



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

The 2022 Annual Statement

Human Rights in Northern Ireland

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2022



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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;
- bring 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 relevant 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 BL

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


Chief Executive: Dr David Russell


Abbreviations

CJEU	Court of Justice of the European Union
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEA	European Economic Area
EU	European Union
NI	Northern Ireland
UK	United Kingdom
UN	United Nations
UN CAT	United Nations Convention Against Torture, Inhuman or Degrading Treatment or Punishment
UN CERD	United Nations Convention on the Elimination of All Forms of Racial Discrimination
UN CEDAW	UN Nations Convention on the Elimination of All Forms of Discrimination Against Women
UN CRC	United Nations Convention on the Rights of the Child
UN CRPD	United Nations Convention on the Rights of Persons with Disabilities
UN ICCPR	United Nations International Covenant on Civil and Political Rights
UN ICESCR	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 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 requires action by the UK Government, NI Executive or relevant public authorities and a firm commitment has been made, followed by an effective response.

Contents

- About Us 2
- Abbreviations..... 4
- Understanding the Annual Statement 5
- Foreword..... 9
- Chapter 1 Introduction..... 10
- Constitutional Protections 14
 - A Bill of Rights for NI 14
 - A Charter of Rights for the island of Ireland 16
 - Birthright 16
 - Common Travel Area 18
 - Human Rights Act and administrative law reform 22
 - National human rights institution 26
 - Human Rights after UK Exit from the EU..... 27
 - EU Settlement Scheme and Frontier Workers 38
 - Retained EU law 43
- Equality and Non-discrimination 46
 - Age discrimination..... 46
 - Business and human rights..... 47
 - Consolidating, strengthening and clarifying equality protections..... 48
 - Conversion therapy 50
 - Discrimination on grounds of sexual orientation..... 52
 - Gender Equality Strategy..... 55
 - Gender recognition..... 56
 - Hate crime..... 59
 - Intersectional multiple discrimination..... 61
 - Persons with disabilities 63
 - Racial equality 68
 - Refugee Integration Strategy 72
 - Sectarianism..... 73
 - Sport and human rights..... 76
- Right to Life 80
 - Conflict related investigations: transitional justice and individual cases..... 80
 - Inquiries Act 2005 84
 - Legacy inquests and inquiries..... 85
 - Rule of law: non-State actors 89
- Freedom from Torture, Inhuman and Degrading Treatment 91
 - Abuse in health and social care settings..... 91
 - Allegations of torture and cruel, inhuman or degrading treatment or punishment overseas 94
 - Child, early and forced marriage..... 96

● Children missing from care	97
● Deprivation of citizenship	100
● Domestic and sexual violence and abuse	101
● Female genital mutilation	107
● Historical abuse of children and adults	110
● Intersex genital mutilation	112
● Mechanisms to identify victims of torture detained in immigration facilities	114
● Physical punishment of children.....	116
● Prison conditions.....	118
● Rwanda asylum proposals.....	122
● Spit and bite guards.....	125
● Strip searches	127
● Victims' payments.....	129
Freedom from Slavery	132
● Child sexual exploitation	132
● Modern slavery and human trafficking	136
Right to Liberty and Security of the Person	143
● Alternatives to imprisonment.....	143
● Definition of terrorism	144
● Imprisonment for fine default.....	145
● Imprisonment of children with adults	146
● Powers of arrest under the Terrorism Act 2000	146
● Remand of children	147
● Women in detention.....	149
Right to Fair Trial and the Administration of Justice.....	152
● Access to justice	152
● Age of criminal responsibility.....	154
● Avoidable delay	155
● Closed material proceedings.....	157
● Compensation for a miscarriage of justice	158
● Cross-border justice arrangements	158
● Non-jury trials.....	162
Right to Private and Family Life.....	163
● Access to financial support for unmarried couples	163
● Alternative care arrangements for children.....	164
● Anonymity: children and pre-charge proceedings	167
● Biometric data.....	168
● Climate change and environmental regulation.....	170
● Health and Social Care (Control of Data Processing) Act 2016.....	173
● Rehabilitation of offenders.....	173
● Stop and search	175
● Visitation in health and social care settings	177

Freedom of Religion and Belief, Expression, Association and Right to Participate in Public and Political Life 179

- Blasphemy179
- Defamation179
- Freedom of expression of journalists 180
- Parades and protests181
- Participation of women in public and political life182

Right to Work and to Just and Favourable Conditions of Work..... 187

- Accessible childcare.....187
- Armed Forces Covenant..... 189
- Children in the Armed Forces 190
- Employment equality 190
- Gender pay gap 193
- Menopause..... 195

Right to An Adequate Standard of Living and To Social Security198

- Asylum and refugee law and resettlement 198
- Asylum financial support..... 202
- Carers..... 204
- Child poverty..... 206
- Cost of living 207
- Crisis fund 209
- Homelessness 210
- Social housing212
- Social security 216
- Travellers’ accommodation.....221
- Unauthorised Encampments (NI) Order 2005223

Right to Health 224

- Access to healthcare for irregular migrants.....224
- Access to reproductive healthcare226
- Emergency healthcare 230
- Mental capacity.....231
- Mental health233
- National Health Service waiting lists235
- Oral health..... 236
- Period poverty.....238
- Relationships and sexuality education 239
- Safe access zones242

Right to Education244

- Academic selection 244
- Bullying in schools 245
- Educational needs of specific groups of children 246
- Integrated education 249
- Shared education 250
- Special educational needs.....251
- Use of restraint in educational settings.....253

Right to Participate in the Cultural Life of the Community256

- Minority culture and languages 256

Foreword

We are trying to recover from the worst of Covid. We are mourning those who died and continuing to suffer the ill effects of the pandemic. We are facing a cost of living crisis that will, as with the pandemic, hurt most the people who are at greater risk. If we learned a single lesson from the pandemic, it is that there must be universal application of human rights, which is practical and effective. It is not enough to have a framework of principles if they are not adhered to. It is not enough to have a body of laws if they are not enforced. It is not enough to speak the language of human rights if we do not convert it into positive action. If human rights matter to any of us, they must apply to all of us. They can, amongst other things, shield us from abuses of power, provide for those who struggle to provide for themselves and protect those who might not be protected by the majority. Those who signed the European Convention on Human Rights understood that. Those who signed the Belfast (Good Friday) Agreement 1998 also knew that.

The Belfast (Good Friday) Agreement promised complete incorporation of the European Convention on Human Rights into Northern Ireland's law, with direct access to local courts for enforcement. That was enshrined in statute in the Human Rights Act 1998 and the Northern Ireland Act 1998. That was restated recently, in the special commitment to rights in the Ireland/Northern Ireland Protocol. Despite that, we are concerned at the recent direction of travel in, for example, the UK Government's proposals for legacy and for replacement of the Human Rights Act. We fear, not least, they will create a hierarchy of rights and rights-holders, which is the antithesis of universal human rights.

This annual report contains a detailed analysis of rights' protection across Northern Ireland. I cannot do justice to it in a few words and will not try. Suffice to say it demonstrates where progress is made and where more needs to be done. There are more areas for concern this year, which is troubling, but we will continue to do all we can to ensure that they are dealt with. In doing so, we rely on colleagues across Northern Ireland and on the public who engage with us. We want to do more and to reach those who did not think we could help them. We value every human being equally. If we do not, we are not worthy of our title. I wish to take this opportunity to restate my commitment, as Chief Commissioner, to the protection of human rights across Northern Ireland for all the people of Northern Ireland.

After my first full year in post, I must thank my colleagues; those on the Board with whom I share collective strategic responsibility, and my colleagues who bring experience and expertise to a range of disciplines. Together, we make the Commission work. This annual statement is a reflection of that.

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 at the Global Alliance of National Human Rights Institutions.

Having assessed developments affecting human rights protections in NI throughout 2022, 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.¹

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 1998 as a result of the UK’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 EU (Withdrawal Agreement) Act 2020 are:

to monitor the implementation of Article 2 of the Protocol on Ireland/NI to the UK-EU Withdrawal Agreement (Protocol Article 2);² 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 2.³

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.⁴

The Commission has assessed developments during 2022 against domestic human rights standards and those treaty obligations of the

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.

UN and European systems that are legally binding in NI.⁵ Moreover, since 1 January 2021 the Commission assesses developments against the requirements of Protocol Article 2.⁶

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.⁷

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 the Withdrawal Agreement, including Protocol Article 2, are recognised and available in domestic law.⁸

Human rights law applies directly in NI by virtue of section 24(1) of the NI Act 1998. That means that Ministers of the Executive Committee of the NI Assembly (NI Executive) and NI Executive departments are required to ensure that all legislation and actions are compatible with the ECHR and Protocol Article 2.⁹

The NI Assembly is proscribed from making any law that is incompatible with the ECHR or with Protocol Article 2.¹⁰

Moreover, section 26 of the NI Act 1998 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.¹¹

Binding international standards

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

- *CoE European Convention on Human Rights 1950 (ECHR)*,¹²
- *CoE European Social Charter 1961*,¹³

5 By ratifying a treaty the State agrees to be bound by the contents of that treaty.

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 [ECHR]... rights; aa) is incompatible with Article 2(1) of the Protocol on Ireland/NI 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 [NI] Assembly. 2) A provision is outside that competence if... c) it is incompatible with any of the [ECHR]... rights; ca) it is incompatible with Article 2(1) of the Protocol on Ireland/NI 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".

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

13 UK ratification 1962. The UK has signed, but not ratified, the CoE Revised European Social Charter 1991.

- *UN Convention on the Elimination of All Forms of Racial Discrimination 1965 (UN CERD);*¹⁴
- *UN International Covenant on Civil and Political Rights 1966 (UN ICCPR);*¹⁵
- *UN International Covenant on Economic, Social and Cultural Rights 1966 (UN ICESCR);*¹⁶
- *UN Convention on the Elimination of All Forms of Discrimination Against Women 1981 (UN CEDAW);*¹⁷
- *UN Convention Against Torture, Inhuman or Degrading Treatment or Punishment 1984 (UN CAT);*¹⁸
- *UN Convention on the Rights of the Child 1989 (UN CRC);*¹⁹
- *CoE European Charter for Regional or Minority Languages 1992;*²⁰
- *CoE Framework Convention for the Protection of National Minorities 1998;*²¹
- *Charter of Fundamental Rights of the EU 2000;*²²
- *UN Optional Protocol to the UN CRC on the Involvement of Children in Armed Conflict 2000;*²³
- *UN Optional Protocol to the UN CRC on the Sale of Children, Child Prostitution and Child Pornography 2000;*²⁴
- *CoE Convention on Action against Trafficking in Human Beings 2005;*²⁵
- *UN Educational, Scientific and Cultural Organisation Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005;*²⁶
- *UN Convention on the Rights of Disabled Persons 2006 (UN CRPD);*²⁷
- *CoE Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse 2007 (Lanzarote Convention);*²⁸ and
- *CoE Convention on Preventing and Combating Violence Against Women and Domestic Violence 2011 (Istanbul Convention).*²⁹

14 UK ratification 1969.

15 UK ratification 1976.

16 UK ratification 1976.

17 UK ratification 1986.

18 UK ratification 1988.

19 UK ratification 1991.

20 UK ratification 2001.

21 UK ratification 1998.

22 UK ratification 2000.

23 UK ratification 2003.

24 UK ratification 2009.

25 UK ratification 2008.

26 UK ratification 2007.

27 UK ratification 2009.

28 UK ratification 2018.

29 UK ratification 2022.

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 interpretative texts adopted by such bodies.³⁰

Treaty examinations in 2022

CoE Framework Convention for the Protection of National Minorities

In March 2022, the Commission made a written submission to inform the CoE Advisory Committee on the Framework Convention for the Protection of National Minorities' fifth report monitoring the UK's implementation of the Framework Convention. In April 2022, the Advisory Committee conducted a country-visit meeting with the Commission, government officials, parliamentarians, representatives of minorities, civil society organisations and other relevant bodies across the UK, including NI. The Advisory Committee is due to publish its adopted opinion, with further consultation possible, before the CoE Committee of Ministers adopts a resolution containing conclusions and recommendations on the UK's implementation on the Framework Convention. The fifth cycle monitoring of the UK is due to be completed in early 2023.

UN Convention against Torture

In June 2022, the UN CAT Committee published its List of Issues prior to reporting in respect of the seventh periodic report of the UK. Disappointingly, the list of issues stage of the process took place without meaningful engagement with the Commission, the UK National Preventive Mechanism or civil society organisations. In May 2023, the responding State report is due with the UN CAT Committee's examination of the written and oral submissions it received to be considered later that year.

Universal Period Review

In August 2022, Universal Period Review Info hosted a pre-session to the UK's fourth cycle examination by the Human Rights Council Universal Periodic Review. The Commission made written and oral submissions to inform the review process. In November 2022, the Universal Periodic Review Working Group conducted its review of the UK, and the resulting outcome report was adopted by the Human Rights Council. The outcome report includes several recommendations for the UK Government on how the human rights situation can be improved in the UK.

³⁰ These 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.

Constitutional Protections

A Bill of Rights for NI

In 2015, the UN Human Rights Committee expressed concern at “the slow progress in introducing the Bill of Rights for NI” and recommended that the UK Government “ensure that the Bill of Rights for NI incorporates all the rights enshrined in the [UN ICCPR] and expedite the process of its adoption”.³¹ In 2016, the UN CERD Committee,³² UN CRC Committee,³³ and UN ICESCR Committee³⁴ also recommended that the UK Government expedite the enactment of a Bill of Rights for NI.

In 2008, as required by the Belfast (Good Friday) Agreement 1998 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”.³⁵

Since 2010, the UK Government has referred to a lack of political consensus around a Bill of Rights for NI.³⁶ This lack of political consensus is reflected in the absence of any significant development.

In 2020, following commitments made in the New Decade, New Approach Agreement, a NI Assembly Ad Hoc Committee on a Bill of Rights was established to consider the creation of a Bill of Rights for NI.³⁷ This included looking at the implications of a Bill of Rights for NI and what rights it might include.

A panel of five experts was to be appointed by the First Minister and Deputy First Minister to support the work of the Ad Hoc Committee on a Bill of Rights.³⁸ The Ad Hoc Committee wrote to the Executive Office on a number of occasions seeking updates on the panel and expressing concern that it had not been appointed.³⁹ In 2022, the Expert Panel had not been appointed at conclusion of the Ad Hoc Committee on a Bill of Rights’ work,⁴⁰ which affected the Ad Hoc Committee’s ability to make decisions.⁴¹

31 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 5 and 5(b).

32 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 10.

33 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 7(b).

34 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 10.

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

36 John Manley, ‘No Bill of Rights until Stormont consensus says British government’, *Irish News*, 17 May 2022; Stormont House Agreement, 23 December 2014, at para 69; NI Office, ‘Written Statement to Parliament: A Bill of Rights for NI – Next Steps’, 16 November 2010.

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

38 *Ibid.*

39 NI Assembly, ‘Report of the Ad Hoc Committee on Bill of Rights’ (NIA, 2022), at para 8.

40 *Ibid.*

41 *Ibid.*, at para 13.

The Ad Hoc Committee on a Bill of Rights discussed and received briefings from a wide range of stakeholders and experts on human rights, including the Commission, and those directly affected. In 2021, the Commission provided further written evidence to the Ad Hoc Committee on Bill of Rights, which gave an overview of how the ‘no diminution’ commitment in 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.⁴² In its evidence, the Commission highlighted the opportunities to ensure a complementarity of approach regarding the Bill of Rights, Human Rights Act 1998 and the Protocol Article 2 commitment and advised that Protocol Article 2 strengthened the argument for a Bill of Rights. Together with the Equality Commission for NI, the Commission provided oral evidence on Protocol Article 2 and a NI Bill of Rights.⁴³

In February 2022, the Ad Hoc Committee on a Bill of Rights published its report, which concluded its work. The report reaffirmed that “human rights of many individuals and groups in NI are not sufficiently protected” and that a majority supports a Bill of Rights for NI.⁴⁴ The report also referenced the Commission’s evidence which highlighted the importance of the EU Charter in the absence of a Bill of Rights and the limits of Protocol Article 2.⁴⁵ The Ad Hoc Committee on a Bill of Rights concluded that it “supported the creation of a Bill of Rights [for NI] in principle”, but was unable to advise as to what form this should take due to the absence of an expert panel and the Democratic Unionist Party’s disagreement with this position.⁴⁶

In 2021, the Commission responded to the Independent Human Rights Act Review Team’s UK wide Call for Evidence,⁴⁷ highlighting the importance of Protocol Article 2.⁴⁸ In March 2022, in its response to the Ministry of Justice consultation on Human Rights Act Reform,⁴⁹ the Commission advised that Protocol Article 2 is limited in scope and is no substitute for a NI Bill of Rights.⁵⁰ A wide range of NI legislation relevant to rights may be susceptible to diminution that would be incapable of challenge via Protocol Article 2, but could be protected by a non-retrogression clause in a Bill of Rights for NI.

In 2022, there has been no further progress on creating a Bill of Rights for NI since the Ad Hoc Committee on a Bill of Rights published its report.

42 NI Human Rights Commission, ‘Briefing Note to the Ad Hoc Committee on a Bill of Rights EU Withdrawal and a Bill of Rights’ (NIHRC, 2021).

43 NI Assembly Hansard, ‘Ad Hoc Committee on a Bill of Rights: Implications of Brexit for Human Rights – Equality Commission for NI and NI Human Rights Commission’, 29 April 2021.

44 NI Assembly, ‘Report of the Ad Hoc Committee on Bill of Rights’ (NIA, 2022), at paras 9 and 11.

45 NI Assembly, ‘Report of the Ad Hoc Committee on Bill of Rights’ (NIA, 2022), at 180 and 186-188.

46 Ibid, at para 13.

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

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

49 Ministry of Justice, ‘Human Rights Act Reform: A Modern Bill Of Rights - A Consultation to Reform the Human Rights Act 1998’ (MoJ, 2021).

50 NI Human Rights Commission, ‘Response to the Consultation on Human Rights Act Reform: A Modern Bill of Rights’ (NIHRC, 2022).

Recommendations

The Commission continues to recommend that the UK Government, particularly the Ministry of Justice, actively engages with and expeditiously implements its commitment to legislate for a Bill of Rights for NI, as set out in the Belfast (Good Friday) Agreement 1998.

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”.⁵¹

In 2011, the Commission and the Irish Human Rights Commission jointly presented advice to the UK Government and Government of Ireland, the Speaker of the NI Assembly and the Ceann Comhairle of Dáil Éireann.⁵² The Speaker and Ceann Comhairle both agreed to forward the advice to political parties in their respective legislative bodies for further consideration. Over a decade later, no further communication has been received on this matter.

Recommendations

The Commission recommends that political parties in both NI and Ireland adopt a Charter of Rights for the island of Ireland, with the UK Government and Government of Ireland as co-guarantors.

Birthright

Recognition in the Belfast (Good Friday) Agreement 1998, of the “birthright of all the people of [NI]... to identify themselves and be accepted as Irish or British, or both”, has attracted renewed focus in the context of EU withdrawal, due to the implications for access to EU free movement rights.

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 the commitment in domestic law.⁵³ Under Section 1 of the British Nationality Act 1981, anyone born in the UK to a British, Irish, or settled parent, is deemed British. In 2019 and 2021, unsuccessful attempts were made to challenge these provisions before the Upper Immigration and Asylum Tribunal and NI High Court.⁵⁴

51 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).

52 Ibid.

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

54 *De Souza (Good Friday Agreement: Nationality)* [2019] UKUT 355, at para 54-57; *In the Matter of Ní Chuinneagain* [2021] NIQB 79, at para 17.

In 2020, following a commitment in New Decade, New Approach Agreement,⁵⁵ temporary changes came into force to allow for a “relevant person of NI” to access EU free movement law protections.⁵⁶ A relevant person of NI was 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 on their period of residence. On 30 June 2021, this scheme closed, in line with the EU Settlement Scheme.⁵⁷

In 2021, following written and oral evidence from the Commission,⁵⁸ the House of Commons NI Affairs Committee report on Citizenship and Passport Processes in NI recommended that the UK Government and Government of Ireland agree a shared approach to the birthright provisions to remove any remaining ambiguity.⁵⁹ The NI Affairs Committee further called on 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 [UK] Government’s approach towards the birthright provisions for the people of NI”.⁶⁰ In February 2019, the NI Affairs Committee also urged the UK Government to publish in full the results of a review on the matter announced by then Prime Minister, Theresa May MP.⁶¹ Former Secretary of State for the Home Department, Priti Patel MP, had later denied there had been a formal review, stating that “the conclusion of that work was published in the New Decade, New Approach deal”.⁶² In February 2022, the UK Government’s response to the recommendations was published by the NI Affairs Committee.⁶³ While committing to continue working closely with the Government of Ireland on a range of issues, the UK Government restated its view that “UK nationality legislation - including the British Nationality Act 1981 - is compliant with the agreed text of the Belfast (Good Friday) Agreement”.⁶⁴

In 2021, the Commission recommended that the then Nationality and Borders Bill be amended to recognise the birthright commitment.⁶⁵ In February 2022, during a House of Lords debate on the then Nationality and Borders Bill, Lord Sharpe of Epsom, representing the UK Government, opposed an amendment on the subject.⁶⁶ Lord Sharpe stated that the birthright provisions were already clear and that further legislation would

55 NI Office, ‘New Decade, New Approach’ (NIO, 2020), at 48.

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

57 NI Human Rights Commission, ‘EU Settlement Scheme Extended to the People of NI: What Does it Mean for Me?’ (NIHRC, 2020).

58 NI Human Rights Commission, ‘Submission to the NI Affairs Committee Inquiry into Citizenship and Passport Processes’ (NIHRC, 2021); UK Parliament Hansard, ‘NI Affairs Committee Inquiry into Citizenship and Passport Processes in NI - NI Human Rights Commission’, 10 March 2021; NI Human Rights Commission, ‘NI Affairs Committee Inquiry into Citizenship and Passport Processes in NI: NIHRC Commentary on the NI Office/Home Office Submission to the Committee’ (NIHRC, 2021).

59 NI Affairs Committee, ‘First Report of Session 2021/2022 on Citizenship and Passport Processes relating to NI’ (HoC, 2021), at para 14.

60 Ibid.

61 Ibid, at para 16; Prime Minister’s Office, ‘Press Release: PM speech in Belfast’, 5 February 2019.

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

63 NI Affairs Committee, ‘Second Special Report of Session 2021/2022 on Citizenship and Passport Processes relating to NI: Government Response to the Committee’s First Report of Session 2021-2’ (HoC, 2022)

64 NI Affairs Committee, ‘Second Special Report of Session 2021/2022 on Citizenship and Passport Processes Relating to NI: Government Response to the Committee’s First Report of Session 2021-2’ (HoC, 2022), at paras 12 and 16.

65 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.

66 House of Lords, ‘Nationality and Borders Bill: Fourth Marshalled List of Amendments to be Moved in Committee of the Whole House’ (HoL, 2022), at 186.

risk impinging upon the freedom of the people of NI to choose what their identity means to them.⁶⁷ In April 2022, the Nationality and Borders Act received Royal Assent, with no amendments to address the issue of birthright included.

Recommendations

The Commission recommends that the Home Office amends 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.

Common Travel Area

Article 3 of the Ireland/NI 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 which noted that the Common Travel Area is “written in sand”, and that what legal underpinning it had was largely dependent on EU rights.⁶⁸ 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 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.⁶⁹ 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”.⁷⁰

The UK Government and the Government of Ireland have agreed a treaty which codifies the areas relating to social security coordination.⁷¹ 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 reciprocal protections in the domestic law in the UK and Ireland.

In 2021, the Commission provided oral evidence to the House of Commons NI Affairs Committee’s inquiry on Citizenship and Passport Processes in NI

67 UK Parliament Hansard, ‘House of Lords: Nationality and Borders Bill (Committee Stage) - Lord Sharpe of Epsom - Column 1937’, 10 February 2022.

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

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

70 Ibid, at para 2 and 17.

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

and outlined the limited legal underpinning to Common Travel Area rights in the absence of supporting EU law.⁷² UK withdrawal from the EU has brought these matters into sharper focus and has, in part, prompted the Commission to undertake further research on Protocol Article 2 and the right to health and the rights of frontier workers.⁷³

In 2021, new Home Office guidance on the Common Travel Area 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.⁷⁴ 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 exit⁷⁵ and wrote to the Home Office inquiring about the training, guidance and procedure in place to prevent and address such occurrences.⁷⁶

Nationality and Borders Act: Electronic Travel Authorisations

In 2021, the UK Government published its then draft Nationality and Borders Bill, which provided for Electronic Travel Authorisations. An Electronic Travel Authorisation will be required for all non-British citizens who require leave to enter the UK when travelling from Ireland to the UK. Irish citizens are excluded as individuals not requiring leave to enter the UK by virtue of Section 3ZA of the Immigration Act 1971. However, a significant number of individuals who do not hold recognised UK immigration status will be affected despite free travel across the island of Ireland being available to them under the current system.

While the Explanatory Notes confirmed that British and Irish citizens do not require an Electronic Travel Authorisation, their permission to travel will require evidence of their nationality, as “demonstrated by their passports”.⁷⁷ It is unclear what measures are in place to decide which individuals will be required to ‘demonstrate’ that permission to travel.

In December 2021, the Commission wrote to the former Secretary of State for the Home Department, Priti Patel MP, to raise concerns about proposals to introduce Electronic Travel Authorisations.⁷⁸ The letter advised that the imposition of restrictions and checks engages Article 8 of the ECHR (the right to private and family life), particularly of those who cross the border to shop, access services or visit family and that related checks raised the risk of racial profiling. The Commission noted that, under

72 NI Human Rights Commission, ‘Submission to the NI Affairs Committee Inquiry into Citizenship and Passport Processes’ (NIHRC, 2021); NI Human Rights Commission, ‘NI Affairs Committee Inquiry into Citizenship and Passport Processes in NI: NIHRC Commentary on the NI Office/Home Office Submission to the Committee’ (NIHRC, 2021); UK Parliament Hansard, ‘NI Affairs Committee Inquiry into Citizenship and Passport Processes in NI - NI Human Rights Commission’ 10 March 2021.

73 Tamara Hervey, ‘Brexit, Health and Its Potential Impact on Article 2 of the Ireland/NI Protocol’ (NIHRC, 2022).

74 Home Office, ‘Common Travel Area - Version 11.0’ (HO, 2021), at 44-47.

75 Joint Committee of the Irish Human Rights and Equality Commission and the NI Human Rights Commission, ‘Policy Statement on the UK Withdrawal from the EU’ (NIHRC and IHREC, 2018), at 10-11.

76 Letter from NI Human Rights Commission to Home Office, 20 December 2021.

77 UK Parliament, ‘Nationality and Borders Bill: Explanatory Notes’ (HoL, 2021), at para 676.

78 Letter from NI Human Rights Commission to Home Secretary, Priti Patel MP, 20 December 2021.

the NI Protocol, the UK Government committed to avoiding a hard border, including related checks and controls, and gave undertakings in respect of protecting North-South co-operation and the Common Travel Area.

In January 2022, the Commission and the Equality Commission for NI raised concerns regarding the potential increase in racial profiling as a result of Electronic Travel Authorisations across the island of Ireland and suggested further consideration was required, including specifically Protocol Article 2's 'non-diminution' guarantee, which includes the right to 'equal opportunity in all social and economic activity'.⁷⁹ The Commissions further advised that no provision made in or under the draft legislation should be inconsistent with Protocol Article 2.⁸⁰

The Commission reiterated concerns that additional restrictions or checks would likely engage Article 8 of the ECHR, and it also recommended that the then draft Nationality and Borders Bill be amended to provide a mechanism for timely review and/or appeal and that all journeys to NI from Ireland be exempt from Electronic Travel Authorisation requirements.⁸¹

In February 2022, the Commission and the Equality Commission for NI jointly sent letters to the former Secretary of State for the Home Department, Priti Patel MP,⁸² and the then Secretary of State for NI, Brandon Lewis MP.⁸³ The Irish Human Rights and Equality Commission wrote to the Government of Ireland's Minister for Foreign Affairs, Simon Coveney TD, and the three Commissions sent a further joint letter, outlining potential Protocol Article 2 concerns with Electronic Travel Authorisations.⁸⁴

In March 2022, the House of Lords Sub-Committee on the Ireland/NI Protocol sent a letter to the then Minister for the Home Office, Baroness Williams of Trafford, asking for a specific response on the two Commissions' recommendations.⁸⁵ In April 2022, the then Minister for the Home Office responded by assuring the Sub-Committee on the Ireland/NI Protocol that the UK would not operate routine immigration controls on journey from within the Common Travel Area, with no immigration controls whatsoever on the Ireland-NI land border.⁸⁶

The former Minister for the Home Office also stated that only once the then Nationality and Borders Bill had received Royal Assent could the UK Government determine the criteria against which any Electronic Travel

79 The Belfast (Good Friday) Agreement 1998 references "the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity". See Belfast (Good Friday) Agreement, 10 April 1998, at Rights, Safeguards and Equality of Opportunity.

80 NI Human Rights Commission and Equality Commission for NI, 'Joint NI Human Rights Commission/Equality Commission for NI Briefing Paper in the Modern Slavery and Human Trafficking and Electronic Travel Authorisation Provisions in the Nationality and Borders Bill' (NIHRC/ECNI, 2022), at 14.

81 Ibid, at 13.

82 Letter from NI Human Rights Commission and Equality Commission NI to Home Office, 9 February 2022.

83 Letter from NI Human Rights Commission and Equality Commission NI to NI Office, 9 February 2022.

84 Letter from Irish Human Rights and Equality Commission to Minister for Foreign Affairs, Simon Coveney TD, 31 January 2021; Letter from Irish Human Rights and Equality Commission, NI Human Rights Commission and Equality Commission for NI, to Minister for Foreign Affairs, Simon Coveney TD, 4 March 2022.

85 Letter from Chair of the Protocol on Ireland/NI Sub-Committee, Lord Jay of Ewelme, to Minister for the Home Office, Baroness Williams of Trafford, 3 March 2022.

86 Letter from Chair of the Protocol on Ireland/NI Sub-Committee, Lord Jay of Ewelme, to Minister for the Home Office, Baroness Williams of Trafford, 1 April 2022.

Authorisation application would be assessed. The former Minister for the Home Office assured the Sub-Committee on the Ireland/NI Protocol that anyone whose application was refused would still be able to apply for a visit visa. In relation to Electronic Travel Authorisation exemptions for journeys into NI from Ireland, the former Minister for the Home Office stated that this would pose too much of a risk to UK border control and would undermine the UK Government's efforts to strengthen its borders.⁸⁷

Responding to whether Protocol Article 2 was given consideration in the development of the draft legislation, the former Minister for the Home Office wrote that the Nationality and Borders Bill was compliant with international obligations, including the Protocol.⁸⁸

In April 2022, the Nationality and Borders Act received Royal Assent, with no amendments to Electronic Travel Authorisation provisions.⁸⁹

The Commission will consider the forthcoming Regulations which will give effect to the Electronic Travel Authorisation provisions of the Act and how they engage of Articles 2, 3 or 11 of the Protocol, considering the commitments that the UK Government has made in respect of the continued operation of the Common Travel Area and the avoidance of a 'hard border' on the island of Ireland.

Recommendations

The Commission recommends that effective steps are taken by the Home Office to prevent and address racial profiling, including through appropriate training and monitoring, in the implementation of the revised guidance on the Common Travel Area and Electronic Travel Authorisation requirements, including at entry to NI at ports and airports and in the context of cross-border travel.

The Commission recommends that the Home Office ensures that all journeys into NI, originating from Ireland, are exempt from Electronic Travel Authorisation requirements.

The Commission recommends that the Common Travel Area and rights associated with it are enshrined in law by a comprehensive bilateral treaty by the UK and Irish governments. The Commission further recommends that this agreement 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.

87 Ibid.

88 Letter from Chair of the Protocol on Ireland/NI Sub-Committee, Lord Jay of Ewelme, to Minister for the Home Office, Baroness Williams of Trafford, 1 April 2022.

89 Section 75, Nationality and Borders Act 2022.

Human Rights Act and administrative law reform

In 2017, the UN Working Group on the Universal Periodic Review made several recommendations for the UK Government to ensure that there is no regression of human rights in any potential reform of the Human Rights Act 1998.⁹⁰ Furthermore, that any proposed British Bill of Rights would strengthen, not reduce, rights and have no impact on the scope of protection or the access to remedies under the ECHR.⁹¹

Between 2015 and 2022, similar recommendations were also made by the UN Human Rights Committee,⁹² UN ICESCR Committee,⁹³ the UN CERD Committee,⁹⁴ the UN CAT Committee⁹⁵ and the CoE Commissioner for Human Rights, Dunja Mijatović.⁹⁶ Additionally, the UN Working Group on the Universal Period Review,⁹⁷ the UN ICESCR Committee⁹⁸ and UN CERD Committee⁹⁹ recommended that the UK Government undertake “broad” and “meaningful” public consultation on its proposals to revise human rights legislation within the UK. 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”.¹⁰⁰

Reform of Human Rights Act

In 2019, the Conservative Party’s manifesto included a commitment to “update the Human Rights Act”.¹⁰¹ In 2021, the Independent Human Rights Act Review Team published its report, which considered the Human Rights Act 1998’s operational mechanisms. The review was not tasked with considering the rights contained within the Human Rights Act and was undertaken on the basis that “the [Human Rights Act] is underpinned by the UK’s international obligations under the [ECHR], and the UK remains committed to upholding those obligations”.¹⁰²

90 A/HRC/36/9, ‘Report of the Working Group on the Universal Periodic Review - UK of Great Britain and NI’, 14 July 2017, at paras 134.67; 134.68; 134.69; 134.70; 134.71; 134.72; 134.73; 134.74; 134.75; 134.76; and 134.77.

91 Ibid, at para 134.67.

92 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 5(c).

93 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 10.

94 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 10.

95 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 11.

96 CoE Commissioner for Human Rights, ‘Press Release: UK - backsliding on human rights must be prevented’, 4 July 2022.

97 A/HRC/36/9, ‘Report of the Working Group on the Universal Periodic Review - UK of Great Britain and NI’, 14 July 2017, at para 134.76.

98 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 10.

99 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 10.

100 A/HRC/36/9, ‘Report of the Working Group on the Universal Periodic Review - UK of Great Britain and NI’, 14 July 2017, at para 134.67.

101 The Conservative Party, ‘Get Brexit Done, Unleash Britain’s Potential: The Conservative and Unionist Party Manifesto 2019’ (Conservative Party, 2019), at 48.

102 Independent Human Rights Act Review Team, ‘Independent Human Rights Act Review: Terms of Reference’ (MoJ, 2020), at 1.

In 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 and recommending that “the [Independent Review of the Human Rights Act] Team consider the Belfast (Good Friday) Agreement 1998 and the UK Government’s commitment to non-diminution when considering its deliberations”.¹⁰³

Further engagement and consultation were undertaken by the Independent Human Rights Act Review Team, which reported “an overwhelming body of support for retaining the Human Rights Act”.¹⁰⁴ It also noted that the proposals the Independent Review Team considered [i.e., a British Bill of Rights or repeal of the Human Rights Act] “could have a significant impact on devolution” and the Belfast (Good Friday) Agreement 1998 “in the case of straightforward repeal”.¹⁰⁵ The Independent Review Panel did state that “depending on how a British Bill of Rights was framed, it might pose less of a risk of such an impact in the devolution context if it substantially replicated the Human Rights Act”.¹⁰⁶

Immediately following publication of the Independent Human Rights Act Review report, the UK Government launched a public consultation on proposals to replace the Human Rights Act 1998 with a British Bill of Rights “for the whole of the UK” and to make significant changes to the current mechanisms for enforcing human rights in the Human Rights Act.¹⁰⁷ The consultation stated that proposals will “ensure that human rights continue to be fully protected in NI... through an improved framework that provides greater legal certainty and respects our constitutional principles” and that “these proposals will be fully in line with our commitments under the Withdrawal Agreement, the NI Protocol and the TCA [Trade and Cooperation Agreement]”.¹⁰⁸ However, there was no analysis on the impact of these proposals on Protocol Article 2, nor any clarity on how the UK Government intends to ensure compliance with Protocol Article 2.

In March 2022, the Commission responded to the consultation rejecting in totality the proposals made in the consultation document.¹⁰⁹ The Commission warned that the proposals would significantly weaken, not strengthen, human rights protection across the UK. The Commission had particular concerns that the proposals hinder individual’s access to the courts in general, create a hierarchy of rights, depart from the core principle of human rights are for everyone, and ignore commitments made in the Belfast (Good Friday) Agreement 1998 that underpin NI’s peace process.

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

104 Independent Human Rights Act Review Team, ‘Independent Human Rights Act Review’ (MoJ, 2021), at para 19.

105 Ibid, at para 23.

106 Independent Human Rights Act Review Team, ‘Independent Human Rights Act Review’ (MoJ, 2021), at para 23.

107 Ministry of Justice, ‘Human Rights Act Reform: A Modern Bill Of Rights - A Consultation to Reform the Human Rights Act 1998’ (MoJ, 2021).

108 Ibid, at paras 68-70.

109 NI Human Rights Commission, ‘Response to the Consultation on Human Rights Act Reform: A Modern Bill of Rights’ (NIHRC, 2022).

The Commission also noted that, under Protocol Article 2, there can be no diminution of those ECHR rights which were underpinned by EU law prior to 1 January 2021.¹¹⁰ The Commission advised that, where required by Protocol Article 2, the EU Charter of Fundamental Rights continues to have relevance in NI¹¹¹ and highlighted that the link between rights in the EU Charter and the ECHR is well established.¹¹² The Commission also raised concerns that the timing and circumstances surrounding the consultation period made it difficult for the consultation process to be deemed meaningful.

In March 2022, the Commission raised concerns regarding the UK Government's plans to replace the Human Rights Act 1998 in its submission to the fourth cycle of the UN Human Rights Council's Universal Periodic Review of the UK. It highlighted in particular the failure of the proposals to adequately consider the Belfast (Good Friday) Agreement 1998, Protocol Article 2 and the integral role of ECHR in NI.¹¹³

In March 2022, the House of Commons and House of Lords Joint Committee on Human Rights published its report on Human Rights Act reform.¹¹⁴ The Joint Committee on Human Rights found that "the Human Rights Act has had a positive impact on the enforcement and accessibility of rights in the UK, both in and out of court".¹¹⁵ In summary, the Joint Committee on Human Rights stated that:

*we are concerned that the proposals and their consequences run counter to three central principles of human rights law. Human rights are universal; they apply to everyone. Human rights are fundamental and require special protection within the domestic and international legal order. Human rights must be able to adapt to stand the test of time, as the common law does. We do not think a case has been made for replacing the Human Rights Act with the British Bill of Rights in the form proposed by the [UK] Government.*¹¹⁶

The Commission provided written and oral evidence to help inform the Joint Committee on Human Rights' report.¹¹⁷ The Commission highlighted how the Human Rights Act has a specific effect on NI, including by reference to the Belfast (Good Friday) Agreement 1998 and Protocol

110 Ibid.

111 *Re SPUC Pro-Life Ltd* [2022] NIQB 9, at 115.

112 *WebMindLicences Kft v Nemzeti Adó*, Case C-419/14, 17 December 2015, at para 70; *AK v Krajowa Rada Sadownictwa v Sad Najwyzszy*, Case C-585/18, C-624/18 C-625/18, 19 November 2019, at para 116-118; *Rayonna Prokuratura Lom*, Case C-467/18, 19 September 2019, at paras 42-45.

113 NI Human Rights Commission, 'NI Human Rights Commission Submission to the UN Human Rights Council's Universal Periodic Review of the UK' (NIHRC, 2022), at para 9.

114 House of Commons and House of Lords Joint Committee on Human Rights, 'Human Rights Act Reform: Thirteenth Report of the Session 2021-2022' (JCHR, 2022).

115 Ibid, at 4.

116 Ibid.

117 UK Parliament Hansard, 'House of Commons and House of Lords Joint Committee on Human Rights: Oral Evidence Session on Human Rights Act Reform', 11 May 2022.

Article 2.¹¹⁸ In July 2022, the UK Government responded that it “disagreed” with the Joint Committee on Human Rights’ findings.¹¹⁹

In June 2022, the Ministry for Justice stated that the proposed reforms to the Human Rights Act were “fully in line with our obligations under the Withdrawal Agreement, the NI Protocol and the UK-EU Trade and Cooperation Agreement”.¹²⁰ Consequently, the Bill of Rights Bill was introduced to the UK Parliament.

