modified legal duties covering special educational needs, including assessment, providing statements and require that the Education Authority, schools and others will have a duty to use their best endeavours to make provision. This modification only applied where an inability to comply with a legal duty was attributable to the temporary closure of schools and the reallocation of Education Authority and health and social care resources to meet other essential services. These changes applied for 28 days at a time. Since schools in NI were able to reopen in the week commencing 31 August 2020<sup>1634</sup>, some schools have taken individual decisions, guided by the Public Health Agency, to partially or fully close for a set period where there have been COVID-19 positive cases within the school community. In October 2020, the NI Executive decided on the basis of medical advice to close all schools in NI for a period of two weeks.<sup>1635</sup> In January 2021, the NI Executive closed most schools and introduced a phased return over March and April, however, Special schools remained open to all pupils during this period.

In February 2021, the Department of Health introduced a programme of weekly testing of pupils and staff in special schools across NI.<sup>1636</sup> This was followed by an announcement from the Department of Education that staff in Special schools will additionally be offered the vaccine from February.<sup>1637</sup>

## Statemending

In 2020/21, a total of 67,824 pupils had special educational needs compared to 67,254 in 2019/20.<sup>1638</sup> In 2020/21, there were 6,403 children enrolled in special schools in NI, compared to 6,170 in 2019/20.<sup>1639</sup>

In November 2019, the Education Authority conducted an internal audit of its Special Educational Needs assessment processes, which found “significant shortcomings in how the Education Authority managed the process”.<sup>1640</sup> The audit found that “85 per cent of pupils did not complete the statemending process within the 26-week statutory period. That meant that, at the time of the analysis in November 2019, over 1,000 children had exceeded the statutory time frame”.<sup>1641</sup> In March 2020, the Chairperson of the NI Assembly Committee for Education, Chris Lyttle MLA, summarised the issues as:

*unnecessary and undue delay in the Education Authority NI’s assessment and statemending of support for children with special educational needs; a lack of management focus and accountability;*

1634 Coronavirus Act 2020 Temporary Modification of Education Duties (No 12) Notice (NI) 2020.

1635 ‘Schools to close and tight new hospitality rules in NI’, *BBC News*, 15 October 2020.

1636 Department of Health, ‘Press Release: Weekly testing for special schools’, 27 January 2021.

1637 Department of Education, ‘Ministers outline proposals for vaccination of staff in Special schools’, 1 February 2021.

1638 NISRA and Department of Education, ‘Special Educational Needs: 2020-2021 Key Statistics’ (DE, 2021).

1639 NISRA and Department of Education, ‘School Enrolments in Northern Ireland: 2020-2021 Key Statistics’ (DE, 2021).

1640 NI Assembly Hansard, ‘Committee for Education: Special Educational Needs Assessment and Statemending Audit - Education Authority NI’, 4 March 2020.

1641 *Ibid.*

*a lack of managerial performance monitoring; limited evidence of management meetings; incorrect interpretation of valid exception reasons for delay; failure to accurately record assessment timescales and the time taken to provide support for children with special educational needs; delayed provision of appropriate transport and classroom assistant support; information governance issues, risking the integrity of highly sensitive information held about children with special educational needs; and some good practice attributable to individual staff working in challenging circumstances but no proactive, effective management.*<sup>1642</sup>

He raised that “of most concern is how such a culture and systematic failure was allowed to develop”.<sup>1643</sup>

In June 2020, almost 300 children in NI with a statement of Special Educational Needs were still without a school place for September 2020.<sup>1644</sup>

In September 2020, the NI Audit Office issued a follow up report on special educational needs in NI from an earlier inquiry in 2017.<sup>1645</sup> The earlier report found that neither the Department of Education nor the Education Authority could demonstrate value for money in the provision of special education needs support in mainstream schools.<sup>1646</sup> The follow up report found that, of ten recommendations made in 2017, none had yet been fully addressed.<sup>1647</sup> Further, it noted that it had been 13 years since the Department of Education had begun a review of special educational needs in NI and that review has still to be completed.<sup>1648</sup>

In February 2021, the Public Accounts Committee published a report on its Impact Review on Special Educational Needs.<sup>1649</sup> The Committee highlighted “elements of dysfunctionality” within the Education Authority and recommended that the Department of Education commission an independent review to assess its effectiveness. The Committee also strongly believes that there is a need for an independent, external review of the effectiveness of special educational needs processes and recommended an immediate independent, external review of the special educational needs service provision and processes. The Department of Education has since confirmed an independent review of the Education Authority’s support for children with special educational needs will begin as soon as possible, however no timescale has been provided yet.<sup>1650</sup>

Elsewhere, the Education Authority is working on implementing ten recommendations identified by the internal audit and the Committee for

1642 NI Assembly Hansard, ‘Committee for Education: Special Educational Needs Assessment and Statementing Audit - Education Authority NI’, 4 March 2020.