The Bill of Rights Bill ignores the findings of the Independent Human Rights Review team, the Joint Committee on Human Rights and majority of views expressed by consultation responders, it seeks to repeal the Human Rights Act and replace it with legislation that significantly weakens human rights protections across the UK. In doing so and contrary to the ECHR, it creates a hierarchy of rights by elevating freedom of speech and freedom of religion. It creates a hierarchy of rights protection for individuals, particularly focusing on expressly denying perceived criminals’ and immigrants’ full enjoyment of their rights. It also reduces access to domestic courts for individuals seeking human rights-based remedy, which is contrary to the ECHR and the Belfast (Good Friday) Agreement 1998. In August 2022, the Commission provided evidence to the Joint Committee on Human Rights’ legislative scrutiny of the Bill raising these concerns.¹²¹

The Commission also advised that the Bill of Rights Bill is not a substitute for the comprehensive framework of human rights protections under the Human Rights Act. Moreover, the Bill will create uncertainty and confusion, making the interpretation of Protocol Article 2 more challenging and may lead to a culture shift that will further reduce the robustness of human rights protections in NI. In addition, irrespective of the provisions of the Bill, future ECtHR jurisprudence will continue to inform the interpretation of Protocol Article 2, where ECHR rights correspond to those in the EU Charter of Fundamental Rights.

In November 2022, the Bill of Rights Bill was awaiting its second reading at the House of Commons, with no confirmed date for progression. It was reported that it would be progressing through the UK Parliament “in the coming weeks”.¹²²

Reform of judicial review

In March 2021, the report of the Independent Review of Administrative Law, chaired by Lord Faulks KC was published.¹²³ The review considered the effectiveness of judicial review in enabling citizens to challenge

118 NI Human Rights Commission, ‘Submission to the Joint Committee on Human Rights on the Independent Human Rights Act Review’ (NIHRC, 2021), at 3; House of Commons and House of Lords Joint Committee on Human Rights, ‘Oral Evidence: Human Rights Act Reform – Baroness Falker of Margravine, Chair, Equality and Human Rights Commission; Alyson Kilpatrick, Chief Commissioner, NI Human Rights Commission; Barbara Bolton, Head of Legal and Policy, Scottish Human Rights Commission’, 11 May 2022.

119 UK Government, ‘Human Rights Act Reform: Government Response to the Committee’s Thirteenth Report of Session 2021-22’ (UK Gov, 2022).

120 Ministry of Justice, ‘Human Rights Act Reform: A Modern Bill of Rights – Consultation Response’ (MoJ, 2022).

121 NI Human Rights Commission, ‘Evidence to Joint Committee on Human Rights Legislative Scrutiny of the Bill of Rights Bill’ (NIHRC, 2022).

122 Michael Cross, ‘Bill of Rights Bill back “in weeks”’, *Law society Gazette*, 7 November 2022.

123 Independent Review of Administrative Law Panel, ‘The Independent Review of Administrative Law’ (MoJ, 2021).

the lawfulness of UK Government action, while also allowing the UK Government and local authorities to carry out their business. The report made two recommendations involving legislative change and several recommendations for procedural change.

In April 2022, the Judicial Review and Courts Act 2022 received Royal Assent. The 2022 Act clarifies the provision that may be made by, and the effects of, quashing orders; restricts judicial review of certain decisions of the Upper Tribunal; provides for the use of written and electronic procedures in courts and tribunals; clarifies the procedure in, and the organisation of, courts and tribunals.

Recommendations

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

The Commission advises that the protections in Protocol Article 2, while an important safeguard against the diminution of rights following UK withdrawal from the EU, are not a substitute for the comprehensive framework of human rights protections under the Human Rights Act.

National human rights institution

The Global Alliance on National Human Rights Institutions Sub-Committee on Accreditation reviews the Commission's compliance with the UN Paris Principles every five years. The Commission is currently recognised as an A-status national human rights institution and consequently enjoys voting rights at the Global Alliance of National Human Rights Institutions and has speaking rights at the UN Human Rights Council. In 2021, the Sub-Committee on Accreditation identified funding, financial autonomy, diversity and pluralism, and visiting places of deprivation of liberty as areas of concern and decided to defer its consideration of the Commission's reaccreditation by one year with a view to these areas being "improved" and a "sustainable position" reached within this deferral period.¹²⁴

In 2020, the Commission was provided with additional funds to undertake its role as part of the dedicated mechanism. Further to the UK Government's commitment in Protocol Article 2(2) to facilitate the related work of the Commission and the Equality Commission for NI in upholding human rights and equality standards, it is important that there is sustained and adequate funding of both Commissions to carry out this related work on upholding rights and equality standards. The Commission's ability to undertake its functions in respect of Protocol Article 2(1) relies on its capacity to undertake its functions across the organisation as a whole. The Commission has advised that there would be a potential breach

¹²⁴ Email correspondence between the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation and the NI Human Rights Commission, 2 November 2021.

of Protocol Article 2(2) if, due to funding concerns, its ‘A status’ is not confirmed by the Sub-Committee on Accreditation.¹²⁵

To aid this process, the Commission called for an independent review of the organisation, as the last was conducted in 2001. The Commission’s mandate has developed substantially since then, most recently with the addition of the dedicated mechanism function under Protocol Article 2(1). In September 2022, an independent review of the Commission was commenced. In November 2022, the independent review was concluded with a response by the UK Government awaited.

In October 2022, the Sub-Committee on Accreditation agreed to defer consideration of the Commission’s reaccreditation until March 2023, to enable time for the outcome of the independent review to be considered.

Recommendations

The Commission recommends that the NI Office provides adequate and secure funding to enable the Commission to fulfil its statutory functions, in line with its role as an A status institution under the UN Paris Principles.

Human Rights after UK Exit from the EU

Withdrawal Agreement and the Ireland/NI Protocol

The Commission is mandated in accordance with Protocol Article 2 of the UK-EU Withdrawal Agreement to oversee the UK Government’s commitment on rights and equality in NI after UK withdrawal from the EU. 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 1 January 2021.¹²⁶

Protocol Article 2(1) states:

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

In Protocol Article 2, the UK Government commits to ensuring that certain rights, safeguards and equality of opportunity protections are not diminished as a result of the UK leaving the EU. Therefore, to fall within scope of Protocol Article 2, the human rights or equality protection being relied on must be covered by the relevant chapter of the Belfast (Good Friday) Agreement 1998 and have been underpinned by EU law

125 Letter from NI Human Rights Commission to Secretary of State for NI, Brandon Lewis MP, 17 November 2021.

126 Agreement on the Withdrawal of the UK of Great Britain and NI from the EU and the European Atomic Energy Community 2020.

including EU treaties, directives and regulations, in place on (or before) 31 December 2020.¹²⁷

In the rights, safeguards and equality of opportunity chapter of the Belfast (Good Friday) Agreement 1998, the parties affirmed their commitment to “the mutual respect, the civil rights and religious liberties of everyone in the community”, before affirming “in particular”:

- *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.*¹²⁸

Alongside these are other specific rights, safeguards and equality of opportunity protections in the relevant chapter which the UK Government has recognised as forming a non-exhaustive list of rights:

- *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.*¹²⁹

In addition to this ‘no diminution’ commitment, Protocol Article 2 includes specific protection against discrimination, referencing Annex 1 to the Protocol which sets out six EU equality directives:

- *EU Racial Equality Directive;*¹³⁰
- *EU Employment Equality (Framework) Directive;*¹³¹
- *EU Gender Goods and Services Directive;*¹³²
- *EU Gender Equal Treatment (Employment) Directive;*¹³³

127 In most cases, the relevant EU law will be that which was binding on the UK on 31 December 2020, by virtue of the UK-EU Withdrawal Agreement. In exceptional circumstances, it may be possible to look at a diminution of rights or safeguards before that date, for example where a diminution occurred in line with the Withdrawal Agreement during the transition period. See Article 127(1), UK-EU Withdrawal Agreement 2020.

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

129 UK Government, ‘UK Government Commitment to No-diminution of Rights, Safeguards and Equality of Opportunity in NI: What Does it Mean and How Will it be Implemented?’ (NIO, 2020), at para 13.

130 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.

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

132 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.

133 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.

- *EU Self-Employment Equal Treatment Directive*,¹³⁴ and
- *EU Equal Treatment in Social Security Directive*.¹³⁵

Any amendment to, or replacement of, an Annex 1 Equality Directive by the EU on or after 1 January 2021, which enhances rights and protections, must be reflected in NI law - an obligation to 'keep pace'.¹³⁶

Scope of Protocol Article 2

During 2022, the Commission, together with the Equality Commission for NI, has engaged with key stakeholders on a working paper on the scope of Protocol Article 2, which is designed to provide an initial assessment of Protocol Article 2 means in practice for the protection of human rights and equality in NI.¹³⁷ A definitive interpretation of Protocol Article 2 will ultimately be determined by the courts and the oversight bodies established by the UK-EU Withdrawal Agreement 2020.

In addition to the Annex 1 equality directives, there are a number of other EU legal obligations which underpin the rights and safeguards in the relevant part of the Belfast (Good Friday) Agreement 1998 and are subject to the no diminution commitment. The UK Government has recognised a non-exhaustive list of relevant measures which fall within scope of the commitment in Protocol Article 2, including:

- *the EU Victim's Directive*,¹³⁸
- *the EU Parental Leave Directive*,¹³⁹
- *the EU Pregnant Workers' Directive*,¹⁴⁰ and
- *other specific measures which protect the rights of disabled people*.¹⁴¹

The Commission considers that there are additional EU measures that also fall within the scope of Protocol Article 2 and, together with the Equality Commission for NI, have been undertaking an extensive exercise to identify relevant EU laws and obligations. The working paper includes an appendix listing EU measures the Commissions have identified to date as falling within the scope of Protocol Article 2. These measures include

134 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.

135 Directive 79/7/EEC, 'European Communities Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security', 19 December 1978.

136 Further discussion on in the scope of Protocol Article 2 is provided in the section of the same name below.

137 NI Human Rights Commission and Equality Commission for NI, 'Working Paper: Scope of Article 2(1) of the Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement 2020' (NIHRC and ECNI, forthcoming).

138 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.

139 Directive 2010/18/EU, 'EU Council Directive Implementing the Revised Framework Agreement on Parental Leave', 8 March 2010.

140 Directive 92/85/EEC, 'EU 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.

141 NI Office, 'UK Government Commitment to "No Diminution of Rights, Safeguards and Equality of Opportunity" in NI: What Does it Mean and How Will it be Implemented?' (NIO, 2020), at para 13.

additional protections for victims,¹⁴² asylum seekers and refugees¹⁴³ and workers.¹⁴⁴ This is not designed as a comprehensive account of all relevant underpinning EU law and is part of ongoing work. There is the potential for additional EU law to be identified as we work to define the rights that are covered within the general commitment to the “civil rights and religious liberties of everyone in the community”.¹⁴⁵

As further elaborated in its working paper, the Commission is adopting a working assumption that all EU law in force on or before 31 December 2020, which underpins rights in the ECHR, falls within scope of the non-diminution commitment in Protocol Article 2. The Commission is also adopting a broad interpretation of the right to equality of opportunity in all social and economic activity protected under Protocol Article 2. In addition, it is arguable that the signatories’ general commitment to civil rights was made with reference to the full range of human rights standards ratified by the UK and that it should be read as an ambulatory or living reference capable of such an interpretation.

The ‘keeping pace’ obligation requires ongoing monitoring of the development and interpretation of the six Annex 1 equality directives which will continue to be informed by future CJEU rulings. To the extent that future CJEU rulings evolve general principles of EU law, the EU Charter of Fundamental Rights and the relevant EU Treaty provisions, these will continue to have relevance in NI.¹⁴⁶

Legal and policy developments

In 2021, following a legal challenge, the NI High Court upheld the legality of the Protocol.¹⁴⁷ In March 2022, the NI Court of Appeal dismissed the appeal on all grounds and emphasised “that there is no reason to doubt that a sovereign Parliament having enacted the law contained in section 7A of [the EU Withdrawal Act] 2018 as amended knew what the legislation involved, particularly the arrangements on NI and acted lawfully”.¹⁴⁸ In February 2022, the NI High Court considered Protocol Article 2 in the context of a challenge to the regulations which empowered the Secretary of State for NI to direct the Department of Health to commission abortion services.¹⁴⁹ The Court dismissed the challenge on the basis that there was no diminution of rights within scope of Protocol Article 2. Nevertheless, the court confirmed that Protocol

142 Directive 2011/36/EU, ‘EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims’, 5 April 2011; Directive 2011/92/EU, ‘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, ‘EU Council Directive Relating to Compensation to Crime Victims’, 29 April 2004.

143 Directive 2003/9/EC, ‘EU Council Directive Laying Down Minimum Standards for the Reception of Asylum Seekers’, 27 January 2003; Directive 2004/83/EC, ‘EU 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; Directive 2005/85/EC, ‘EU Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status’, 1 December 2005.

144 Directive 97/81/EC, ‘EU Council Directive Concerning the Framework Agreement on Part-time Workers’, 15 December 1997; Directive 2008/104/EC, ‘Directive of the European Parliament and of the Council on Temporary Agency Work’, 19 November 2008.

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

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

147 *In the Matter of an Application by James Hugh Allister for Judicial Review* [2021] NIQB 64.

148 *Allister et al v Secretary of State for NI* [2022] NICA 15, at para 206.

149 *Re SPUC Pro-Life Ltd* [2022] NIQB 9.

Article 2 has direct effect and can be relied on in domestic courts; recognised that EU general principles and the EU Charter of Fundamental Rights continue to be relevant to the Protocol; and that the UN CRPD was a part of the EU legal order prior to UK withdrawal and continues to be relevant to Protocol Article 2, however it does not have direct effect.

In 2021, the UK Government published proposals for “establishing a new balance” on how the Protocol operates noting that the protection of equality and human rights in Protocol Article 2 was uncontroversial and that the focus should be on trade in goods and institutional arrangements.¹⁵⁰ This was followed by the EU’s “non-papers” in response to the ongoing issues facing NI in relation to the operation of the Protocol. In November 2021, the Commission, together with the Equality Commission for NI, made a joint submission on the UK and EU proposals and the prospects for Agreement to the House of Lords Sub-Committee on the Protocol on Ireland/NI.¹⁵¹

In the submission, the Commission and Equality Commission for NI highlighted that, in light of the positive aspects of the Protocol Article 2 commitment, and its ‘non-controversial’ nature, it is essential the UK Government remains committed to upholding its commitment set out in Protocol Article 2. The Commissions also highlighted the need to ensure that there are no changes to the Protocol that would result in a weakening of the Protocol Article 2 commitment and the importance of engagement with civil society including human rights and equality groups.

NI Protocol Bill

In June 2022, the NI Protocol Bill was introduced into the UK Parliament. The then Foreign Secretary, Liz Truss MP, stated that the purpose of the Bill is to “uphold the Belfast (Good Friday) Agreement 1998 and support political stability in NI” and that it will “end the untenable situation where people in NI are treated differently to the rest of the UK, protect the supremacy of our courts and our territorial integrity”.¹⁵² The NI Protocol Bill provides that ‘excluded provisions’ of the Protocol will no longer have domestic effect in UK and provides that domestic courts are not bound by any principles or decisions made by the CJEU after the Bill comes into force. The Bill provides some safeguards for Protocol Article 2, which is not an excluded provision in the Bill and clause 15 prevents a Minister from making regulations to define it as such, but this protection is incomplete.

The UK Government published its legal position stating “the [UK] Government’s assessment that the situation in NI constitutes a state of necessity is without prejudice to the UK’s right to take measures under Article 16 of the Protocol to safeguard against serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade”.¹⁵³ In June 2022, the Commission, jointly with the Equality

150 UK Government, ‘NI Protocol: The Way Forward’ (UK Gov, 2021), at para 37.

151 NI Human Rights Commission and Equality Commission for NI, ‘Submission of the NI Human Rights Commission and Equality Commission for NI on the UK and EU Proposals and the Prospects for Agreement to the House of Lords Sub-Committee on the Protocol on Ireland/NI’ (NIHRC and ECNI, 2021).

152 Foreign, Commonwealth and Development Office, ‘Press Release: Government introduces bill to fix the NI Protocol’, 13 June 2022.

153 Foreign, Commonwealth and Development Office, ‘NI Protocol Bill: UK Government Legal Position’ (FCDO, 2022).

Commission for NI, published a preliminary briefing on the NI Protocol Bill recommending that the Bill be amended to ensure no weakening of Protocol Article 2 or its implementation. In October 2022, in advance of the second reading of the Bill in the House of Lords, the Commissions published an expanded briefing which made recommendations to protect Protocol Article 2, addressing the role of the CJEU and the extent of ministerial powers. During the Committee Stage at the House of Lords, the Parliamentary Under Secretary of State at the NI Office, Lord Caine, in response to a number of amendments seeking to address the Commissions' concerns, confirmed the UK Government's position that the NI Protocol Bill "will not do anything to undermine the provisions of Article 2" and that "the Bill gives us all the powers we need to ensure that we can protect it".¹⁵⁴ The Under Secretary of State also committed to provide Baroness Ritchie with detailed written responses to her questions and which were to be published in the House of Lords Library in advance of the Report Stage. In November 2022, the Commission, jointly with the Equality Commission for NI, submitted further evidence to the House of Lords Sub-Committee on the Protocol on Ireland/NI inquiry on the NI Protocol Bill, which further reiterated their concerns that Protocol Article 2 is not adequately protected in the NI Protocol Bill.¹⁵⁵

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.*¹⁵⁶

The EU (Withdrawal Agreement) Act 2020 amended the NI Act 1998 to provide 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. 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 two years of this work.

154 UK Parliament Hansard, 'House of Lords: NI Protocol Bill - Parliamentary Under Secretary of State at the NI Office, Lord Caine - Vol 825 Column 111', 31 October 2022.

155 NI Human Rights Commission and Equality Commission for NI, 'Submission of the NI Human Rights Commission and Equality Commission for NI to the House of Lords Sub-Committee on the Protocol's call for evidence for its new inquiry into the UK Government's Northern Ireland Protocol Bill' (NIHRC and ECNI, 2022).

156 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.

In 2021, the UN concluded its five-year periodic review of the Commission and deferred its decision on re-accrediting the Commission with ‘A Status’ due to concerns about the impact of funding cuts on the Commission’s fitness for purpose. In 2022, further deferrals were made with a decision expected from the Global Alliance for National Human Rights Institutions Sub-Accreditation Committee in early 2023. The Commission’s ability to undertake its functions in respect of Protocol Article 2(1) relies on its capacity to undertake its functions across the organisation as a whole. The Commission has advised that there would be a potential breach of Protocol Article 2(2) if for this reason its ‘A status’ is not confirmed at the end of the deferral period.¹⁵⁷

In February 2022, the Commission met with the Rapporteur of the CoE Committee on Political Affairs and Democracy, George Katrougalos, during a follow up country visit to the UK on the impact of Brexit on human rights on the island of Ireland. In October 2022, the CoE Parliamentary Assembly adopted a resolution which called on the UK to “make use of the ‘dedicated mechanism’... by seeking and heeding the advice of... the Equality Commission for NI and of the NI Human Rights Commission”.¹⁵⁸

Island of Ireland dimension of Protocol Article 2

In 2021, the Commission, the Equality Commission for NI and the Irish Human Rights and Equality Commission 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. Following this Memorandum of Understanding, a working group of the three Commissions has met regularly. In 2021, at an initial in-person meeting of the boards of the three Commissions, it was agreed that the three Commissions would meet annually, with the second annual meeting taking place in November 2022 in Dublin. At this meeting Commissioners were updated on the ongoing research on Protocol Article 2 and agreed a programme of work for the forthcoming year.

In March 2022, following on from cross-border stakeholder roundtable engagement in 2021, the three Commissions held a hybrid stakeholder engagement in Derry/Londonderry with representatives from the migrant and ethnic minority communities. At this engagement, the three Chief Commissioners briefed stakeholders on the powers and functions under Protocol Article 2, outlined relevant work and facilitated discussion on key issues of concern for people living and working in border areas.

In 2021, the three Commissions gave oral evidence to the NI Assembly Committee for the Executive Office, in which they updated on the wide range of work that they have been progressing. In September 2022, the three Commissions gave evidence to the Joint Oireachtas Committee on the Implementation of the Good Friday Agreement and updated on the Commissions’ island of Ireland work with a focus on key developments in

¹⁵⁷ Letter from NI Human Rights Commission to Secretary of State for NI, Brandon Lewis MP, 17 November 2021.

¹⁵⁸ CoE Parliamentary Assembly, ‘Resolution 2464(2002) – The Impact of Brexit on Human Rights on the Island of Ireland’, 31 October 2022.

relation to Human Rights Act reform, legacy, the Commons Travel Area and Electronic Travel Authorisations.

The Equality Commission for NI has led on commissioning research on the divergence of rights of rights on the island of Ireland on behalf of the three Commissions, to be launched early in 2023.

Electoral Rights of EU citizens

In 2021, following correspondence expressing concerns that Protocol Article 2 would be engaged if EU citizens lost the right to vote and stand in NI local elections,¹⁵⁹ the UK Government subsequently confirmed that EU citizens living in the UK prior 1 January 2021 would maintain their local voting and candidacy rights in NI, including NI Assembly elections.¹⁶⁰

In 2021, the UK Government sought to remove voting and candidacy rights of EU citizens moving to the UK after 31 December 2020 in the Elections Bill. Following oral evidence by the Commission and the Equality Commission for NI, there was an exchange of correspondence between the House of Lords Sub-Committee on the Ireland/NI Protocol and the NI Office.¹⁶¹ In March 2022, the then Minister of State for NI, Conor Burns MP, wrote to the Commission and the Equality Commission for NI reiterating the UK Government position, which was expressed to the Sub-Committee on the Ireland/NI Protocol, that voting rights previously available under the EU Treaty were not within scope of Protocol Article 2 and that it would be irrational for the non-diminution commitment to require retention of some voting rights for EU citizens without reciprocal arrangements for UK citizens in EU jurisdictions.¹⁶²

In March 2022, the Commission and the Equality Commission jointly briefed House of Lords peers advising that the UK Government should maintain the position that existed prior to 1 January 2021 to avoid any risk of inconsistency with Protocol Article 2. In April 2022, the Commissions wrote to the then Minister of State NI expressing concerns that if the Elections Bill was passed without amendment, it could result in a breach of the non-diminution commitment.¹⁶³ In April 2022, the Elections Act 2022 received Royal Assent without addressing the Commissions' concerns. The Commission is considering what action to take to address potential incompatibility with Protocol Article 2.

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

160 UK Parliament Hansard, 'House of Commons Written Statement: Local Elections - Minister of State for the Constitution and Devolution, Chloe Smith MP', 17 June 2021.

161 Letter from the Chair of the House of Lords EU Affairs Sub Committee on the Protocol on Ireland/NI, Lord Jay of Ewelme to the Secretary of State for NI, Brandon Lewis MP, 25 October 2021; Letter from the Minister of State in the NI Office, Conor Burns MP, to the Chair of the House of Lords EU Affairs Sub Committee on the Protocol on Ireland/NI, Lord Jay of Ewelme, 24 November 2021; Letter from the Chair of the House of Lords EU Affairs Sub Committee on the Protocol on Ireland/NI, Lord Jay of Ewelme to the Minister of State in the NI Office, Conor Burns MP, 16 December 2021; Letter from the Minister of State in the NI Office, Conor Burns MP, to the Chair of the House of Lords EU Affairs Sub Committee on the Protocol on Ireland/NI, Lord Jay of Ewelme, 24 January 2022.

162 Letter from the Minister of State in the NI Office, Conor Burns MP, to the NI Human Rights Commission and the Equality Commission for NI, 15 March 2022.

163 Letter from the NI Human Rights Commission and the Equality Commission for NI to the Minister of State in the NI Office, Conor Burns MP, 11 April 2022.

Research

Alongside ongoing research on the overall scope of Protocol Article 2, research has been commissioned in particular areas. In May 2022, the Commission launched research on Human Trafficking and Protocol Article 2, which was undertaken by Alison Harvey.¹⁶⁴ This research was completed in the context of the passage of the Nationality and Borders Act 2022 through the UK Parliament and assisted the Commission in analysing how Protocol Article 2 can be read as protecting the rights of victims of human trafficking. Following the publication of this research, the Commission met with officials in the Department of Justice to discuss the findings of the research and the relevance of Protocol Article 2 to their work.

In June 2022, the Commission launched research undertaken by Professor Tamara Hervey on the right to health and Protocol Article 2.¹⁶⁵ The research takes an inclusive approach to the interpretation of Protocol Article 2, suggesting the broad commitments in the rights, safeguards and equality of opportunity chapter of the Belfast (Good Friday) Agreement 1998 encompass the right to health. The research highlights some possible examples of rights being diminished, which are under consideration by the Commission. Following publication of this research, the Commission met with officials in the Department of Health to discuss the relevance of Protocol Article 2 to their work and the findings of the research.

The Commission used the opportunity of these launches to engage with stakeholders on the substance of the research reports and their key recommendations and held follow up meetings with key stakeholders.

In 2022, the Commission is undertaking further research on Protocol Article 2 in the context of immigration law and asylum seekers and refugees; on the rights of frontier workers and on environmental rights. In addition, the Commission and Equality Commission for NI have sought a series of legal opinions and legal research on Protocol Article 2 and relevant underpinning EU obligations to inform their ongoing legal and policy work.

Trade and Cooperation Agreement

In 2020, the UK and EU signed the Trade and Cooperation Agreement (TCA) governing the future UK-EU relationship. The Agreement formally entered into force on 1 May 2021. The Trade and Cooperation Agreement was given effect in UK law by the EU (Future Relationship) Act 2020.

The Trade and Cooperation Agreement is largely focused on trade and covers a range of issues relating to importing/exporting goods, transport and fisheries, which includes 'level playing field' provisions on labour and social standards and the climate and environment. The Commission and the Equality Commission for NI welcome the level playing field commitment in relation to labour and social protection in the Trade and Cooperation Agreement, however it is weakened by a caveat to the effect that the diminution must not impact upon trade or investment,

164 Alison Harvey, 'Human Trafficking and Article 2 of the Ireland/NI Protocol' (NIHRC, 2022).

165 Tamara Hervey, 'Brexit, Health and Its Potential Impact on Article 2 of the Ireland/NI Protocol' (NIHRC 2022).

which may be difficult to demonstrate. Both Commissions advise that the development of domestic policy in this field must take account of Protocol Article 2, as well as the Trade and Cooperation Agreement.

It is critical to ensure that measures are taken, including information-sharing by the relevant joint bodies to avoid, for example, changes to employment law which are compatible with the Trade and Cooperation Agreement but could breach Protocol Article 2. Such rights are central to the work of the TCA Trade Specialised Committee on Level Playing Field for Open and Fair Competition and Sustainable Development, but are also relevant to the UK-EU Specialised Committee on the Protocol under the Withdrawal Agreement. Importantly, policy and legislative developments in the UK or the EU, which engage human rights and equality commitments under either treaty, will need to be shared at an early stage with the Commissions and all relevant stakeholders and bodies. This is critical to enable Protocol Article 2 and the Dedicated Mechanism to function effectively.

In addition, the Trade and Cooperation Agreement sets out 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 further sets out a 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 Groups¹⁶⁶ and a Civil Society Forum.¹⁶⁷ In 2021, the Commission and the 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.¹⁶⁸

Recommendations

The Commission recommends that the NI Office ensures there is adequate and sustained resourcing of the Commission, and the Equality Commission for NI, to fulfil their responsibilities as the dedicated mechanism framework.

The Commission recommends that, further to the UK Government's commitment in Protocol Article 2(2) to facilitate the related work of the Commission, and the Equality Commission for NI, in upholding human rights and equality standards, there is sustained and adequate funding of the Commissions generally.

The Commission recommends that the UK Government ensures that there are no changes to how the Protocol is implemented in domestic law that would result in a weakening of either the Protocol Article 2 commitment or rights, safeguards and oversight mechanisms relating to this commitment.

¹⁶⁶ Article 13, UK-EU Trade and Co-operation Agreement 2021.

¹⁶⁷ Article 14, UK-EU Trade and Co-operation Agreement 2021.

¹⁶⁸ 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 Foreign, Commonwealth and Development Office brings forward amendments to the NI Protocol Bill to address the incomplete protection of the human rights and equality aspects of the Protocol, particularly in Clauses 20, 15 and 13, to ensure that interpretation and enforceability of Protocol Article 2 are not weakened.

The Commission advises the UK Government and NI Executive to embed effective consideration of Protocol Article 2 obligations at all stages of policy and legislative development to ensure 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 Equality Directives.

The Commission recommends that the NI Executive, in particular the Executive Office, Department for Communities, Department for Education and Department for the Economy, ensure that NI law keeps pace with any changes to the Annex 1 Equality Directives, including relevant CJEU case law, which enhance protections.

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

The Commission recommends that the Executive Office works 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.

The Commission recommends that the NI Office and the Executive Office keeps it informed of any future EU equality law developments relevant to the Annex 1 Equality Directives, including via the Joint Consultative Working Group, and have the opportunity to highlight in advance any implications of those changes for equality law in NI.

The Commission recommends that the UK Government and EU Commission ensure effective and timely communication of proposed policy and legislative developments, between the bodies established under the UK-EU Trade and Cooperation Agreement with those established under the UK-EU Withdrawal Agreement and Protocol and the Commission.

The Commission recommends that the NI Office engages with relevant UK Government departments and the supervisory bodies established under the UK-EU Withdrawal Agreement and the UK-EU Trade and Cooperation Agreement to ensure there is effective and regular engagement with equality and human rights stakeholders in NI.

The Commission recommends that the Department of Levelling Up, Housing and Communities reconsiders the Elections Act to ensure there is no reduction of the voting/candidacy rights in local elections in NI of certain EU citizens who arrive in NI after 31 December 2021.

The Commission recommends that the Department of Levelling Up, Housing and Communities sets out, in full, its assessment of conformity of the relevant provisions of the Elections Act with Protocol Article 2.

EU Settlement Scheme and Frontier Workers

The EU Settlement Scheme is relevant to the Commission's role under Protocol Article 2 since it concerns the rights of EU nationals living in NI prior to 1 January 2021 and therefore interacts with the 'no diminution' commitment. The Independent Monitoring Authority has responsibility for monitoring the 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. The Scheme gives effect to the Citizens' Rights provisions in the UK-EU Withdrawal Agreement.¹⁶⁹ Applicants, and their families, can be granted either settled status or pre-settled status. 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.

In 2021, the House of Lords European Affairs Committee published a report on Citizens' Rights providing its assessment of the operation of the EU Settlement Scheme.¹⁷⁰ 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 older people 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

169 Part 2, UK-EU Withdrawal Agreement 2020.

170 House of Lords European Affairs Select Committee, 'Citizens' Rights: 1st Report of Session 2021-2022' (HoL, 2021).

applicants to the EU Settlement Scheme who may lose rights as a result of late applications.

In September 2022, the Independent Monitoring Authority launched a review to find out what measures are being taken across all the regions of the UK to ensure all eligible looked after children and care leavers have their rights protected.¹⁷¹ In 2021, civil society organisations had warned that children, particularly children in and leaving care, may be falling through the gaps as they are less likely to be identified or supported to apply.¹⁷² Following engagement with the Children’s Law Centre, the Commission understands that all outstanding applications were resolved before the deadline for applications. However continued monitoring is required to ensure that any child or care leaver with pre-settled status is supported to make the application for EU Settled Status.

Late applications

The deadline for applications to the EU Settlement Scheme was 30 June 2021. The UK Government confirmed that late applications will be accepted where there are reasonable grounds for failing to meet the deadline. Guidance indicated that a “flexible and pragmatic approach” should be taken; that rights would be protected pending consideration of applications; and that those without status, encountered by Immigration Enforcement, who may be eligible, should be afforded the opportunity to make a late application.¹⁷³

The Independent Monitoring Authority for the Citizens’ Rights Agreements called on the Home Office to provide further clarity on the rights 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.¹⁷⁴

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.¹⁷⁵ 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.¹⁷⁶ The Commission continues to monitor the situation regarding applicants for the EU Settlement Scheme who have had their applications deferred due to minor criminal convictions or pending prosecutions.

171 Independent Monitoring Authority, ‘Press Release: EU citizens watchdog takes steps to secure rights of looked after children and care leavers’, 24 October 2022.

172 Children’s Law Centre, ‘Briefing on the Implications for EU families with Children Who Fail to Apply to the EU Settlement Scheme’ (CLC, 2021).

173 Home Office, ‘EU Settlement Scheme: EU, Other EEA and Swiss Citizens and Their Family Members’ (HO, 2021), at 31-34.

174 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.

175 Home Office, ‘EU Settlement Scheme: Suitability Requirements - Version 6.0’ (HO, 2021).

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

In 2021, the Commission wrote 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.¹⁷⁷ 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.¹⁷⁸ Concerns have been raised with the Commission and the Equality Commission for NI about individuals' access to housing benefit and individuals being denied employment, despite being able to prove that they had applied for settled status, which both Commissions have subsequently raised with the Independent Monitoring Authority. The Commission engages regularly with the Independent Monitoring Authority on issues relating to the operation of the EU Settlement Scheme.

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.¹⁷⁹ 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.¹⁸⁰ The CJEU found that the right to human dignity¹⁸¹ the right to private and family life¹⁸² and the rights of the child¹⁸³ were engaged and decided that such applications could only be refused where claimants and their children would not be exposed to "an actual and current risk of violation of their fundamental rights".¹⁸⁴

In 2021, the Independent Monitoring Authority issued judicial review proceedings against the Home Office, challenging the Home Office's position that EU citizens who failed to apply for Settled Status before the Expiry of their Pre-Settled Status automatically lose their rights, as unlawful.¹⁸⁵ In June 2022, permission was granted for the judicial review hearing against the Home Office. In November 2022, the case was due to be heard and the judgment of the England and Wales High Court is awaited.¹⁸⁶

VI v HM Revenue and Customs (2022)

In 2020, the Social Security Appeal Tribunal (NI) referred a case to the CJEU for a preliminary ruling under Article 267 of the Treaty on the

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

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

179 Regulation 9(3)(d), Universal Credit Regulations (NI) 2016.

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

181 Article 1, EU Charter of Fundamental Rights 2000.

182 Article 7, EU Charter of Fundamental Rights 2000.

183 Article 24, EU Charter of Fundamental Rights 2000.

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

185 Independent Monitoring Authority, 'Press Release: Judicial Review Claim by Independent Monitoring Authority', 14 December 2021.

186 Independent Monitoring Authority, 'Press Release: Independent Monitoring Authority receives permission for judicial review hearing against Home Office', 30 June 2022.

Functioning of the EU. The case concerned VI, a woman from a third country living in NI with her husband, also a third country national, and her four children, one of whom held Irish nationality by virtue of having been born in NI. VI's son had resided legally in the UK for a period of five years and thus acquired permanent residence pursuant to Article 16(1) of the EU Citizens' Rights Directive.¹⁸⁷ The case concerned VI's right to reside in the UK during the periods from 1 May 2006 to 20 August 2006 and from 18 August 2014 to 25 September 2015 and to receive Child Tax Credit and Child Benefit for these periods.¹⁸⁸

In March 2022, the CJEU found that conditions in the Citizens' Rights Directive¹⁸⁹ on the right of residence for more than three months, do not apply to EU citizens who have permanent residence and this extends to family members even where they are not dependants.¹⁹⁰ Thus, the CJEU concluded that neither VI nor her son required comprehensive sickness insurance cover to retain their right to reside in the UK since 2011.¹⁹¹

The CJEU also found that the EU Citizens' Rights Directive makes it clear that, for periods before the child acquired permanent residence in the UK, not only the EU citizen, but also members of their family who reside with them, must have comprehensive sickness insurance cover.¹⁹² Thus the CJEU concluded that before 2011, when VI's son acquired the right to permanent residence, both VI and her son were required to have comprehensive sickness insurance cover within the meaning of the EU Citizens' Rights Directive. In October 2022, the UK Government responded to this judgment in an update to its guidance to Home Office staff on European Economic Area national qualified persons.¹⁹³ It confirmed that European Economic Area nationals living in the UK before 31 December 2020 did not need to be exercising rights under the EU Treaties or have the right to reside under EU Citizens' Rights Directive in order to be considered ordinarily resident for the purpose of accessing the NHS free of charge.¹⁹⁴

EU Citizenship and Workers' Rights

Under Article 26 of the UK-EU Withdrawal Agreement 2020, frontier workers are entitled to be issued with appropriate documentation which certifies their rights as frontier workers. Article 10(1)(c) of the Withdrawal Agreement extends the rights set out in Part Two of the treaty, to "[EU] citizens who exercised their right as 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.

187 Directive 2004/38/EC, 'Directive of the European Parliament and of the Council on the Right of Citizens of the European Union and their Family Members to Move and Reside Freely within the Territory of the Member States', 29 April 2004.

188 *VI v HM Revenue and Customs*, C-247/20, 10 March 2022.

189 Directive 2004/38/EC, 'Directive of the European Parliament and of the Council on the Right of Citizens of the European Union and their Family Members to Move and Reside Freely within the Territory of the Member States', 29 April 2004.

190 *VI v HM Revenue and Customs*, C-247/20, 10 March 2022, at paras 54-58.

191 *Ibid*, at para 60.

192 *Ibid*, at para 63.

193 Home Office, 'European Economic Area Nationals: Qualified Persons - Version 9.0' (HO, 2022), at 41.

194 *Ibid*.

The Frontier Workers Permit Scheme was established by the UK Government to give effect to this obligation.¹⁹⁵ Any EU citizens not qualifying for the scheme, and wishing to come to the UK to work on or after 1 January 2021, will have to apply through the new points-based immigration system.

As their right to work in the UK is preserved by the Common Travel Area arrangements, Irish citizens who live in Ireland and who cross the border into NI for work purposes were advised by the UK Government that they did not need to apply to the frontier workers scheme, but they could do so if they wished.¹⁹⁶ 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.¹⁹⁷

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.¹⁹⁸ The regulations confirm that applications can be refused on grounds of public policy, public security, public health or on grounds of misuse of rights.¹⁹⁹ The regulations apply to a number of EU citizens travelling between Ireland and NI for work.

Several 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.²⁰⁰

Following earlier research,²⁰¹ the Commission has contracted researchers to explore the protection of rights under the Frontier Worker scheme and its interaction with Protocol Article 2. This research is due to be completed in 2023.

195 Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020.

196 Home Office, 'Frontier Worker Permit'. Available at: <https://www.gov.uk/frontier-worker-permit>

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

198 Regulation 4, Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020.

199 Regulation 18, Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020.

200 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.

201 Tamara Hervey, 'Brexit, Health and Its Potential Impact on Article 2 of the Ireland/NI Protocol' (NIHRC, 2022), at Chapter 3.

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.

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

The Commission recommends that the Home Office ensures that all eligible EU citizens with pre-settled status are automatically transitioned to the EU Settlement Scheme within the appropriate timescales without any loss of rights or entitlements.

The Commission advises that people living and working across the border are in a particularly vulnerable situation and recommends that the Department for Communities provides 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.

Retained EU law

In 2017, the UN Working Group on the Universal Periodic Review recommended that “in view of the process of leaving the EU, [the UK should] ensure that any new legislation aims at strengthening human rights in the entire jurisdiction of the country”.²⁰²

The EU (Withdrawal) Act 2018 repealed the European Communities Act 1972, which gave effect to EU law within the UK domestic legal framework before 1 January 2021. The 2018 Act then provided for the body of existing EU law to be ‘retained’ in the UK, so that it would continue to have effect after 1 January 2021, subject to amendment or repeal over time.

Where required by the UK-EU Withdrawal Agreement, both the EU Charter and the general principles of EU law will continue to be relevant to the provisions of the Withdrawal Agreement, including Protocol Article 2.²⁰³ This is an exception from the general provision of the EU (Withdrawal) Act 2018 which provides that the EU Charter is not carried over by the general rules on the retention of EU law and is not part of UK law on or after 1 January 2021.²⁰⁴

The question of whether a piece of legislation falls within the category of ‘retained EU law’ is not material to whether it falls within the scope of Protocol Article 2. It is not necessary for EU-derived UK law underpinning the rights, safeguards and equality of opportunity protections in the

202 A/HRC/36/9, ‘Report of the Working Group on the Universal Periodic Review - UK of Great Britain and NI’, 14 July 2017.

203 Article 4, UK-EU Withdrawal Agreement 2020.

204 Section 5, EU (Withdrawal) Act 2018. See also *Re SPUC Pro-Life Limited* [2022] NIQB 9, at paras 78 and 115.

relevant part of the Belfast (Good Friday) Agreement 1998 to be part of retained EU law. Nevertheless, particular care should be taken by the NI Executive and UK Government when repealing or amending retained EU law to ensure it does not result in a diminution of rights, safeguards or equality of opportunity protections, contrary to Protocol Article 2.

In 2021, the England and Wales Court of Appeal identified a number of principles to be considered when departing from retained EU caselaw and confirmed that the court should take into account the meaning and effect of a retained EU measure 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.²⁰⁵

In 2021, the UK Government announced a planned review of retained EU law to accelerate its repeal and amendment.²⁰⁶ In April 2022, the Commission, together with the Equality Commission for NI, made a joint submission to the House of Commons European Scrutiny Committee inquiry into the future of retained EU law. The Commissions cautioned against a standard approach which would facilitate amendment or repeal of retained EU law by an ‘accelerated procedure’ or subordinate legislation and advised that, given the volume of retained EU law relevant to the non-diminution commitment, excessive reliance on secondary legislation could increase the risk of undermining Protocol Article 2.²⁰⁷

In addition, the Commissions advised that the no diminution requirement applies to the substance of the rights protected as well as to the procedural safeguards relevant to implementation and enforcement of rights. Therefore, changes to the status of EU-derived UK law which, for example, excluded specific EU general principles, changed how courts interpret that law, and/or reduced or limited the means by which rights can be asserted or enforced, could potentially constitute a diminution of rights contrary to Protocol Article 2.²⁰⁸ The Commissions further advised that the UK Government has made internationally binding commitments in relation to the supremacy of the UK EU Withdrawal Agreement and EU law made applicable under it, which are central to the enforcement of the human rights and equality commitment under Protocol Article 2.

In March 2022, the Commission highlighted concerns about amendments to retained EU law over time without adequate parliamentary scrutiny in its submission to the fourth cycle of the UN Human Rights Council’s Universal Periodic Review of the UK. The Commission advised that care should be taken when repealing or amending retained EU law to ensure it does not result in a diminution of rights contrary to Protocol Article 2 and that any change impacting human rights or equality, should progress changes by primary legislation, rather than secondary legislation or other ‘accelerated process’.²⁰⁹

205 *Lipton and Another v BA City Flyer Ltd* [2021] EWCA Civ 454, at para 83.

206 UK Parliament Hansard, ‘House of Lords: Brexit Opportunities - Lord Frost’, 16 September 2021.

207 NI Human Rights Commission and Equality Commission for NI, ‘Submission of the NI Human Rights Commission and Equality Commission NI to Retained EU Law: Where Next? An inquiry by the European Scrutiny Committee’ (NIHRC and ECNI, 2022).

208 Ibid.

209 NI Human Rights Commission, ‘NI Human Rights Commission Submission to the UN Human Rights Council’s Universal Periodic Review of the UK’ (NIHRC, 2022), at para 12.

In September 2022, the Retained EU Law (Revocation and Reform) Bill was introduced to the UK Parliament. The Bill contains a sunset clause for all EU derived subordinate legislation and retained direct EU law by 31 December 2023 unless that sunset provision is extended to a time no later than June 2026. The Bill excludes NI legislation from the definition of EU derived subordinate legislation, but none for retained direct EU law. Retained EU law will be known as assimilated law after 31 December 2023. The Bill removes general principles from domestic law and includes a power to restate retained EU law and assimilated law. In November 2022, the Retained EU Law (Revocation and Reform) Bill was at Committee Stage in the House of Commons. The Commission is currently reviewing the Bill.

Recommendations

The Commission recommends that the Department for Business, Energy and Industrial Strategy introduces safeguards to the Retained EU Law (Revocation and Reform) Bill to prevent any breach of human rights and equality obligations deriving from the UK-EU Withdrawal Agreement, including Protocol Article 2.

The Commission recommends that the Department for Business, Energy and Industrial Strategy undertakes an assessment of all retained EU law subject to the sunset clause in the Retained EU Law (Revocation and Reform) Bill for compliance with the commitment in Protocol Article 2.

The Commission recommends that, irrespective of the categorisation of retained EU law, particular caution be exercised in amending or repealing EU-derived domestic legislation in areas which overlap transferred and reserved or excepted matters relating to NI.

The Commission recommends that no change to retained EU law be made which would weaken Protocol Article 2, its enforceability or oversight mechanisms.

The Commission recommends that amendment or repeal of retained EU law, affecting human rights and/or equality protections in NI, should be progressed on the basis of continuing adherence to the UK constitutional convention of providing for policy change via the primary legislative process, with technical and operational detail addressed in subordinate legislation.

Equality and Non-discrimination

Age discrimination

In 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”.²¹⁰

Protocol Article 2 provides specific protection against discrimination in the six Annex 1 Equality Directives, including the EU Employment Equality (Framework) Directive which protects against discrimination on the grounds of age.²¹¹ NI law must keep pace with any changes made by the EU to improve the minimum levels of protection, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.²¹²

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.²¹³ The Commission welcomed the initiative but, along with the NI Commissioner for Children and Young People and a number of children’s organisations, highlighted that discrimination against children under 16 years old should be included.²¹⁴

In 2022, further work is required to inform the potential scope of any legislation regarding age discrimination in NI. Officials are considering next steps,²¹⁵ however any advancement is delayed by the suspension of the NI Assembly and NI Executive.²¹⁶

210 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.

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

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

213 Office of the First Minister and Deputy First Minister, ‘Proposals to Extend Age Discrimination Legislation (Age Goods, Facilities and Services) Consultation Document’ (OFMDFM, 2015).

214 NI Commissioner 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 CRC Committee 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).

215 NI Assembly Hansard, ‘Written Question: Age Discrimination Legislation - Andrew Muir MLA - AQW 28071/17-22’, 26 January 2022.

216 ‘Equality campaigners calls for change in NI age discrimination laws’, *BBC News NI*, 13 August 2022.

Recommendations

The Commission recommends that the Executive Office promptly introduces legislation that extends age discrimination protection in the provision of goods, facilities and services to all children under 18 years old. Any proposals should be developed in consultation with children, including the NI Youth Assembly, and representative organisations.

In line with the ‘keeping pace’ obligations under Protocol Article 2, the Commission advises the Executive Office to monitor any proposed changes by the EU to the EU Employment Equality (Framework) Directive, as well as relevant case law of the CJEU.

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”.²¹⁷

In 2020, the UK Government published an update on implementing its National Action Plan, which aims to embed the UN Guiding Principles on Business and Human Rights.²¹⁸ It 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 Business and Human Rights 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 Business and Human Rights Forum is chaired by A and L Goodbody Associate, Stephen Abram. The Vice-Chair is Caterpillar Human Resources Manager, Barbara Henry.

In 2022, the Business and Human Rights Forum hosted meetings with the then Minister of Finance, Conor Murphy MLA and former Ireland Ambassador to the UN and Co-Chair of UN Negotiations on Sustainable Development Goals, David Donoghue. It also promoted the Department of Justice’s work to tackle modern slavery and human trafficking, which focuses on the issue of transparency in supply chains and how that relates to business and the public sector in NI.

The Business and Human Rights Forum, in conjunction with the Labour Relations Agency and the Commission, is considering a toolkit to assist in assessing issues around compliance and good practice in the area of employment rights.

217 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.

218 Foreign and Commonwealth Office, ‘Implementing the UN Guiding Principles on Business and Human Rights: May 2020 Update’ (FCO, 2020).

Public procurement

In 2013, the Commission produced a report on public procurement and human rights.²¹⁹ In 2019, a guidance note on public procurement and human rights was published by the Department of Finance.²²⁰

In 2020, the then Minister of Finance, Conor Murphy MLA, reconstituted the Procurement Board and committed to elevating the status of procurement guidance notes to ensure compliance across the NI Executive. In February 2022, the then Minister of Finance announced a series of changes to public procurement including the adoption of four new procurement policy notes on by the NI Executive.²²¹ These included one on human rights in public procurement, which requires that NI Departments must incorporate human rights considerations into contracts when conducting a procurement process.²²² The Department of Finance is working with the NI Business and Human Rights Forum to promote the human rights in public procurement policy note and to assist businesses in their understanding and implementation of it.²²³

Recommendations

The Commission recommends that the NI Executive ensures that all relevant stakeholders in NI are provided with meaningful opportunities to assist in the design, implementation and monitoring of measures aimed at implementing the UN Guiding Principles on Business and Human Rights in NI.

The Commission recommends that the NI Executive adopts a national action plan on business and human rights for NI.

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.²²⁴ 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”.²²⁵ The CoE 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, taking inspiration from the Equality Act 2010, and taking account of the recommendations of the Equality Commission NI”.²²⁶

219 NI Human Rights Commission, ‘Public Procurement and Human Rights in NI’ (NIHRC, 2013).

220 Department of Finance, ‘Construction and Procurement Delivery Procurement Guidance Note: Human Rights in Public Procurement’ (CPD, 2018).

221 Minister of Finance, ‘Press Statement: Procurement changes will benefit local companies’, 7 February 2022.

222 Department of Finance, ‘PPN 05/21 Human Rights in Public Procurement’ (DoF, 2021).

223 Minister of Finance, ‘Press Statement: Procurement changes will benefit local companies’, 7 February 2022.

224 E/C.12/GBR/CO/6, ‘UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI’, 14 July 2016, at para 22.

225 Ibid, at para 23.

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

In 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”.²²⁷

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... [UK]”.²²⁸

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 1998 as a result of the UK leaving the EU, including the right to equality of opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity. Protocol Article 2 requires the UK Government to ensure NI law ‘keeps pace’ with any changes made by the EU to six Annex 1 Equality Directives which improve the minimum levels of protection available, after 1 January 2021, including the EU Racial Equality Directive.²²⁹

In NI, discrimination is prohibited across several pieces of legislation, 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. Furthermore, NI legislation does not provide for cases of intersectional multiple discrimination. At present in NI, each ground for discrimination must form its own case, meaning it must be considered and ruled on separately.

In March 2022, the House of Commons NI Affairs Committee expressed concern that anti-discrimination legislation in NI “lags behind the rest of the UK”.²³⁰ The NI Affairs Committee welcomed proposals from the Executive Office to consult on updating NI race-related legislation, but urged for the process to be expedited “to afford the people of NI the same rights and protections as their fellow citizens throughout the rest of the UK”.²³¹

In April 2022, the Commission responded to EU Commission public consultation on potential gaps in the EU Racial Equality Directive and how these gaps should be addressed.²³² In its submission, the Commission highlighted that there has been limited progress to consolidate, strengthen and clarify existing equality protections in NI thus far,

227 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 17(b).

228 CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI’, 14 March 2019, at para 16(a).

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

230 House of Commons NI Affairs Committee, ‘The Experiences of Minority Ethnic and Migrant People in NI: Second Report of Session 2021-2022’ (NIAC, 9 March 2022), at 3.

231 Ibid, at 15.

232 European Commission, ‘Addressing Possible Gaps in the Racial Equality Directive – Public Consultation’ (EU Commission, 2022).

despite numerous recommendations from various international standard bodies.²³³ It recommended that the EU Directive be amended to include a requirement that all jurisdictions to which the EU Directive applies take steps to strengthen, simplify and harmonise anti-discrimination protections across all protected categories.²³⁴ In accordance with Protocol Article 2, if the EU Racial Equality Directive is amended in such a way that enhances rights and safeguards, then NI law would then be required to keep pace with those changes.

In October 2022, the Executive Office confirmed that there is currently no agreement by the NI Executive to bring forward a Single Equality Act for NI.²³⁵

Recommendations

The Commission continues to recommend that the Executive Office introduces a Single Equality Act for NI and that the NI Executive supports the Executive Office in securing the necessary political consensus to deliver this.

The Commission advises the Executive Office to monitor any proposed changes by the EU to the six Annex 1 Equality Directives, as well as relevant CJEU case law, and pay particular attention to the ongoing consultation by the EU on the Racial Equality Directive.

Conversion therapy

In 2016, the UN CRC Committee condemned “the imposition of so-called “treatments” to try to change sexual orientation and forced surgeries or treatments on intersex adolescents” and urged “States to eliminate such practices, repeal all laws criminalising or otherwise discriminating against individuals on the basis of their sexual orientation, gender identity or intersex status and adopt laws prohibiting discrimination on those grounds”.²³⁶

In 2020, the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, called for a global ban on conversion therapy, with particular protections required for children.²³⁷ The Independent Expert defines 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

233 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; CRI(2016)38, ‘European Commission on Racial Intolerance Report on the UK (Fifth Monitoring Cycle)’ (ECRI, 2016), at para 22; 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.

234 NI Human Rights Commission, ‘Response to the European Commission Consultation on the Racial Equality Directive (Directive 2000/43/EC)’ (NIHRC, 2022).

235 Email from the Executive Office to NI Human Rights Commission, 11 October 2022.

236 CRC/C/GC/20, ‘UN CRC Committee General Comment No 20: Implementation of the Rights of the Child During Adolescence’, 6 December 2016.

237 A/HRC/44/53, ‘Report of the UN Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity: Practices of So-called “Conversion Therapy”’, 1 May 2020, at paras 17 and 55.

*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 effecting a change from non-hetrosexual to heterosexual and from trans or gender diverse to cisgender. Depending on the context, the term is used for a multitude of practices and methods, some of which are clandestine and therefore poorly documented.*²³⁸

In 2021, the Expert Advisory Panel on a Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), Intersex+ Strategy for NI defined conversion therapy as:

*any practice designed to change a person's sexual orientation or gender identity. It can be distinguished from other practices designed to provide guidance and support to [lesbian, gay, bisexual, transgender, queer (or questioning), intersex +]... people provided by psychotherapists, counsellors or faith leaders because it operates under the premise that a specific sexual orientation, gender identity, or gender expression is pathological and/or evidence of a mental illness that can be cured. Unlike therapies that facilitate a person's open and autonomous exploration of their sexual and gender futures, these therapies are discriminatory from the outset because [conversion therapy]... designates identities into normal and abnormal categories. As such, it is proscriptive because it attempts to modify identity into traditional heterosexual and cis-gendered models. It includes both pseudo-psychological treatments and physical interventions. In its 'therapeutic' forms it is a scientifically discredited, unprofessional and dangerous practice.*²³⁹

The Expert Advisory Panel concluded that any such practices should be made illegal.²⁴⁰ It also recommended that steps are taken to ensure such practices are not commissioned or funded and that appropriate medical services are created to provide free access to support for victims.²⁴¹

In 2021, the UK Government committed to banning conversion therapy²⁴² and consulted on proposals intending to ban conversion therapy of all kinds for anyone under the age of 18 and adults who are vulnerable and not able to consent.²⁴³ The proposals excluded provisions relating to changing someone's gender identity, which are to be dealt with separately.²⁴⁴ The NI Assembly also passed a motion calling on the then Minister for Communities, Deirdre Hargey MLA, to commit to bringing forward legislation to ban conversion therapy in all its forms before the end of the current NI Assembly mandate.²⁴⁵ The Commission wrote to the then Minister for Communities in support of the motion.²⁴⁶

238 Ibid, at para 17.

239 Department for Communities, 'Lesbian, Gay, Bisexual, Transgender, Queer (Or Questioning), Intersex+ Strategy Expert Advisory Panel - Themes and Recommendations' (DfC, 2021), at Section 6.2.

240 Ibid, at para 33.

241 Ibid, at para 33.

242 Prime Minister's Office, 'The Queen's Speech 2021' (UK Gov, 2021).

243 Government Equalities Office, 'Banning Conversion Therapy' (GEO, 2021).

244 'What is conversion therapy and when will it be banned?', *BBC News*, 11 May 2022.

245 Department for Communities, 'Press Release: Conversion Therapy must end - Hargey', 20 April 2021.

246 Letter from NI Human Rights Commission to the Minister for Communities, Deirdre Hargey MLA, 5 May 2021.

In 2022, work is continuing to inform the drafting of legislation. The Department for Communities is working closely with representatives of those most affected.²⁴⁷ However, no new primary legislation can be progressed with the continued absence of a functioning NI Executive and NI Assembly.²⁴⁸

Recommendations

The Commission recommends that the Department for Communities, with the support of the NI Executive, promptly introduces legislation in NI to ban all practices of conversion therapy aimed at changing or suppressing a person’s sexual orientation or gender identity, by any person or group of persons. The Department for Communities should be guided by the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity and the Expert Advisory Panel on a Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), Intersex+ Strategy for NI’s definitions of conversion therapy in developing this legislation and its broader work related to this issue.

Discrimination on grounds of sexual orientation

In 2016, the UN CRC Committee noted that “many children in certain groups, including... lesbian, gay, bisexual... children, continue to experience discrimination and social stigmatisation, including through the media”.²⁴⁹ The UN CRC Committee recommended that the UK Government and NI Executive “strengthen its awareness-raising and other preventive activities against discrimination and stigmatization and, if necessary, take temporary special measures for the benefit of children in vulnerable situations”.²⁵⁰

Protocol Article 2 provides specific protection against discrimination in the six Annex 1 Equality Directives, including the Employment Equality (Framework) Directive which protects against discrimination on the grounds of sexual orientation.²⁵¹ 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.²⁵²

The rights, safeguards and equality of opportunity provisions chapter of the Belfast (Good Friday) Agreement 1998 includes the right of victims “to

247 NI Assembly Hansard, ‘Written Question: Conversion Therapy - Colin McGrath MLA - AQW 2582/22-27’, 14 July 2022.

248 Ibid.

249 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 21(c).

250 Ibid, at para 22(c).

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

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

remember as well as contribute to a changed society”.²⁵³ EU obligations underpinning the rights of victims include the EU Victims’ Directive²⁵⁴ as well as other relevant EU laws.²⁵⁵

The EU Victims’ Directive establishes minimum standards on victims’ rights and recognises that victims of hate crime are at a high risk of secondary and repeat victimisation and, as such, there should be a strong presumption that those victims will benefit from special protection measures during criminal proceedings.²⁵⁶

In 2021/2022, the Police Service NI reported that there were 462 homophobic motivated incidents, an increase from 366 in 2020/2021.²⁵⁷ The number of homophobic crimes recorded by the police was 336, an increase from 246 in 2020/2021. These are the highest annual figures since the start of the data series in 2004/2005.²⁵⁸

Under the Criminal Justice (No 2) (NI) Order 2004, sexual orientation is recognised as a ground for inciting hatred. In 2020, the Independent Hate Crime Review recommended that statutory aggravations should be added to all existing offences in NI, including homophobic hate crime, following the model adopted in Scotland.²⁵⁹ In 2021, the Department of Justice committed to considering how to implement the Independent Hate Crime Review’s recommendations in a two-stage consultation process.²⁶⁰ In 2022, stage one of the process, which considered statutory aggravations, has been completed. In its response to the first consultation, the Commission recommended that careful consideration is given to the statutory aggravation model, alongside an evaluation of best practice from other jurisdictions.²⁶¹ In November 2022, the Department of Justice was considering the responses received and planning for the second stage of the consultation process.²⁶²

In 2020, the New Decade, New Approach Agreement committed the NI Executive to publish a Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), Intersex+ Strategy.²⁶³ The Department for Communities appointed an Expert Advisory Panel and created a Co-design Group made up of key stakeholders, including the Commission. A cross-departmental working group was also created. In 2022, the Expert Advisory Panel for the Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), Intersex+

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

254 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.

255 Directive 2011/36/EU ‘EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims’, 5 April 2011; Directive 2011/92/EU, ‘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, ‘EU Council Directive Relating to the Compensation to Crime Victims’, 29 April 2004.

256 Article 8 and Recitals 56-58, 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.

257 NI Statistics and Research Agency, ‘Incidents and Crimes with a Hate Motivation Recorded by the Police in NI: Update to 31 March 2022’, 12 May 2022.

258 Ibid.

259 Independent Hate Crime Review Team, ‘Hate Crime Legislation in NI: Independent Review’ (DoJ, 2020).

260 Department of Justice, ‘Improving the Effectiveness of Hate Crime Legislation in NI: A Public Consultation and Call for Views’ (DoJ, 2022).

261 NI Human Rights Commission, ‘Response to Public Consultation on Improving the Effectiveness of Hate Crime Legislation in NI’ (NIHRC, 2022).

262 Department of Justice, ‘Improving the Effectiveness of Hate Crime Legislation in NI: A Public Consultation and Call for Views’ (DoJ, 2022).

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

Strategy for NI published its report, which recommended that the strategy considers discrimination on the grounds of sexual orientation.²⁶⁴ As an observer member of the Co-Design Group, the Commission identified, among other human rights considerations, the need to embed consideration of Protocol Article 2 into the strategy. A public consultation on the strategy was due to take place in early 2022, but this process has been delayed. The Department for Communities has confirmed that the Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), Intersex+ Strategy cannot progress until a new NI Executive is in place.²⁶⁵

Lee v UK (2021)

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 discrimination on grounds of sexual orientation, as the same bakery would have refused to supply this particular cake to anyone, whatever their personal characteristics.²⁶⁶

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.²⁶⁷ In January 2022, the ECtHR declared the application inadmissible. The ECtHR found that the applicant had not exhausted all domestic remedies as he had not invoked his ECHR rights during the domestic proceedings.²⁶⁸

Recommendation

The Commission recommends that the Department of Justice ensures that the Hate Crime Review Team's recommendations on homophobic hate crime are promptly implemented in full and that the Department of Justice considers carefully and ensures compliance with Protocol Article 2, including the provisions of the EU Victims' Directive in the development of hate crime legislation.

The Commission recommends that the Department for Communities promptly publishes and implements a robust and adequately resourced Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), Intersex+ Strategy for NI which takes a human rights-based approach in line with international human rights standards and Protocol Article 2. This strategy should be accompanied by a measurable plan of action and effective monitoring mechanisms.

The Commission recommends that the Executive Office introduces clear guidance that provides legal certainty for businesses and customers on what constitutes discrimination. This guidance should clarify that the right to hold religious beliefs is absolute, but the right to manifest one's religion or beliefs is qualified.

264 Department for Communities, 'Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), Intersex+ Strategy Expert Advisory Panel – Themes and Recommendations' (DfC, 2021), at page 76.

265 Letter from Minister for Communities. Deirdre Hargey MLA, to Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), Intersex+ Strategy Co-Design Group, 18 July 2022.

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

267 'Ashers 'gay cake' row referred to European Court', *BBC News*, 15 August 2019.

268 *Lee v UK* (2021) ECHR 1129.

Gender Equality Strategy

In 2015, the UN Human Rights Committee recommended that the UK Government and NI Executive “ensure that all existing and future gender equality strategies and policies, including the gender equality strategy for NI, identify and address effectively the barriers hindering women’s access to high positions in the civil service and the judiciary”.²⁶⁹

In 2016, the UN ICESCR Committee recommended that the UK Government and NI Executive “take all necessary measures to ensure the full enjoyment of economic, social and cultural rights by all persons under its jurisdiction”.²⁷⁰

In 2017, the UN CRPD Committee recommended that the UK Government and NI Executive “in close consultation with organisations of women and girls with disabilities, mainstream the rights of women and girls with disabilities into disability and gender equality policies”.²⁷¹

Protocol Article 2 provides specific protection against discrimination in the six Annex 1 Equality Directives, including four equal treatment directives which protect against gender discrimination in the areas of employment and vocational training,²⁷² access to goods and services,²⁷³ and social security.²⁷⁴ NI law must keep pace with any changes made by the EU, which improve the minimum levels of protection, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.²⁷⁵

The rights, safeguards and equality of opportunity provisions set out in the relevant chapter of the Belfast (Good Friday) Agreement 1998 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 EU Parental Leave Directive²⁷⁶ and the EU Pregnant Worker’s Directive,²⁷⁷ there should be no regression of rights, safeguards and equality of opportunity following the UK withdrawal from the EU.

In 2020, the New Decade, New Approach Agreement committed the NI Executive to publish a new Gender Equality Strategy.²⁷⁸ The Department

269 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 12.

270 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 8.

271 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.

272 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.

273 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.

274 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.

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

276 Directive 2010/18/EU, ‘EU Council Directive Implementing the Revised Framework Agreement on Parental Leave’, 8 March 2010.

277 Directive 92/85/EEC, ‘EU 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.

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

for Communities appointed an Expert Advisory Panel and created a Co-Design Group made up of key stakeholders, including the Commission. A cross-departmental working group was also created. In 2021, the Expert Advisory Panel published its report, which highlighted key human rights obligations relevant to gender equality and outlined several key themes for discussion by the Co-Design Group.²⁷⁹ In 2022, the Co-Design Group and cross-departmental working groups have continued to meet regularly. The Commission has raised, among other human rights considerations, how gender equality engages commitments under Protocol Article 2. A public consultation on the Gender Equality Strategy was due to take place in early 2022, but this process has been delayed. The Department for Communities has confirmed that the Gender Equality Strategy cannot progress until a new NI Executive is in place.²⁸⁰

Recommendations

The Commission recommends that the Department for Communities promptly publishes and implements a robust, gender-sensitive Gender Equality Strategy, which takes a human rights based approach in line with international human rights standards and Protocol Article 2. This strategy should be accompanied by a measurable plan of action and effective monitoring mechanisms.

Gender recognition

In 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; [and]*
- 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.*²⁸¹

In 2015, the then CoE High Commissioner for Human Rights, Nils Muižnieks, published several recommendations on 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

279 Department for Communities, 'Gender Equality Strategy Expert Advisory Panel Report' (DfC, 2021), at 12.

280 Letter from Department for Communities to NI Human Rights Commission, 18 July 2022.

281 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.

*male or female gender marker. Member States should consider the proportionality of requiring gender markers in official documents.*²⁸²

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 1998 as a result of the UK leaving the EU, including the right to equality of opportunity in all social and economic activity, regardless of gender. Protocol Article 2 provides specific protection against discrimination in the six Annex 1 Equality Directives.²⁸³ Four of these non-discrimination EU Directives cover employment and vocational training,²⁸⁴ access to goods and services,²⁸⁵ and social security²⁸⁶ and relate to a prohibition of discrimination on grounds of sex, which includes 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”.²⁸⁷ NI law must keep pace with any changes made by the EU to improve the minimum levels of protection, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.²⁸⁸

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 UK is centralised and based in England. Consultations on possible amendments to the gender recognition process have been conducted in England, Wales and Scotland, but not NI.²⁸⁹ 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 that an applicant is over 18, diagnosed with gender dysphoria, has lived

282 CoE High Commissioner for Human Rights, ‘Human Rights and Intersex People’ (CoE, 2015).

283 Article 13, Ireland/NI Protocol to the UK-EU Withdrawal Agreement 2020; Directive 2000/43/EC, ‘EU Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin’, 29 June 2000; Directive 2000/78/EC, ‘EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation’, 27 November 2000; Directive 2004/113/EC, ‘EU Council Directive on Implementing the Principle of Equal Treatment Between Men and Women in the Access To and Supply of Goods and Services’, 13 December 2004; Directive 2006/54/EC, ‘EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation’, 5 July 2006; Directive 2010/41/EU, ‘EU Parliament and EU Council Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity’, 7 July 2010.; Directive 79/7/EEC, ‘EU Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security’, 19 December 1978.

284 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.

285 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.

286 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.

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

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

289 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).

in the acquired gender for more than two years and intends to do so permanently.²⁹⁰ In 2022, the fee for a gender recognition certificate in NI was reduced to five pounds.²⁹¹ Research is currently being conducted by Queen's University Belfast, on behalf of the Department of Finance, to inform how legislative change could be brought forward to enable people to declare their own gender identity.²⁹²

In 2022, there continues to be significant delays in accessing gender-affirming healthcare in NI, with many people having been on the waiting list to access Brackenburn clinic for three to four years.²⁹³

In 2021, the Expert Advisory Panel for the Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), Intersex+ Strategy recommended that gender recognition legislation is fit for purpose, including that it recognises and is reflective of the diversity of genders in NI.²⁹⁴ After a process of engaging with the Co Design Group and cross-departmental group focused on the strategy, it was due to be subject to a public consultation in early 2022. The Commission is a member of the Co-Design group and, among other human rights considerations, has identified gender identity and gender recognition as issues engaging commitments under Protocol Article 2. However, the Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), Intersex+ Strategy cannot progress any further until a new NI Executive is in place.²⁹⁵

Recommendations

The Commission recommends that the Department for Communities promptly publishes and implements a robust and adequately resourced Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), Intersex+ Strategy for NI that deals with gender recognition and takes a human rights based approach in line with international human rights standards and Protocol Article 2. This strategy should be accompanied by a measurable plan of action and effective monitoring mechanisms.

The Commission recommends that the Department of Health ensures that the gender recognition process in NI is amended to reflect the self-declaration model. This process should be affordable, respectful and accessible, including effectively training staff and professionals across an individual's gender recognition journey.

The Commission recommends that the Department of Health, Department of Communities and Department of Education ensure that transgender children are effectively supported and that the best interests of the child are a primary consideration.

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

291 Ibid.

292 Queen's University Belfast, 'Press Release: Researchers calling for views on NI's Gender Recognition Act', 10 March 2022.

293 Rainbow Project, 'Trans Healthcare'. Available at: <https://www.rainbow-project.org/trans-healthcare-nhs-and-private/>

294 Department for Communities, 'Lesbian, Gay, Bisexual, Transgender, Queer (Or Questioning), Intersex+ Strategy Expert Advisory Panel – Themes and Recommendations' (DfC, 2021).

295 Letter from Department for Communities to NI Human Rights Commission, 18 July 2022.

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”.²⁹⁶

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”.²⁹⁷ In addition, the UN CERD Committee also recommended that 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”.²⁹⁸

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”.²⁹⁹

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 1998 as a result of the UK leaving the EU, including the right of victims “to remember as well as contribute to a changed society”.³⁰⁰ EU obligations underpinning the rights of victims include the EU Victims Directive³⁰¹ as well as other relevant EU laws.³⁰² The EU Victims’ Directive recognises that victims of hate crime are at a high risk of secondary and repeat victimisation and, as such, there should be a strong presumption that those victims will benefit from special protection measures during criminal proceedings.³⁰³

In 2013, the Together: Building a United Community was published, which aimed to promote good race relations and social cohesion.³⁰⁴ In 2015, the

296 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 10.

297 CERD/C/GBR/CO/21-23, ‘Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of UK’, 26 August 2016, at para 16(a) and (b).

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

299 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 63.

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

301 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.

302 Directive 2011/36/EU ‘EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims’, 5 April 2011; Directive 2011/92/EU, ‘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, ‘EU Council Directive Relating to the Compensation to Crime Victims’, 29 April 2004.

303 Article 8 and Recitals 56-58, 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.

304 The Executive Office, ‘Together: Building a United Community’ (TEO, 2013).

Race Equality Strategy 2015-2025 was published, which aimed to tackle racial inequalities and eradicate racism and hate crime.³⁰⁵

In 2021/2022, there were 3,119 recorded incidents of hate crime and 2,236 recorded hate crimes, an increase from 2,493 recorded incidents of hate crime and 1,757 recorded hate crimes in 2020/2021.³⁰⁶ The number of hate motivated incidents recorded rose across five of the six hate motivations (racist, homophobic, sectarian, disability and faith/religion), when compared with the previous 12 months. The number of crimes recorded also increased across all six motivations (racist, homophobic, sectarian, disability, faith/religion and transphobic). This was the highest number of crimes recorded since the beginning of the data series for four out of six motivations (racist, homophobic, disability and transphobic).³⁰⁷

In 2020, the Independent Hate Crime Review Team published its report on improving hate crime legislation in NI.³⁰⁸ In 2021, the Department of Justice published its response to the Independent Review, indicating that no recommendations had been wholly rejected at this stage.³⁰⁹ The Department of Justice has put in place a dedicated Hate Crime Branch to take forward work on implementing the Independent Review's recommendations.³¹⁰

The Department of Justice committed to considering how to implement the Independent Hate Crime Review's recommendations in a two-stage consultation process.³¹¹ In 2022, stage one of the process, which considered statutory aggravations, has been completed. The first stage focused on proposals regarding a new statutory aggravation hate crime model, sectarian offending in hate crime, stirring up offences, special measures and cross-examination and the possibility of exploring misogyny and transmisogyny in hate crime law.³¹² In its response to the consultation, the Commission recommended that the Department of Justice carefully consider the provisions of the EU Victims' Directive within the context of Protocol Article 2 in the development of hate crime legislation.³¹³ The EU Victims' Directive requires that victims receive "timely and individual assessments to assess their specific protection needs" which pays particular attention to victims of hate crime, gender-based violence and disabled victims.³¹⁴ The Commission's response also highlighted that human rights standards are clear that a gender-sensitive approach should be taken to addressing gender-based violence,³¹⁵ a position that is echoed

305 The Executive Office, 'Race Equality Strategy' (TEO, 2015).

306 Police Service NI, 'Incidents and Crimes with a Hate Motivation Recorded by the Police Service in NI' (PSNI, 2022).

307 Ibid.

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

309 Department of Justice, 'Review of Hate Crime Legislation in NI - Departmental Response' (DoJ, 2021), at 3.

310 Ibid, at 13.

311 Department of Justice, 'Improving the Effectiveness of Hate Crime Legislation in NI: A Public Consultation and Call for Views' (DoJ, 2022).

312 Ibid.

313 NI Human Rights Commission, 'Response to Public Consultation on Improving the Effectiveness of Hate Crime Legislation in NI' (NIHRC, 2022), at para 5.18.

314 Article 22, 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.

315 CEDAW/C/GC/35, UN CEDAW Committee General Recommendation No 35: Gender Based Violence Against Women', 26 July 2017; A/HRC/38/47 'UN Special Rapporteur on Violence against Women, Its Causes and Consequences, Dubravka Šimonovic, Report on Online Violence against Women and Girls from a Human Rights Perspective', 18 June 2018, at para 102.

in the EU Victims' Directive, which emphasises that women victims of gender-based violence and their children often require special support and protection.³¹⁶

In September 2022, the Department of Justice was considering the responses received and is due to publish a summary report of stage one consultation responses by the end of 2022. Work on stage two is due to begin in Autumn 2022, with a view to consulting on the relevant issues at the beginning of 2023. These remaining issues will cover the inclusion of age and gender as protected groups, stirring up offences and the possibility of a statutory duty on public authorities to remove hate expression from public places.³¹⁷

In June 2022, Commissioner Designate for Victims of Crime in NI, Geraldine Hanna, was appointed.³¹⁸ The Commissioner Designate's mandate includes victims of hate crime.

Recommendations

The Commission recommends that the Department of Justice promptly and effectively improves hate crime legislation in NI, guided by the Independent Hate Crime Review Team's recommendations and the Department of Justice's consultations. The Department of Justice and the Executive Office should ensure that any new legislation compliments existing and future strategies on race and community relations.

The Commission advises the Department of Justice to consider carefully and ensure compliance with Protocol Article 2, including the provisions of the EU Victims' Directive, in the development of hate crime legislation and ensure that a victim-centred approach is adopted when investigating, prosecuting and remedying hate crimes.

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.*³¹⁹

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:

³¹⁶ Recital 17, 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.

³¹⁷ Email correspondence from Department of Justice to NI Human Rights Commission, 7 September 2022.

³¹⁸ Department of Justice, 'Press Release: Victims of Crime Commissioner Designate for NI appointed', 14 March 2022.

³¹⁹ 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.

*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.*³²⁰

Protocol Article 2 provides specific protection against discrimination in the six Annex 1 Equality Directives.³²¹ 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 1998 as a result of the UK leaving the EU, including the right to equality of opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity.³²² The UK Government also committed to ensuring that NI equality law 'keeps pace' with any changes made by the EU to six Annex 1 Equality Directives which improve the minimum levels of protection available, after 1 January 2021, including the EU Racial Equality Directive.³²³

NI legislation does not provide for cases of intersectional multiple discrimination. At present in NI, each ground for discrimination must form its own case, meaning it must be considered and ruled on separately.³²⁴ The Equality Act 2010 which applies in England, Scotland and Wales, contains a dual discrimination provision, which has not been brought into force.³²⁵

Between 2016 and 2021, the Equality Commission for NI received 1,878 hybrid new enquiries, which raised issues on two or more equality grounds. Of these, 439 had a race discrimination element.³²⁶

In 2015, a commitment was made to review the Race Relations (NI) Order 1997, including considering intersectional multiple discrimination.³²⁷ In 2020, the Independent Hate Crime Review Team published its report on improving hate crime legislation in NI.³²⁸ In considering intersectionality, the Independent Review Team recommended that any new hate crime legislation should provide appropriate recognition of the importance of

320 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 15(a) and (c).

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

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

323 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.

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

325 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)' (HoL, 2016).

326 Email correspondence from Equality Commission for NI to NI Human Rights Commission, 4 February 2022.

327 Eoin Mullan, Sinead Brown and Paul Roddy, 'Racial Equality Legislation Review' (TEO, 2018).

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

intersectionality.³²⁹ It also recommended that intersectionality is reflected when considering statutory aggravations to existing offences.³³⁰

The Department of Justice committed to considering how to implement the Independent Hate Crime Review’s recommendations in a two-stage consultation process.³³¹ In 2022, stage one of the process was completed, which confirmed that the Department of Justice accepted that hate crime legislation should address intersectionality. The Commission supported this approach in its consultation response.³³²

In April 2022, the Commission responded to the EU Commission’s public consultation on potential gaps in the EU Racial Equality Directive and how these gaps should be addressed.³³³ The submission highlighted that current NI legislation does not provide for intersectional discrimination and noted with concern the lack of legislative reform due to the absence of an Executive.³³⁴ Given these inadequacies and delays at a domestic level, the Commission recommended that the EU Racial Equality Directive be amended to implement specific protections against intersectional and multiple discrimination, since Protocol Article 2 would require NI law to ‘keep pace’ with such changes.³³⁵

Recommendations

The Commission recommends that the Executive Office ensures intersectional multiple discrimination claims in NI are effectively addressed, including providing for intersectionality within equality legislation as required.

The Commission advises the Executive Office to monitor any proposed changes by the EU to the six Annex 1 Equality Directives, as well as relevant CJEU case law, and pay particular attention to the ongoing consultation by the EU on the EU Racial Equality Directive.

Persons with disabilities

In 2017, the UN CRPD 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”.³³⁶ 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

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

330 Ibid.

331 Department of Justice, ‘Improving the Effectiveness of Hate Crime Legislation in NI: A Public Consultation and Call for Views’ (DoJ, 2022).

332 NI Human Rights Commission, ‘Response to Public Consultation on Improving the Effectiveness of Hate Crime Legislation in NI’ (NIHRC, 2022), at para 6.10.

333 European Commission, ‘Addressing Possible Gaps in the Racial Equality Directive – Public Consultation’ (EU Commission, 2022).

334 NI Human Rights Commission, ‘Response to the European Commission Consultation on the Racial Equality Directive (Directive 2000/43/EC)’ (NIHRC, 2022).

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

336 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.

the enforceability of all its elements, and adopt rights-based policies, regulations and guidelines to ensure implementation”.³³⁷

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 1998 as a result of the UK leaving the EU, including the right to equality of opportunity in all social and economic activity, regardless of disability. The UK Government has recognised that EU law which protects the rights of disabled people also falls within scope of the non-diminution guarantee.³³⁸

Protocol Article 2 also provides specific protection against discrimination in the six Annex 1 Equality Directives, including the EU Employment Equality (Framework) Directive which protects against discrimination on the grounds of disability in employment and vocational training.³³⁹ 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.³⁴⁰

As the EU acceded to the UN CRPD prior to UK withdrawal,³⁴¹ the overriding obligation to promote, protect and implement the UN CRPD through EU law and policy is relevant to the interpretation of Withdrawal Agreement 2020, including Protocol Article 2, and to all EU measures referenced in that Agreement.³⁴² The UN CRPD is similarly relevant to the interpretation of the Annex 1 Equality Directives and any additional underpinning EU obligations for the rights, safeguards and equality of opportunity listed in the relevant part of the Belfast (Good) Friday Agreement 1998.³⁴³

Disability Strategy

In 2020, the NI Executive committed to publish a Disability Strategy. The Department for Communities appointed an Expert Advisory Panel and created a Co-Design Group for the Disability Strategy made up of key stakeholders, including the Commission. A cross-departmental working group was also created. In 2021, the Expert Advisory Panel for the Disability Strategy published its report, which called for a focus on the general principles of the UN CRPD as a guide to what should be included in a Disability Strategy.³⁴⁴ The Commission has identified, among other human rights considerations, the need to embed consideration of Protocol Article 2 into the Disability Strategy. A public consultation on the Disability

337 Ibid.

338 NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” In NI: What Does It Mean and How Will It Be Implemented?’ (NIO, 2020), at para 13.

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

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

341 EU Commission, ‘Press Release: EU Ratifies UN Convention on Disability Rights’, 5 January 2011.

342 *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.

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

344 Disability Strategy Expert Advisory Panel, ‘Report and Recommendations’ (DfC, 2021), at 4.

Strategy was due to take place in early 2022, but this process has been delayed. The Disability Strategy cannot progress until a new NI Executive is in place.³⁴⁵

Independent living fund

In June 2015, the UK-wide Independent Living Fund was closed and future responsibilities were transferred to the individual devolved administrations.³⁴⁶ The Independent Living Fund Scotland was established by the Scottish Government to administer the fund in Scotland. 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. In 2022, the Expert Advisory Panel for the Disability Strategy recommended that the Department for Communities adopt any final recommendations from the Independent Living Fund Working Group.³⁴⁷ This included agreed options and terms for reopening the Independent Living Fund to new applicants and, taking account of recipients' experiences, improvements to operating the Independent Living Fund.