1643 Ibid.

1644 Robbie Meredith, ‘Hundreds of special needs children have no September place’, *BBC News*, 24 June 2020.

1645 NI Audit Office, ‘Impact Review of Special Educational Needs’ (NIAO, 2020).

1646 NI Audit Office, ‘Special Educational Needs’ (NIAO, 2017).

1647 NI Audit Office, ‘Impact Review of Special Educational Needs’ (NIAO, 2020).

1648 Ibid.

1649 NI Assembly, ‘Public Accounts Committee Report on Impact Review of Special Educational Needs’, (NIA, 2021).

1650 Robbie Meredith, ‘Support for special needs pupils by Education Authority to be reviewed’, *BBC News*, 22 April 2021.

Education, who will monitor how the implementation is progressing.<sup>1651</sup> This includes drafting a report on lessons learned from the Special Educational Needs admissions process and the use of Interim Specialist Resource Provisions, which is to inform discussions with the Department of Education on the way forward.<sup>1652</sup> The Department of Education established a Special Educational Needs Governance Group, chaired by the Department of Education's Permanent Secretary and including the Education Authority, to provide strategic oversight to the programme of Special Educational Needs improvements.<sup>1653</sup> The Department of Education also consulted on its draft Special Educational Needs Regulations and Code of Practice.<sup>1654</sup>

In September 2021, the Education Minister announced a £21m investment in special schools, providing 61 additional classes, the recruitment of approximately 60 additional teachers and 145 additional classroom assistants to 17 special schools.<sup>1655</sup>

### Recommendations

The Commission recommends that the Department of Education, and the Education Authority, ensure that children with special educational needs in NI are promptly and comprehensively assessed and provided with the appropriate support. This should include appropriate education support as well as transport and other measures to ensure effective educational engagement to improve children's outcomes.

The Commission recommends that children with special educational needs in NI that have been adversely affected by past failings of the assessment process are effectively remedied.

### Use of restraint in educational settings

In 2016, the UN CRC Committee urged that restraint is only used against children as a last resort to prevent harm to the child or others.<sup>1656</sup>

Additionally, it recommended that disaggregated data on the use of restraint, including in educational settings, is systematically and regularly collected, published and monitored.<sup>1657</sup>

Section 4 of the Education (NI) Order 1998 allows for a school staff member to restrain any pupil at the school where such force is "reasonable in the circumstances" for the purpose of preventing the pupil from doing or continuing to a) commit any offence, b) cause personal injury to, or damage to the property of any person (including the pupil), or c) engage in any behaviour prejudicial to the maintenance of good

1651 NI Assembly Hansard, 'Committee for Education: Special Educational Needs Assessment and Statementing Audit - Education Authority NI', 4 March 2020.

1652 NI Assembly Hansard, 'Response to Written Question - Special Educational Needs - Peter Weir MLA - AQW 7523/17-22', 1 October 2020.

1653 Ibid.

1654 Department of Education, 'Consultation on Draft Special Educational Needs Regulations' (DoE, 2020); Department of Education, 'Consultation on Draft Special Educational Needs Code of Practice' (DoE, 2020).

1655 Department of Education, 'Press Release: Education Minister hails £21m investment in special schools' 2 September 2021.

1656 CRC/C/GBR/CO/5, 'UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 40(c).

1657 Ibid, at para 40(d).

order and discipline at the school or among any of its pupils, whether that behaviour occurs during a teaching session or otherwise. This provision is clear that it does not allow for corporal punishment of children by teachers.<sup>1658</sup>

The accompanying non-statutory guidance has not been updated since 1999.<sup>1659</sup> The guidance states that any occasion when reasonable force is used must be logged in an incident book, which is to be reviewed at least annually by the Chair of the Board of Governors and Principal.<sup>1660</sup> However, such incidents are not required to be subject to an independent review.