Central Regional Disability Forum

In 2016, the Executive Office made a commitment to set up a Central Regional Disability Forum.³⁴⁸ In 2022, the Expert Advisory Panel for the Disability Strategy recommended that the Department for Communities implements this commitment,³⁴⁹ which is yet to be fulfilled.

Employment

NI has the lowest employment rate for deaf and disabled people and the largest gap between the employment rates of disabled and non-disabled people within the UK.³⁵⁰ In 2022, the Expert Advisory Panel for the Disability Strategy highlighted that the employment rate of working aged deaf and disabled people in NI is significantly lower than in the rest of the UK and the EU.³⁵¹ Concerns have been raised as to the future, long-term funding arrangements for disability employment projects previously or currently supported by EU funding, such as the European Social Fund.³⁵² The Expert Advisory Panel recommended that the Department for Communities addressed this issue by developing a new Disability Employment Strategy and ensuring funding for the Supported Employment model for deaf and disabled people in NI.³⁵³

345 Letter from Department for Communities to NI Human Rights Commission, 18 July 2022.

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

347 Disability Strategy Expert Advisory Panel, 'Report and Recommendations' (DfC, 2021).

348 NI Executive, 'Draft Programme for Government Framework 2016-2021' (NIE, 2016).

349 Disability Strategy Expert Advisory Panel, 'Report and Recommendations' (DfC, 2021), at 18.

350 University of Ulster Economic Policy Centre, 'Disability and the Labour Market' (JUEPC, 2022).

351 Disability Strategy Expert Advisory Panel, 'Report and Recommendations' (DfC, 2021), at 82.

352 NI Union of Supported Employment, 'Future Funding for Disability Employment Services' (NIUSE, 2019); John Campbell, 'Brexit: Jobs "at risk" over failure to replace EU funds', *BBC News*, 12 October 2022.

353 Disability Strategy Expert Advisory Panel, 'Report and Recommendations' (DfC, 2021), at 18.

Autism

The Autism Act (NI) 2011 places a statutory responsibility on the Department of Health to publish an autism strategy every seven years. In 2021, following delays caused by the COVID-19 pandemic, the Department of Health published an interim Autism Strategy, which includes key priorities underpinned by outcome-based, cross-departmental actions with set timelines.³⁵⁴ The Department of Health has consulted on key priorities for the next five-year Autism Strategy.³⁵⁵

In 2021, the Commission provided written advice to the NI Assembly Committee for Health welcoming the intention of the then Autism (Amendment) Bill to strengthen the impact of the Autism Strategy and the relevance of the UN CRPD. The Commission also advised that the Department consider the EU Employment Equality (Framework) Directive and continue to monitor relevant current and future CJEU jurisprudence insofar as it is relevant to those parts of the Autism Strategy relating to employment and vocational education.³⁵⁶

In April 2022, the Autism (Amendment) Act NI 2022 received Royal Assent. It provides for a regional autism strategy, which includes training for staff, an autism information service, an early intervention service, adult support services, measurable targets, and an independent autism reviewer to oversee implementation.

Assistance Dogs

In 2021, the Commission and Equality Commission for NI wrote jointly to the then Minister for Agriculture, Environment and Rural Affairs, Edwin Poots MLA, highlighting potential equality and human rights implications both domestically and internationally, including in relation to Protocol Article 2, Article 8 of the ECHR and the UN CRPD³⁵⁷ in respect of changes to rules around taking pets, including assistance dogs, from Great Britain to NI.³⁵⁸ Checks on pets and assistance dogs entering NI from Great Britain were subsequently delayed indefinitely to allow for the UK and EU to find a long-term solution.³⁵⁹

Medicines

In 2021, in evidence to the House of Lords Sub-Committee on the Ireland/NI Protocol, the Commission and Equality Commission for NI raised concerns about access to medicines in NI following changes to how these are regulated in NI, highlighting potential equality and human rights implications for disabled people.³⁶⁰ The Commissions urged constructive

354 Department of Health, 'Autism Interim Strategy 2021-2022' (DoH, 2021).

355 Department of Health, 'Autism Strategy 2023-2028 Questionnaire' (DoH, 2021).

356 NI Human Rights Commission, 'Response to Autism (Amendment) Bill' (NIHRC, 2021).

357 Letter from the NI Human Rights Commission and Equality Commission for NI to Minister for Agriculture, Environment and Rural Affairs, Edwin Poots MLA, 10 June 2021.

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

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

360 NI Human Rights Commission and Equality Commission for NI, 'Submission of the NI Human Rights Commission and Equality Commission for NI on the UK and EU Proposals and the Prospects for Agreement to the House of Lords Sub-Committee on the Protocol on Ireland/NI' (NIHRC and ECNI, 2021), at paras 3.1-3.8.

engagement between the UK Government and the EU to reach agreement on a long-term, sustainable solution.

In April 2022, the EU regulations which aimed to ensure the continued long-term supply of medicines from Great Britain into NI entered into force and applied retrospectively from 1 January 2022.³⁶¹ The UK Government described the EU's package as "not comprehensive" and stated it would be "closely monitoring supply and gathering evidence on the risks not dealt with in the EU proposals".³⁶²

In June 2022, the UK Government introduced the NI Protocol Bill in the House of Commons which proposes to exclude those parts of the NI Protocol relating to the movement of goods from having effect in UK law.³⁶³

Recommendations

The Commission recommends that the Department for Communities promptly publishes and effectively implements a robust and adequately resourced Disability Strategy, which takes a human rights based approach in line with international human rights standards and Protocol Article 2. This strategy should be accompanied by a measurable plan of action and effective monitoring arrangements.

The Commission recommends the Department for Communities promptly establishes a Central Regional Disability Forum, that is sufficiently resourced on a long-term basis and consists of persons with disabilities and their representative organisations.

The Commission recommends that the Department for Communities reopens the Independent Living Fund for new claimants in NI and ensures the fund is resourced to meet demand on a long-term basis.

The Commission recommends that the Department for Communities ensures an up-to-date Autism Strategy, which takes a human rights based approach in line with international human rights standards and Protocol Article 2, is promptly designed, implemented and monitored through meaningful engagement with persons with disabilities and their representative organisations.

The Commission recommends that the Department for the Economy ensures provision of long-term funding arrangements for new and existing disability employment projects.

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

361 Council of the EU, 'Press Release: EU-UK relations: The Council adopts legislation to ensure continued supply of medicines', 12 April 2022.

362 Letter from Minister of State for Europe and North America, James Cleverly MP, to Lord Jay of Ewelme, Chair of House of Lords Sub-Committee on the Ireland/NI Protocol, 28 March 2022.

363 NI Human Rights Commission and Equality Commission for NI, 'NI Human Rights Commission/Equality Commission for NI Briefing on the NI Protocol Bill' (NIHRC and ECNI, 2022). See Human Rights after UK Exit from the EU for further discussion on the NI Protocol Bill and Protocol Article 2.

The Commission recommends that the Foreign, Commonwealth and Development Office work with the EU to ensure the continued long-term supply of medicines from Great Britain into NI.

Racial equality

In 2016, the UN CERD Committee recommended that “the authorities of NI act without further delay to adopt comprehensive legislation prohibiting racial discrimination in accordance with the provisions of the [UN CERD]”.³⁶⁴

In 2018, the UN Special Rapporteur on contemporary forms of racism, E Tendayi Achiume, visited NI and noted inconsistency in the data collected by government departments, and the limitations in its scope.³⁶⁵ The UN Special Rapporteur called on the UK Government and NI to adopt comprehensive legislation prohibiting racial discrimination in NI.³⁶⁶

In 2021/2022, there were 1,334 incidents and 931 crimes recorded where there was a racist motivation.³⁶⁷ This is an increase from 993 incidents and 719 crimes in 2020/2021.³⁶⁸ In 2016, the number of racist hate motivated incidents overtook sectarian motivated incidents.³⁶⁹

In 2015, the Executive Office committed to reviewing the Race Relations (NI) Order 1997.³⁷⁰ In 2021, a comparative study of protections offered by the Race Relations (NI) Order with laws in the rest of the UK and Ireland had been examined by the Departmental Solicitor’s Office and formed part of engagement with stakeholders and other administrations.³⁷¹ In 2022, any consultation on legislation reform is unable to proceed due to the absence of a NI Executive and NI Assembly.³⁷²

EU Racial Equality Directive

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 1998 as a result of the UK leaving the EU, including the right to equality of opportunity in all social and economic activity, regardless of ethnicity.³⁷³

³⁶⁴ CERD/C/GBR/CO/21-23, ‘UN CERD Committee Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of UK’, 26 August 2016, at para 8(c).

³⁶⁵ Office of the High Commissioner for Human Rights, ‘Press Release: UN rights expert hails UK for anti-racism action but raises serious concerns over Immigration Policy, Prevent programme and Brexit’, 11 May 2018.

³⁶⁶ A/HRC/41/54/Add.2, ‘Report of the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance: Visit to the UK of Great Britain and NI’, 27 May 2019, at para 74(f).

³⁶⁷ Police Service of NI, ‘Incidents and Crimes with a Hate Motivation Recorded by the Police in NI: Financial Year Update’ (PSNI, 2022), at 7.

³⁶⁸ Police Service of NI, ‘Incidents and Crimes with a Hate Motivation Recorded by the Police in NI: Financial Year Update’ (PSNI, 2022), at 6.

³⁶⁹ Independent Hate Crime Review Team, ‘Hate Crime Legislation in NI: Independent Review’ (DoJ, 2020), at 100.

³⁷⁰ The Executive Office, ‘Racial Equality Strategy 2015-2025’ (TEO, 2015).

³⁷¹ Email correspondence from the Executive Office to the NI Human Rights Commission, October 2021.

³⁷² Racial Equality Subgroup Meeting, 16 February 2022.

³⁷³ Belfast (Good Friday) Agreement, 10 April 1998, at Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

Protocol Article 2 provides specific protection against discrimination in the six Annex 1 Equality Directives, including the EU 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.³⁷⁴ NI 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.³⁷⁵

In 2021, the Commission wrote to the head of the NI Civil Service, Jayne Brady, highlighting recent legal and other developments in relation to the EU Racial Equality Directive, underlining that these developments were of particular significance in relation to the ongoing review of the Race Relations (NI) Order 1997.³⁷⁶

In April 2022, the Commission responded to EU Commission public consultation on potential gaps in the EU Racial Equality Directive and how these gaps should be addressed.³⁷⁷ As part of its mandate to monitor the implementation of Protocol Article 2, in particular the obligation to keep pace with any enhancements to rights or safeguards under the EU Directive, the Commission reiterated its overarching concerns in relation to racial equality in NI, including lack of protection against intersectional and multiple discrimination, sectarianism, hate crime, insufficient equality data and monitoring, and lack of legislative harmonisation. Given current inadequacies in NI law, the Commission recommended that the EU Directive be updated in these areas to provide an enhanced layer of protection for racial equality in NI.³⁷⁸ The submission also pointed to the need to enhance the scope of discrimination and compliance under the EU Directive and highlighted the need to recognise and include discrimination arising from the use of algorithms and data-driven technology within the EU Directive. Furthermore, the Commission recommended that the EU Directive include a specific acknowledgement of the significance of Protocol Article 2 and keep pace obligations for racial equality in NI.³⁷⁹

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

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

376 COM/2021/139, '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 and Of Council Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Occupation' (EU Commission, 2021).

377 European Commission, 'Addressing Possible Gaps in the Racial Equality Directive - Public Consultation' (EU Commission, 2022).

378 NI Human Rights Commission, 'Response to the European Commission Consultation on the Racial Equality Directive (Directive 2000/43/EC)' (NIHRC, 2022).

379 Ibid.

Ethnic monitoring

In 2015, the Executive Office acknowledged that ethnic monitoring is an important tool in tackling inequality and racism and committed to “examine where ethnic monitoring should be introduced and consult on proposals for implementation”.³⁸⁰ In 2020, a study to determine the feasibility of introducing ethnic monitoring to the public sector in NI was completed. It recommended that the Race Relations (NI) Order 1997 is amended to impose a duty on specified public authorities to collect data on racial equality and set racial equality objectives.³⁸¹ In 2022, any legislative reform is unable to proceed without a functioning NI Executive and NI Assembly.

In 2021, the Commission highlighted the need for effective data collection on racial equality.³⁸² In 2022, the Executive Office is working to update its guidance on ethnic monitoring, which will be the foundation for harmonisation of data collection across the NI Civil Service.³⁸³ A cross-departmental working group has been established to take this work forward.³⁸⁴

Racial profiling

In 2021, the Commission wrote to the former Secretary of State for the Home Department, Priti Patel MP, to express concerns about Home Office guidance in relation to the Common Travel Area and the proposed intelligence-led immigration checks which could lead to increased risk of racial profiling.³⁸⁵ In July 2022, the Home Office responded to this correspondence stating that all staff must undertake mandatory training to ensure they comply with human rights and equality law and that staff are prohibited from using racial profiling.³⁸⁶ The Home Office confirmed that officers record the reasons for examination of members of the public in their notebooks, but it does not record racial profiles. The Home Office further confirmed that intelligence led checks were conducted under Common Travel Area guidance on journeys between Ireland and the UK to identify people who need permission to enter the UK and to identify anyone attempting to circumvent UK immigration controls. However, the Home Office confirmed that it does not operate routine immigration controls on journeys from within the Common Travel Area and that there are no immigration controls whatsoever on the Ireland-Northern Ireland border. As such, data is not recorded in a way which would make it possible to answer this question on how many intelligence led checks were conducted under Common Travel Area guidance.

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

381 This would be analogous to sections 149 and 153 of the Equality Act 2010, which does not extend to NI.

382 NI Human Rights Commission, ‘Submission to the NI Affairs Committee Inquiry into the experience of minority ethnic and migrant people in NI’ (NIHRC, 2021).

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

384 Racial Equality Subgroup Meeting, 17 May 2022.

385 Letter from the NI Human Rights Commission to the Secretary of State for the Home Department, Priti Patel MP, 20 December 2021.

386 Letter from the Home Office to the NI Human Rights Commission, 5 July 2022.

In January 2022, related concerns were raised with the House of Lords in relation to the Nationality and Borders Act in a joint briefing paper by the Commission and the Equality Commission for NI.³⁸⁷ The paper had a particular focus on Electronic Travel Authorisations, which will be required for all non-British citizens who require leave to enter the UK, when travelling from Ireland to the UK.³⁸⁸ Irish citizens do not require leave to enter the UK but those who do not hold recognised UK immigration status will be affected. The Commission expressed concern about associated checks, and the risk of increased racial profiling.³⁸⁹

Minority ethnic groups/faith communities

In June 2022, in a joint submission with the Equality Commission for NI to the House of Lords Sub-Committee on the Ireland/NI Protocol, the Commission reiterated concerns on access to, cost, and the availability of, halal and kosher food and ritual items and the impact on Jewish and Islamic communities in NI.³⁹⁰

Recommendations

The Commission recommends that the Executive Office takes effective steps to ensure its data collection on racial equality is consistent, extensive and disaggregated. This includes working with the NI Executive and NI Assembly to promptly amend the Race Relations (NI) Order 1997 so that it imposes a duty on specified public authorities to collect data on racial equality and set racial equality objectives.

The Commission advises the Executive Office to monitor any proposed changes by the EU to the six Annex 1 Equality Directives, as well as relevant CJEU case law, and pay particular attention to the ongoing consultation by the EU on the EU Racial Equality Directive, in line with the 'keeping pace' obligations under Protocol Article 2.

The Commission recommends that the Home Office, in the implementation of the revised guidance on the Common Travel Area and the European Travel Authorisation requirements, take effective steps to prevent and address racial profiling at entry to NI at ports and airports and in the context of cross-border travel. This should include effective gathering and monitoring of disaggregated data, including racial and ethnic monitoring, of people examined by enforcement officers. It should also include effective monitoring and provision of training to enforcement officers, including review mechanisms and disciplinary procedures in cases of racial profiling.

387 NI Human Rights Commission and Equality Commission for NI, 'Joint Submission to House of Lords on the Nationality and Borders Bill' (NIHRC and ECNI, 2022).

388 Ibid, at 11-12.

389 See above for further detail on Electronic Travel Authorisations in the section Constitutional Protections - Common Travel Area.

390 UK Parliament Hansard, 'European Affairs Committee - Sub-Committee on the Protocol on Ireland/NI Follow up Inquiry on the Impact of the Protocol - Joint Written Evidence from NI Human Rights Commission and Equality Commission for NI', 8 June 2022.

The Commission recommends that the Home Office ensures all journeys into NI, that originate from Ireland, are exempt from Electronic Travel Authorisation requirements.

The Commission recommends that the Foreign, Commonwealth and Development Office work with the EU Commission to find a long-term solution which ensures Muslim and Jewish communities in NI are able to access halal and kosher food products and ritual items respectively.

Refugee Integration Strategy

In 2016, the CoE 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”.³⁹¹

Despite a commitment within the Racial Equality Strategy 2015-2025,³⁹² NI remains the only part of the UK without a Refugee Integration Strategy.

In 2021, consulted on a draft Refugee Integration Strategy,³⁹³ which sought to address the pressure “exerted on the voluntary sector to backfill, what should be, essential services”.³⁹⁴ In February 2022, the Commission responded to the consultation raising several concerns, particularly around the language used throughout.³⁹⁵

The Commission also highlighted that the UK Government recognises that Protocol Article 2 applies to “everyone who is subject to [NI]... law”.³⁹⁶ The Commission advised that the commitment in the Belfast (Good Friday) Agreement 1998 to the civil rights and religious liberties of “everyone in the community” includes asylum seekers and refugees. Protocol Article 2 requires the Executive Office ensure NI law ‘keep pace’ with any changes in the EU Racial Equality Directive,³⁹⁷ and the EU Gender Equality (Goods and Services) Directive³⁹⁸ and relevant CJEU case law which enhance protections.

The non-exhaustive list of rights which are “affirmed in particular” in the relevant chapter of the Belfast (Good Friday) Agreement 1998, include the right to freely choose one’s place of residence and the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity.³⁹⁹ The UK Government has acknowledged

391 ECRI(2016)38, ‘European Commission against Racial Intolerance Report on the UK (Fifth Monitoring Cycle)’, 4 October 2016, at para 116.

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

393 The Executive Office, ‘Refugee Integration Strategy Consultation Document’ (TEO, 2021).

394 Dr Fiona Murphy and Dr Ulrike M Vieten, ‘Asylum Seekers and Refugees’ Experiences of Life in NI’ (QUB, 2017).

395 NI Human Rights Commission, ‘Response to Public Consultation on Draft Refugee Integration Strategy’ (NIHRC, 2022).

396 NI Office, ‘UK Government Commitment To “No Diminution of Rights, Safeguards and Equality of Opportunity” In NI: What Does It Mean and How Will It Be Implemented?’ (NIO, 2020), at para 8.

397 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.

398 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.

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

that “the key rights and equality provisions in the [Belfast (Good Friday) Agreement] are supported by the ECHR”.⁴⁰⁰ The non-diminution commitment in Protocol Article 2 therefore encompasses the full range of rights set out in the ECHR, to the extent that they are underpinned by EU legal obligations in force on 31 December 2020. Additional EU obligations falling within Protocol Article 2 on this basis and relevant to refugees and people seeking asylum, include the EU Reception Directive,⁴⁰¹ the EU Qualification Directive⁴⁰² and the EU Procedures Directive.⁴⁰³ The EU Charter on Fundamental Rights also continues to apply in the context of those provisions of EU law within scope of Protocol Article 2.

In March 2022, the House of Commons NI Affairs Committee published its inquiry findings on the experiences of minority ethnic and migrant people in NI.⁴⁰⁴ It highlighted issues relating to the experiences of refugees, including housing provision, access to healthcare services and the Belfast-centred provision of services. The NI Affairs Committee recommended that the final Refugee Integration Strategy addressed the issues cited and was delivered at pace.⁴⁰⁵

Recommendations

The Commission recommends that the Executive Office introduces a Refugee Integration Strategy that reflects the outcomes of the consultation process and the NI Affairs Committee’s inquiry and takes a human rights-based approach in line with international human rights standards and Protocol Article 2 without further delay. The final strategy should be accompanied by a comprehensive action plan and adequate, long-term resources.

The Commission recommends that the Executive Office promptly develops, implements, monitors, and adequately funds public education and community integration initiatives across NI, which raise awareness about the issues facing people seeking asylum and refugees in order to tackle fear, stigma, and discrimination. This should be included as a commitment within the Refugee Integration Strategy.

Sectarianism

In 2016, the UN CERD Committee reiterated its 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”.⁴⁰⁶ The UN CERD Committee

400 NI Office, ‘UK Government Commitment To “No Diminution of Rights, Safeguards and Equality of Opportunity” In NI: What Does It Mean and How Will It Be Implemented?’ (NIO, 2020), at para 3.

401 Directive 2003/9/EC, ‘EU Council Directive Laying Down Minimum Standards for the Reception of Asylum Seekers’, 27 January 2003.

402 Directive 2004/83/EC, ‘EU 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.

403 Directive 2005/85/EC, ‘EU Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status’, 1 December 2005.

404 House of Commons NI Affairs Committee, ‘The Experiences of Minority Ethnic and Migrant People in NI’ (HoC, 2022).

405 Ibid, at para 28.

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

recommended that concrete measures are adopted to address racial discrimination and on the impact of the Together: Building a United Community Strategy.⁴⁰⁷

In 2017, the CoE 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.*⁴⁰⁸

In Protocol Article 2, the UK Government commits to ensuring there is no diminution of the rights, safeguards and equality of opportunity provisions set out in the relevant chapter of the Belfast (Good Friday) Agreement 1998, including the “the right to freedom from sectarian harassment” and the rights of victims.⁴⁰⁹ EU obligations underpinning the rights of victims include the EU Victims’ Directive⁴¹⁰ as well as other relevant EU laws.⁴¹¹

The EU Victims’ Directive recognises that victims of hate crime are at a high risk of secondary and repeat victimisation and that, as such, there should be a strong presumption that those victims will benefit from special protection measures during criminal proceedings.⁴¹²

In 2021/2022, 1,067 sectarian incidents and 780 sectarian crimes were recorded.⁴¹³ This represented an increase from 934 recorded sectarian incidents and 639 recorded sectarian crimes in 2020/2021.⁴¹⁴

The Together: Building a United Community strategy contains a commitment to develop a statutory definition of ‘sectarianism’ and ‘good relations’.⁴¹⁵ The New Decade New Approach Agreement 2020 re-commits to “ending sectarianism and robust supporting strategies and actions will be put in place”.⁴¹⁶

Sectarian offences are not included in the Criminal Justice (No 2) (NI) Order 2004 as attracting an enhanced sentence as ‘aggravated hostility’. The New Decade, New Approach Agreement 2020 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”.⁴¹⁷

407 Ibid, at para 37.

408 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.

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

410 Directive 2012/29/EU, ‘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.

411 Directive 2011/36/EU ‘EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims’, 5 April 2011; Directive 2011/92/EU, ‘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, ‘EU Council Directive Relating to the Compensation to Crime Victims’, 29 April 2004.

412 Article 8 and Recitals 56-58, 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.

413 Police Service of NI, ‘Incidents and Crimes with a Hate Motivation Recorded by the Police in NI: Financial Year Update’ (PSNI, 2022), at 15.

414 Ibid.

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

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

417 Ibid, at 43.

In 2021, following a recommendation from Judge Marrinan,⁴¹⁸ the Department of Justice agreed in principle that there should be a sectarian offences definition in legislation and acknowledged the merit in considering the Scots law definition carefully in relation to its implementation in NI.⁴¹⁹ The Department of Justice also agreed in principle to include a new statutory aggravation for sectarian prejudice (subject to an agreed definition of sectarianism), which could be monitored by the proposed Victims of Crime Commissioner.⁴²⁰ However, the Department of Justice also stated any changes to NI hate crime law would need to be considered in conjunction with recommendations made in the report of the Commission on the Flags, Identity, Culture and Tradition.⁴²¹

The Department of Justice put in place a dedicated Hate Crime Branch to take forward the Independent Review's recommendations in a two-stage consultation process.⁴²² In 2022, stage one of the consultation process, which considered statutory aggravations, was completed. The first stage focused on proposals regarding a new statutory aggravation hate crime model, sectarian offending in hate crime, alongside other issues.⁴²³ In its consultation response, the Commission supported introducing a sectarian offence definition and a new statutory aggravation for sectarian prejudice.⁴²⁴ The Commission also recommended that the legislation is future proofed to accommodate the inclusion of sectarianism against a broader range of religious beliefs, descent, nationalities or citizenship.⁴²⁵

In November 2022, the Department of Justice was considering the responses received and planning for the second stage of the consultation process.⁴²⁶

A consolidated Hate Crime Bill is likely to be introduced in the next NI Assembly mandate.⁴²⁷ This process is delayed by the continued suspension of the NI Executive and NI Assembly.

EU Racial Equality Directive

In January 2022, the EU Commission launched a public consultation to pinpoint potential gaps in the EU Racial Equality Directive and identify measures to address these gaps.⁴²⁸ In its response to the submission, the Commission recommended that, given the complex interplay between

418 Independent Hate Crime Review Team, 'Hate Crime Legislation in NI: Independent Review' (DoJ, 2020), at Recommendation 12.

419 Department of Justice, 'Review of Hate Crime Legislation in NI - Departmental Response' (DoJ, 2021), at 6-7.

420 Ibid.

421 Department of Justice, 'Review of Hate Crime Legislation in NI - Departmental Response' (DoJ, 2021), at 7.

422 Department of Justice, 'Improving the Effectiveness of Hate Crime Legislation in NI: A Public Consultation and Call for Views' (DoJ, 2022).

423 Ibid.

424 NI Human Rights Commission, 'Response to Public Consultation on Improving the Effectiveness of Hate Crime Legislation in NI' (NIHRC, 2022).

425 Ibid.

426 Department of Justice, 'Improving the Effectiveness of Hate Crime Legislation in NI: A Public Consultation and Call for Views' (DoJ, 2022).

427 Email correspondence from Department of Justice to NI Human Rights Commission, 7 September 2022.

428 European Commission, 'Addressing Possible Gaps in the Racial Equality Directive - Public Consultation' (EU Commission, 2022).

ethnicity, nationality and sectarianism in NI, sectarianism should be recognised as a type of racial discrimination within the EU Directive.⁴²⁹

Recommendations

The Commission recommends that the Department of Justice and Executive Office promptly and effectively implement the recommendations of the Independent Hate Crime Review Team, including introducing legislation that provides statutory definitions for 'sectarianism' and 'good relations'.

The Commission recommends that the Department of Justice ensures compliance with Protocol Article 2 in the context of the EU Victims' Directive, when developing hate crime legislation, including sectarian hate crime.

The Commission recommends that the Executive Office, Department of Justice and other relevant departments monitor any proposed changes by the EU to the six Annex 1 Equality Directives, as well as relevant CJEU case law, and pay particular attention to the outcome of the ongoing consultation on the EU Racial Equality Directive.

Sport and human rights

In 2016, the UN CRC Committee recommended that the UK Government and NI Executive:

- a) *strengthen its efforts to guarantee the right of the child to rest and leisure and to engage in play and recreational activities appropriate to the age of the child, including by adopting and implementing play and leisure policies with sufficient and sustainable resources;*
- b) *provide children, including those with disabilities and children in marginalized and disadvantaged situations, with safe, accessible, inclusive and smoking-free spaces for play and socialization and public transport to access such spaces; [and]*
- c) *fully involve children in planning, designing and monitoring the implementation of play policies and activities relevant to play and leisure, at community, local and national levels.*⁴³⁰

In 2017, the UN CRPD Committee recommended that the UK Government and NI Executive "adopt a concrete plan of action, with resources and measurable objectives, to implement legislation, regulation and standardisation to ensure that persons with disabilities have access to inclusive participation in all sports facilities".⁴³¹

429 NI Human Rights Commission, 'Response to the European Commission Consultation on the Racial Equality Directive (Directive 2000/43/EC)' (NIHRC, 2022).

430 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 74.

431 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 63.

In 2017, the Kazan Action Plan marked a commitment to link sport policy development to the 2030 Sustainable Development Goals.⁴³² Within this framework the CoE published guidelines for public authorities around sport and human rights themes contained within the 2017 action plan.⁴³³

In 2018, the London Declaration on Sport and Human Rights and was adopted by members of the Commonwealth Forum of National Human Rights Institutions. The London Declaration sets out several commitments aimed at protecting and promoting human rights through sport. The Commission, as Chair of the Commonwealth Forum at the time, was a key player in drafting the resulting declaration.⁴³⁴

In 2020, a Children and Young People’s Strategy for NI was published.⁴³⁵ This includes commitments to address inequalities and barriers for persons with disabilities and those from disadvantaged and marginalised backgrounds to the right to rest and leisure.

In March 2022, a Sport and Physical Activity Strategy for NI was published.⁴³⁶ This strategy recognises that “human rights are inextricably linked to sport” and that sport and physical activity should be “ethical, inclusive, diverse and safe from grassroots to competitor level”.⁴³⁷ It includes an action plan, which is to be implemented through a co-design and co-production approach.⁴³⁸ The NI Sport and Human Rights Forum contributed to the development of the strategy through focus groups organised by the Department for Communities.

NI Sport and Human Rights Forum

In 2019, the NI Sport and Human Rights Forum was launched by the Commission. The Sports and Human Rights Forum has a multi-stakeholder membership, which is supported by the Commission. It enables sporting bodies, grassroots sporting groups, public authorities, government representatives and civil society to engage with each other on sport and human rights issues. It focuses on sharing information and examples of best practice. It currently has over 40 members and is chaired by Business and Operations Manager of the Commonwealth Games NI, Conal Heatley.

In March 2022, the Commission (in partnership with the Ulster University) hosted the first annual Sport and Human Rights Conference. The conference took place on International Women’s Day, focusing on a range of human rights issues related to women and girls in sport.

The NI Sport and Human Rights Forum meets three times a year. It has covered a range of topic including disability and sport, using sport to tackle violence against women and girls, and sport in the context of children’s rights. In February 2022, the Forum discussed gender identity

432 UN Educational, Scientific and Cultural Organisation, ‘Ministers and Senior Officials Responsible for Physical Education and Sports VI – Kazan 2017’. Available at: <https://en.unesco.org/mineps6/kazan-action-plan>

433 CoE, ‘Guidelines on Integrity in Sport – Kazan Action Plan – Online Database’. Available at: <https://www.coe.int/en/web/sport/kazan-action-plan-online-directory>

434 Commonwealth Forum of National Human Rights Institutions, ‘The London Declaration on Sport and Human Rights’ (CFNHRI, April 2018).

435 Department of Education, ‘Children’s and Young People’s Strategy 2020-2030’ (DoE, 2020).

436 Department for Communities, ‘Sport and Physical Activity Strategy for NI’ (DfC, 2022).

437 Ibid, at 26.

438 Ibid.

and sport. Following the meeting several Forum members asked for more guidance on transgender inclusion in grassroots sport. Consequently, the Commission has contracted and funded England-based charity Gendered Intelligence to develop this resource. The Commission will also produce its own legal research to accompany this resource.

In 2021, the Sports and Human Rights Forum wrote to the then Minister of Justice, Naomi Long MLA, welcoming the Department of Justice's commitment to extend 'abuse of trust' legislation to include sport coaches in NI. In April 2022, the Justice (Sexual Offences and Trafficking Victims) Act (NI), which fulfilled this commitment, gained Royal Assent.⁴³⁹

Declaration on Sport and Human Rights

In 2019, the Commission launched the Declaration on Sport and Human Rights.⁴⁴⁰ Inspired by the UN Universal Declaration of Human Rights, the NI Declaration outlines a commitment by the signatory organisation to support the use of sport to advance the human rights of everyone and to promote a set of universal values amongst everyone involved in sport – from participants and fans to workers, local communities and governments. In November 2022, 14 organisations had signed up to the NI Declaration, including the Irish Football Association, Ulster GAA, Ulster Rugby, and the Belfast Giants.

Commonwealth Games

In 2022, three gymnasts, Rhys McClenaghan, Eamon Montgomery and Ewan McAteer, were banned by the Commonwealth Games Gymnastics Federation from representing NI at the Commonwealth Games.⁴⁴¹ The decision was based on the three gymnasts previously representing Ireland in international competition. The Commission's Chief Commissioner, Alyson Kilpatrick, wrote to the International Gymnastics Federation in support of the athletes and to express concern at the decision's impact on their human rights. The Commonwealth Games NI overturned the initial decision, and the three gymnasts were able to represent NI at the 2022 Commonwealth Games.⁴⁴²

Recommendations

The Commission recommends that the Department for Communities resources and conducts research on sport and human rights in NI. This should include a baseline analysis of sport and human rights in NI. It should also consider progress made through sport in NI related to the Kazan Action Plan and UN Sustainable Development Goals.

439 Justice (Sexual Offences and Trafficking Victims) Act (NI) 2022.

440 NI Sport and Human Rights Forum, 'Declaration on Sport and Human Rights' (NISHRF, 2019).

441 Adam McKendry, 'Commonwealth Games NI plan appeal as three gymnasts banned from competing in Birmingham', *Belfast Telegraph*, 26 May 2022.

442 NI Human Rights Commission, 'Press Release: NIHRC welcomes decision that permits NI gymnasts to compete at the Commonwealth Games', 28 July 2022.

The Commission recommends that the NI Executive adopts a concrete plan of action, with resources and measurable objectives, to implement legislation, regulation and standardisation to ensure that persons with disabilities have access to inclusive participation in all sports facilities.

Right to Life

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”.⁴⁴³ 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 UN CAT.⁴⁴⁴

The UN CAT Committee’s recommendations are supported by the UN Human Rights Committee,⁴⁴⁵ and the former UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and guarantees of non-repetition, Pablo de Greiff.⁴⁴⁶

In 2021, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabian Salvioli, and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Morris Tidball-Binz, expressed “grave concern” that the UK Government’s current plan for Troubles-related offences:

*forecloses the pursuit of justice and accountability for the serious human rights violations committed during the Troubles and thwarts victims’ rights to truth and an effective remedy for the harm suffered, placing the UK in flagrant violation of its international obligations.*⁴⁴⁷

In 2022, the CoE Commissioner for Human Rights, Dunja Mijatović, stated that “the UK Government has embarked on a course of action that runs a very significant risk of eventually being found by domestic courts and/or the ECtHR not to be compliant with the... [ECHR]”.⁴⁴⁸ The Commissioner for Human Rights continued that this:

*would continue to deprive victims and families from the full enjoyment of their rights under the... [ECHR]. This is all the more concerning because the package of measures to which the UK Government previously committed could be considered as a good basis for a human rights compliant way forward in legacy cases.*⁴⁴⁹

The CoE Committee of Ministers urged the UK Government:

443 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.

444 Ibid.

445 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.

446 A/HRC/34/62/Add.1, ‘Report of the UN 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.

447 Office of the UN High Commissioner for Human Rights, ‘Press Release: UN experts voice concern at proposed blanket immunity to address the legacy of “the Troubles” in NI’, 10 August 2021.

448 CoE, ‘Submission by the CoE Commissioner for Human Rights Under Rule 9.4 of the Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements in the Cases of McKerr v UK, Finucane v UK, Kelly and Others v UK, Shanaghan v UK, McCaughey and Others v UK’ (CoE, 2022), at para 28.

449 Ibid.

to amend the [NI Troubles (Legacy and Reconciliation)] Bill, if it is progressed, to allay concerns about compatibility with the... [ECHR], including by addressing the following key issues: ensuring that the Secretary of State for NI's role in the establishment and oversight of the Independent Commission for Reconciliation and Information Recovery is more clearly circumscribed in law in a manner that ensures that the Independent Commission for Reconciliation and Information Recovery is independent and seen to be independent; ensuring that the disclosure provisions unambiguously require full disclosure to be given to the Independent Commission for Reconciliation and Information Recovery; ensuring that the Bill adequately provides for the participation of victims and families; transparency and public scrutiny; urged... [the UK Government] further to reconsider the conditional immunity scheme in light of concerns expressed around its compatibility with the [ECHR].⁴⁵⁰

The CoE Committee of Ministers:

noting the... [UK Government's] expressed openness to constructive engagement with stakeholders as the [NI Troubles (Legacy and Reconciliation) Bill] proceeds through Parliament, strongly reiterated therefore their calls on the... [UK Government] to take all necessary measures and devote sufficient time, before they pursue progression and adoption of the Bill, for discussions and meaningful effective engagement with all stakeholders to address their concerns and garner the widest possible public trust and confidence.⁴⁵¹

These concerns have been echoed by the CoE Parliamentary Assembly⁴⁵² and the CoE Commissioner for Human Rights, Dunja Mijatović.⁴⁵³ The CoE Commissioner for Human Rights has specifically stated that “the lack of consultation” after “such a radical shift away from earlier approaches, and the unilateral steps by the UK Government in this respect, were repeatedly identified [by victims and survivors] as a major source of concern” and did not equate to a “victim-centred approach”.⁴⁵⁴ The CoE Commissioner for Human Rights has also warned that:

while there will never be complete agreement on any approach, in this case the baseline of trust is so low that it is difficult to see how the mechanisms in the Bill will come to garner more confidence during its implementation.⁴⁵⁵

In Protocol Article 2, the UK Government commits to ensuring there is no diminution of the rights, safeguards and equality of opportunity

450 CM/Notes/1443H46-32, 'CoE Committee of Ministers McKerr Group v UK (Application No 28883/95) Supervision of the Execution of the ECtHR's Judgments', 22 September 2022, at para 8.

451 Ibid, at para 7.

452 CoE Parliamentary Assembly, 'Resolution 2464(2002) – The Impact of Brexit on Human Rights on the Island of Ireland', 31 October 2022, at paras 8 and 9.

453 Letter from CoE Commissioner for Human Rights, Dunja Mijatovic, to Secretary of State for NI, Brandon Lewis MP, 13 September 2021; CoE, 'Submission by the CoE Commissioner for Human Rights Under Rule 9.4 of the Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements in the Cases of McKerr v UK, Finucane v UK, Kelly and Others v UK, Shanaghan v UK, McCaughey and Others v UK' (CoE, 2022), at para 30.

454 Letter from CoE Commissioner for Human Rights, Dunja Mijatovic, to Secretary of State for NI, Brandon Lewis MP, 13 September 2021.

455 CoE, 'Submission by the CoE Commissioner for Human Rights Under Rule 9.4 of the Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements in the Cases of McKerr v UK, Finucane v UK, Kelly and Others v UK, Shanaghan v UK, McCaughey and Others v UK' (CoE, 2022), at para 30.

protections contained in that chapter of the Belfast (Good Friday) Agreement 1998 as a result of the UK leaving the EU, including the right of victims “to remember as well as contribute to a changed society”.⁴⁵⁶ EU obligations underpinning the rights of victims include the EU Victims’ Directive⁴⁵⁷ as well as other relevant EU laws which support victims.⁴⁵⁸ The EU Victims’ Directive has been acknowledged by the UK Government as falling within the scope of Protocol Article 2.⁴⁵⁹

In 2018, the UK Government consulted on a draft Stormont House Agreement Bill. There were 17,000 consultation responses, the majority of which raised significant issues that required addressing to ensure the resulting legislation was victim-centred and human rights compliant.⁴⁶⁰ In 2020, the then Secretary of State for NI, Brandon Lewis MP, issued a written Ministerial Statement that ignored the findings the 2018 consultation responses and indicated a significant roll back on the Stormont House Agreement 2014. The then Secretary of State for NI stated:

*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.*⁴⁶¹

In 2021, the then Secretary of State for NI set out specific plans for legislation to address the legacy of the Troubles.⁴⁶² Contrary to the majority of views expressed in 2018, the plans indicated a shift away from conducting human rights compliant Troubles-related investigations, towards seeking and receiving information about Troubles-related deaths and injuries. The plan also included the intention to introduce a statute of limitations to apply equally to all Troubles-related incidents.⁴⁶³

In May 2022, the NI Troubles (Legacy and Reconciliation) Bill was introduced to the UK Parliament. It proposes to establish an Independent Commission for Reconciliation and Information Recovery which will conduct reviews, upon request, into deaths and serious injuries resulting

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

457 Directive 2012/29/EU, ‘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.

458 Directive 2011/36/EU ‘EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims’, 5 April 2011; Directive 2011/92/EU, ‘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, ‘EU Council Directive Relating to the Compensation to Crime Victims’, 29 April 2004.

459 UK Government, ‘UK Government Commitment to No-diminution of Rights, Safeguards and Equality of Opportunity in NI: What Does It Mean and How Will It Be Implemented?’ (NIO, 2020).

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

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

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

463 Ibid, at para 34.

from or connected with conduct during the Troubles. It also proposes that the Independent Commission for Reconciliation and Information Recovery will produce a historical record of all remaining deaths that occurred during the Troubles (i.e. Troubles-related deaths that are not subject to a review by the Independent Commission). It further proposes that the Independent Commission for Reconciliation and Information Recovery will operate a conditional immunity scheme for certain Troubles-related offences and most Troubles-related proceedings will cease with immediate effect. The NI Troubles (Legacy and Reconciliation) Bill also proposes to establish several statutory-based initiatives aimed at memorialising the Troubles such as oral history records, a memorialisation strategy and Troubles-related academic research.

In 2022, the Commission provided oral evidence to the House of Commons NI Affairs Committee and written evidence to the House of Commons and House of Lords Joint Committee on Human Rights setting out its concerns with the initial and current draft of the NI Troubles (Legacy and Reconciliation) Bill.⁴⁶⁴ The Commission also provided evidence to the CoE Committee of Ministers in its continued consideration of the McKerr group of cases and the UK's execution of these ECtHR judgments.⁴⁶⁵ The Commission also provided broader advice to MPs and Peers to inform consideration of the NI Troubles (Legacy and Reconciliation) Bill as it continued its passage through the UK Parliament.⁴⁶⁶

The Commission is gravely concerned that, as currently drafted, the proposed investigative body is not independent in practice and its mandate does not satisfy procedural human rights obligations. The proposed conditional immunity scheme applies to offences where immunity should not be an option. The proposed immediate cessation of criminal investigations (other than those referred by the Independent Commission for Reconciliation and Information Recovery to the prosecutor), police complaints, civil proceedings and inquests/inquiries linked to Troubles-related offences is likely contrary to the right to an effective remedy.

The Commission is also concerned that the current draft of the NI Troubles (Legacy and Reconciliation) Bill may not be compliant with Protocol Article 2, for example, with obligations under the EU Victims' Directive to ensure 'sufficient access to justice',⁴⁶⁷ for victims and their next-of-kin, particularly in relation to the lack of opportunity to inform or challenge decisions on immunity and referral for criminal enforcement action.⁴⁶⁸ Moreover, obligations under the EU Victims' Directive must be interpreted in line with the EU Charter of Fundamental Rights provisions,

464 House of Commons NI Affairs Committee, 'Oral Evidence: Addressing the Legacy of NI's Past - The UK Government's New Proposals', 7 June 2022; NI Human Rights Commission, 'Legislative Scrutiny: NI Troubles (Legacy and Reconciliation) Bill' (NIHRC, 2022).

465 NI Human Rights Commission, 'Rule 9 Submission to the CoE Committee of Ministers in Relation to the Supervision of the Cases Concerning the Actions of the Security Forces in NI: Advice on NI Troubles (Legacy and Reconciliation) Bill' (NIHRC, 2022).

466 NI Human Rights Commission, 'Advice on NI Troubles (Legacy and Reconciliation) Bill' (NIHRC, 2022).

467 Recital 9, Directive 2012/29/EU, '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.

468 Articles 6 and 11, Directive 2012/29/EU, '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.

including Article 47 (right to an effective remedy and to a fair trial) and Article 41 (right to good administration), and general principles of EU law.⁴⁶⁹ The Commission takes the view that compliance with Protocol Article 2 requires recognition of a victim's entitlement to a fair and public hearing in respect of any decision on immunity or prosecution. The mandatory and irrevocable outcome of the immunity decision in preventing prosecutions,⁴⁷⁰ leaves no avenue for a victim to be heard, or request a review of a decision not to prosecute, as required under the EU Victims' Directive and general principles.⁴⁷¹

In July 2022, despite several proposed amendments, the NI Troubles (Legacy and Reconciliation) Bill passed through the House of Commons with very few changes. The most significant, and welcomed, amendment was to include a provision that excluded Troubles-related sexual offences from the conditional immunity scheme proposed within the Bill. In November 2022, the NI Troubles (Legacy and Reconciliation) Bill had its Second Reading at the House of Lords.

Recommendations

The Commission remains concerned that the UK continues to fail to implement ECtHR judgments stipulating measures to achieve effective investigations into 'Troubles-related' deaths. This continued failure is itself resulting in further violations by the UK.

The Commission continues to advise that a statute of limitations or immunity scheme that restricts the investigation and prosecution of alleged unlawful killings and serious injuries is incompatible with Articles 2 (right to life) and 3 (freedom from torture) ECHR.

The Commission recommends that the fundamentals of the NI Troubles (Legacy and Reconciliation) Bill require immediate and thorough reassessment, which should take place through meaningful engagement. The resulting legislation should be victim-centred and human rights compliant.

The Commission is concerned that the NI Troubles (Legacy and Reconciliation) Bill may diminish the rights of victims, in breach of the UK's obligations under Protocol Article 2 and advises that provisions on immunity and restrictions on criminal enforcement action may diminish the rights of victims, in breach of Protocol Article 2.

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

469 Article 4, Agreement on the Withdrawal of the UK of Great Britain and NI from the EU and the European Atomic Energy Community 2020.

470 Clauses 36 and 37, NI Troubles (Legacy and Reconciliation) Bill.

471 Articles 6 and 11, 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.

suppress the publication of Inquiry reports under the Inquiries Act 2005”.⁴⁷² There has been no substantive progress on this issue to date.

The Inquiries Act 2005 continues to be utilised in NI. In 2021, the 2005 Act was used to commence public inquiries into allegations of abuse at Muckamore Abbey Hospital⁴⁷³ and the work of a urology consultant who has retired from the Southern Health and Social Care Trust.⁴⁷⁴ In June 2022, the Independent Neurology Inquiry, which was converted to a statutory public inquiry, published its report. It found “information was essentially retained in silos. Communication between different organisations and between management levels within organisations was poor and inadequate”.⁴⁷⁵

In June 2022, a UK COVID-19 Inquiry commenced under the 2005 Act to examine, consider and report on preparations and the response to the pandemic in England, Wales, Scotland and NI. The UK-wide inquiry “will consider reserved and devolved matters across the UK, as necessary, but will seek to minimise duplication of investigation, evidence gathering and reporting with any other public inquiry established by the devolved governments”.⁴⁷⁶ The UK-wide inquiry will consider aspects related to NI, but an additional NI-specific COVID-19 inquiry that will consider the NI Executive’s response to COVID-19 as a whole has not been established.⁴⁷⁷

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 by the NI Executive that considers devolved issues not fully covered by the UK-wide inquiry.

Legacy inquests and inquiries

Between 2015 and 2021, international mechanisms, including the UN Human Rights Committee,⁴⁷⁸ the then UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition, Pablo de Greiff,⁴⁷⁹ and the CoE Committee of Ministers continued to call

472 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.

473 Muckamore Abbey Hospital Inquiry, ‘Press Release: Media Statement from Tom Kark KC, Chair of the Muckamore Abbey Hospital Inquiry’, 11 October 2021.

474 Urology Services Inquiry, ‘Terms of Reference for the Statutory Independent Public Inquiry into Urology Services in the Southern Health and Social Care Trust’ (USI, 2021).

475 Independent Neurology Inquiry, ‘Report’ (INI, 2022).

476 UK COVID-19 Inquiry, ‘COVID-19 Inquiry Terms of Reference’ (UKCI, 2022).

477 NI Human Rights Commission, ‘Submission to the UN Human Rights Committee Regarding the UK’s Eighth Periodic Report on Compliance with the UN ICCPR’ (NIHRC, 2020).

478 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).

479 A/HRC/34/62/Add.1, ‘Report of the UN 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.

for prompt, adequate and effective resourcing of legacy inquests and inquiries in NI.⁴⁸⁰

Between 2015 and 2019, the UN CAT Committee⁴⁸¹ and UN Human Rights Committee also specifically called for an inquiry into the killing of Patrick Finucane.⁴⁸² In 2021, the CoE Committee of Ministers reopened its supervision of the individual measures in the case of Finucane.⁴⁸³

In September 2022, the CoE Committee of Ministers:

*noted that, while ongoing civil claims that were brought before the date of the [NI Troubles (Legacy and Reconciliation) Bill's] introduction will continue, the new legislation will prevent new civil claims from being brought or continued and reiterated their serious concern about the proposal to terminate pending inquests that have not reached substantive hearings, bearing in mind the progress finally being made in those inquests further to the measures recently undertaken; urged the... [UK Government] to reconsider this proposal and allow the limited number of pending legacy inquests to conclude, to avoid further delay for families.*⁴⁸⁴

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 1998 as a result of the UK leaving the EU, including the right of victims “to remember as well as contribute to a changed society”.⁴⁸⁵ EU obligations underpinning the rights of victims include the EU Victims’ Directive⁴⁸⁶ as well as other relevant EU laws which support victims.⁴⁸⁷

Legacy inquests

In 2019, the Legacy Inquest Unit was established within the Coroner’s Service, under the remit of the Lord Chief Justice. The Legacy Inquest Unit was due to complete its work within five years, but this has been delayed due to COVID-19 restrictions delaying court business in general.⁴⁸⁸

In 2022, nine new cases were identified by the Presiding Coroner, Mr Justice Humphreys, as suitable for progressing by the Legacy Inquest Unit.⁴⁸⁹ In April 2022, the Neil John McConville Inquest concluded finding

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

481 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).

482 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.

483 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.

484 CM/Notes/1443H46-32, ‘CoE Committee of Ministers McKerr Group v UK (Application No 28883/95) Supervision of the Execution of the ECtHR’s Judgments’, 22 September 2022, at para 9.

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

486 Directive 2012/29/EU, ‘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.

487 Directive 2011/36/EU ‘EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims’, 5 April 2011; Directive 2011/92/EU, ‘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, ‘EU Council Directive Relating to the Compensation to Crime Victims’, 29 April 2004.

488 Coroners Service for NI, ‘Case Management Direction - CMD Legacy No 1’ (CSNI, 2021).

489 Judicial Communications Office, ‘Press Release: Legacy Inquest Review’, 22 March 2022.

that the force used leading to Neil McConville’s death was justified, but that there were “numerous failings in the Police Ombudsman’s investigation in the deceased death” and that “the operation was not planned and controlled in such a way that it minimised to the greatest extent possible the need for recourse to lethal force”.⁴⁹⁰ In May 2022, the Thomas Mills Inquest concluded that the deceased was killed by force that was “disproportionate to the threat perceived and more than was absolutely necessary in the circumstances”.⁴⁹¹ In June 2022, the Kathleen Thompson Inquest concluded that deceased was killed by force that was “unjustified” and that “no proper investigation” had been carried out.⁴⁹² In September 2022, the Stephen Geddis Inquest concluded that the deceased was killed by force that was “unjustified”.⁴⁹³

In July 2022, the Legacy Inquest Unit made a public appeal for information regarding the Springhill Inquest, which was considering the deaths of John Dougal, Patrick Butler, Father Noel Fitzpatrick, David McCafferty and Margaret Gargan.⁴⁹⁴ In August 2022, the Legacy Inquest Unit made a public appeal for information regarding the Coagh Inquest considering the deaths of Michael Ryan, Anthony Doris and Lawrence McNally.⁴⁹⁵

In 2021, Martin McCaughey’s family brought a challenge to the ECtHR in relation to a coroner’s inquest that concluded that he was lawfully killed, arguing that the process was not Article 2 ECHR compliant. The Commission submitted a third-party intervention in the case. In February 2022, the ECtHR “identified certain weaknesses in the inquest”, dismissed the case as it did “not consider that these weaknesses, either individually or cumulatively, undermined the ability of the inquest to fulfil” the purpose of ensuring “accountability”.⁴⁹⁶

In 2022, the NI Troubles (Legacy and Reconciliation) Bill proposes to immediately cease criminal investigations (other than those referred by the Independent Commission for Reconciliation and Information Recovery to the prosecutor), police complaints, civil proceedings and inquests/inquiries linked to Troubles-related offences. The Commission is gravely concerned that the immediacy of these proposed changes will close off any pursuit of justice outside of the proposed Independent Commission for Reconciliation and Information Recovery.

Patrick Finucane inquiry

In 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

490 Coroners Court for NI, ‘In Matter of An Inquest into the Death of Neil John McConville’, 11 April 2022.

491 Judicial Communications Office, ‘Coroner Finds Soldier Was Not Justified in Shooting Thomas Mills - Summary of Judgment’, 13 May 2022.

492 *In the Matter of An Inquest Into the Death of Kathleen Thompson* [2022] NICoroner1, at paras 412(i) and 412(j).

493 *In the Matter of An Inquest into the Death of Master Stephen Geddis* [2022] NICorner 2, at para 463(v).

494 Judicial Communications Office, ‘Press Release: Legacy Inquest Unit Appeal for Information Regarding the Injury and Death of John Dougal, Patrick Butler, Fr Noel Fitzpatrick, David McCafferty and Margaret Gargan on 9 July 1972’, 5 July 2022.

495 Judicial Communications Office, ‘Press Release: Legacy Inquest Unit Appeal for Information Regarding the Deaths of Michael Ryan, Anthony Doris and Lawrence McNally’, 18 August 2022.

496 *Gribben v UK*, Application No 28864/18, Judgment of 25 January 2022, at para 147.

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.⁴⁹⁷ 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.*⁴⁹⁸

In 2020, the then Secretary of State for NI, Brandon Lewis MP, 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".⁴⁹⁹ The Police Service of NI confirmed 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".⁵⁰⁰

In June 2022, the NI High Court heard further judicial review proceedings brought by the Finucane family claiming that the Secretary of State for NI's decision to not hold a public inquiry as irrational and unlawful, particularly as the Police Service NI's Legacy Investigation Branch has finished its work and the Police Ombudsman's process will not be completed until at least 2025.⁵⁰¹

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 the right to life (Article 2 ECHR).

The Commission further recommends that a right to life (Article 2 ECHR) compliant inquiry is expeditiously conducted into the death of Patrick Finucane, in line with the judgment of the UK Supreme Court.

The Commission is gravely concerned that the immediacy of the proposed changes to a victim's access to justice within the current draft of the NI Troubles (Legacy and Reconciliation) Bill closes off any pursuit of justice outside of the Independent Commission for Reconciliation and Information Recovery and is therefore incompatible with human rights and the Belfast (Good Friday) Agreement 1998.

497 *In the Matter of an Application by Geraldine Finucane for Judicial Review (NI)* [2019] UKSC 7, at 4.

498 *Ibid*, at para 153.

499 'Pat Finucane: No public inquiry into Belfast lawyer's murder', *BBC News*, 30 November 2020, at para 153.

500 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, at para 153.

501 'Challenge brought to the High Court by Pat Finucane's widow against decision not to hold public inquiry', *ITV News*, 15 June 2022.

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”.⁵⁰²

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”.⁵⁰³

In 2021/2022, there was one security related death, compared to three in 2020/2021. There were 33 casualties of paramilitary style assaults, a decrease from 39 in 2020/2021 and the lowest number since 1985/1986. No casualties were children. There were 20 shooting incidents, 5 bombing incidents and 12 casualties from paramilitary style shooting.⁵⁰⁴

In 2015, a five-year programme for ending paramilitarism was established under the Fresh Start Agreement. In 2020, this programme was extended for a further three years by the NI Executive. The UK Government is yet to confirm what financial support it will provide for the continuation of this programme.

Since 2016, a Paramilitary Crime Task Force has been operating through the Police Service NI, the National Crime Agency and HM Revenue and Customs, which focuses on tackling paramilitary groups criminality. In 2020, the New Decade, New Approach Agreement reaffirmed the NI Executive’s commitment to “ending paramilitarism”.⁵⁰⁵ It also included a continued commitment by the UK Government to ensure the Police Service NI is “appropriately resourced to deal with terrorism and paramilitary activity”.⁵⁰⁶ Furthermore, 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”.⁵⁰⁷

In 2021, the Department of Justice provided £13 million to community groups and other organisations to tackle paramilitarism and criminality.⁵⁰⁸ Additionally, the Communities in Transition project was awarded £10 million in funding until 2024.⁵⁰⁹

In 2021, the Independent Reporting Commission published its fourth annual report, which concluded that:

502 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.

503 Ibid.

504 Police Service NI, ‘Police Recorded Security Situation Statistics - 1 April 2021 to 31 March 2022’ (PSNI, 2022).

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

506 Ibid.

507 Ibid.

508 Department of Justice, ‘Press Release: Ending the harm inflicted on people and communities by paramilitaries and criminals is Executive priority, says Long’, 28 April 2021.

509 Ibid.

our overall view continues to be that paramilitarism remains a clear and present danger. New structures have been put in place to tackle paramilitarism, and new approaches are underway but more needs to be done, across all relevant agencies and Departments, working alongside local communities. Furthermore, we remain of the view that in order to achieve the comprehensive ending of paramilitarism, a process of Group Transition is required and needs to be added to the Twin Track approach already being implemented.⁵¹⁰

Recommendations

The Commission recommends that the NI Executive and UK Government allocate sufficient resources to the programme to end paramilitarism, and that the Executive Office establishes consistent monitoring to ensure the steps taken to end paramilitarism in NI are reflective of the Independent Reporting Commission's recommendations.

⁵¹⁰ Independent Reporting Commission, 'Press Release: Fourth Report of the Independent Reporting Commission' (IRC, 2021).

Freedom from Torture, Inhuman and Degrading Treatment

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.*⁵¹¹

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 1998 as a result of the UK leaving the EU, including the right of victims “to remember as well as contribute to a changed society”.⁵¹² EU obligations underpinning the rights of victims include the EU Victims’ Directive⁵¹³ as well as other relevant EU laws which support victims.⁵¹⁴

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. Unlike in England and Wales,⁵¹⁵ there is still no 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.⁵¹⁶

In 2021, the Department of Health published its analysis report and final policy proposals for an Adult Protection Bill in NI.⁵¹⁷ Drafting of the Adult Protection Bill has begun, with the intention of it being introduced early within the next NI Assembly mandate.⁵¹⁸

In 2021, the Department of Health consulted on a regional framework for the management of restrictive interventions, restraint and seclusion across all areas where health and social care is delivered.⁵¹⁹ The Commission, in its consultation response, recommended that there should be a clearly

511 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.

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

513 Directive 2012/29/EU, ‘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.

514 Directive 2011/36/EU ‘EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims’, 5 April 2011; Directive 2011/92/EU, ‘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, ‘EU Council Directive Relating to the Compensation to Crime Victims’, 29 April 2004.

515 Sections 20-25, Criminal Justice and Courts Act 2015.

516 NI Human Rights Commission, ‘Submission to the Consultation on Proposals for New Mental Capacity Legislation for NI’ (NIHRC, 2014).

517 Department of Health, ‘Adult Protection Bill – Draft Final Policy Proposals for Ministerial Consideration’ (DoH, 2021).

518 NI Assembly Hansard, ‘Written Question: Adult Safeguarding – Gerry Carroll MLA – AQW27105/17-22’ 15 December 2021.

519 Department of Health, ‘Regional Policy on the Use of Restrictive Practices in Health and Social Care Settings and Regional Operational Procedure for the Use of Seclusion – Consultation Document’ (DoH, 2022).

defined list of general principles that apply to the use of all restrictive practices in accordance with human rights standards. Due to resourcing pressures the review of the consultation was delayed, however the final report is due for publication before the end of 2022 with the revised policy document to follow thereafter.⁵²⁰

COVID-19

In 2020, serious concerns regarding the care and management of residents in care homes during the first surge of the pandemic were highlighted in a joint statement by the Commission and Commissioner for Older People NI.⁵²¹ The Commission also raised these issues with the House of Commons and House of Lords Joint Committee on Human Rights⁵²² and House of Commons Women and Equalities Committee⁵²³ in response to their inquiries into the UK Government's response to COVID-19.

In April 2022, the England and Wales High Court ruled that the UK Government's policy which allowed untested hospital patients to be discharged into care homes at the start of the pandemic was illegal.⁵²⁴ In reaction to this ruling, the Commissioner for Older People for NI, Eddie Lynch, stated that it strengthens the need for an NI specific public inquiry into the handling of care homes during the pandemic.⁵²⁵

In June 2022, the UK Government commenced a UK-wide inquiry into the preparations and response to the pandemic.⁵²⁶ It will examine the management of the pandemic in care homes, including in NI.

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.⁵²⁷ In 2020, CPEA's first review report was published, which concluded that adult safeguarding practice "did not actively contribute" to keeping residents safe at Dunmurry Manor and that families' voices were repeatedly unheard.⁵²⁸ It also found divergent safeguarding practices across the Health and Social Care Trusts.⁵²⁹

CPEA's eight recommendations included establishing an Adult Safeguarding/Adult Protection Change programme and an Adult Safeguarding/Protection Bill.⁵³⁰ The Adult Safeguarding Transformation

520 Email correspondence from Department of Health to NI Human Rights Commission, 27 September 2022.

521 NI Human Rights Commission, 'Press Release: Joint Statement from Chief Commissioner and Commissioner for Older People on COVID-19', 6 May 2020.

522 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).

523 NI Human Rights Commission, 'Women and Equalities Committee's Inquiry into the Unequal Impact of COVID-19: Disability and Access to Services' (NIHRC, 2020).

524 Robert Booth, 'COVID care home discharge policy was unlawful, says court', *The Guardian*, 27 April 2022.

525 Commissioner for Older People for NI, 'Press Release: Statement on behalf of the Commissioner for Older People for NI re High Court ruling unlawfulness of discharge of COVID patients to care homes', 27 April 2022.

526 UK Government, 'Press Release: UK COVID-19 Inquiry: terms of reference', 28 June 2022.

527 Department of Health, 'Press Release: Minister announces plans for Adult Safeguarding Bill for NI', 10 September 2020.

528 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.

529 Ibid, at para 193.

530 Ibid, at para 221.

Board was established to oversee the implementation of these recommendations and “to strengthen the governance around adult safeguarding to achieve a more accountable, regional approach”.⁵³¹

In March 2022, the second CPEA report on the regulation and handling of complaints at Dunmurry Manor Care Home was published.⁵³² It found that the company that owned the home, Runwood Homes, did not seek to engage with complainants to fully understand their complaints or to engage with the relevant Health and Social Care Trusts to address them. It made eight recommendations for further action. In response, the then Minister of Health, Robin Swann MLA, indicated his commitment to improving outcomes for individuals who wish to complain about health and social care services to ensure that service users, carers and their families’ voices are heard.⁵³³

Muckamore Abbey Hospital

In 2020, the Department of Health published a report of an independent review into the leadership and governance at Muckamore Abbey Hospital, confirming that it operated outside the sightlines of the Belfast Health and Social Care Trust.⁵³⁴ The former Minister of Health, Robin Swann MLA, then launched a public inquiry to examine the abuse of patients by staff at Muckamore Abbey Hospital.

In 2021, the Public Prosecution Service NI 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 Intensive Care Unit at Muckamore Abbey Hospital.⁵³⁵ These cases are before the Magistrates Court, with committal proceedings yet to take place. At least 17 further files, including staff members, are being considered by the Public Prosecution Service NI.⁵³⁶

In June 2022, the Muckamore public inquiry held its first hearing. Chair of the Inquiry, Tom Kark KC, reported that 34 arrests have been made in connection with this investigation and more than 70 staff have been suspended as a precaution since the alleged abuse came to light in 2017.⁵³⁷

Recommendations

The Commission recommends that the Department of Health promptly introduces a freestanding 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.

531 Department of Health, ‘Press Release: Minister announces plans for Adult Safeguarding Bill for NI’, 10 September 2020.

532 CPEA, ‘Independent Whole Systems Review into Safeguarding and Care at Dunmurry Manor Care Home – Evidence Paper 2: Learning and Change Briefing’ (DoH, 2022).

533 Department of Health, ‘Press Release: Review of Complaints handling at Dunmurry Manor Care Home published’, 2 March 2022.

534 Department of Health, ‘A Review of Leadership and Governance at Muckamore Abbey Hospital’ (DoH, 2020).

535 Public Prosecution Service, ‘Press Release: Public Prosecution Service NI issues decisions on one Muckamore Abbey Hospital file’, 16 April 2021.

536 Muckamore Abbey Hospital Inquiry, ‘Transcript for Tuesday 7 June 2022’, 10 June 2022.

537 Rory Carroll, ‘Inquiry opens into alleged patient abuse at Muckamore Abbey’, *The Guardian*, 6 June 2022.

The Commission recommends that the Department of Health ensures that findings from investigations into human rights abuses at Dunmurry Manor and Muckamore Abbey Hospital are addressed immediately and fully remedied. The Commission further recommends that the Department of Health ensures that effective complaints mechanisms are in place, accessible and monitored to ensure that such breaches do not recur in the future.

The Commission recommends that the Department of Health adopts the recommendations from the COVID-19 Inquiry in relation to the management of the pandemic in care homes, ensuring that learning is disseminated across the sector and that a human rights based plan is in place for any future outbreak.

The Commission recommends that, when developing or implementing any laws or policies in relation to abuse in health and social care settings, the Department of Health, and other relevant NI departments, consider the extent to which Protocol Article 2 is engaged and ensures that there is no diminution to the rights and safeguards which fall within its scope.

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.*⁵³⁸

The UN CAT Committee also recommended that the UK Government “reviews the consolidated guidance in light of its obligations under the [UN CAT]”, and should 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; [and]*
- b) *monitoring the application of the consolidated guidance in practice. The State party should also ensure that military and intelligence*

⁵³⁸ 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.

*personnel are trained on the provisions of the [UN CAT], including on the absolute prohibition of torture and ill-treatment.*⁵³⁹

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".⁵⁴⁰ 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]".⁵⁴¹

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 1998 as a result of the UK leaving the EU, including the right of victims "to remember as well as contribute to a changed society".⁵⁴² EU obligations underpinning the rights of victims include the EU Victims' Directive⁵⁴³ as well as other relevant EU laws which support victims.⁵⁴⁴

The Overseas Operations (Service Personnel and Veterans) Act 2021 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 2021 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.

In May 2022, the Home Secretary, Priti Patel MP, introduced the National Security Bill to UK Parliament.⁵⁴⁵ Clause 23 of the National Security Bill proposes amending provisions of the Serious Crime Act 2007, which apply in NI, to enable ministers or spies to assist crimes overseas where "necessary for the proper exercise of any function" of the armed forces or intelligence services. Former Secretary of State for Exiting the EU, David Davis MP, warns that clause 23 effectively allows Ministers to authorise criminal acts.⁵⁴⁶ This could include the provision of information to foreign partners that may lead to someone being tortured or unlawfully killed. In November 2022, the Bill had its First Reading at the House of Lords.

539 Ibid.

540 Ibid.

541 Ibid.

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

543 Directive 2012/29/EU, '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.

544 Directive 2011/36/EU 'EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011; Directive 2011/92/EU, '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, 'EU Council Directive Relating to the Compensation to Crime Victims', 29 April 2004.

545 UK Parliament, 'National Security Bill - HC: Bill 007 2022-23' (UK Gov, 2022).

546 UK Parliament Hansard, 'House of Commons: National Security Bill - Volume 715', 6 June 2022.

Recommendations

The Commission continues to recommend that the UK Government establishes 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.

Child, early and forced marriage

In 2016, the UN CRC Committee recommended that the UK Government and the NI Executive raise the minimum age of marriage to 18 years.⁵⁴⁷ In 2019, the UN CEDAW Committee⁵⁴⁸ 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.⁵⁴⁹

The Marriage (NI) Order 2003 permits the marriage of a child aged 16 or 17 years old with the consent of their parents or legal guardians or the courts. In Scotland, children aged 16 and 17 years old are allowed to marry without parental consent.⁵⁵⁰

In April 2022, the Marriage and Civil Partnership (Minimum Age) Act 2022 raised the legal age of marriage and civil partnerships in England and Wales to 18.⁵⁵¹ Under the 2022 Act, children will not face penalties, but adults who facilitate underage marriages could face imprisonment for up to seven years and a fine. The 2022 Act applies to children taken abroad from England and Wales to marry.⁵⁵²

In 2021, 39 girls and 15 boys were married in NI.⁵⁵³ In 2020, 24 girls and seven boys married in NI, which due to COVID-19 and associated lockdown restrictions was lower than previous years.⁵⁵⁴ For example in 2019, there were 54 girls and 15 boys married in NI.⁵⁵⁵

The Home Office has implemented several UK-wide measures for tackling forced marriage, including awareness raising campaigns.⁵⁵⁶

In 2021, the Department of Finance consulted on changes to Marriage Law in NI,⁵⁵⁷ including raising the minimum age at which people can legally marry or enter into a civil partnership. In February 2022, the Commission responded to the consultation noting that, if NI retains current laws,

547 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 19.

548 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).

549 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).

550 Marriage (Scotland) Act 1977.

551 Marriage and Civil Partnership (Minimum Age) Act 2022.

552 Section 2, Marriage and Civil Partnership (Minimum Age) Act 2022.

553 Email correspondence from NI Statistics and Research Agency to NI Human Rights Commission, 4 August 2022.

554 Email correspondence from NI Statistics and Research Agency to NI Human Rights Commission, 2 July 2021.

555 Email correspondence from NI Statistics and Research Agency to NI Human Rights Commission, 17 August 2020.

556 Home Office, 'Press Release: What the Government is doing to tackle forced marriage', 24 May 2019.

557 Department of Finance, 'Belief Marriage and Minimum Age for Marriage or Civil Partnership - A Public Consultation' (DoF, 2021).

it would create a divergence of child protection laws within the UK.⁵⁵⁸ The Commission's response also noted that international human rights standards consider child marriage to be a form of forced marriage and the EU Victims' Directive recognises forced marriage as a form of gender-based violence.⁵⁵⁹ The Commission advised that it considers that certain provisions on marriage law engage Protocol Article 2 and that any legislation or policy resulting from this consultation process must consider Protocol Article 2 throughout its development and implementation.⁵⁶⁰

In July 2022, the Department of Finance published its consultation analysis report, which revealed near unanimous support among respondents for increasing the minimum age for marriage and civil partnerships to 18 years.⁵⁶¹ The then Minister for Finance, Conor Murphy MLA, responded by issuing a Written Ministerial Statement signalling his intention to prepare legislation to raise the minimum age for marriage to 18 years old.⁵⁶² Such legislation is subject to the reinstatement of the NI Executive and NI Assembly.

Recommendations

The Commission recommends that the Department of Finance expeditiously introduces legislation to repeal 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 recommends that the Department of Finance ensure Protocol Article 2 is considered and complied with throughout the development of legislation and policy in relation to marriage law including changing the minimum age for marriage to 18.

The Commission recommends that cross-Departmental efforts within the NI Executive to combat forced marriages are strengthened, including by sensitising parents on the need for full and free consent of their child to marry.

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.*⁵⁶³

558 NI Human Rights Commission, 'Submission to Department of Finance Consultation on Marriage Law' (NIHRC, 2022), at para 3.5.

559 Recital 17, 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.

560 NI Human Rights Commission, 'Submission to the Department of Finance Consultation on Marriage Law' (NIHRC, 2022).

561 Department of Finance, 'Marriage Law Consultation: Results and Analysis' (DoF, 2022).

562 Department of Finance, 'Marriage Law: Written Ministerial Statement - Conor Murphy MLA - Minister of Finance' (DoF, 2022).

563 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.

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 1998 as a result of the UK leaving the EU, including the right of victims “to remember as well as contribute to a changed society”. EU obligations underpinning the rights of victims include the EU Victims’ Directive as well as other relevant EU laws which support victims.⁵⁶⁴ These EU directives require that the best interests of the child is a primary consideration.

In 2020/2021, the Police Service NI received 4,732 reports of children going missing from care in NI, which involved 1,213 individual children.⁵⁶⁵ Of these, 2,321 missing persons reports (49 per cent) were from Residential Children’s Homes, relating to 182 individuals. 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.⁵⁶⁶

Children and young people who are missing from care are particularly vulnerable to exploitation,⁵⁶⁷ and it has been noted that there is a “particular link” between children going missing from care and child sexual exploitation.⁵⁶⁸

The Police Service NI has ongoing work to identify and engage with the most frequent missing children to ensure a focus of engagement, prevention and early interaction.⁵⁶⁹ 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.⁵⁷⁰

In 2021, the Department of Health and the Department of Education published the new joint strategy on caring for children and young people in NI.⁵⁷¹ It committed to the establishment of a Regional Joint Care and Justice Campus, which would encompass the existing Secure Care Centre and the Juvenile Justice Centre. In March 2022, after public consultation, the then Minister of Health, Robin Swann MLA, and then Minister of Justice, Naomi Long MLA, announced that both existing centres will continue to operate independently, while working together to provide shared support services, such as health and education.⁵⁷² This shared arrangement will operate under a formal partnership

564 Directive 2012/29/EU, ‘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, ‘EU Parliament and Council Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography’, 13 December 2011; Directive 2011/36/EU ‘EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims’, 5 April 2011; Directive 2004/80/EC, ‘EU Council Directive Relating to the Compensation to Crime Victims’, 29 April 2004.

565 Email correspondence from Police Service NI to NI Human Rights Commission, 16 June 2021.

566 Community visits conducted by the NI Human Rights Commission.

567 NI Human Rights Commission, ‘Submission to the UN Committee on the Rights of the Child 88th Session on the Sixth Periodic Report of the UK of Great Britain and NI on Compliance with the UN CRC (List of Issues)’ (NIHRC, 2020).

568 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.

569 Email correspondence from Police Service NI to NI Human Rights Commission, 14 October 2020.

570 Email correspondence from Police Service NI to NI Human Rights Commission, 21 August 2020.

571 Department of Health and Department of Education, ‘A Life Deserved: “Caring” for Children and Young People in NI’ (DoH and DE, 2021).

572 Letter from Department of Justice and Department of Health to Regional Facilities for Children and Young People Stakeholder Reference Group Members, 24 March 2022.

agreement, supported by a jointly managed Partnership Board. The cross-departmental Regional Care and Justice Programme is currently working to harmonise support across the two sites.⁵⁷³

In January 2022, the Department of Health published the Integrated Therapeutic Care Framework for Care Experienced Children and Young People in NI.⁵⁷⁴ This new model for the delivery of trauma-informed care will be rolled out across both the Secure Care Centre and the Juvenile Justice Centre and staff will receive joint training.⁵⁷⁵ The Department of Health hopes that this consistent and multi-disciplinary therapeutic approach, coupled with strengthened community provision, will reduce the need for future readmission to a secure care setting.⁵⁷⁶

In June 2022, the Police Service of NI and the Health and Social Care Board conducted a targeted consultation on a revised Protocol on Children Missing from Home and Care. In its response, the Commission welcomed the revision and highlighted where further consideration of relevant human rights standards and principles can provide guidance to ensure a holistic response to this complex area of child safeguarding.⁵⁷⁷ For example, the Commission highlighted possible factors contributing to the vulnerability of the child, who may require additional support during the multi-agency response. The Commission recommended that the Protocol should make specific reference to the victims' rights and protections which fall within scope of Protocol Article 2, including the EU Child Sexual Exploitation Directive,⁵⁷⁸ which places a positive obligation on States to prevent children from becoming victims of child sexual abuse and to investigate such crimes.⁵⁷⁹ Other EU measures with specific protection for child victims include the EU Victims' Directive⁵⁸⁰ and EU Trafficking Directive.⁵⁸¹ The Commission expressed concern that the Revised Missing Children Protocol had removed a section on safeguarding child victims of modern slavery and human trafficking which had been included in the Missing Children Protocol 2015⁵⁸² and advised on relevant provisions of the EU Trafficking Directive. In terms of risk assessment, the Commission welcomed specific consideration being given to children who are flagged as at risk of child sexual exploitation and also recommended the inclusion of measures for child victims of modern slavery and human trafficking.

573 Email correspondence from Department of Health to NI Human Rights Commission, 5 August 2022.

574 Department of Health, 'An Overview of the NI Framework for Integrated Therapeutic Care for Care Experienced Children and Young People' (DoH, 2022).

575 Letter from Department of Justice and Department of Health to Regional Facilities for Children and Young People Stakeholder Reference Group Members, 24 March 2022.

576 Email correspondence from Department of Health to NI Human Rights Commission, 5 August 2022.

577 Letter from NI Human Rights Commission to Police Service of NI, 29 July 2022.

578 Directive 2012/29/EU, '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, 'EU Parliament and Council Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography', 13 December 2011; Directive 2011/36/EU 'EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011; Directive 2004/80/EC, 'EU Council Directive relating to the Compensation to Crime Victims', 29 April 2004.

579 Article 23, Directive 2011/93/EU, 'EU Directive of the European Parliament and of the Council on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography', 13 December 2011.

580 Articles 1 and 24, 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.

581 Articles 2, 9, 13-16, and 18, Directive 2011/36/EU, 'Directive of the European Parliament and of the Council on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011.

582 Health and Social Care Board and Police Service of NI, 'Runaway and Missing from Home and Care: Missing Children Protocol' (HSCB and PSNI, 2015).

Recommendations

The Commission remains concerned at the number of children reported as having gone missing from care in NI. 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.

The Commission recommends that the Police Service of NI and the Health and Social Care Board Missing Children Protocol makes specific reference to the victims' rights and protections which fall within scope of Protocol Article 2 and that the protocol sets out the immediate actions to be taken in respect of missing children that are either recovered or suspected victims of trafficking.

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”.⁵⁸³ In addition, the UK Government should “ensure that appropriate standards and procedures are in place to avoid rendering an individual stateless”.⁵⁸⁴

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.⁵⁸⁵ This power may be exercised when an individual is in the UK and when they are abroad.⁵⁸⁶

In 2022, the Nationality and Borders Act received Royal Assent. Section 10 of the 2022 Act further amends the British Nationality Act by exempting the UK Government from having to give notice of a decision to deprive a person of British citizenship 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 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.⁵⁸⁷ In 2020, one Temporary Exclusion Order

583 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.

584 Ibid.

585 Section 40, British Nationality and Citizenship Act 1981.

586 Melanie Gower, ‘Deprivation of British Citizenship and Withdrawal of Passport Facilities’ (HoC 2015).

587 Section 10, Counter Terrorism and Security Act 2015.

was imposed and the subject returned to the UK in 2021.⁵⁸⁸ This was a decrease from four imposed Temporary Exclusion Orders in 2019, with two returned to the UK in 2019 and one returned in 2020.⁵⁸⁹

In 2020, the Independent Reviewer of Terrorism Legislation, Jonathan Hall KC, 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”.⁵⁹⁰ He recommended that the “Independent Reviewer be given statutory authority to review any immigration power used by the Home Secretary to the extent that it is used in counter-terrorism”.⁵⁹¹ In 2021, this recommendation was rejected by the UK Government.⁵⁹²

Recommendations

The Commission recommends that the UK Home Office, as a minimum, introduces a requirement to ensure judicial scrutiny before exercising the power to deprive an individual of their UK citizenship.

The Commission recommends that the UK Government only utilises the power to withhold notice of a decision to deprive a person of British citizenship when it is absolutely necessary.

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; [and]*
- 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.*⁵⁹³

588 HM Government, ‘Transparency Report: Disruptive Powers 2018/2019’ (HoC 2020), at 21.

589 Ibid.

590 Jonathan Hall KC, ‘The Terrorism Acts in 2018 - Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006’ (IRTL, 2020), at para 1.15.

591 Ibid, at para 1.16.

592 Ibid.

593 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.

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

- 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; [and]*
- e) *compile and provide to the [UN CAT] 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.*⁵⁹⁴

These are reflective of recommendations by the then UN Special Rapporteur on Violence against Women, Rashida Manjoo, following her 2014 visit to the UK.⁵⁹⁵

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 1998 as a result of the UK leaving the EU, including the right of victims “to remember as well as contribute to a changed society”.⁵⁹⁶

594 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.

595 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.

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

EU obligations underpinning the rights of victims include the EU Victims' Directive⁵⁹⁷ as well as other relevant EU laws which support victims.⁵⁹⁸

The EU 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 EU Directive further recognises that women are disproportionately affected by this harm.⁵⁹⁹

In 2020/2021, there were 31,196 domestic abuse incidents recorded, the third highest level recorded since the data series began in 2004/05.⁶⁰⁰ This latest figure is one and a half times higher than the level of 20,959 recorded at the start of the data series in 2004/05.⁶⁰¹ In 2020/2021, 69 per cent of victims of domestic abuse crimes were women and 31 per cent were men.⁶⁰² At least 85 per cent of offenders are men and up to 14 per cent are women.⁶⁰³ Due to lack of reporting, these figures are only indicative of the extent of the issue, particularly regarding violence against women and girls.⁶⁰⁴

In 2020/2021, 530 women and 319 children in NI accessed refuges run by Women's Aid NI. However, in that same period, 276 women could not access a refuge because there was no space.⁶⁰⁵ Women's Aid NI recorded 5,536 women and 5,143 children accessed outreach support, allowing them to stay in their own homes.⁶⁰⁶

In 2022, the no recourse to public funds rule continues to operate, preventing persons with insecure immigration status from accessing benefits, such as refuge support. The strict eligibility criteria for the Destitute Domestic Violence concession also continues, which may prevent some groups, such as women from the EEA, from benefiting. Delays in issuing the concession also continue.⁶⁰⁷

Justice (Sexual Offences and Trafficking Victims) Act 2022 (NI)

In 2021, the Department of Justice introduced the then Justice (Sexual Offences and Trafficking Victims) Bill, which included provision to introduce recommendations arising from the Gillen Review to exclude the public from all serious sexual offence hearings and to introduce anonymity for defendants pre-charge. It also included provisions to give effect to the

597 Directive 2012/29/EU, '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.

598 Directive 2011/36/EU 'EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011; Directive 2011/92/EU, '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, 'EU Council Directive Relating to the Compensation to Crime Victims', 29 April 2004.