Use of restraint in an educational setting has been raised as a particular concern for children with special educational needs in NI,<sup>1661</sup> with lack of training on the use of restraint for educational professionals being raised as a contributor.<sup>1662</sup>

In 2021, the Department of Education formed a Working Group to review the use of restraint and seclusion practices for children and young people, including those with special educational needs, and to make recommendations to the Minister for change to guidance and policy.<sup>1663</sup> The group is supported by a Reference Group, which the Commission sits on alongside civil society organisations. In February 2021, the Commission provided advice to the Committee for Education on the human rights implications of the current guidance relating to restrictive practice, restraint and seclusion in educational settings, and made a number of recommendations for change, including that restraint and restrictive practices should be used as a matter of last resort, and that comprehensive guidance is produced on the application of restrictive practices in an education setting, which includes a definition of “restraint” that is in line with international human rights standards.<sup>1664</sup> Any changes will be subject to Ministerial approval and it is expected that new guidance will be issued by the end of 2021.

In light of the urgency of this issue, the Department of Education published interim guidance in relation to the use of restraint and seclusion which reminded providers that reasonable force and restraint should only be used as a measure of last resort.<sup>1665</sup> It noted that all instances should be recorded, parents/carers should be informed and follow up support provided to the pupils and staff involved.

1658 Section 4(2), Education (NI) Order 1998.

1659 Department of Education, 'Pastoral Care: Guidance on the Use of Reasonable Force to Restrain or Control Pupils' (DoE, 1999).

1660 Ibid.

1661 British Association of Social Workers, 'Policy Statement: Restraint and Seclusion of Children and Young People in Schools and Educational Facilities' (BASWNI, 2019); Robbie Meredith, 'School seclusion "could have damaging effects"', BBC News, 21 December 2019.

1662 Ibid.

1663 NI Assembly Hansard, 'Written Question: Restraint and Seclusion in Educational Settings Working Group - Chris Lyttle MLA - AQW12869/17-22', 22 January 2021.

1664 NI Human Rights Commission, 'Submission to the Northern Ireland Committee for Education on the Human Rights Implications of Current Guidance Relating to the Use of Restrictive Practices in Schools', (NIHRC, 2021).

1665 Department of Education, 'DE Circular 2021/13 - Interim Guidance on the Use of Restraint and Seclusion in Educational Settings', (DE, 2021).

In 2021, the NI Public Services Ombudsman published an ‘Overview Report on the use of Restrictive Practices in Northern Ireland Schools’.<sup>1666</sup> It highlighted recurring themes from maladministration investigations into the use of such practices in schools, including issues with record-keeping, inadequate policies and procedures, and a lack of appropriate complaint investigations by Board of Governors.

In addition, the NI Commissioner for Children and Young People is undertaking a rights-based review on the use of restraint and seclusion in educational settings. The review is to be published in December 2021 and will include recommendations to the Minister for Education to inform the review of Departmental guidance.

### **Recommendations**

The Commission recommends that the Department of Education develops comprehensive and updated statutory guidance on the application of restrictive practices and seclusion in educational settings. This guidance should include a definition of ‘restraint’ and ‘seclusion’, and give clear direction on when and how such practices can be applied in line with international human rights standards.

The Commission recommends that the Department of Education takes steps to amend the Education (Northern Ireland) Order 1998 in order to remove Section 4(1)(c) and ensure that restrictive interventions are not used to maintain good order and discipline. Guidance from the Department of Education should also be updated to reflect this change.

The Commission recommends that the Department introduce a statutory obligation on schools in NI to systematically and regularly collect disaggregated data on the use of restraint against children in an educational setting, and that this data is published and independently monitored. Departmental guidance should also require schools to share records with parents or guardians of the children involved in each incident.

The Commission recommends that the Department of Education provides mandatory training on the use of restrictive practices and seclusion in educational settings in line with human rights standards, which includes measures to ensure the use of restraint is used as a last resort. Training should include alternative interventions to restrictive practices, particularly pertaining to children and young people with special educational needs.

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<sup>1666</sup> NI Public Services Ombudsman, ‘Overview Report: the use of Restrictive Practices in Northern Ireland Schools’ (NIPSO, 2021).