599 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.

600 Police Service NI, 'Trends in Domestic Abuse Incidents and Crimes Recorded by the Police in NI 2004/2005 to 2020/2021' (PSNI 2021), at para 5.

601 Ibid.

602 Ibid, at 14.

603 Ibid, at 16.

604 Women's Policy Group NI, 'Violence against Women and Girls in NI: Primary Research Findings' (WPGNI, 2022).

605 Women's Aid Federation NI, 'Annual Report 2019-20' (WAFNI, 2020).

606 Ibid.

607 Nisan Zerai Kesete, 'Destitution Domestic Violence Concession - Monitoring Research Report (Unbound Philanthropy, 2013).

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.

In 2021, the Commission responded to a NI Assembly Committee for Justice Call for evidence on the then Justice (Sexual Offences and Trafficking Victims) Bill.⁶⁰⁸ The response noted that the EU Victims' Directive set out a number of the rights and safeguards for victims, including child victims in the criminal justice process.⁶⁰⁹ The Commission advised that provisions of the Bill engaged the EU Victims' Directive and Protocol Article 2 should be considered throughout development and implementation of the Bill.

In April 2022, the Justice (Sexual Offences and Trafficking Victims) Act 2022 received Royal Assent.

Domestic Abuse (Safe Leave) Act (NI) 2022

The Domestic Abuse (Safe Leave) Act (NI) 2022 introduces a statutory right to ten days paid leave for employees that are victims or survivors of domestic violence or abuse.

In January 2022, the Commission responded to the NI Assembly Committee for the Economy's call for views on the then Domestic Abuse (Safe Leave) Bill, advising that provisions of the Bill fall within scope of Protocol Article 2 as they relate to both employment and social protection. In particular, the Commission highlighted that the EU Gender Equality (Employment) Directive⁶¹⁰ and the EU Gender Equality (Social Security) Directive,⁶¹¹ listed in Annex 1 of the Protocol, and the EU Victims' Directive⁶¹² were relevant and advised that new legislation should be screened to ensure its compatibility with Protocol Article 2.⁶¹³

In May 2022, the Domestic Abuse (Safe Leave) Act (NI) 2022 received Royal Assent.

Protection from Stalking Act (NI) 2022

The Protection from Stalking Act (NI) 2022 creates a new specific offence of stalking for NI, which will apply to two or more occasions that cause a person to suffer fear, alarm or substantial distress. A new offence of threatening or abusive behaviour has also been created which can be triggered by a single incident.⁶¹⁴ Additionally, the Justice (Sexual Offences

608 NI Human Rights Commission, 'NI Human Rights Commission Response to Committee for Justice Call for Evidence on the Justice (Sexual Offences and Trafficking Victims) Bill' (NIHRC, 2021).

609 Directive 2012/29/EU, '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.

610 Directive 2006/54/EC, 'EU Directive of European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast)', 5 July 2006.

611 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.

612 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.

613 Letter from the NI Human Rights Commission to the NI Assembly Committee for the Economy, 7 January 2022.

614 Department of Justice, 'Press Release: Long welcomes new stalking legislation', 22 February 2022.

and Trafficking Victims) Act (NI) 2022 introduces a specific offence banning upskirting and downblousing in NI.

Strategies

In 2022, the Domestic and Sexual Abuse Strategy and Equally Safe Strategy were consulted on.⁶¹⁵ Concerns have been raised that the Domestic and Sexual Abuse Strategy will take a gender-neutral approach and only the Equally Safe Strategy will take a gender-specific approach, with a focus on women and girls.⁶¹⁶ In its consultation response, the Commission recommended that both strategies adopt a gender-sensitive approach, have dedicated ring-fenced funding and include measures to target marginalised and vulnerable women and girls.⁶¹⁷ The Commission also advised that the provisions of the strategies engaged the EU Victims' Directive and fell within scope of Protocol Article 2.⁶¹⁸ The response highlighted that the EU 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 need special protection measures.⁶¹⁹ The EU Directive also recognises that women are disproportionately affected by this harm.⁶²⁰ Additionally, the EU Directive notes that gender-based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim.⁶²¹

In April 2022, advising on improving hate crime legislation in NI, the Commission recommended that the proposed legislation includes gender as a protected characteristic.⁶²² The Commission also recommended that the proposed legislation includes misogyny and transmisogyny as aggravating factors.⁶²³

In June 2022, Geraldine Hanna was appointed as Victims of Crime Commissioner Designate for a three-year term with the potential for an extension of up to one year.⁶²⁴ This role has a particular focus on domestic and sexual abuse.

In September 2022, the Police Service of NI published its first violence against women and girls action plan. The Action Plan is aligned with the UK National Strategy with a focus on building trust and confidence in policing to tackling violence against women and girls, relentlessly pursuing perpetrators of violence and supporting victims, and creating safer spaces

615 Department of Justice, 'Call For Views: New Strategies – Domestic and Sexual Abuse Strategy and Violence Against Women and Violence Against Women and Girls Strategy' (DoJ, 2022).

616 NI Commission on Human Rights Engagement with Civil Society Organisations on the UN ICESCR, 11 and 13 October 2022; Department of Justice, 'Call For Views: New Strategies – Domestic and Sexual Abuse Strategy and Violence Against Women and Violence Against Women and Girls Strategy' (DoJ, 2022).

617 NI Human Rights Commission, 'Response to Call for Views: Domestic Abuse Strategy and Equally Safe Strategy – A Strategy to Tackle Violence against Women and Girls' (NIHRC, 2022).

618 NI Human Rights Commission, 'Response to Call for Views: Domestic Abuse Strategy and Equally Safe Strategy – A Strategy to Tackle Violence against Women and Girls' (NIHRC, 2022).

619 Recital 18, Directive 2012/29/EU, '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.

620 Ibid.

621 Recital 17, 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 NI Human Rights Commission, 'Consultation Response to Improving Hate Crime Legislation in NI' (NIHRC, 2022).

623 Ibid.

624 Department of Justice, 'Press Release: Victims of Crime Commissioner Designate for NI appointed', 14 March 2022.

for women and girls.⁶²⁵ An Independent Advisory Group is to be setup to oversee the outcomes of the action plan.⁶²⁶

Istanbul Convention

In July 2022, the UK ratified the CoE Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention).

In November 2022, the Istanbul Convention came into force in the UK. However, the UK has placed a reservation against the provision that requires the UK to prosecute for offences committed outside of UK territory by a person who has her or his habitual residence in its territory.⁶²⁷ The UK Government has also placed a reservation against the provision that requires States to grant residence to victims of abuse whose immigration status depends on an abusive partner,⁶²⁸ which has faced particular criticism. Civil society organisations have warned that:

*this reservation, which denies migrant women survivors life-saving support, would be disastrous for them. It will mean migrant women, who will be some of the most reliant on the protections of the [Istanbul] Convention, will be excluded from it. This is in direct opposition to the spirit of the [Istanbul] Convention, which is firmly based on the principles of equality and non-discrimination.*⁶²⁹

Chair of the International Agreements Committee, Baroness Hayter, has stated that:

*we are deeply concerned that the UK Government is opting out of a key provision—the obligation to provide, in particularly difficult circumstances, an autonomous residence permit to migrant victims of domestic violence who rely on their spouse or partner for their own residency.*⁶³⁰

Recommendations

The Commission recommends that the UK Government withdraws its reservations against the Istanbul Convention.

The Commission recommends that the Department of Justice takes immediate steps to ensure there are enough refuge places for those that need them, when they need them.

625 Police Service of NI, 'Press Release: Police Service of NI launches first action plan to tackle violence against women and girls', 26 September 2022.

626 Ibid

627 Article 44(3), CoE Convention on Preventing and Combating Violence against Women and Domestic Violence 2011.

628 Article 59, CoE Convention on Preventing and Combating Violence against Women and Domestic Violence 2011.

629 ICChange, 'Press Release: Letter to Home Secretary - over 80 organisations call for ratification of the Istanbul Convention without reservations', 30 May 2022.

630 House of Lords International Agreements Committee, 'Press Release: All migrant victims of domestic abuse and violence must be protected, says Lords committee', 17 June 2022.

The Commission recommends that the Department of Justice, Department of Health and the Executive Office ensure that all policies and support for victims of domestic and sexual violence and abuse are specialised, accessible, gender-sensitive and guaranteed sustainable funding. These factors should be taken into account when commissioning services aimed at supporting victims and survivors. Steps taken should also be guided by disaggregated data and meaningful engagement with victims, survivors and representative organisations.

The Commission recommends that the Department of Justice, Department of Health and the Executive Office ensure that support for domestic and sexual violence and abuse is available regardless of an individual's immigration status.

The Commission recommends that, when implementing the Justice (Sexual Offences and Trafficking Victims) Act 2022, the Department of Justice takes Protocol Article 2 and the EU Victims' Directive into account, to ensure there is no diminution of the rights and safeguards which fall within its scope.

The Commission recommends that, when implementing the Domestic Abuse (Safe Leave) Act (NI) 2022, the Department for Economy takes Protocol Article 2 and the EU Victims' Directive into account to ensure there is no diminution of the rights and safeguards which fall within its scope.

In line with the 'keeping pace' obligations under Protocol Article 2, the Commission recommends the Department for Economy monitors any proposed changes by the EU to the EU Gender Equality (Employment) Directive and the EU Gender Equality (Social Security) Directive, including the relevant case law of the CJEU.

The Commission recommends that the Department of Justice and the Department of Health, in respect of the Domestic Abuse Strategy, and the Executive Office in respect of the Equally Safe Strategy, consider and take into account the EU Victims' Directive and Protocol Article 2 during the development and implementation of both Strategies.

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”.⁶³¹

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

631 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.

*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.*⁶³²

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”.⁶³³

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”.⁶³⁴

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 1998 as a result of the UK leaving the EU, including the right of victims “to remember as well as contribute to a changed society”.⁶³⁵ EU obligations underpinning the rights of victims include the EU Victims’ Directive⁶³⁶ as well as other relevant EU laws which support victims.⁶³⁷ The EU 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.⁶³⁸

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.⁶³⁹

In Scotland, the Female Genital Mutilation (Protection and Guidance) (Scotland) Act 2020 Bill provides for Female Genital Mutilation Protection Orders 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. There have been no prosecutions in NI and no recorded instances of female genital mutilation being performed in NI. The Department of Health is aware of historical cases of female genital mutilation in NI, these have been identified at

632 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.

633 Ibid.

634 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.

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

636 Directive 2012/29/EU, ‘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.

637 Directive 2011/36/EU ‘EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims’, 5 April 2011; Directive 2011/92/EU, ‘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, ‘EU Council Directive Relating to the Compensation to Crime Victims’, 29 April 2004.

638 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.

639 NI Executive, ‘Multi-Agency Practice Guidelines: Female Genital Mutilation’ (NIE, 2014).

maternity appointments of the affected women. The NI Maternity System records and collates data on such historical cases as they present to maternity services. In 2016/2017, the most recent available statistics, there were 32 incidences of female genital mutilation recorded in NI.

In 2021, the Department of Health was revising updating multi-agency guidelines that would take into account Female Genital Mutilation Protection Orders, new care pathways and a risk assessment tool.⁶⁴⁰ In 2022, while work on the revision is at an advanced stage, no date for publication has been confirmed.⁶⁴¹

In 2022, 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.⁶⁴² In addition, Section 116 of the Adoption and Children (NI) Act 2022 amends Article 8(4) of the Children Order so that proceedings for Female Genital Mutilation Protection Orders will be classified as family proceedings. This will enable a court, when dealing with an application for a Female Genital Mutilation Protection Order, to make other orders 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. Beginning in 2022/2023, the 2022 Act will be implemented on a phased basis over a period of five years. It is anticipated that Section 116 of the 2022 Act will be commenced in 2023/2024 under Phase 2.⁶⁴³

In 2022, the Domestic and Sexual Abuse Strategy and Equally Safe Strategy were consulted on.⁶⁴⁴ In its consultation response, the Commission advised that the EU Victims’ Directive identifies female genital mutilation as a form of gender-based violence and advised on the protection and supports for victims required by the Directive.⁶⁴⁵ The Commission also advised that both strategies engaged the EU Victims’ Directive and, therefore, fall within scope of Protocol Article 2.

In 2022, NI continues to operate the Child Protection Senior Officials Group, a cross-departmental group tasked with implementing an action plan to protect against the risk of female genital mutilation.⁶⁴⁶

Recommendations

The Commission recommends measures are taken by the Department of Health and the Department of Justice to investigate and prosecute perpetrators of female genital mutilation. This requires implementing a prevention strategy and action plan, which includes increasing

640 Email correspondence from the Department of Justice to the NI Human Rights Commission, July 2021.

641 Email correspondence from the Department of Health to the NI Human Rights Commission, 18 August 2022.

642 Email correspondence from the Department of Justice to the NI Human Rights Commission, July 2021.

643 Email correspondence from the Department of Health to the NI Human Rights Commission, 18 August 2022.

644 Department of Justice, ‘Call For Views: New Strategies – Domestic and Sexual Abuse Strategy and Violence Against Women and Violence Against Women and Girls Strategy’ (DoJ, 2022).

645 NI Human Rights Commission, ‘Response to Call for Views: Domestic Abuse Strategy and Equally Safe Strategy – A Strategy to Tackle Violence Against Women and Girls’ (NIHRC, 2022).

646 Email correspondence from the Department of Justice to the NI Human Rights Commission, July 2021.

efforts to raise awareness, particularly within affected communities, that female genital mutilation is a form of both child abuse and gender-based violence against women and girls. It also requires ensuring specialised support is available and accessible to victims of female genital mutilation. The Commission also recommends that disaggregated data on the prevalence of female genital mutilation in NI is gathered and monitored.

The Commission recommends that the Department of Justice and the Department of Health in respect of the Domestic Abuse Strategy and the Executive Office in respect of the Equally Safe Strategy consider and take into account the EU Victims' Directive and Protocol Article 2 during the development and implementation of both strategies.

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; [and]*
- 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.*⁶⁴⁷

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 1998 as a result of the UK leaving the EU, including the right of victims “to remember as well as contribute to a changed society”.⁶⁴⁸ EU obligations underpinning the rights of victims include the EU Victims' Directive,⁶⁴⁹ as well as other relevant EU laws which support victims.⁶⁵⁰

In cases of sexual abuse of children, the EU Directive on Child Sexual Exploitation sets out a number of provisions in relation to criminal offences and minimum tariffs, including effective, proportionate and dissuasive penalties.⁶⁵¹ 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

647 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.

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

649 Directive 2012/29/EU, '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.

650 Directive 2011/36/EU 'EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011; Directive 2011/92/EU, '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, 'EU Council Directive Relating to the Compensation to Crime Victims', 29 April 2004.

651 Recitals 11-12, Directive 2011/92/EU, 'Parliament and Council Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography', 13 December 2011.

necessary for the child’s physical and psychological recovery, including into adulthood.⁶⁵²

Historical Institutional Abuse Inquiry

In 2017, the Historical Institutional Abuse Inquiry report was published.⁶⁵³ In 2020, the Historical Institutional Abuse Redress Board was established for the purposes of receiving and processing applications for compensation from those who experienced abuse in residential institutions in NI between 1922 and 1995. Up to 31 December 2021, the Redress Board had received 2,081 compliant applications and made determinations totalling £34 million.⁶⁵⁴

In March 2022, an apology was issued jointly to victims and survivors historical institutional abuse by the then Minister of Education, Michelle McIlveen MLA; then Minister of Finance, Conor Murphy MLA; then Minister for Infrastructure, Nichola Mallon MLA; then Minister of Health, Robin Swann MLA; and then Minister of Justice, Naomi Long MLA.⁶⁵⁵ The apology acknowledged the wrong that had occurred, accepting the NI Executive’s responsibility, expressed regret at what happened, provided assurance of non-repetition and offered to take corrective action.

The Commissioner for Survivors of Institutional Childhood Abuse, Fiona Ryan, also made an apology that acknowledged the wrongdoing as “systemic abuse” that was enabled by “failed oversight and accountability on the part of the public authorities”.⁶⁵⁶

Abuses outside Historical Institutional Abuse Inquiry’s remit

The Historical Institutional Abuse Inquiry’s remit did not extend to adult residents of Magdalene laundry type institutions or those abused in private settings. In 2021, the Department of Health 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. A Truth Recovery Design Panel worked with victims and survivors to recommend the most appropriate form of investigation. It recommended that there was an integrated investigation by a non-statutory Independent Panel that fed into a statutory public inquiry.⁶⁵⁷

Recommendations

The Commission recommends that the NI Executive ensures victims of historical abuse outside the remit of the Historical Institutional Abuse Inquiry have an effective remedy, including expedient access

652 Recital 31, Directive 2011/92/EU, ‘Parliament and Council Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography’, 13 December 2011.

653 Anthony Hart, ‘Historical Institutional Abuse Inquiry Report’ (HIAI, 2017).

654 Historical Institutional Abuse Redress Board, ‘Annual Report 2020-2021’ (HIARB, 2022).

655 The Executive Office, ‘Press Release: Apology to victims and survivors of historical institutional abuse – Ministerial Statements’, 11 March 2022.

656 Commissioner for Survivors of Institutional Childhood Abuse, ‘Press Release: Apology’, 11 March 2022.

657 Deirdre Mahon, Maeve O’Rourke, Phil Scraton, ‘Mother and Baby Institutions, Magdalene Laundries and Workhouses in NI Truth, Acknowledgement and Accountability’ (DoH, 2021).

to thorough and effective independent investigations that offer effective redress (including compensation) and are subject to public scrutiny and meaningful victim participation.

The Commission recommends that, when developing or implementing any laws or policies in relation to historical abuse, the NI Executive considers the extent to which Protocol Article 2 is engaged and ensures that there is no diminution to the rights and safeguards which fall within its scope.

Intersex genital mutilation

In 2019, the UN CAT Committee recommended that 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; [and]*
- 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.*⁶⁵⁸

In 2016, the UN CRC Committee recommended that 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; [and]*
- 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.*⁶⁵⁹

658 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 65.

659 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 47.

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.⁶⁶⁰ 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.⁶⁶¹ 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.

Lesbian, Gay, Bisexual, Transgender, Queer (Or Questioning), Intersex+ Strategy

In 2020, the Department for Communities commenced work on a Lesbian, Gay, Bisexual, Transgender, Queer (Or Questioning), Intersex+ Strategy for NI. As part of this process an Expert Advisory Panel was appointed and undertaking ongoing engagement with a Co-Design Group made up of key stakeholders, including the Commission, and cross-departmental working group was established. In 2021, the Expert Panel recommended that the Lesbian, Gay, Bisexual, Transgender, Queer (Or Questioning), Intersex+ Strategy addresses issues faced by intersex persons in NI, including the healthcare needs of intersex persons, commitment to and guidance around informed consent of intersex children and a commitment to ending intersex genital mutilation in NI.⁶⁶² The strategy, which was due to be published for consultation, cannot progress until the NI Executive is reinstated.⁶⁶³

Recommendations

The Commission calls for the Department of Finance and the UK 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.

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.

660 Department of Health, Social Services and Public Safety, 'Reference Guide to Consent for Examination, Treatment or Care' (DHSSP, 2003), at para 64.

661 Department for Communities, 'Lesbian, Gay, Bisexual, Transgender, Queer (Or Questioning), Intersex+ Strategy Expert Advisory Panel - Themes and Recommendations' (DfC, 2021).

662 Ibid.

663 Letter from Department for Communities to NI Human Rights Commission, 18 July 2022.

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.*⁶⁶⁴

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); [and]*
- 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.*⁶⁶⁵

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 1998 as a result of the UK leaving the EU, including the right of victims “to remember as well as contribute to a changed society”.⁶⁶⁶ EU obligations underpinning the rights of victims include the EU Victims’ Directive⁶⁶⁷ as well as other relevant EU laws which support victims.⁶⁶⁸

In 2021, there were 59 immigration detainees held at the short-term holding facility, Larne House. Of these, 55 were men and 4 were women. There were no children held during this period. There has been a significant decline in immigration detainees held at Larne House. In 2020, there were 97 immigration detainees. In 2019, there were 473 immigration detainees.⁶⁶⁹

664 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.

665 Ibid.

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

667 Directive 2012/29/EU, ‘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.

668 Directive 2011/36/EU, ‘EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims’, 5 April 2011; Directive 2011/92/EU, ‘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, ‘EU Council Directive Relating to Compensation to Crime Victims’, 29 April 2004.

669 Home Office, ‘Immigration Statistics Data Tables: Year Ending September 2020’ (HO, 2020), at Table Dt_01.

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 they are 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.

In 2021, the HM Chief Inspector of Prisons, Charlie Taylor, reported improvements to staff training within Larne House on keeping residents safe and on mental health awareness.⁶⁷⁰ The Chief Inspector of Prisons also found that good quality safeguarding adult policies were observed.⁶⁷¹ This includes a Vulnerable Adult Care Plan for anyone who was at risk and Assessment, Care in Detention and Teamwork forms for detainees at risk of suicide or self-harm. Staff were also reportedly aware of the National Referral Mechanism and their role as first responders.⁶⁷²

However, the Chief Inspector of Prison's previous recommendation for men and women to be held separately was repeated.⁶⁷³ In 2021, the Home Office advised of plans to update the accommodation within Larne House, which includes providing a separate contained wing for women, with single occupancy bedrooms and a separate association room.⁶⁷⁴ In August 2022, the building work has still not commenced. However, the Home Office advised that the proposals are out to tender and will be passed to the Ministry of Justice for consideration when the Larne House operator receives three or more bids.⁶⁷⁵

Further concerns have been raised by civil society 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.⁶⁷⁶

In 2021, the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation raised concerns that the Commission is not able to enter places of detention, such as Larne House, without providing advance notice.⁶⁷⁷

Recommendations

The Commission recommends that the Home Office ensures effective, consistent 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.

670 HM Inspectorate of Prisons, 'Report on an Unannounced Inspection of the Residential Short-term Holding Facilities at Larne House, Manchester Airport and Yarl's Wood by HM Chief Inspector of Prisons' (HMIP, 2021), at paras 2.6-2.11.

671 Ibid, at para 2.6.

672 Ibid, at para 2.8.

673 Ibid, at para 2.30.

674 Email correspondence from Home Office to NI Human Rights Commission, 26 August 2021.

675 Email correspondence from Home Office to NI Human Rights Commission, 11 August 2022.

676 Meeting between NI Human Rights Commission and civil society representatives, November 2018.

677 Global Alliance of National Human Rights Institutions, 'Report and Recommendations of the Virtual Session of the Sub-Committee on Accreditation - October 2021' (GANHRI, 2021).

The Commission recommends that the Home Office ensures the independence of health care professionals dealing with detained asylum seekers.

The Commission recommends that the NI Office takes prompt steps to amend the NI Act 1998 to allow the Commission to enter Larne House without having to provide advance notice.

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, specifically 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; [and]*
- 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.*⁶⁷⁸

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 1998 as a result of the UK leaving the EU, including the right of victims "to remember as well as contribute to a changed society".⁶⁷⁹ EU obligations underpinning the rights of victims include the EU Victims' Directive⁶⁸⁰ as well as other relevant EU laws which support victims.⁶⁸¹

As an EU Member State, the UK had primary responsibility for protecting children against violence and the role of EU law was limited to those areas within its competence. While the physical punishment of children did not fall within EU competence prior to 31 December 2020, protections for victims did fall within its scope. The EU 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 the UN CRC.⁶⁸² In addition, the EU 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

678 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.

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

680 Directive 2012/29/EU, '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.

681 Directive 2011/36/EU 'EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011; Directive 2011/92/EU, '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, 'EU Council Directive Relating to the Compensation to Crime Victims', 29 April 2004.

682 Recital 14 and Article 1, 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.

need special protection measures.⁶⁸³ A person is considered a victim whether an offender is identified, apprehended, prosecuted or convicted and regardless of familial relationship between them.⁶⁸⁴

The Law Reform (Miscellaneous Provisions) (NI) Order 2006 continues to allow for a defence of reasonable punishment of a child. This reflects the situation in England.⁶⁸⁵ However, Scotland, Wales and Ireland have prohibited the physical punishment of children by parents and others caring for them.⁶⁸⁶

Regarding its approach in England, the UK Government 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”.⁶⁸⁷

In 2021, University College of London research found that:

*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.*⁶⁸⁸

In 2021, the then Minister of Justice, Naomi Long MLA, intended to take legislative steps to remove the defence of reasonable chastisement in NI.⁶⁸⁹ However, the proposed legislative provision failed to secure majority cross-party support and could not be brought forward.⁶⁹⁰ In 2022, the then Minister of Justice was considering options for the primary legislative programme for the new mandate and intended to revisit the handling of this issue once the NI Executive and NI Assembly are reinstated.⁶⁹¹

Recommendations

The Commission recommends that the Department of Justice expeditiously repeals the defence of reasonable chastisement of a child and devise and implement 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.

683 Recital 18 and Articles 9 and 23, 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 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.

685 Section 58, Children’s Act 2004.

686 Children (Equal Protection from Assault) (Scotland) Act 2019; Children (Abolition of Defence of Reasonable Punishment) (Wales) Act 2020; Children Act 2011 and Children First Act 2015.

687 UK Government, ‘Universal Periodic Review: UK, British Overseas Territories and Crown Dependencies National Report’ (UKG, 2017).

688 University College London, ‘Press Release: Physically punishing children is not effective and increases behavioural problems’, 29 June 2021.

689 NI Assembly Hansard, ‘Committee for Justice: Report on the Justice (Sexual Offences and Trafficking Victims) Bill - NIA 165/17-22’ (NIA, 2022).

690 Ibid.

691 Email correspondence from the Department of Justice to the NI Human Rights Commission, 22 June 2022.

The Commission recommends that, when developing or implementing any laws or policies on the physical punishment of children, the Department of Justice considers the extent to which Protocol Article 2 is engaged and ensures that there is no diminution to the rights and safeguards which fall within its scope.

Prison conditions

In 2015, the UN Human Rights Committee recommended robust measures:

to prevent self-inflicted deaths, including suicides and self-harm in custody, inter alia by:

- a) *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;*
- b) *providing adequate training to prison officials on suicide and self-harm prevention;*
- c) *ensuring adequate protection of, and appropriate mental health and other support services to, prisoners; [and]*
- d) *combating bullying in custody facilities effectively.*⁶⁹²

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”.⁶⁹³

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; [and]*
- d) *investigate all incidents of violence in places of detention and ensure that prison officials are held accountable in cases where they*

692 CPR/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.

693 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.

*fail to take reasonable measures to prevent and respond to such violence.*⁶⁹⁴

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; [and]*
- c) compile detailed data on suicides among persons deprived of their liberty and assess the effectiveness of prevention and risk identification strategies and programmes.*⁶⁹⁵

Population

In 2021/2022, the overall average daily prison population was 1,494, an increase from 1,448 in 2020/2021.⁶⁹⁶ Between 2021/2022 and 2020/2021, the men's prison population increased from 1,393 to 1,428, while the women prison population increased from 55 to 66.⁶⁹⁷ In 2021/2022, the remand population was 546, an increase from 545 in 2020/2021.⁶⁹⁸ During 2021/2022, the average daily immediate custody prison population was 941, an increase from 898 in 2020/2021.⁶⁹⁹ Prisoners aged between 30 to 39 years of age made up the largest proportion (36.5 per cent) of the average daily immediate custody prison population. In terms of custodial sentence length, the average daily population in sentence length categories of life and indeterminate custodial sentence has remained similar, while 'greater than five years but less than life' has decreased.⁷⁰⁰ Increases were found in the remaining categories.⁷⁰¹ Violence against the person offences continued to account for the largest proportion of all principal offence categories (35.4 per cent).⁷⁰²

In 2021, 156 prisoners were placed in a Care and Supervision Unit for more than 10 days. This has been decreasing year-on-year, from 187 prisoners in 2020 and 209 prisoners in 2019.⁷⁰³

In 2021/2022, there were 75 prisoner assaults on prison staff, representing a 97 per cent increase from the 38 recorded in 2020/2021.⁷⁰⁴ There were a further 66 prisoner-on-prisoner assaults, representing a 65 per cent increase from the 40 recorded in 2020/2021.⁷⁰⁵

694 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.

695 Ibid.

696 NI Statistics and Research Agency, 'NI Prison Population 2021/2022' (DoJ, 2022), at Section 1.1.

697 Ibid.

698 Ibid, at Section 3.10.

699 Ibid.

700 NI Statistics and Research Agency, 'NI Prison Population 2021/2022' (DoJ, 2022), at Section 3.8.

701 Includes 'greater than one year but less than five years', 'greater than six months but less than 12 months' and 'three month or less'.

702 NI Statistics and Research Agency, 'NI Prison Population 2021/2022' (DoJ, 2022).

703 NI Assembly Hansard, 'Oral Question - Care and Supervision Units in the Prison Service - Colm Gildernew MLA - AQO 3084/17-22', 7 February 2022.

704 Email correspondence from Department of Justice to NI Human Rights Commission, 26 September 2022.

705 Ibid.

Conditions of detention

In 2020/2021, the Prisoner Ombudsman for NI received 367 individual complaints from prisoners, an increase of 11 per cent from 2019/2020.⁷⁰⁶ 87 per cent of prisoner complaints came from Maghaberry Prison, 25 per cent of which came from separated prisoners.⁷⁰⁷ Of 391 complaints investigated, eight per cent were upheld or partially upheld.⁷⁰⁸ The Prisoner Ombudsman for NI made 68 recommendations for improvement, of which 91 per cent have been accepted.⁷⁰⁹

In 2018, the Criminal Justice Inspection NI noted that living conditions in Maghaberry Prison were good, but that the older buildings were “claustrophobic, unhygienic and extremely uncomfortable”.⁷¹⁰ It recommended that the prison should “work to increase prisoner confidence in staff and important processes like the complaints system”.⁷¹¹

In February 2022, the Criminal Justice Inspection NI identified poor living conditions as a key concern, which in certain instances presented considerable risks to health, within Magilligan Prison.⁷¹² The Criminal Justice Inspection NI recommended that effective arrangements should be put in place to monitor and maintain high standards of cleanliness in residential units.⁷¹³

In February 2022, the Criminal Justice Inspection NI found that the treatment of some prisoners and patients in a Care and Supervision Unit within NI prisons “did not meet the expected Standard Minimum Rules and what some experienced was solitary confinement, sometimes despite the best efforts of Prison Officer and health care staff”.⁷¹⁴ The Criminal Justice Inspection NI confirmed that:

*meaningful human contact goes beyond asking someone at a cell door if they have any requests, do they want a shower or placing a food tray through their door. It is not transferring them from one cell to another each day while their cell is deep cleaned. Establishing and maintaining meaningful human contact... requires skilled and committed staff with access to support and specialist advice when needed... Evidence that opportunities for engaging in or maintaining learning and skills, physical or other purposeful activity were very limited and using these activities as opportunities to have conversations were missed by some prisoners who needed them most.*⁷¹⁵

706 Prisoner Ombudsman for NI, ‘Annual Report 2020-2021’ (PONI, 2022).

707 Ibid.

708 Ibid.

709 Ibid.

710 National Preventative Mechanism, ‘Report on an Unannounced Inspection of Maghaberry Prison: 9-19 April 2018’ (CJINI, 2018).

711 Ibid.

712 Criminal Justice Inspection NI, ‘Report on an Unannounced Inspection of Magilligan Prison - 21 May-10 June 2021’ (CJINI, 2022).

713 Ibid.

714 Criminal Justice Inspection NI, ‘A Review into the Operation of Care and Supervision Units in the NI Prison Service’ (CJINI, 2022), at 4.

715 Ibid, at 4-5.

In response to these findings, the former Minister of Justice, Naomi Long MLA, advised that the NI Prison Service has developed an action plan and work is progressing to deliver all recommendations.⁷¹⁶ The Commission has been asked to advise on a draft Care and Supervision Unit framework. In October 2022, the Commission met with the NI Prison Service to discuss its action plan. In November 2022, the Commission was due to visit the Hydebank Care and Supervision Unit to inform its response.

In 2021, the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation raised concerns that the Commission is not able to enter places of detention, such as prisons, without providing advance notice.

Prisoners with complex needs

In 2019, the Criminal Justice Inspection NI reported concerns 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”.⁷¹⁷

In 2021, the Regional Quality Improvement Authority reiterated significant concerns regarding the use of Care and Supervision Units to manage prisoners that have specific vulnerabilities, rather than providing them with appropriate inpatient treatment.⁷¹⁸ It also found that waiting times for transferring detainees to mental health beds was unacceptably long.⁷¹⁹

In February 2022, the Criminal Justice Inspection NI highlighted positive practices in Magilligan Prison where “the provision of integrated social care packages to prisoners with severe needs was an excellent and innovative example of joint working across several departments and included the involvement of prisoners”.⁷²⁰

Drug use and availability in NI prisons

In 2020, the Criminal Justice Inspection NI found that the supply and use of illegal and prescription drugs and improve governance around the use of force within Hydebank Wood and Ash House continues to be an issue.⁷²¹

In February 2022, the Criminal Justice Inspection NI identified the use and availability of illicit drugs and diverted prescribed medications as a key concern that was becoming increasingly problematic within Magilligan Prison.⁷²²

716 NI Assembly Hansard, ‘Written Question - Care and Supervision Units in the Prison Service - Sinéad Ennis MLA - AQW 1685/22-27’, 23 June 2022.

717 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).

718 Regulation and Quality Improvement Authority, ‘Baseline Audit of Forensic Mental Health and Learning Disability Services - Adult Services’ (RQIA, 2018).

719 Regulation and Quality Improvement Authority, ‘Review of Services for Vulnerable Persons Detained in NI Prisons’ (RQIA, 2021).

720 Criminal Justice Inspection NI, ‘Report on an Unannounced Inspection of Magilligan Prison 21 May-10 June 2021’ (CJINI, 2022).

721 Criminal Justice Inspection NI, ‘Report on an Unannounced Inspection of Hydebank Wood Secure College 23- 24 October and 4-7 November 2019’ (CJINI, 2020).

722 Criminal Justice Inspection NI, ‘Report on an Unannounced Inspection of Magilligan Prison 21 May-10 June 2021’ (CJINI, 2022).

Deaths in custody

In 2020/2021, the Prisoner Ombudsman for NI initiated investigations into five deaths in custody, two in Magilligan prison and three in Maghaberry prison, an increase from three deaths in 2019/2020.⁷²³ Two deaths appeared to be from natural causes and three deaths appeared to be self-inflicted. Inquests to establish the cause of death are pending for all five deaths reported.

In 2020/2021, enquiries were also initiated into three post-release deaths, a decrease from 11 in 2019/2020.⁷²⁴ Of these, one case warranted further investigation.⁷²⁵

In 2022, the Post-Release Deaths Project continues to operate. This is a collaborative project between prison, probation, court services and the South Eastern Health and Social Care Trust, which aims to provide details on the cause of death of former prisoners to better inform custodial interventions.⁷²⁶ Plans are also being developed for the NI Statistics and Research Agency to track deaths of former prisoners.

Recommendations

The Commission recommends that the Department of Justice and the NI Prison Service urgently implement the Prison Ombudsman NI and Criminal Justice Inspection NI's recommendations, particularly in relation to the use of Care and Supervision Units in NI. Immediate steps should be taken to have measures in place to ensure solitary confinement can be avoided, while also maintaining public safety, during future pandemics or emergencies.

The Commission recommends the Department of Justice and the NI Prison Service compile disaggregated data 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. Furthermore, that the Department of Justice ensures 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 the Commission to enter places of detention, such as prisons, without having to provide advance notice.

Rwanda asylum proposals

In April 2022, the UN Refugee Agency urged the UK to refrain from transferring people seeking asylum and refugees to Rwanda for asylum processing. It found that "the UK is adopting arrangements that abdicate

723 Prisoner Ombudsman for NI, 'Annual Report 2020-2021' (PONI, 2022).

724 Ibid.

725 Ibid.

726 Niall McCracken, 'Post-custody deaths in NI to be investigated', *BBC News*, 11 December 2019.

responsibility to others and thus threaten the international refugee protection regime, which has stood the test of time, and saved millions of lives over the decades”.⁷²⁷ In June 2022, the UN Refugee Agency published a legal opinion on the proposals that found:

*the UK-Rwanda arrangement fails to meet the required standards relating to the legality and appropriateness of bilateral or multilateral transfers of asylum-seekers. This arrangement, which amongst other concerns seeks to shift responsibility and lacks necessary safeguards, is incompatible with the letter and spirit of the... [UN Refugee Convention 1951].*⁷²⁸

In April 2022, the then Home Secretary, Priti Patel MP, announced a migration and economic development partnership between the UK and Rwanda, proposing to relocate some migrants who have arrived in the UK illegally to Rwanda “to resettle and rebuild their lives”.⁷²⁹ On 13 April 2022, a Memorandum of Understanding was signed, with immediate effect, between the UK and Rwanda setting out the terms for the Asylum Partnership Arrangement,⁷³⁰ within which Rwanda committed to:

*receive asylum seekers from the UK, to consider their claims for asylum, giving effect to their rights under international law through the Rwanda domestic asylum system and arranging for the settlement in Rwanda of those recognised as refugees or otherwise requiring protection.*⁷³¹

The Memorandum of Understanding also contained a commitment by the UK and Rwanda to uphold “fundamental human rights and freedoms without discrimination”.⁷³² Yet, the Memorandum of Understanding is not binding in international law⁷³³ and compliance with this arrangement is not “justiciable in any court of law by third-parties or individuals”.⁷³⁴

Under the Memorandum of Understanding and the Nationality and Borders Act 2022, if an asylum claim in the UK is deemed ‘inadmissible’ it will not be considered in the UK, but could be considered in Rwanda.

In June 2022, the Home Office updated its guidance on inadmissible claims stating that:

*asylum claims may be declared inadmissible and not substantively considered in the UK, if the claimant was previously present in or had another connection to a safe third country, where they claimed protection, or could reasonably be expected to have done so, provided there is a reasonable prospect of removing them in a reasonable time to a safe third country.*⁷³⁵

727 UN Refugee Agency, ‘Press Release: UN Refugee Agency opposes plan to export asylum’, 14 April 2022.

728 UN Refugee Agency, ‘UNCHR Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers Under the UK-Rwanda Arrangement’ (UNCHR, 2022).

729 Home Office, ‘Press Release: UK and Rwanda migration and economic development partnership’, 14 April 2022.

730 Memorandum of Understanding Between the Government of the UK of Great Britain and NI and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Arrangement, 13 April 2022.

731 Ibid.

732 Ibid.

733 Ibid, at Article 1.6.

734 Ibid, at Article 2.2.

735 Home Office, ‘Guidance, Inadmissibility: Safe Third Country Cases, Version 7’ (HO, 2022).

Where children are involved, applications should be considered in accordance with the duty to safeguard the welfare of the child under the Borders, Citizenship and Immigration Act 2009.⁷³⁶ Unaccompanied children are not suitable for this inadmissibility process, though they may be invited to withdraw their application where certain grounds are fulfilled. However, families with children under 18 years of age may still be removed on inadmissibility grounds.⁷³⁷

On 1 June 2022, formal directions were issued to the first group of people to be relocated to Rwanda on 14 June 2022.⁷³⁸ Legal actions against the policy were commenced by civil society organisations, including Asylum Aid and Detention Action.⁷³⁹ An injunction was also sought on behalf of the applicants to prevent the flight, but this was refused by the England and Wales Court of Appeal. The UK Supreme Court also refused permission to appeal to this decision.⁷⁴⁰ The initial flight was stopped after an intervention from the ECtHR, on behalf of one of the individuals affected, which indicated an interim measure on an exceptional basis due to the applicant facing a real risk of irreversible harm. The ECtHR indicated the applicant should not be removed to Rwanda until three weeks after the delivery of the final domestic decision in his ongoing judicial review proceedings.⁷⁴¹

In September 2022, hearings for the first judicial review application began on behalf of people seeking asylum, supported by the Public and Commercial Services Union, Care4Calais and Detention Action. This action challenges that people seeking asylum removed to Rwanda would be at risk from torture and inhuman treatment.⁷⁴² In October 2022, a second challenge based on the procedural fairness of the proposals was heard on behalf of Asylum Aid.⁷⁴³

In October 2022, the House of Lords International Agreement Committee found that:

*the arrangement will have far-reaching consequences for individuals and their rights, and the Memorandum of Understanding contains specific assurances and protections for those being relocated that both Parties commit to uphold. However, because it is a political agreement only – as opposed to a legally binding treaty – the safeguards included in it are not enforceable. This is unacceptable. Agreements that fundamentally affect individuals’ rights should be entered into through a formal treaty, so that the rights of those affected can be fully protected.*⁷⁴⁴

736 Section 55, Border, Citizenship and Immigration Act 2009.

737 Ibid.

738 Home Office, ‘Press Release: First migrants set for Rwanda to be given final notice’, 1 June 2022.

739 Rajeev Syal and Diane Taylor, ‘Home Office’s Rwanda deportation plans face high court challenge’, *The Guardian*, 8 June 2022.

740 *R(NSK (Iraq)) v Secretary of State for the Home Department* [2022] UKSC 90, 14 June 2022.

741 European Court of Human Rights, ‘Press Release: The European Court grants urgent interim measure in case concerning asylum-seeker’s imminent removal from the UK to Rwanda’, 14 June 2022.

742 Dominic Casciani, ‘Rwanda migrant flights plan legally viable, government lawyer say’, *BBC News*, 8 September 2022; Rajeev Syal and Diane Taylor, ‘UK Ministers ignored evidence Rwanda violated human rights, court told’, *The Guardian*, 5 September 2022.

743 Asylum Aid, ‘Press Release: Rwanda Policy – Our legal fight to prevent injustice’, 9 June 2022.

744 House of Lords International Agreements Committee, ‘Memorandum of Understanding Between the UK and Rwanda for the Provision of an Asylum Partnership Arrangement – Seventh Report of Session 2022–2023’ (HoL, 2022), at 2.

Recommendations

The Commission recommends that the UK Government repeals the Memorandum of Understanding with Rwanda and ensures all people seeking asylum in the UK are processed in a human rights compliant way. This should take into account the difficult journey and trauma experienced by many prior to arriving in the UK.

Spit and bite guards

In 2016, the UN CRC Committee recommended that the UK Government and NI Executive:

*prohibit the use on children of electrical discharge weapons, such as tasers, attenuating energy projectiles (in NI) and any other harmful devices and systematically collect and publish age-disaggregated data on their use in order to monitor the implementation of such prohibition.*⁷⁴⁵

In 2020, spit and bite guards were introduced as a temporary measure by the Police Service 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.⁷⁴⁶ Since March 2020, spit and bite guards have been used 259 times in NI.⁷⁴⁷

In February 2022, the NI Policing Board's Human Rights Advisor, John Wadham, reviewed the Police Service NI's use of spit and bite guards.⁷⁴⁸ The review found that there is a lack of sound medical evidence that demonstrates the effectiveness of spit and bite guards in preventing the transmission of COVID-19. The NI Policing Board's Human Rights Advisor made a number of recommendations, including that the Police Service NI makes it clear to police officers and the public that the use of spit and bite guards on medical grounds alone is not justified.⁷⁴⁹

In May 2022, spit and bite guards were made a permanent tactic for all front-line police officers. Assistant Chief Constable, Chris Todd, has advised that this approach is subject to all eligible officers being trained in the Police Service NI's Personal Safety Programme and to further assurance around a governance framework and equality concerns.⁷⁵⁰

In June 2021, the Police Service NI identified that the use of spit and bite guards has a greater impact on some groups, namely – men, members of the Catholic community and people with a disability (including mental health). The Police Service NI also reported that “at least 81 per cent of uses of spit and bite guards were on a male or female with a disability,

745 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(a).

746 Rebecca Black, 'Police Service NI to deploy spit and bite guards in custody suites', *Belfast Telegraph*, 27 March 2020.

747 Letter from Police Service NI Assistant Chief Constable, Chris Todd, to NI Human Rights Commission, 15 June 2022.

748 NI Policing Board, 'A Review of Police Service NI's Use of Spit and Bite Guards by the NI Policing Board's Human Rights Advisor' (NIPB, 2022).

749 *Ibid.*, at 22.

750 Letter from Police Service NI Assistant Chief Constable, Chris Todd, to NI Human Rights Commission, 15 June 2022.

including mental health disabilities”.⁷⁵¹ In June 2022, the Police Service NI advised that:

*this figure should now be caveated by the fact that we do not formally record disability. Any record of a detainee having a disability is either officer-perceived or volunteered by a detainee whilst in custody. The figure of 81 per cent included people with mental health disabilities and incidents where drugs and/or alcohol were noted as a factor.*⁷⁵²

Spit and bite guards can be used on children aged ten years old and upwards, in line with the current age of criminal responsibility in NI. The Police Service NI’s policy on the use of spit and bite guards 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 that “where officers or staff are aware or believe that a member of the public is under 18, the presumption will be that a spit and bite guard should not be used”.⁷⁵³ However, to date, Police Service NI officers have used spit and bite guards on 13 children, ranging in age from 14 to 17 years old.⁷⁵⁴ The NI Policing Board’s Human Rights Advisor noted that “it is difficult to see how the use of a spit and bite guard will ever be in the interests of a child and therefore the guidance should be amended to set out the circumstances where this might, possibly, be true”.⁷⁵⁵

Police officers and staff must use body worn video in any encounter outside a custody suite where they are considering using a spit and bite guard. The video must remain active during the use of the spit and bite guard. Dip sampling by line managers is due to take place as a form of monitoring. In instances where a spit and bite guard is used on a child, the video footage must be reviewed by the deploying officer’s supervisor and an officer of at least the rank of Chief Inspector.⁷⁵⁶

In terms of independent review, the Police Ombudsman for NI is no longer reviewing each instance of the use of a spit and bite guard.⁷⁵⁷ However, the Police Ombudsman for NI has agreed to recommence the review of all footage that involves a child.⁷⁵⁸ It has been further agreed that the Policing Board NI Independent Human Rights Advisor will review the use of spit and bite guards through a dip sampling process and will publish a formal report in February 2023.⁷⁵⁹

Recommendations

The Commission recommends that the Police Ombudsman for NI and Police Service NI ensure that each use of a spit and bite guard

751 Police Service NI, ‘Equality Impact Assessment on the Use of Spit and Bite Guards’ (PSNI, 2021), at 37.

752 Ibid, at 38.

753 Letter from Police Service NI Assistant Chief Constable to NI Human Rights Commission, 15 June 2022.

754 Letter from Police Service NI Assistant Chief Constable, Chris Todd, to NI Human Rights Commission, 15 June 2022.

755 NI Policing Board, ‘A Review of Police Service NI’s Use of Spit and Bite Guards by the NI Policing Board’s Human Rights Advisor’ (NIPB, 2022), at 41.

756 Letter from Police Service NI Assistant Chief Constable, Chris Todd, to NI Human Rights Commission, 15 June 2022.

757 Police Service NI Stakeholder Event on the Use of Spit and Bite Guards, 25 October 2022.

758 Ibid.

759 Ibid.

in NI is necessary, proportionate and non-discriminatory. Guided by these principles, consideration should be given to the human rights of both the recipient of the spit and bite guard and the affected police officers. Rigorous safeguarding measures should be in place and effectively utilised, such as regularly reviewing the use of spit and bite guards and ensuring that robust disaggregated data is collected, effectively monitored and evaluated on each use of a spit and bite guard in NI.

The Commission recommends that the Police Service NI amends its policy on the use of spit and bite guards to advise in what circumstances it would be appropriate for a police officer to use a spit and bite guard on a child, including ensuring that the best interests of the child is a primary consideration.

Strip searches

In 2015, the UN Human Rights Committee recommended that the UK Government and NI Executive “ensure the operation of robust independent scrutiny and oversight of any stop and search powers in the UK with a view to ensuring that such powers are not exercised in an arbitrary or discriminatory manner and are fully compliant” with the UN ICCPR.

In 2016, the UN CRC Committee recommended that the UK Government and NI Executive “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”.⁷⁶⁰ The UN CRC Committee further recommended that the UK Government and NI Executive “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”.⁷⁶¹

Children

In 2021, children between the ages of 12 and 17 years old were strip searched by the Police Service NI on 34 occasions. Strip searches involve the removal of clothing and can include exposure of intimate body parts. On only three occasions was anything found. In the other 31 occasions, no drugs, weapons or anything else harmful were uncovered. Police officers are obligated to record the reason for conducting a strip search, but in 14 of the 34 cases the Police Service NI was unable to provide any justification for why strip searches were conducted.⁷⁶²

In May 2022, Chief Superintendent, Sam Donaldson, stated that:

unfortunately there are occasions when it is necessary and proportionate for police officers to conduct strip searches of under-18s... [which are conducted] when authorised by a custody sergeant

760 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 38(b).

761 Ibid, at para 38(c).

762 Rory Winters, 'Police Service NI strip searching of under-18s is "deeply shocking"', *The Detail*, 20 May 2022.

*and are carried out in a place of privacy by a suitably qualified/trained officer of the same sex, giving appropriate respect to preferred gender identity, as the individual being searched.*⁷⁶³

The Chief Superintendent continued that the Police Service NI's Policing Powers Development Group will look at the concerns raised and that "any trends or issues arising will be addressed".⁷⁶⁴

Video recording in prisons

In 2016, the NI High Court quashed the NI Prison Service's policy that enabled 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".⁷⁶⁵ 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.⁷⁶⁶

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 previously conducted an unsuccessful trial of a millimetre wave scanning equipment. In 2022, the NI Prison Service completed the process to secure approval to use x-ray body scanners in NI.⁷⁶⁷ The NI Prison Service is working towards implementing x-ray body scanners in NI prisons by end of March 2023.⁷⁶⁸

Recommendations

The Commission recommends the Department of Justice, Police Service NI and the NI Prison Service promptly implement less intrusive methods for searching persons than conducting strip searches, recorded or otherwise. Once implemented the use of the methods adopted should be effectively monitored and regularly reviewed.

The Commission recommends that the Department of Justice, Police Service NI and the NI Prison Service ensure that strip searches, particularly of children, are a last resort.

The Commission recommends that the Department of Justice, Police Service NI and the NI Prison Service ensure that all strip searches have a clear justification that is proportionate and non-discriminatory. The decision to strip search an individual and the manner in which it

763 Ibid.

764 Ibid.

765 *Flannigan's Application* [2016] NIQB 27, at para 44.

766 Ibid, at para 48.

767 Email correspondence from the Department of Justice to NI Human Rights Commission, 14 October 2022.

768 Ibid.

is conducted should take into consideration the age, maturity and any specific needs of the individual being searched.

The Commission recommends that the Department of Justice, Police Service NI and the NI Prison Service ensure that any occasion when an individual is strip searched is documented, including the proposed justification for the search. This data should be disaggregated, including the age of the individual, and effectively monitored.

Victims' payments

In 2016, the UN Human Rights Committee recommended that in the context of accountability for conflict-related violations in NI, the UK Government provides “appropriate remedies for victims”.⁷⁶⁹ In 2019, the UN CAT Committee recommended, regarding conflict-related violations in NI, that the UK Government “ensure that victims of torture and ill-treatment obtain redress, including fair and adequate compensation, and as full a rehabilitation as possible”.⁷⁷⁰

In 2020, the Victims' Payments Regulations 2020 were passed by the UK Parliament, which provide for one or more payments to be made to, or in respect of, a person who has sustained an injury as a result of a ‘Troubles-related injury’. Consequently, the Troubles Permanent Disablement Payment Scheme was established, which aims to provide “those living with permanent disablement (either physical or psychological) caused by injury through no fault of their own in a Troubles-related incident with payments primarily in acknowledgement of the harm they have suffered”.⁷⁷¹

The Victims' Payments Regulations establish a Victims' Payments Board, which makes decisions on applications to the Troubles Permanent Disablement Payment Scheme. In 2021, the Victims' Payments Board (which consists of legal, medical and ordinary members) was appointed by the then Lord Chief Justice, Sir Declan Morgan.⁷⁷²

The NI Office has issued guidance which aims to support the independent Victims' Payments Board when making decisions about applicants who have serious convictions or in other exceptional circumstances with regard to material evidence.⁷⁷³ The Victims' Payments 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.⁷⁷⁴ The Victims' Payments 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

769 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(a).

770 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 40(e).

771 Victims Payments Board, 'Procedural Guidance' (VPB, 2021), at para 4.

772 Victims Payments Board, 'About Us'. Available at: <https://www.victimspaymentsboard.org.uk/about-us-0>

773 NI Office, 'Guidance on Decision-making for the Victims' Payments Scheme' (NIO, 2020).

774 Ibid.

sentence, the age at the time of offence, or the passage of time since that offence and the individual's behaviour since.⁷⁷⁵

Those injured at their own hand are not eligible for a victims' payment. The then Secretary of State for NI, Brandon Lewis MP, 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 [Victims' Payments] 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.*⁷⁷⁶

The scheme was originally subject to delays due to lack of clarity around funding and administrative challenges regarding IT and training.⁷⁷⁷ In 2021, the NI 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 2020.⁷⁷⁸ This clarity enabled implementation of the scheme to progress. On 31 August 2021, the Troubles Permanent Disablement Payment Scheme was opened for applications⁷⁷⁹ and will run until August 2026.⁷⁸⁰

In its first year, the Victims' Payments Scheme had received 2,506 applications.⁷⁸¹ Of these 110 determinations have been made, with only 44 (40 per cent) being successful.⁷⁸² The Victims' Payments Board urged applicants to use the free advice services available to ensure that applications were being submitted correctly.⁷⁸³

Recommendations

The Commission recommends that the NI Office guarantees the independence of the Victims' Payments Board, and implementation of the scheme is effectively monitored to ensure it offers fair and adequate compensation.

775 NI Office, 'Guidance on Decision-making for the Victims' Payments Scheme' (NIO, 2020).

776 NI Office, 'Press Release: Secretary of State issues Victims' Payments Guidance', 14 August 2020.

777 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.

778 *Re Brian Turley (Victims Payments)* [2021] NICA 10, at para 40(e).

779 Department of Justice, 'Victims Payments Scheme'. Available at: <https://www.justice-ni.gov.uk/victims-payment-scheme>

780 NI Direct, 'Troubles Permanent Disablement Payment Scheme'. Available at: <https://www.nidirect.gov.uk/articles/troubles-permanent-disablement-payment-scheme>

781 Victims Payments Board, 'Statistics'. Available at: <https://www.victimspaymentsboard.org.uk/statistics>

782 'Warning that Troubles injured may be missing out on compensation', *BBC News*, 26 July 2022.

783 *Ibid.*

The Commission recommends that the NI Office and Victims' Payments Board ensure that the Victims' Payments Scheme is accessible in practice at every point in the process to all who are eligible. This includes ensuring that the advice available is comprehensive and available in all required formats.

Freedom from Slavery

Child sexual exploitation

Between 2014 and 2019, the UN CRC Committee and UN CEDAW Committee repeatedly raised the need to shift the burden of proof from the prosecution to the perpetrator in legislation governing specific sexual offences.⁷⁸⁴ 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 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.*⁷⁸⁵

In 2021, the UN Special Rapporteur on trafficking of persons, Siobhan Mullally, the UN Special Rapporteur on human rights of migrants, Felipe González Morales, the UN Special Rapporteur on contemporary forms of slavery, Tomoya Obokata, and the UN Special Rapporteur on human rights in countering terrorism, Fionnuala Ní Aoláin, jointly wrote to the UK Government expressing concerns about the compliance of the Nationality and Borders Bill with the UK's international obligations and, in particular, that:

*there is no recognition of the primacy of the rights of the child, or of the State's obligation to ensure the protection of migrant child victims of trafficking and contemporary forms of slavery, including through the implementation of best interests assessments and determination procedures in migration related decisions.*⁷⁸⁶

In 2014, an Independent Inquiry into Child Sexual Exploitation recommended legislative reform in several areas, including addressing a gap in protection under the Sexual Offences (NI) Order 2008.⁷⁸⁷

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 1998 as a result of the UK leaving the EU, including the right of victims “to remember as well as contribute to a changed society”.⁷⁸⁸ EU obligations underpinning the rights of child victims of sexual exploitation

⁷⁸⁴ 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).

⁷⁸⁵ 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 Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography', 8 July 2014.

⁷⁸⁶ 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.

⁷⁸⁷ Kathleen Marshall, 'Child Sexual Exploitation in NI: Report of the Independent Inquiry' (RQIA, 2014).

⁷⁸⁸ Belfast (Good Friday) Agreement, 10 April 1998, at Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

and abuse include the EU Child Sexual Exploitation Directive,⁷⁸⁹ as well as other relevant EU laws which support victims.⁷⁹⁰

The EU Child Sexual Exploitation 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.⁷⁹¹ 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.⁷⁹²

In 2020, the Criminal Justice Inspection NI 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".⁷⁹³ The Criminal Justice Inspection NI found that "Public Prosecution Service NI staff instructions specific to child sexual abuse and exploitation were needed".⁷⁹⁴ It also found that "where cases did progress to court, support for children was required".⁷⁹⁵ 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.⁷⁹⁶ The Barnahus (children's house) model was proposed as the preferred approach.⁷⁹⁷

In April 2022, changes to NI's legislative framework were introduced through the Justice (Sexual Offences and Trafficking Victims) Act (NI) 2022. The 2022 Act aims to implement certain Gillen Review Recommendations,⁷⁹⁸ and to improve services for victims of trafficking and exploitation. It removes potentially harmful terms such as 'child prostitution' and 'child pornography' from the Sexual Offences (NI) Order 2008, legislates against adults masquerading as children (where the offending behaviour is not limited to online), and includes live streaming in relevant sexual offences. It also amends the Sexual Offences (NI) Order 2008 to extend the scope of offences to include the abuse of positions of trust where the perpetrator 'coaches, teaches, trains, supervises or instructs' the victim in a sport or religion.⁷⁹⁹ In its response to a call for evidence by the NI Assembly Committee for Justice on the Bill, the Commission advised that provisions of the Bill engaged Protocol Article

789 Directive 2011/92/EU, 'EU Parliament and Council Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography', 13 December 2011.

790 Directive 2012/29/EU, '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 'EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011; Directive 2004/80/EC, 'EU Council Directive relating to the Compensation to Crime Victims', 29 April 2004.

791 Recital 6, Directive 2011/93/EU, 'EU Directive of the European Parliament and of the Council on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography', 13 December 2011.

792 Recital 31, Directive 2011/92/EU, 'EU Parliament and Council Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography', 13 December 2011.

793 Criminal Justice Inspection NI, 'Child Sexual Exploitation in NI: An Inspection of the Criminal Justice System's Response' (CJINI, 2020), at 80.

794 Ibid, at 8.

795 Ibid.

796 Ibid.

797 Ibid.

798 Sir John Gillen, 'Report into the Law and Procedures in Serious Sexual Offences in NI: Recommendations' (DoJ, 2019).

799 Justice (Sexual Offences and Trafficking Victims) Act (NI) 2022.

2 noted the need to monitor relevant EU Directives and related CJEU jurisprudence to ensure there is no diminution of rights.⁸⁰⁰

While the 2022 Act makes welcome improvements to the law, the Department of Justice's proposal to reverse the burden of proof for the defence of 'reasonable belief' in sexual offences against children has been delayed.⁸⁰¹ The NI Assembly Committee for Justice noted concerns raised by the Commission and others that the Department of Justice had not proceeded with reversing the burden of proof.⁸⁰² The Department of Justice advised that it could not ignore the potential implications of such a change that were raised by the Bar of NI, the Public Prosecution Service NI, and the Law Society of NI.⁸⁰³ The Department of Justice reiterated its commitment to exploring the matter through engagement with key stakeholders to ensure any future legislative changes are "workable and appropriate within the current legal system".⁸⁰⁴

Nationality and Borders Act and human trafficking of children

In 2021, the UK Government introduced the Nationality and Borders Bill, which made provision for victims of human trafficking, but did not specifically address child victims.⁸⁰⁵ The Commission raised concerns about compliance with the UK's international human rights obligations on the rights of children throughout the Bill and in relation to its provisions on modern slavery. The Commission also advised that UK Government should ensure that any changes to provisions extending to NI, that fall within scope of Protocol Article 2, including changes to domestic law deriving from the EU Trafficking Directive, do not result in a diminution of rights, safeguards and equality of opportunity in that field.⁸⁰⁶

In January 2022, in a joint briefing with the Equality Commission for NI, the Commission raised the issue of child victims of human trafficking in a briefing on the Nationality and Borders Bill for members of the House of Lords and recommended that peers enquire as to what consideration had been given to the needs of child victims of human trafficking.⁸⁰⁷ In April 2022, the then Minister of State in the Home Office, Baroness Williams of Trafford, responded to a letter from the House of Lords Sub-Committee on the Ireland/NI Protocol recognising the particular vulnerabilities of child victims and the UK Government's duty to safeguard the welfare of children adding that the UK Government would engage with stakeholders

800 NI Human Rights Commission, 'Response to Committee for Justice Call for Evidence on the Justice (Sexual Offences and Trafficking Victims) Bill' (NIHRC, 2021).

801 NI Assembly Hansard, 'Written Answers: Child Sexual Exploitation - Minister of Justice, Naomi Long MLA - AQW 27342/17-22', 22 December 2021.

802 NI Assembly Committee for Justice, 'Report on the Justice (Sexual Offences and Trafficking Victims) Bill' (NIA, 2022), at paras 112-113.

803 Ibid, at para 114.

804 Ibid, at para 115.

805 As noted in the section Freedom From Slavery – Modern Slavery and Human Trafficking below, the Commission considers that child victims of trafficking fall within scope of Protocol Article 2 for a number of reasons: first, since these are sub-categories of victims and victims' rights are recognised in the relevant chapter of the Belfast (Good Friday) Agreement 1998; second, on the basis that these EU Directives underpin Article 4 of the ECHR; and third, on the basis of the equality commitments in the relevant chapter of the Belfast (Good Friday) Agreement 1998.

806 NI Human Rights Commission, 'Response to Call for Evidence by the Joint Committee on Human Rights on the Nationality and Borders Bill' (NIHRC, 2021).

807 NI Human Rights Commission and Equality Commission for NI, 'Joint NI Human Rights Commission/Equality Commission for NI Briefing Paper in the Modern Slavery and Human Trafficking and Electronic Travel Authorisation Provisions in the Nationality and Borders Bill' (NIHRC/ECNI, 2022).

“to ensure the specific vulnerabilities and needs of children are understood and taken into account”.⁸⁰⁸

In May 2022, the Commission launched research on Human Trafficking and Protocol Article 2 which identifies and further explains the reasoning for the Directive falling within the scope of Protocol Article 2 and highlights the obligation on the state to ensure that the child’s best interests is a primary consideration and to provide child victims of trafficking with assistance, support and protection.⁸⁰⁹

In April 2022, the Nationality and Borders Act 2022 received Royal Assent. The Commission is considering what further action should be taken to address this potential breach of Protocol Article 2.

In May 2022, the Commission responded to the Department of Justice’s consultation on measures to strengthen the response to modern slavery and human trafficking.⁸¹⁰ The Commission highlighted the relevance of the EU Child Sexual Exploitation Directive and Protocol Article 2 to the potential provisions contained in the consultation, and recommended that the Department of Justice ensure that Protocol Article 2 is built into and considered actively during the development and implementation of all legislation and/or policy.⁸¹¹

Child sexual exploitation online

In 2021/2022, there were 211 offences of sexual grooming in NI, of which 198 were sexual communication with a child.⁸¹² Of these offences, 125 had an online element.⁸¹³

In March 2022, the Online Safety Bill was introduced in the House of Commons, which includes provisions aimed at tackling sexual exploitation of children online.⁸¹⁴ In November 2022, the Online Safety Bill remained at the Reporting Stage in the House of Commons. The UK Government has confirmed its commitment to progressing the Bill,⁸¹⁵ however completion of Report Stage has been delayed with no agreed date for progression. The Commission is considering the extent to which the Bill engages Protocol Article 2.

Recommendations

The Commission recommends that the Department of Justice urgently introduces legislation to reverse the burden of proof in cases concerning children as victims of sexual offences.

808 Letter from Minister of State in the Home Office, Baroness Williams of Trafford, to Chair of the Protocol on Ireland/Ni Sub-Committee, Lord Jay of Ewelme, 1 April 2022.

809 Alison Harvey, ‘Human Trafficking and Article 2 of the Ireland/Ni Protocol’ (NIHRC, 2022), at 27.

810 NI Human Rights Commission, ‘Response of the NI Human Rights Commission to the Department of Justice Consultation on Human Trafficking and Slavery: Strengthening NI’s Response’ (NIHRC, 2021).

811 Ibid, at 10-11.

812 Police Service NI, ‘Police Recorded Crime in NI: Update to 31 March 2022’ (PSNI and NISRA, 2022), at Table 14.

813 Ibid, at Table 8.

814 Department for Digital, Culture, Media and Sport and Home Office, ‘Consultation Outcome: Online Harms White Paper’ (DDCM and HO, 2020).

815 UK Parliament Hansard, ‘House of Commons: Prime Minister’s Questions – Rishi Sunak MP – Vol 722 Column 253’, 9 November 2022.

The Commission recommends that, in line with best international practice and the requirements of the EU Trafficking Directive, the Department of Justice ensures specialised training is provided for relevant professionals and measures reflective of the Barnahus Model are adopted throughout the criminal justice system.

The Commission advises that the requirements of the EU Child Sexual Exploitation Directive should be considered as falling within scope of Protocol Article 2.

The Commission recommends that the Department of Justice, the Home Office and other relevant departments and bodies, in the development and implementation of legislation or policy on child sexual exploitation and on modern slavery and human trafficking, consider the extent to which Protocol Article 2 is engaged and ensure that there is no diminution to the rights and safeguards which fall within its scope.

The Commission recommends that, in line with the requirements of the EU Trafficking Directive, the Department of Justice and the Home Office, within their respective remits, legislate to provide specific protections for child victims of modern slavery and human trafficking, which ensure consideration of the best interests of the child.

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; [and]*
- 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.*⁸¹⁶

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”;*

⁸¹⁶ 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.

- 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; [and]*
- 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.⁸¹⁷*

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; [and]*
- c) *improve the training of law enforcement officers, prison personnel and other first responders to include statutory training into the identification of potential victims of human trafficking and modern slavery, and continue developing specialised training programmes for support workers and those providing foster care.⁸¹⁸*

In 2021, the UN Special Rapporteur on human rights of migrants, Siobhán Mullally, the UN Special Rapporteur on contemporary forms of slavery, Felipe González Morales, and the UN Special Rapporteur on human rights in countering terrorism, Tomoya Obokata, jointly wrote to the UK Government expressing concerns about the compliance of then 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

817 Ibid.

818 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.

of slavery”.⁸¹⁹ The letter also highlighted that the need to “recognise the impact of trauma” on victims of trafficking and contemporary forms of slavery, including not over-relying on victim statements.⁸²⁰ The UN Special Rapporteurs further noted that:

*there is no recognition of the primacy of the rights of the child, or of the State’s obligation to ensure the protection of migrant child victims of trafficking and contemporary forms of slavery, including through the implementation of best interests assessments and determination procedures in migration related decisions.*⁸²¹

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 1998 as a result of the UK leaving the EU including the right of victims to remember as well as to contribute to a changed society.⁸²² The UK Government has recognised a non-exhaustive list of relevant measures which fall within scope of the commitment in Protocol Article 2, which includes the EU Victims’ Directive.⁸²³ In addition, the Commission has identified other relevant EU laws which support victims, including the EU Trafficking Directive⁸²⁴ and the EU Child Sexual Exploitation Directive.⁸²⁵ The Commission considers these EU Directives within scope of Protocol Article 2 for a number of reasons: first, since these are sub-categories of victims and victims’ rights are recognised in the relevant chapter of the Belfast (Good Friday) Agreement; second, on the basis that these EU Directives underpin ECHR Article 4;⁸²⁶ and third, on the basis of the equality commitments in the relevant chapter of the Belfast (Good Friday) Agreement.⁸²⁷

In 2021, 363 potential victims of human trafficking were identified in NI, an increase from 128 in 2020.⁸²⁸ The figure of 363 included 38 child victims. The reasons for exploitation included for criminal activity, labour and sexual exploitation.⁸²⁹ Of 363 potential victims, 38 were children. Additionally, 325 were from overseas.⁸³⁰ This differs from trends in England and Wales, where the majority of potential victims identified were

819 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.

820 Ibid.

821 Ibid.

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

823 Directive 2012/29/EU, ‘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.

824 Directive 2011/36/EU, ‘Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims’, 5 April 2011.

825 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.

826 NI Human Rights Commission and Equality Commission for NI, ‘Working Paper: Scope of Article 2(1) of the Ireland/NI Protocol’ (NIHRC and ECNI, Forthcoming).

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

828 Home Office, ‘Modern Slavery: National Referral Mechanism and Duty to Notify Statistics UK, End of Year Summary 2021: Data Tables’, 3 March 2021, at Table 2.

829 Ibid.

830 Ibid, at Table 3.

from the UK.⁸³¹ The actual number of people in NI affected by modern slavery is unknown, as it often goes unreported and undetected within the community.⁸³²

Between April 2018 and May 2021, Barnardo's NI provided an Independent Guardian for 121 young people in NI who are unaccompanied or separated from a legal guardian and who are at risk of human trafficking. Of these, 23 per cent were referred within the National Referral Mechanism.⁸³³

Nationality and Borders Act 2022

In 2021, the UK Government introduced the then Nationality and Borders Bill in the UK Parliament, which included provisions relating to victims of human trafficking. The then Nationality and Borders Bill did not specifically mention child victims of human trafficking, nor were they discussed in the explanatory notes to the Bill. In responding to the House of Commons and House of Lords Joint Committee on Human Rights' call for evidence on the then Nationality and Borders Bill, the Commission raised concerns about the Part 4 of the then Bill related to modern slavery.⁸³⁴ The Commission also advised that the UK Government should ensure that any changes to provisions extending to NI, that fall within scope of Protocol Article 2, including changes to domestic law deriving from the EU Trafficking Directive, do not result in a diminution of rights, safeguards and equality of opportunity in that field.⁸³⁵

In January 2022, the Commission, jointly with the Equality Commission for NI, provided a briefing paper on the Bill's provisions on modern slavery and human trafficking to members of the House of Lords. The paper identified a number of ways in which the provisions of the Bill may breach the minimum standards laid out in the EU Trafficking Directive and therefore, potentially breach Protocol Article 2.⁸³⁶

In February 2022, the Commission, jointly with the Equality Commission for NI, wrote to the then Home Secretary, Priti Patel MP, and then Secretary of State for NI, Brandon Lewis MP, on concerns relating to the then Nationality and Borders Bill's compliance with Protocol Article 2.⁸³⁷ In April 2022, the then Minister for the Home Office, Baroness Williams of Trafford, wrote to the House of Lords Sub-Committee on the Ireland/NI Protocol indicating that the UK Government considered the EU Victims' Directive as applying only to victims of the conflict in NI and, therefore, did not consider the EU Trafficking Directive as falling within scope of Protocol Article 2.⁸³⁸

831 Ibid.

832 'Potential upsurge in modern slavery in NI', *ITV News*, 18 October 2018.

833 Barnardo's NI, 'Consultation Response to the Home Office New Plan for Immigration' (Barnardo's NI, 2021).

834 Part 4, Nationality and Borders Bill as introduced in the House of Commons on 6 July 2021.

835 NI Human Rights Commission, 'Response to Call for Evidence by the Joint Committee on Human Rights on the Nationality and Borders Bill' (NIHRC, 2021).

836 NI Human Rights Commission and Equality Commission for NI, 'Joint NI Human Rights Commission/Equality Commission for NI Briefing Paper in the Modern Slavery and Human Trafficking and Electronic Travel Authorisation Provisions in the Nationality and Borders Bill' (NIHRC/ECNI, 2022).

837 Letter from the NI Human Rights Commission and the Equality Commission for NI to Secretary of State for the Home Department, Priti Patel MP, 9 February 2022; Letter from the NI Human Rights Commission and the Equality Commission for NI to Secretary of State for NI, Brandon Lewis MP, 9 February 2022.

838 Letter from Minister of State in the Home Office, Baroness Williams of Trafford, to Chair of the Protocol on Ireland/NI Sub-Committee, Lord Jay of Ewelme, 1 April 2022.

In May 2022, the Commission published legal research on the human trafficking provisions of the Nationality and Borders Bill and Protocol Article 2.⁸³⁹ This research supported the Commission's position that the EU Trafficking Directive falls within scope of Protocol Article 2.⁸⁴⁰

In April 2022, the Nationality and Borders Act received Royal Assent. The Commission remains concerned that the 2022 Act requires that a potential victim's late compliance with a Trafficking Information Notice, without good reason, must be taken into account as damaging the person's credibility.⁸⁴¹ Additionally, the 2022 Act does not extend to child victims of human trafficking, nor does it recognise that the rights of the child should be a primary consideration.⁸⁴² The Commission is considering what further action should be taken to address potential incompatibility with Protocol Article 2.

Justice (Sexual Offences and Trafficking Victims) Act 2022 (NI)

In 2021, the Commission provided written and oral evidence to the NI Assembly Committee for Justice on the then Justice (Sexual Offences and Trafficking Victims) Bill advising that the Department of Justice continue to ensure there is no diminution of victims' rights in line with Protocol Article 2.⁸⁴³ In April 2022, the Justice (Sexual Offences and Trafficking Victims) Act 2022 (NI) received Royal Assent.

In 2022, the Department of Justice consulted on a range of tools that could be utilised to help tackle modern slavery and human trafficking, including possible amendments to the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (NI) 2015. These tools included the use of Slavery and Trafficking Risk Orders, the implementation of the Duty to Notify and additional search powers for police officers.⁸⁴⁴ In responding to this consultation, the Commission recommended that Slavery and Trafficking Risk Orders are promptly introduced and accompanied by robust statutory guidance in line with international human rights obligations, which explicitly incorporates with best interests of the child principle.⁸⁴⁵ The Commission's response also outlined that Protocol Article 2 is engaged by proposed provisions in the consultation and that the EU Trafficking Directive⁸⁴⁶ and the EU Child

839 Alison Harvey, 'Human Trafficking and Article 2 of the Ireland/NI Protocol' (NIHRC, 2022).

840 As noted in this section above, the Commission considers that victims of trafficking fall within scope of Protocol Article 2 for a number of reasons: first, since these are sub-categories of victims and victims' rights are recognised in the relevant chapter of the Belfast (Good Friday) Agreement 1998; second, on the basis that these EU Directives underpin Article 4 of the ECHR; and third, on the basis of the equality commitments in the relevant chapter of the Belfast (Good Friday) Agreement 1998.

841 NI Human Rights Commission, 'Joint NI Human Rights Commission/Equality Commission for NI Briefing Paper on the Modern Slavery and Human Trafficking and Electronic Travel Authorisation Provisions in the Nationality and Borders Bill' (NIHRC, 2022).

842 Ibid.

843 NI Human Rights Commission, 'NIHRC Response to Committee for Justice Call for Evidence on the Justice (Sexual Offences and Trafficking Victims) Bill' (NIHRC, 2021).

844 Department of Justice, 'Public Consultation on Measures to Strengthen Response to Modern Slavery and Human Trafficking - Proposed amendments to the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (NI) 2015' (DoJ, 2022).

845 NI Human Rights Commission, 'Submission to Department of Justice Consultation on Measures to Strengthen the Response to Modern Slavery and Human Trafficking' (NIHRC, 2022).

846 Directive 2011/36/EU, 'EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims', 5 April 2011.

Sexual Exploitation Directive⁸⁴⁷ place positive obligations on States to prevent and investigate crimes and to protect victims.

In addition, the Commission noted that new powers to impose Slavery and Trafficking Risk Orders and Prevention Orders will require the processing of personal data. The Commission advised that the UK had not, to date, diverged significantly from EU General Data Protection Regulations, but may do so in the future and that any data processing may still be subject to EU General Data Protection Regulations and diverging from these standards may engage Protocol Article 2.

In October 2022, the Department of Justice published a consultation on its three-year strategy on Modern Slavery and Human Trafficking. The strategy seeks to operationalise the measures brought in under the Justice (Sexual Offences and Trafficking Victims) Act (NI) 2022.⁸⁴⁸ The consultation runs until January 2023.

Recommendations

The Commission recommends that the Department of Justice promptly introduces legislation providing for Trafficking and Exploitation Risk Orders in NI. In line with international human rights standards and Protocol Article 2, this guidance should require individual assessments of victims to be conducted for the purposes of identifying the necessity and proportionality of a risk order.

The Commission recommends that the Department of Justice ensures that the root causes of human trafficking and exploitation are addressed. Trauma-informed, specialised, accessible support for victims of human trafficking and exploitation in NI should be sufficiently and promptly available when required, and adequately funded. This includes effective access to social security benefits and specific provision for specialised care and support for child victims of human trafficking, many of whom may have experienced complex trauma.

The Commission recommends that the Home Office embeds consideration of Protocol Article 2 in the development and implementation of subsequent Regulations and Guidance on human trafficking resulting from the Nationality and Borders Act 2022 and establishes processes to ensure compliance with this obligation.

The Commission further recommends that subsequent regulations and guidance should ensure the needs of child victims of modern slavery and human trafficking are safeguarded and the best interests principle is embedded. The Commission recommends that the Home Office promptly takes the required legislative steps to amend the extent provision in the Nationality and Borders Act 2022 to exclude

847 Directive 2011/92/EU, 'EU Directive of the European Parliament and of the Council on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and Replacing Council Framework Decision 2004/68/JHA', 13 December 2011.

848 Department of Justice, 'NI Draft Modern Slavery and Human Trafficking Strategy: Consultation' (DoJ, 2022).

NI from Sections 58, 59, 61, 62, 63 and 68 to ensure compliance with Protocol Article 2.

The Commission recommends that the Department of Justice ensures that Protocol Article 2 is built into and considered actively during the development and implementation of all legislation and/or policy; and that the Department continues to monitor relevant EU Directives and related CJEU jurisprudence to ensure there is no diminution of victims' rights within the scope of Protocol Article 2.

The Commission recommends that, in line with international human rights standards and Protocol Article 2, the Department of Justice requires compulsory specialised training and guidance to all relevant staff, which is trauma-informed and victim-centred, to ensure victims are accurately identified and supported.

The Commission recommends the Department of Justice decriminalise prostitution in NI and clear the criminal records of those who have been convicted for offences related to prostitution to enable them to seek alternative forms of employment.

The Commission recommends that the Department of Health ensures trauma-informed specialist services which are adequately funded, inclusive and accessible, to assist women and girls to exit prostitution are practically available. Furthermore, the NI Executive should ensure 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 recommends that the Department of Justice takes effective steps 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

Alternatives to imprisonment

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. 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).⁸⁴⁹

Statistics

In 2020/2021, there were 123 immediate custody prisoners in NI serving six to 12 months, a decrease from 179 in 2019/2020. There were 60 serving three to six months, a decrease from 84 in 2019/2020.⁸⁵⁰

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.⁸⁵¹

Adult Restorative Justice Strategy

In March 2022, the Department of Justice published a five-year Adult Restorative Justice Strategy, which contains an action plan that will be monitored by the multi-agency Restorative Justice Working Group.⁸⁵² The Adult Restorative Justice Strategy identifies five key priorities – to support to victims of crime; to review the Protocol for Community Based Restorative Justice 2007; to consider the need for, and scope of, legislative change; to promote understanding and awareness of restorative justice practices; and to assist with establishing long-term funding arrangements for the delivery of restorative practices in NI.⁸⁵³

849 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 21(a).

850 Department of Justice, 'Prison Populations 2020-21 Data Tables' (DoJ, 2021), at Table 4.

851 Department of Justice, 'Analytical Services Group: Adult and Youth Reoffending in NI (2017/18 Cohort)' (DoJ, 2020), at 1.

852 Department of Justice, 'Adult Restorative Justice Strategy for NI: Restoring Relationships, Redressing Harm 2022-2027' (DoJ, 2022).

853 Ibid, at 51.

Recommendations

The Commission recommends that the Department of Justice, with the NI Executive, ensures long term sustainable funding for the implementation of the adult restorative justice strategy for NI.

Definition of terrorism

In 2015, the UN Human Rights Committee recommended that the UK Government should “review its counter-terrorism legislation in order to bring it into line with its obligations under the [International Covenant on Civil and Political Right (ICCPR)]” and that it should “consider revising the broad definition of terrorism to require intent to coerce, compel or intimidate a government or section of the public”.⁸⁵⁴

In 2018, concerns were raised regarding the lack of a definition of ‘hostile activity’ and moving criminal law into private spaces within the now Counter-Terrorism and Border Security Act 2019.⁸⁵⁵ In 2022, these concerns remain.