## Right to Participate in the cultural life of the community

The final section of the Annual Statement explores the right to participate in the cultural life of the community. It looks at rights related to minority languages, particularly the Irish language and Ulster Scots.

The right to participate in cultural life is protected under the following treaties:

<b>UN CEDAW</b>	Article 13(c)
<b>UN CRC</b>	Article 31
<b>UN CRPD</b>	Article 30
<b>UN ICESCR</b>	Article 15
<b>UN ICCPR</b>	Article 27
<b>European Charter for Regional or Minority Languages</b>	Articles 1-14
<b>Framework Convention for the Protection of National Minorities</b>	Article 5
<b>Ireland/NI Protocol to the UK-EU Withdrawal Agreement</b>	Article 2

### Minority languages

In February 2017, the Advisory Committee for the Framework Convention for the Protection of National Minorities published its fourth advisory opinion. The Advisory Committee noted that there had been little progress on an Irish language bill or the strategy for the development of the language. It commented that it regards:

*appropriate legislation by the NI Assembly as a necessity to protect and promote the Irish language.*<sup>1667</sup>

As a recommendation for immediate action, the Advisory Committee called for the NI Executive and NI Assembly to:

*adopt appropriate legislation protecting and promoting the Irish language and take measures to ensure progress on language rights of persons belonging to the Irish minority.*<sup>1668</sup>

The Advisory Committee also advised the UK Government to:

*engage in a dialogue to create the political consensus needed for adopting legislation.*<sup>1669</sup>

<sup>1667</sup> ACFC/OP/IV(2016)005, 'Advisory Committee on the Framework Convention for the Protection of National Minorities Fourth Opinion on the UK', 27 February 2017, at para 150.

<sup>1668</sup> Ibid, at 2.

<sup>1669</sup> Ibid, at 49.



In March 2021, the Committee of Experts for the Charter of Regional and Minority Languages highlighted that:

*an Irish Language Act and a strategy are integral to the protection and promotion of Irish in Northern Ireland. It cannot but reiterate its previous recommendations to this effect”.*<sup>1670</sup>

In respect of Ulster-Scots, the Committee of Experts recommended the State Party to:

*take steps to expedite the development and publication of an Ulster Scots Language strategy, covering education, culture and an additional field of public life, along with time scales and milestones, and regular opportunities for review in consultation with speakers of Ulster Scots.*<sup>1671</sup>

In Protocol Article 2, the UK Government commits to ensuring there is no diminution of the rights, safeguards and equality of opportunity protections contained in that chapter of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU, including recognition of:

*the importance of respect, understanding and tolerance in relation to linguistic diversity, including in Northern Ireland, the Irish language, Ulster-Scots and the languages of the various ethnic communities, all of which are part of the cultural wealth of the island of Ireland.*<sup>1672</sup>

The UK Government has accepted that respect, understanding and tolerance in relation to linguistic diversity falls within the scope of Protocol Article 2.<sup>1673</sup> Article 22 of the EU Charter of Fundamental Rights is relevant to the interpretation of any underpinning EU legislation, identifies that “the Union shall respect cultural, religious and linguistic diversity”.<sup>1674</sup>

The New Decade, New Approach agreement committed the First Minister and deputy First Minister to “sponsor and oversee a new framework both recognising and celebrating NI’s diversity of identities and culture, and accommodating cultural difference”.<sup>1675</sup> This framework would consist of the establishment of an Office of Identity and Cultural Expression, a Commissioner to recognise, support, protect and enhance the development of the Irish language in NI, and a Commissioner to enhance and develop the language, arts and literature associated with the Ulster Scots/Ulster British tradition.<sup>1676</sup> The framework was also to include recognition of the status of the Irish language and Ulster Scots language in NI.<sup>1677</sup> The three Bills that were intended to provide for this legislative framework were published with the agreement – NI Act 1998 (Amendment No 1) Bill, NI Act 1998 (Amendment No 2) Bill, and NI Act (Amendment No

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<sup>1670</sup> MIN-LANG(2021)3, ‘Evaluation by the Committee of Experts of the Implementation of the Recommendations for Immediate Action contained in the Committee of Experts’ fifth evaluation report on the United Kingdom and Isle of Man’, (ECRML, 2021), at para 28.

<sup>1671</sup> Ibid, at para 59.

<sup>1672</sup> Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity.

<sup>1673</sup> UK Government, ‘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.

<sup>1674</sup> Article 22, Charter of Fundamental Rights of the European Union.

<sup>1675</sup> NI Office, ‘New Decade, New Approach’ (NIO, 2020), at 16.

<sup>1676</sup> Ibid.

<sup>1677</sup> Ibid.

3) Bill. These Bills were to be presented to the NI Assembly by April 2020, but this is still awaited.<sup>1678</sup> In May 2020, the Commission provided advice to the Executive Office and Secretary of State for NI, Brandon Lewis MP, on the three Bills.<sup>1679</sup>

### Irish language

The New Decade, New Approach agreement also commits to publishing an Irish Language Strategy.<sup>1680</sup> In October 2021, the Minister for Communities invited the Commission to sit on a co-design group established to support the production of an Irish Language Strategy.<sup>1681</sup>

Following on from a judgment of the NI High Court in 2017 which held “the Executive Committee has failed in its statutory duty, under section 28D(1) of the NI Act 1998, to adopt a strategy setting out how it proposes to enhance and protect the development of the Irish language”<sup>1682</sup>, Conradh na Gaeilge intends to issue a further legal challenge to the ongoing failure to introduce an Irish Language Strategy.<sup>1683</sup>

In January 2021, the UK Government submitted an interim report to the Committee of Experts of the European Charter for Regional or Minority Languages on the implementation of the recommendations for immediate action based on the fifth monitoring cycle.<sup>1684</sup> The UK Government noted that the absence of a functioning Executive in NI for a period of three years, and resourcing issues within the NI Office’s Department for Communities’ Language Branch had slowed progress on the implementation of the Committee of Expert’s recommendations for immediate action from its fifth reporting cycle.<sup>1685</sup> The UK Government further noted that:

*a timeline to deliver on the development of an Irish Language Strategy and an Ulster-Scots Language, Heritage and Culture Strategy has been issued to the Northern Ireland Executive to consider and agree to publish. This has not yet featured on the Northern Ireland Executive meeting agenda. It is proposed that the strategies will be published by the end of 2021, subject to Executive approval.*<sup>1686</sup>

In February 2021, the Commission submitted a response to the UK Government’s interim report to the Committee of Experts on the Charter for Regional and Minority Languages, advising that the production of

1678 NI Office, ‘New Decade, New Approach’ (NIO, 2020), at 36.

1679 NI Human Rights Commission, ‘Office of Identity and Cultural Expression Provisions of the Draft NI Act 1998 (Amendment No 1)’ (NIHRC, 2020); NI Human Rights Commission, ‘Irish Language Provisions of the NI Act 1998 (Amendment No 2)’ (NIHRC, 2020); NI Human Rights Commission, ‘Ulster Scots/Ulster British Provisions of the NI Act 1998 (Amendment No 3)’ (NIHRC, 2020).

1680 NI Office, ‘New Decade, New Approach’ (NIO, 2020), at 36.

1681 Correspondence from Minister for Communities to NI Human Rights Commission, October 2021.

1682 *In the matter of an application by Conradh na Gaeilge* [2017] NIQB 27.

1683 Conradh na Gaeilge, ‘Press Release: Conradh na Gaeilge gets High Court approval to take Judicial Review against Northern Executive in relation to Irish Language Strategy’, 10 June 2021.

1684 UK Government, ‘Information Document on the implementation of the Recommendations for Immediate Action based on the 5th monitoring cycle’, (UKG, 2021).

1685 *Ibid.*, at para 173.

1686 *Ibid.*, at para 176.

an Irish Language Strategy was a domestic legal requirement.<sup>1687</sup> The Commission additionally advised that the Committee of Experts may wish to seek further information from the UK Government as to the progression if its recommendation to provide the basic and further training of a sufficient number of teachers teaching in Irish due to a lack of available data in the State's interim report.<sup>1688</sup>

In March 2021, the Committee of Experts of the European Charter for Regional or Minority Languages published its response to the UK Government's interim report. In relation to its recommendation for immediate action to adopt a comprehensive law and a strategy on the promotion of Irish in NI, the Committee reiterated that "an Irish Language Act and a strategy are integral to the protection and promotion of Irish in NI. It cannot but reiterate its previous recommendations to this effect".<sup>1689</sup> In respect of its recommendation for immediate action to provide the basic and further training of a sufficient number of teachers teaching in Irish, the Committee asked that:

*the authorities work with representatives of Irish language speakers to develop a long-term strategy to tackle this shortage, as well as short-term remedies such as incentives to students (such as further bursaries, guaranteed employment or salary bonuses) and intensive courses to boost capacities to teach in Irish.*<sup>1690</sup>

In June 2021, Secretary of State for NI Brandon Lewis announced that the UK Government will introduce legislation in NI should the NI Assembly fail to do so before the end of September.<sup>1691</sup> Legislation has yet to be introduced into the NI Assembly or at Westminster.

During a debate on the Northern Ireland (Ministers, Elections and Petitions of Concern) Bill in November 2021, the Secretary of State for NI said "we have always said that we will deliver a cultural package. There has never been discussion of an Irish language Act; that is not what is in [New Decade, New Approach]. It is a cultural package." He also said "[we will] stand by our word and make sure that the cultural package is delivered within the mandate".<sup>1692</sup>

In November 2021, the Department of Finance advised that it proposes to make a Statutory Rule under powers conferred by the Births and Deaths Registration (Northern Ireland) 1976, the Marriage (Northern Ireland) Order 2003 and the Civil Partnership Act 2004.<sup>1693</sup> The Statutory Rule will introduce changes to civil registration legislation to enable registrations and subsequent life event certificates to be produced with the choice of certificate headings in English, Irish or bi-lingual English/Irish with all content remaining in English. The Department advised that the legislation

1687 NI Human Rights Commission, 'Submission to the Committee of Experts on the European Charter for Regional and Minority Languages on the Interim Report of the United Kingdom of Great Britain and Northern Ireland', (NIHRC, 2021).

1688 Ibid, at para 27.

1689 MIN-LANG(2021)3, 'Evaluation by the Committee of Experts of the Implementation of the Recommendations for Immediate Action contained in the Committee of Experts' fifth evaluation report on the United Kingdom and Isle of Man', (ECRML, 2021), at para 28.

1690 Ibid, at para 32.

1691 Rory Carroll, 'Northern Ireland: Paul Givan becomes first minister after Irish language deal', *The Guardian*, 17 June 2021.

1692 UK Parliament Hansard, 'Third Reading: Northern Ireland (Ministers, Elections, and Petitions of Concern) Bill - Brandon Lewis MP', 26 October 2021.

1693 Correspondence from the Department of Finance to the Committee for Finance, November 2021.

will be the first step in a phased approach to meeting the New Decade, New Approach requirement to “make any necessary statutory provision for births, marriages and deaths to be registerable in Irish.”<sup>1694</sup> While the agreement only stipulates births, marriages and deaths, the option for registration in Irish will include the registration of all life events including stillbirths, civil partnerships and the conversion of civil partnership to marriage and vice versa.<sup>1695</sup> It is proposed that the rule will come into operation on 1 March 2022.

### **Ulster Scots**

The New Decade, New Approach agreement also commits to publishing an Ulster Scots Strategy.<sup>1696</sup>

In its interim report to the Committee of Experts of the European Charter for Regional or Minority Languages in January 2021, the UK Government highlighted the absence of a functioning Executive in NI for a period of three years, and resourcing issues as having slowed progress on the implementation of recommendations.<sup>1697</sup> The UK Government further noted that the proposed strategy would be published by the end of 2021, subject to approval.<sup>1698</sup>

In March 2021, the Committee of Experts of the European Charter for Regional or Minority Languages published its evaluation report, recommending, for immediate action, that the UK Government adopt a strategy to promote Ulster Scots in education and other areas of public life. The Committee noted its regret at the lack of progress on the strategy, and asked the UK Government to take steps to expedite its production.<sup>1699</sup>

In October 2021, the Minister for Communities invited the Commission to sit on a co-design group established to support the production of an Ulster Scots Strategy.<sup>1700</sup>

1694 Correspondence from the Department of Finance to the Committee for Finance, November 2021.

1695 Ibid.

1696 NI Office, ‘New Decade, New Approach’ (NIO, 2020), at 36.

1697 UK Government, ‘Information Document on the implementation of the Recommendations for Immediate Action based on the 5th monitoring cycle’, (UKG, 2021), at para 173.

1698 Ibid, at para 176.

1699 MIN-LANG(2021)3, ‘Evaluation by the Committee of Experts of the Implementation of the Recommendations for Immediate Action contained in the Committee of Experts’ fifth evaluation report on the United Kingdom and Isle of Man’, (ECRML, 2021), at para 59.

1700 Correspondence from Minister for Communities to the NI Human Rights Commission, October 2021.

## **Recommendations**

The Commission recommends that legislation to protect and promote the Irish language in NI is introduced and enacted.

The Commission recommends that an Irish language strategy is developed and implemented. Both of these initiatives should be developed through engagement with Irish language speakers and their representative organisations.

The Commission recommends that legislation to establish a Commissioner to promote and protect Ulster Scots is introduced and enacted.

The Commission recommends that the necessary support is in place to guarantee the full implementation of the Ulster Scots strategy in NI. Both of these initiatives should be developed through engagement with individuals that identify as Ulster Scots and their representative organisations.

# Annex 1: Traffic Light Summary of Issues 2021

## Constitutional protections

- A Bill of Rights for NI
- A Charter of Rights for the Island of Ireland
- National Human Rights Institution
- Other constitutional reforms
- Human Rights after UK Exit from the EU
- Common Travel Area
- EU Settlement Scheme
- Birthright

## Equality and non-discrimination

- Age discrimination
- Business and human rights
- Consolidating, strengthening and clarifying equality protections
- Conversion therapy
- Discrimination on the grounds of sexual orientation
- Gender equality strategy
- Gender recognition
- Hate crime
- Intersectional multiple discrimination
- Persons with disabilities
- Racial equality
- Sectarianism

## Right to life

- Conflict related investigations: transitional justice and individual cases
- Legacy inquests and inquiries
- Rule of law: non-state actors
- Inquiries Act 2005

## Freedom from torture, inhuman and degrading treatment

- Abuse in health and social care settings
- Allegations of torture and cruel, inhuman or degrading treatment or punishment overseas
- Deprivation of citizenship
- Domestic and sexual violence and abuse
- Female genital mutilation
- Intersex genital mutilation
- Historical abuse of children and adults
- Mechanisms to identify victims of torture detained in immigration facilities
- Physical punishment of children
- Prison conditions



- Refugee resettlement
- Spit and bite guards
- Strip searches
- Victims' payments

### **Freedom from slavery**

- Child, early and forced marriage
- Children missing from care
- Child sexual exploitation
- Modern slavery and human trafficking

### **Right to liberty and security of the person**

- Alternatives to imprisonment
- Imprisonment for fine default
- Imprisonment of children with adults
- Remand of children
- Women in prison
- Definition of terrorism
- Powers of arrest under the Terrorism Act 2000

### **Right to fair trial and the administration of justice**

- Access to justice
- Age of criminal responsibility
- Avoidable delay
- Closed material proceedings
- Compensation for a miscarriage of justice
- Non-jury trials
- Cross-border justice arrangements

### **Right to private and family life**

- Access to financial support for unmarried couples
- Alternative care arrangements for children
- Anonymity: children and pre-charge proceedings
- Biometric data
- Climate change and environmental regulation
- Health and Social Care (Control of Data Processing) Act 2016
- Rehabilitation of offenders
- Stop and search
- Visitation in care homes

### **Freedom of religion and belief, expression, association and right to participate in public and political life**

- Blasphemy
- Defamation
- Freedom of expression of journalists
- Parades and protests
- Participation of women in public and political life

### Right to work and to just and favourable conditions of work

- Accessible childcare
- Armed Forces Covenant
- Children in the Armed Forces
- Gender pay gap
- Employment equality

### Right to an adequate standard of living and to social security

- Anti-poverty strategy
- Asylum financial support
- Carers
- Child poverty
- Crisis fund
- Homelessness
- Social housing
- Social security
- Travellers' accommodation
- Unauthorised Encampments (NI) Order 2005

### Right to health

- COVID-19 vaccines
- Access to healthcare for irregular migrants
- Emergency healthcare
- NHS waiting lists
- Access to reproductive healthcare
- Oral health
- Relationships, sexuality and gender identity education
- Mental capacity
- Mental health

### Right to education

- Academic selection
- Bullying in schools
- Educational needs of specific groups of children
- Integrated education
- Shared education
- Special educational needs
- Use of restraint in educational settings

### Right to participate in the cultural life of the community




- Minority languages





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