In 2020, the Independent Reviewer of Terrorism, Jonathan Hall KC, expressed that “for all its imperfections, the definition of terrorism in the Terrorism Act 2000 is able to embrace different variations of terror”.⁸⁵⁶ The Independent Reviewer noted that the definition is both ideology and threat neutral”.⁸⁵⁷ However, the Independent Reviewer continued that “the treatment of new or existing types of behaviour as terrorism can have unforeseen consequences”⁸⁵⁸ and that “this recognition that threats, even those capable of meeting the broad 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”.⁸⁵⁹ In 2021, the Independent Reviewer of Terrorism also highlighted that the “onus must therefore be on how the terrorism definition is applied”.⁸⁶⁰

The Counter-Terrorism and Sentencing Act 2021, which extends to NI, introduces new measures including a ‘serious terrorism sentence’ with a minimal 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 2021 Act does not address the definition of terrorism.

854 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(a).

855 NI Human Rights Commission, ‘Parliamentary Briefing Paper on Counter-Terrorism and Border Security Bill’ (NIHRC, 2018); House of Commons and House of Lords Joint Committee on Human Rights, ‘Ten Clauses Government Must Change in Counter-Terrorism and Border Security Bill’ (JCHR, 2018).

856 Jonathan Hall KC, ‘The Terrorism Acts in 2018 - Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006’ (IRTL, 2020).

857 Ibid, at para 28.

858 Ibid, at para 28.

859 Ibid, at para 29.

860 Ibid, at para 2.63.

Recommendations

The Commission recommends that the Home Office promptly conducts and publishes a review of the broad definition of terrorism.

The Commission recommends that the Home Office addresses the lack of a definition of ‘hostile activity’ and moving criminal law into private spaces within the Counter-Terrorism and Border Security Act 2019.

Imprisonment for fine default

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”.⁸⁶¹

In 2018, Part 1 of the Justice Act (NI) 2016, 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.

In 2020/2021, fine default receptions decreased to 150, from 222 during 2019/2020.⁸⁶² In 2020/2021, receptions of women for fine default decreased to 18 from 21 in 2019/2020.⁸⁶³

In 2022, there is evidence of “a growing problem of unmanageable debt across the UK”⁸⁶⁴ and “in NI there are concerns that levels of problem debt could be even worse due to existing vulnerabilities within the population”.⁸⁶⁵ NI has the highest rate of personal debt (excluding mortgages) in the UK, with figures for unsecured debt indicating that adults in NI owe £3,990 on average and adults with debts owe an average of £10,730.⁸⁶⁶ The increase in the cost of living for essentials such as food and energy is putting further strain on household budgets,⁸⁶⁷ which increases the chance of potential fine default.

Recommendations

The Commission recommends that the Department of Justice promptly ends imprisonment for fine default and that the Department of Justice works with other departments and bodies to promptly develop, implement, and monitor alternative strategies, including community interventions and support services for actual or potential fine defaulters.

861 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.

862 Department of Justice, ‘NI Prison Population 2020/2021’ (DOJ, 2021), at 2.

863 Ibid, at Table 7.

864 Women’s Regional Consortium, ‘Women Living with Debt’ (WRC, 2022), at 4.

865 Ibid.

866 Financial Conduct Authority, ‘Key findings from the FCA’s Financial Lives Survey 2017’ (FCA, 2018).

867 Women’s Regional Consortium, ‘Women Living with Debt’ (WRC, 2022), at 5.

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”.⁸⁶⁸

The Criminal Justice (Children) (NI) Order 1998 makes provision for an offender between 15 and 17 years old who is considered likely to injure themselves or others to be detained in the young offenders centre at Hydebank Wood, 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.⁸⁶⁹

The Department of Justice has committed to abolish provisions of the Criminal Justice (Children) (NI) Order 1998 allowing for the imprisonment of children alongside adults.⁸⁷⁰ In 2020, the Department indicated plans to consolidate all youth justice legislation into a single Children’s Bill, which would repeal all provisions allowing for children to be held in adult custody.⁸⁷¹ The Children’s Bill was expected to form part of the legislative programme for the early part of the 2022 NI Assembly mandate, which has not been able to progress due to the NI Executive and NI Assembly’s suspension. In June 2022, the Department of Justice advised that legislative options continue to be considered for underpinning the current administrative arrangement.⁸⁷²

Recommendations

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.

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

868 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.

869 Criminal Justice Inspection NI, ‘An Announced Inspection of Woodlands Juvenile Justice Centre’ (CJINI, 2018), at 6.

870 Declan McGeown, ‘Scoping Study Stakeholder Update’ (DoJ, 2017).

871 Email correspondence between NI Human Rights Commission and Department of Justice, 20 July 2020.

872 Meeting between NI Human Rights Commission and Department of Justice, 23 June 2022.

*safety, make bail available to such persons, as recommended by the [House of Commons and House of Lords] Joint Committee on Human Rights and the Independent Reviewer of Terrorism.*⁸⁷³

Under section 41 of the Terrorism Act 2000, a constable may arrest without a warrant a person whom they reasonably suspect to be a terrorist. In 2020/2021, 83 people were arrested under this provision, compared to 127 in 2019/2020.⁸⁷⁴ Of the 83 people arrested, 13 people were subsequently charged.⁸⁷⁵

In 2021, the Independent Reviewer of Terrorism Legislation, Jonathan Hall KC, noted that the 152 arrests made under section 41 of the Terrorism Act 2000 in NI in 2019 “continues the trend observed in recent years namely that despite having only 3 per cent of the UK population, NI accounts for 77 per cent of the arrests made under section 41 of the Terrorism Act 2000”.⁸⁷⁶

Recommendations

The Commission recommends that the Home Office promptly conducts and publishes 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 arrest powers and 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.

The Commission recommends that the Home Office enables bail to be available for persons arrested under the Terrorism Act 2000 and ensures bail is granted for such persons when appropriate, following consideration of public safety.

Remand of children

In 2015, the UN Human Rights Committee recommended that the UK Government and NI Executive ensures “that the detention on remand of child defendants is used only as a measure of last resort and for the shortest possible period of time and that suitable bail packages are available to child defendants in NI”.⁸⁷⁷

In 2016, 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

873 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).

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

875 Ibid.

876 Jonathan Hall KC, ‘The Terrorism Acts in 2019: Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006’ (IRTL, 2021), at para 5.4.

877 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 23(c).

time and ensure that detention is not used discriminatorily against certain groups of children”.⁸⁷⁸

In 2021/2022, there were 207 admissions to the Juvenile Justice Centre, a decrease from 269 admissions in 2020/2021.⁸⁷⁹ Of these, 165 (79.7 per cent) were related to the Police and Criminal Evidence Order 1989 and 42 (20 per cent) related to remand.⁸⁸⁰ Of the 165 Police and Criminal Evidence Order admissions, 74 children were subsequently remanded by court or sentenced to custody.⁸⁸¹ In 2021/2022, the total average daily population in the Juvenile Justice Centre was nine children.⁸⁸² Of these, seven were children on remand.⁸⁸³

In 2017, the Department of Justice committed to introducing a Children’s Bill to consolidate all legislation pertaining to children in justice into one place. 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 Woodlands Juvenile Justice Centre as a ‘place of safety’, were considered as part of this proposal.⁸⁸⁴ These proposals were not committed to within the New Decade, New Approach Agreement 2020.⁸⁸⁵ However, the former Minister of Justice, Naomi Long MLA, reaffirmed the Department of Justice’s 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.*⁸⁸⁶

In June 2022, provisions aimed at reducing the number of children held on remand in NI have been drafted and will be brought forward in the next suitable legislative vehicle.⁸⁸⁷ This work forms part of the commitments set out in the new Strategic Framework for Youth Justice.⁸⁸⁸

Children with experience of care

Of the 207 admissions to the Juvenile Justice Centre, 92 were children with experience of care, a decrease from 125 in 2020/2021.⁸⁸⁹

In 2021, the Department of Health and Department of Education published a strategy for children in care.⁸⁹⁰ It commits the Department of Health and Department of Justice to collaboratively work to create a more welfare-orientated approach to looked after children and young people who interface with the youth justice system.

878 Ibid.

879 NI Statistics and Research Agency, ‘NI Youth Justice Agency Annual Workload Statistics 2021/2022’ (NISRA, 2022).

880 Ibid, at Figure 9.

881 Ibid, at Table 30.

882 Ibid, at Table 30.

883 Ibid, at Table 30.

884 Declan McGeown, ‘Scoping Study Stakeholder Update’ (DoJ, 2017).

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

886 NI Assembly Hansard, ‘Written Question – Custody of Children – Naomi Long MLA – AQO 992/17-22’, 2 November 2020.

887 Meeting between NI Human Rights Commission and Department of Justice, 23 June 2022.

888 Department of Justice, ‘Strategic Framework for Youth Justice 2022-2027’ (DoJ, 2022).

889 NI Statistics and Research Agency, ‘NI Youth Justice Agency Annual Workload Statistics 2021/2022’ (NISRA, 2022), at Table 23.

890 Department of Health and Department of Education, ‘A Life Deserved: “Caring” for Children and Young People in NI’ (DoH and DoE, 2021).

In 2022, joint work is progressing under the Care and Justice Programme with oversight by the Care and Justice Programme Board.⁸⁹¹ This work will consider the accommodation needs of children admitted to Woodlands Juvenile Justice Centre along with alternatives to police detention ‘place of safety’ admissions.⁸⁹² It aims to build on initiatives aimed at keeping children out of custody, including embedding trauma informed practice across agencies interacting with children at risk of engaging in criminal activity, especially those in children’s residential care who are at particular risk, and the bail support work of the Youth Justice Agency.

In September 2022, a new inspection by the Criminal Justice Inspection NI praised the high standards of child-centred care provided at the Woodlands Juvenile Justice Centre.⁸⁹³ However, the Criminal Justice Inspection NI noted that Woodlands is still being used too often as a place of safety due to a lack of available alternatives.⁸⁹⁴

Recommendations

The Commission recommends that the Department of Justice promptly introduces, implements and monitors legislation for the purposes of ensuring that a child should only be held in pre-trial detention 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 and Department of Health ensure that a range of non-custodial accommodation arrangements is available for children awaiting trial who cannot return to their homes.

Women in detention

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... [and]*
- b) *take further measures to improve the provision of mental health care in all prisons, taking into account the particular needs of women.*⁸⁹⁵

Additionally, the UN CEDAW Committee recommended that the UK Government and NI Executive “introduce a general time limit on immigration detention and implement alternatives to detention” and

891 Email correspondence from Department of Health to NI Human Rights Commission, 5 August 2022.

892 Ibid.

893 Criminal Justice Inspection NI, ‘An Announced Inspection of Woodlands Juvenile Justice Centre 22-28 January 2022’ (CJINI, 2022).

894 Ibid, at 4.

895 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.

“take immediate measures to end the detention of pregnant women and nursing mothers”.⁸⁹⁶

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”.⁸⁹⁷

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 2021/2022, the average daily women prisoner population was 66, an increase from 55 in 2020/2021.⁸⁹⁸

In 2021/2022, there were 308 women prisoner receptions, an increase from 233 during 2020/2021.⁸⁹⁹ There were 19 women remand receptions, an increase from 15 in 2020/2021.⁹⁰⁰ There were 35 women immediate custody, a decrease from 41 in 2020/2021.⁹⁰¹

Separate facility

In 2020, the Criminal Justice Inspection NI found that “if properly supervised and managed” a small amount of properly controlled contact between men and women prisoners “can be of considerable benefit both to men and women”.⁹⁰²

In 2021, the Department of Justice and NI Prison Service confirmed they remain committed to the development of a separate new women’s facility on the Hydebank Site and expenditure for the first phase has been approved by the Department of Finance.⁹⁰³ The target date for the delivery of the new women’s facility, subject to the necessary funding being made available, is mid-2025.

Conditions

In 2020, while overall findings were positive, the Criminal Justice Inspection NI found that governance of the use of force in Ash House Women’s Prison “was not sufficiently robust” and 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”.⁹⁰⁴

In 2021, the Criminal Justice Inspection NI found that women and girls in NI are most commonly prosecuted and convicted of motoring,

896 Ibid.

897 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 21(a).

898 NI Statistics and Research Agency, ‘NI Prison Population 2021/2022’ (NISRA, 2022), at 4.

899 Ibid, at 17.

900 Ibid.

901 Ibid.

902 Criminal Justice Inspection NI, ‘Report on an Unannounced Inspection of Ash House Women’s Prison Hydebank Wood’ (CJINI, 2020).

903 Email correspondence from Department of Justice to NI Human Rights Commission, 3 November 2021.

904 Criminal Justice Inspection NI, ‘Report on an Unannounced Inspection of Ash House Women’s Prison Hydebank Wood’ (CJINI, 2020).

violence and theft offences.⁹⁰⁵ It also found that women are most likely to receive short-term prison sentences. The Criminal Justice Inspection NI recommended that the criminal justice system needs to develop and deliver women focused interventions and outcomes that met their specific needs.⁹⁰⁶

In March 2022, the Department of Justice published a new strategy for women and girls in or at risk of contact with the justice system.⁹⁰⁷ The strategy focuses on prevention and early intervention, alternatives to custody within the community, and a rehabilitative and restorative custodial environment.⁹⁰⁸ Action plans are to be developed.⁹⁰⁹ The Commission welcomed the strategy, but recommended it is provided with ring-fenced resources.⁹¹⁰

Women immigration detainees

Women immigration detainees are held with men in Larne House short-term holding facility. It holds up to 19 men and women. In 2021, 118 immigration detainees were held in Larne House, including six women.⁹¹¹ Between June 2016 and June 2022, eight pregnant women were detained in Larne House.⁹¹²

Women are accommodated in a separate area, but this area cannot be locked off from the men's section and there is no separate communal room available.⁹¹³ Larne House has submitted tenders to the Home Office for alterations, including a separate communal room for women immigration detainees.⁹¹⁴

Recommendations

The Commission recommends that the Department of Justice expedites 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 the Home Office promptly takes effective steps to ensure that women immigration detainees are safe and have the option of gender-specific communal areas.

The Commission recommends that the Home Office takes immediate steps to end detention of pregnant women and nursing mothers in NI.

905 Criminal Justice Inspection NI, 'How the Criminal Justice System in NI Treats Females in Conflict With the Law' (CJINI, 2021), at 49.

906 Ibid, at 19.

907 Department of Justice, 'Supporting Change: A Strategy for Women and Girls In Or At Risk of Contact With the Justice System' (DoJ, 2022).

908 Ibid, at 4.

909 Ibid, at 32.

910 NI Human Rights Commission, 'Response to the Department of Justice Proposed Strategy To Support and Challenge Women and Girls In Contact With the Justice System' (NIHRC, 2021).

911 Email correspondence from the Home Office to NI Human Rights Commission, 21 October 2022.

912 Faith Voices for Reproductive Justice, End Deportations Belfast, Alliance for Choice Belfast, Alliance for Choice Derry et al, 'Press Release: Statement criticising the detention of pregnant women in Larne House', 31 October 2022.

913 HM Inspectorate of Prisons, 'Report on an Unannounced Inspection of the Residential Short-term Holding Facilities at Larne House, Manchester Airport and Yarl's Wood by HM Chief Inspector of Prisons' (HMIP, 2021), at para 2.27.

914 Ibid.

Right to Fair Trial and the Administration of Justice

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”.⁹¹⁵

The EU Victims’ Directive, which falls within scope of Protocol Article 2,⁹¹⁶ includes the right of victims to understand and be understood in the context of criminal proceedings and for the right to interpretation and translation services, to that end.⁹¹⁷

The Commission is adopting a working assumption that all EU law in force on or before 31 December 2020, which underpins rights in the ECHR, falls within scope of the non-diminution commitment in Protocol Article 2. Article 6(3)(e) of the ECHR states that everyone charged with a criminal offence has the right “to have the free assistance of an interpreter if he cannot understand or speak the language used in court”. The EU Directive on Interpretation and Translation in Criminal Proceedings establishes minimum protections for suspected or accused persons who do not speak or understand the language of the criminal proceedings and facilitates the application of Article 6 ECHR.⁹¹⁸

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”.⁹¹⁹

A Shadow Family Justice Board and Shadow Civil Justice Council were established to coordinate a draft plan for the implementation of Gillen’s recommendations on civil justice and family justice.⁹²⁰ In 2019, the Advocacy Training Board introduced written guidance on working with children and vulnerable adults.⁹²¹ It also held a series of lectures on the topic.⁹²²

915 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 33.

916 For further detail on the scope of Protocol Article 2 see about at Constitutional Protections – Human Rights After UK Exit from the EU.

917 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.

918 Recital 14, Directive 2010/64/EU, ‘Directive of the European Parliament and of the Council on the Right to Interpretation and Translation in Criminal Proceedings’, 20 October 2010.

919 Review of Civil and Family Justice, ‘Review Group’s Report on Family Justice’ (LCJ, 2017).

920 Judiciary NI, ‘Civil and Family Justice Review’ (JNI, 2017).

921 Shadow Family Justice Board, ‘Minutes of Seventh Meeting’, 10 October 2019.

922 Ibid.

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”.⁹²³ 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, implementation and monitoring of targeted or mainstreamed policy initiatives”.⁹²⁴

In 2019, Sir John Gillen also reviewed the law and procedures in serious sexual offences in NI, making several recommendations in relation to access to justice.⁹²⁵

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.⁹²⁶ The report included several 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 representation⁹²⁷ and has established a Litigants in Person Reference Group.⁹²⁸

In 2019, a Litigant in Person Reference Group was established by the Department of Justice comprised of litigants in person, statutory bodies, academics and legal professionals. In 2022, the Reference Group continues to meet quarterly and publish progress reports.⁹²⁹

Live links

In 2020, the Department of Justice consulted on the current use of live links within custody settings and extending the use of live links across other custody functions.⁹³⁰ The majority of consultees welcomed the amendments proposed “while stressing that the rights, voice and participation of the detainee must be maintained at all times”.⁹³¹ In 2021, it was intended that a Justice (Miscellaneous Provisions) Bill would include provisions on the use of live links.⁹³² However, these plans were amended resulting in the pared-back Justice (Sexual Offences and Trafficking

923 Bronagh Byrne, Brent Elder and Michael Schwartz, ‘Implementing Article 13 of the UNCRPD: Enhancing Deaf People’s Access to Justice in NI’ (DRILL, 2019), at 43.

924 Ibid, at 44.

925 Department of Justice, ‘Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in NI’ (DoJ, 2019).

926 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).

927 Department of Justice, ‘Information for Litigants in Person’. Available at: <https://www.justice-ni.gov.uk/articles/information-litigants-person>.

928 Department of Justice, ‘Terms of Reference: Litigants in Person Reference Group’ (DoJ, 2019).

929 Department of Justice, ‘Litigants in Person Reference Group Publications’. Available at: <https://justice-ni.gov.uk/publications/litigants-person-reference-group/>

930 Department of Justice, ‘Consultation on Proposals on the Use of Live Links for Police Detention/Interviews’ (DoJ, 2020).

931 Department of Justice, ‘The Use of Live Links for Policy Detention/Interviews – A Consultation: Summary of Responses’ (DoJ, 2020).

932 Ibid, at paras 3.3-3.4.

Victims) Act 2022.⁹³³ In 2022, the Department of Justice conducted a further consultation on the use of audio and video links for NI Court and Tribunal hearings. The Commission provided a response, which highlighted the relevance of Protocol Article 2 and recommended that live links are only utilised when a court or tribunal considers their use to be in the interests of justice.⁹³⁴ The Commission advised the Department of Justice to carefully consider the provisions of the EU Victims' Directive⁹³⁵ and the EU Directive on Interpretation and Translation in Criminal Proceedings⁹³⁶ in respect of the person suspected or accused, victims with disabilities and people who do not speak English as a first language.⁹³⁷ The Commission also recommended that research is conducted into whether the use of live links has adverse consequences on the ability of court users with disabilities and those without English as a first language to participate in and understand the proceedings.⁹³⁸

Recommendations

The Commission recommends that the Department of Justice promptly implements the recommendations contained in the Gillen Reviews and the Ulster University and Commission's research on litigants in person to ensure that unrepresented litigants do not have their access to justice impaired.

The Commission recommends that the Department of Justice conducts a review, in line with international human rights standards and Protocol Article 2, to identify individuals for whom the use of live links is not suitable, particularly in the context of reviews, hearings or police interviews. Based on the findings of this review, the Department of Justice should ensure that clear guidance is provided on the circumstances live links can be used and the safeguards that should be in place to ensure such technology is accessible and used appropriately.

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".⁹³⁹ In 2019, the UN CAT Committee echoed this recommendation.⁹⁴⁰

933 NI Assembly, 'Justice (Sexual Offences and Trafficking Victims) Bill - NIA Bill 29/17-22' (NIA, 2021).

934 NI Human Rights Commission, 'Response to the Department of Justice's Consultation on Audio and Video Links for NI Court and Tribunal Hearings' (NIHRC, 2022).

935 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.

936 Recital 14, Directive 2010/64/EU, 'Directive of the European Parliament and of the Council on the Right to Interpretation and Translation in Criminal Proceedings', 20 October 2010.

937 NI Human Rights Commission, 'Response to the Department of Justice's Consultation on Audio and Video Links for NI Court and Tribunal Hearings' (NIHRC, 2022).

938 Ibid.

939 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.

940 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.

In 2019, the UN CRC Committee suggested that the minimum age of criminal responsibility should be raised to 14 years of age.⁹⁴¹

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 12 years of age.

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”.⁹⁴²

The former Minister of Justice, Naomi Long MLA, has made several attempts to progress this issue. In 2021, the then Minister of Justice wrote to other NI Executive Ministers seeking their views on raising the age of criminal responsibility in NI and only received responses from the then Ministers for Communities, Finance and Infrastructure.⁹⁴³

In 2022, the Department of Justice published a new Strategic Framework for Youth Justice, which is accompanied by a five-year Action Plan.⁹⁴⁴ The Strategic Framework indicates that increasing the minimum age of criminal responsibility to 14 years old is a key priority for the Department of Justice.⁹⁴⁵ In October 2022, the Department of Justice consulted on raising the age of criminal responsibility.⁹⁴⁶ In its consultation response, the Commission recommended increasing the age of criminal responsibility.⁹⁴⁷

Recommendations

The Commission recommends the Department of Justice promptly introduces 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”.⁹⁴⁸

In 2021/2022, the average time taken for a case to be dealt with, at all courts, was 226 days, an increase from 193 days in 2020/2021 and the highest figure recorded since 2016/2017.⁹⁴⁹

941 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.

942 Department of Justice, ‘A Review of the Youth Justice System in NI’ (DoJ, 2011), at 107.

943 Allan Preston, ‘Moves made to increase the age of criminality in NI’, *Belfast Telegraph*, 20 September 2020.

944 Department of Justice, ‘Strategic Framework for Youth Justice 2022-2027’ (DoJ, 2022).

945 *Ibid*, at 47.

946 Department of Justice, ‘Public Consultation on Increasing the Minimum Age of Criminal Responsibility in NI from 10 Years to 14 Years’ (DoJ, 2022).

947 NI Human Rights Commission, ‘Consultation Response to Department of Justice on Increasing the Minimum Age of Criminal Responsibility in NI’ (NIHRC, 2022).

948 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.

949 Department of Justice, ‘Case Processing Time for Criminal Cases Dealt with at Courts in NI April 2021 to March 2022’ (DoJ, 2022), at 2.

The Criminal Justice Inspection 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”.⁹⁵⁰ In 2019, the Criminal Justice Inspection NI noted that delays “increase the likelihood that the victim withdraws support for the prosecution case”.⁹⁵¹ Also in 2019, Sir John Gillen’s review into how the NI criminal justice system handles cases of serious sexual assault made 26 recommendations designed to reduce delays.⁹⁵²

In 2020, the New Decade, New Approach Agreement included a commitment that “the [NI] Executive will deliver committal reform to help speed up the criminal justice system, benefiting victims and witnesses”.⁹⁵³ It also committed 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”.⁹⁵⁴

In 2020, the then Minister of Justice, Naomi Long MLA, established an Implementation Team to co-ordinate phased actions aimed at addressing Gillen Review’s recommendations, as agreed by the Criminal Justice Board.⁹⁵⁵ In 2022, it was reported that only 34 per cent of the 253 recommendations made by the Gillen Review had been implemented.⁹⁵⁶

In March 2022, the Criminal Justice (Committal Reform) Act 2022 received Royal Assent.⁹⁵⁷ In September 2022, implementation of phase one of commencement of the 2022 Act was completed.⁹⁵⁸ Phase one focused on removing the use of oral evidence as part of the committal process, which means that victims and witnesses cannot be put on the stand to be examined and cross-examined in a committal hearing before the actual trial. Phase two of commencing the 2022 Act is due to be implemented by early 2024.⁹⁵⁹ Phase two focuses on allowing cases involving some of the most serious offences to bypass a traditional committal hearing ensuring that those cases are transferred to the Crown Court at an earlier stage.

Recommendations

The Commission recommends the Department of Justice promptly and fully implements the Criminal Justice Inspection NI and Gillen Review’s recommendations aimed at tackling undue delay within the criminal justice system.

950 NI Assembly Hansard, ‘Committee for Justice - Criminal Justice Inspector’, 25 June 2014.

951 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 NI’ (CJINI, 2019), at 10.

952 Sir John Gillen, ‘Report into the Law and Procedures in Serious Sexual Offences in NI - Part 1’ (DoJ, 2019), at 13-14.

953 NI Office, ‘New Decade, New Approach’ (NIO, 2020), at 7.

954 Ibid, at 7-8.

955 Department of Justice, ‘Press Release: We must work together to deliver real change for victims of serious sexual assault: Long’, 3 February 2020.

956 Andrew Madden, ‘Only a third of recommendations outlined in 2019’s Gillen Review Report on sex offences have been fully implemented’, *Belfast Telegraph*, 24 June 2022.

957 Criminal Justice (Committal Reform) Bill 2022.

958 Department of Justice, ‘Press Release: Long welcomes progress on plans to implement reforms of the court committal process’, 9 March 2022.

959 Ibid.

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.*⁹⁶⁰

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. In 2020/2021, there were six applications lodged for a declaration that a closed material procedure application may be made in proceedings⁹⁶¹ and five declarations that a closed material procedure may be made in proceedings.⁹⁶² There was one revocation of a declaration for closed material proceedings,⁹⁶³ two final judgments that are closed and three final judgements that are not closed.⁹⁶⁴

In 2021, the then Lord Chancellor and Secretary of State for Justice, Robert Buckland MP, 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 2013.⁹⁶⁵ Sir Duncan Ouseley conducted the statutory review. In September 2022, the reviewer's report was due to be laid before the UK Parliament. The Commission's evidence to the statutory review highlighted how the issue of closed material procedures and the relationship to dealing with the past in NI remains important.⁹⁶⁶

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

960 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.

961 Ministry of Justice, 'Report on the Use of Closed Material Procedure (from 25 June 2020 to 24 June 2021)' (MoJ, 2022), at 4.

962 Ibid, at 5.

963 Ibid, at 6.

964 Ibid, at 7.

965 UK Parliament, 'Written Statement: Statutory Review of the "Closed Material Procedure" Provisions in the Justice and Security Act 2013 - Robert Buckland MP', 25 February 2021.

966 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).

accountability. This must not compromise the rights to a fair trial and an effective remedy.

The Commission recommends that the Department of Justice ensures a comprehensive library for closed judgments is available and accessible to legal teams and judges in NI.

Compensation for a miscarriage of justice

In 2015, the UN Human Rights Committee recommended that the UK Government should “review the new test for miscarriage of justice with a view to ensuring its compatibility with Article 14(6) of the UN ICCPR”.⁹⁶⁷

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.⁹⁶⁸ This new test applies to all offences in England and Wales and to offences related to terrorism in NI. The new test is contained within section 133(1ZA) of the Criminal Justice Act 1988.

In 2019, by a majority of five-to-two, the UK Supreme Court dismissed the application that the section 133 of the Criminal Justice Act 1988 violated the ECHR and declined to make a declaration of incompatibility.⁹⁶⁹ An application has been lodged with the ECtHR arguing that the provision violates Article 6(2) of the ECHR.

In 2021, the NI Court of Appeal, found that the scheme for compensation for miscarriage of justice is compatible with the ECHR.⁹⁷⁰

Recommendations

The Commission calls on the Ministry of Justice and Home Office to review the test for a miscarriage of justice to ensure it is compatible with Article 14(6) of the UN ICCPR.

Cross-border justice arrangements

Policing, security and criminal justice

In 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.⁹⁷¹ The Commission submitted evidence to the NI Affairs Committee highlighting human rights and data protection standards and the need to establish an effective and efficient UK-EU extradition arrangement in the absence of the European Arrest Warrant,

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(b).

968 The Anti-social Behaviour, Crime and Policing Act 2014 amended section 133 of the Criminal Justice Act 1988.

969 *R (On the Application of Hallam) v Secretary of State for Justice* [2019] UKSC 2.

970 *Re Veronica Ryan* [2021] NI CA 42.

971 NI Affairs Committee, ‘Cross-Border Cooperation on Policing, Security and Criminal Justice after Brexit’ (NIAC, 2021).

to ensure continued cross-border arrangements to uphold victims' rights and the rights of accused persons.⁹⁷²

In its response, the UK Government highlighted a number of significant developments in relation to cross-border policing, security and criminal justice after Brexit, including a commitment to work with domestic and EU partners to monitor the operation of the new extradition arrangements under the Trade and Cooperation Agreement; to work with EU and Irish law enforcement partners to strengthen international law enforcement cooperation in the absence of access to Schengen Information System II;⁹⁷³ and a commitment to ongoing cooperation in the areas of information-sharing initiatives.⁹⁷⁴

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.⁹⁷⁵

The Trade and Cooperation Agreement established a fast-track system which enables the extradition of either UK or EU nationals.⁹⁷⁶ However 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.⁹⁷⁷ 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.⁹⁷⁸

In November 2021, following a request from the Supreme Court of Ireland, the CJEU found that the surrender mechanism established by the UK-EU Withdrawal Agreement and the Trade and Cooperation Agreement relating to the investigation, detection and prosecution of criminal offences and the execution of criminal penalties could be included in those agreements without the need for Ireland to opt into 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.⁹⁷⁹

Any delays and impediments to the timely operation of the criminal justice system have the potential to impact on both the rights of the accused

972 NI Human Rights Commission, 'Submission to NI Affairs Committee Inquiry on Cross-border Cooperation on Policing, Security and Criminal Justice after Brexit' (NIHRC, 2020).

973 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. See Regulation 1987/2006, 'European Parliament and EU Council Regulation on the Establishment, Operation and Use of the Second Generation Schengen Information System (SIS II)', 28 December 2006.

974 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).

975 Article 524, UK-EU Trade and Cooperation Agreement 2020.

976 Article 596-632, UK-EU Trade and Cooperation Agreement 2020.

977 Section 12, EU (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.

978 C(2021)4800, 'European Commission Implementing Decision Pursuant to Regulation (EU) 2016/679 on the Adequate Protection of Personal Data by the UK', 28 June 2021; C(2001) 4801, 'European Commission Implementing Decision pursuant to Regulation (EU) 2016/680 on the Adequate Protection of Personal Data by the UK', 28 June 2021.

979 *Governor of Cloverhill Prison and Others*, Case C-479/21, 16 November 2021, at paras 68-71.

person and victims. Where such delays result in a diminution of the current levels of protection for victims, these have the potential to engage Protocol Article 2.

Civil justice and the Adoption and Children Bill

In 2021, questions of cross-border civil justice co-operation arose during committee stage of the then Adoption and Children (NI) Bill. In January 2022, following oral evidence by the Commission to the NI Assembly Committee for Health, the Commission responded to a request by the Committee for further information regarding the possible impact of Protocol Article 2.⁹⁸⁰

Before 1 January 2021, cross-border disputes within the EU relating to children were regulated under the Brussels Ila Regulation ('Brussels Ila').⁹⁸¹ This provided rules for establishing jurisdiction and ensured that orders relating to parental responsibility issued in one EU member state could be recognised and enforced in another.

Neither the UK-EU Withdrawal Agreement, nor the UK-EU Trade and Cooperation Agreement address cooperation on matters of cross-border civil justice and no replacement of the Brussels Ila system has been put in place. Therefore, for cases instituted after 1 January 2021, the mechanisms for inter-country child placement are now governed by common law and the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children 1996.

The 1996 Hague Convention confers functions on designated Central Authorities within each Contracting State. England, Wales, Scotland and NI each have their own Central Authority. The Department of Justice has been designated as the Central Authority for NI under the 1996 Hague Convention. One of its key functions is "to request the competent authorities in NI to consider the need to take measures for the protection of a child habitually resident in NI upon the request of another Contracting State with which the child has a substantial connection".⁹⁸²

Current challenges in the area of civil justice are exemplified by the introduction of a Special Guardianship Order and the then Adoption and Children Bill. A special guardian would acquire parental responsibility for the child and may exercise it to the exclusion of others with parental responsibility, except in very exceptional circumstances.⁹⁸³ Special Guardianship Orders are an option for those who do not wish to go through the adoption process, but who want to provide greater security for a child by placing him or her with a kinship carer. In NI, it is foreseeable that such cases may involve an extended family member who lives across the Irish border.

980 Letter from the NI Human Rights Commission to the NI Assembly Committee for Health, 17 January 2022.

981 Regulation 2201/2003/EU, 'EU Council Regulation Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility (Brussels Ila)', 27 November 2003.

982 Department of Justice, 'Child Abduction 1996 Hague Convention'. Available at: <https://www.justice-ni.gov.uk/articles/child-abduction-1996-hague-convention>

983 Article 14(A), Children (NI) Order 1995.

In its correspondence with the NI Assembly Committee for Health, the Commission welcomed the expedition of the then Adoption and Children Bill, which contained vital and long overdue reforms for NI adoption law and child safeguarding. The Commission did, however, raise questions as to whether the loss of the Brussels IIa framework could adversely impact how the cross-border placement of children is managed; and advised that it was unclear how the then Adoption and Children Bill, as drafted, would meet the needs of children for whom adoption is not appropriate, but who would benefit from the permanence provided by a kinship placement across the Irish border. The Commission further asked whether placing children under Special Guardianship Orders overseas or cross-border may warrant a distinct form of regulatory framework for domestic cases (for example, a bilateral agreement between UK and Ireland), in order to pre-empt any difficulties that may arise.

In April 2022, the Adoption and Children Act (NI) 2022 received Royal Assent. The Committee for Health agreed to seek assurances from the Department of Health and the Department of Justice that the loss of the Brussels IIa framework would not adversely affect how the cross-border placement of children is managed and whether placing children under overseas or cross-border Special Guardianship Orders warrants a distinct form of regulatory framework for domestic cases to pre-empt any difficulties that may arise. In addition, the Committee for Health recommended that the Department of Health undertake a review of cross-border care arrangements including consideration of a regulatory framework for cross-border cases.⁹⁸⁴

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 the EU establish clear safeguards within the Trade and Cooperation Agreement oversight mechanisms to ensure robust human rights and legal safeguards for accused persons and for victims of crimes.

The Commission recommends that the UK and the EU work to ensure that the loss of access to criminal justice data-sharing arrangements does not result in unreasonable delays in investigations and proceedings.

The Commission recommends that consideration be given to how the cross-border placement of children is managed following the UK's withdrawal from the EU, to ensure no adverse impacts.

984 NI Assembly Hansard, 'Committee for Health: Report on the Adoption and Children Bill - NIA 132/17-22', 27 January 2022.

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.*⁹⁸⁵

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 by the House of Commons and House of Lords. The relevant provisions have been extended on six occasions since their establishment in 2007. In 2021, the former Secretary of State for NI, Brandon Lewis MP, once again extended the provisions until 31st July 2023.⁹⁸⁶ This decision was based on the UK Government's continued assessment that the threat level NI-related terrorism in NI was severe.⁹⁸⁷

In 2021, the Commission 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.⁹⁸⁸

In 2021, 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.⁹⁸⁹ The Commission is a member of the working group. In November 2022, the working group provided a report to the Independent Reviewer of the Justice and Security Act (NI) Act 2007.

Recommendations

The Commission recommends that the NI Office implements effective measures to ensure the principles of necessity and proportionality are fully reflected within any authorisation for non-jury trials in NI. The Commission further recommends that the NI Office takes practical steps to determine the conditions whereby the use of non-jury trials will be discontinued.

985 CAT/C/GBR/CO/5, 'UN CAT Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 6 May 2013.

986 Justice and Security (NI) Act 2007 (Extension of Duration of Non-jury Trial Provisions) Order 2021.

987 HM Government, 'Consultation Response: Non-jury Trials – Justice and Security (NI) Act 2007' (HM Gov, 2021).

988 Letter from the NI Human Rights Commission to the Secretary of State for NI, Brandon Lewis MP, 11 February 2021.

989 Non-Jury Trials Working Group Meeting, 27 July 2021.

Right to Private and Family Life

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 violated the right to private and family life (Article 8 ECHR) and freedom from discrimination (Article 14 ECHR).⁹⁹⁰ In 2019, the House of Commons Work and Pensions Committee noted the continued delay in remedying the position and meeting its stated aim of "making bereavement benefits more accessible as quickly as possible".⁹⁹¹

In 2021, an initial draft Remedial Order was laid by the Minister of the Department of Work and Pensions, Baroness Stedman-Scott, allowing cohabiting partners with children to access Widowed Parent's Allowance and Bereavement Support Payment.⁹⁹² Under the initial draft Remedial Order, a surviving partner with children would only have to have lived with the deceased on the date of death and the changes will apply retrospectively from 30 August 2018. Once approved backdated payments would be made in lump sums.

In 2021, the House of Commons and House of Lords Joint Committee on Human Rights considered the initial draft Remedial Order. The Joint Committee on Human Rights supported the Commission's recommendation to extend the benefit to those who do not have children, to make ex gratia payments to fully recompense those bereaved back to February 2016, when the NI High Court first considered this issue.⁹⁹³

In September 2022, an unmarried mother in NI was granted leave by the NI High Court to seek a judicial review of her exclusion from the financial support following the death of her partner. The case is on hold amid expectations that delayed UK-wide legislation will be introduced to rectify the acknowledged breach of human rights.⁹⁹⁴

In October 2022, a revised draft Remedial Order was published.⁹⁹⁵ The revised draft Remedial Order continues to propose a retrospective effect to 30 August 2018. Where a claimant's late partner died before this date, the revised draft Remedial Order proposes a part payment of the higher rate of Bereavement Support Payment, if the death was after 5 April 2017, provided that the claim is made within 12 months of the Remedial Order coming into force. Under the revised draft Remedial Order, claimants will also be eligible for Widowed Parent's Allowance, where their late partner died before 6 April 2017, and they continue to meet the entitlement

990 *In the Matter of an Application by Siobhan McLaughlin for Judicial Review (NI)* [2018] UKSC 48.

991 House of Commons Work and Pensions Committee, 'Bereavement Support Payment - First Report of Session 2019-20' (WPC, 2019).

992 Draft Bereavement Benefits (Remedial) Order 2021.

993 House of Commons and House of Lords Joint Committee for Human Rights, 'Proposal for a Draft Bereavement Benefits Remedial Order 2021: Discrimination against Cohabiting Partners' (JCHR, 2021).

994 'Unmarried mother in NI granted permission to challenge denial of bereavement benefits', *Belfast Telegraph*, 21 September 2022.

995 Department for Work and Pensions, 'Explanatory Memorandum to The Bereavement Benefits (Remedial) Order 2022' (DWP, 2022).

conditions on 30 August 2018.⁹⁹⁶ The revised draft Remedial Order does not satisfy the Joint Committee on Human Rights and the Commission's recommendations. It will be subject to further scrutiny before it comes into force, which is not expected to occur until at least February 2023.⁹⁹⁷

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 argued that there was no objective and justifiable reason for treating the individual differently to a married woman in her circumstances and that the failure to make provision for her, and others like her, violates the right to private and family life (Article 8 ECHR), the right to peaceful enjoyment of possessions (Article 1 of Protocol No 1 to the ECHR) and freedom from discrimination (Article 14 ECHR). In 2021, the NI High Court dismissed the defendant's application to have the claim struck out and an appeal has been lodged by the Ministry of Defence. In May 2022, the NI High Court allowed the defendant's appeal and held that taking the case via a private action instead of a public law judicial review was an abuse of process. The Commission has appealed, with the NI Court of Appeal due to hear the appeal at end of January 2023.

Recommendations

The Commission recommends that the Department for Work and Pensions ensures that Bereavement Benefits (Remedial) Order is fully retrospective to February 2016 for those families who made claims based on the NI High Court judgment.

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 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.*⁹⁹⁸

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".⁹⁹⁹

996 Ibid, at para 7.13.

997 Law Centre NI, 'Press Release: Law Centre NI challenges denial of vital bereavement support benefit', 27 September 2022.

998 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 53.

999 Ibid.

In 2019, a Children and Young Persons Strategy was published in line with the Children's Services Co-operation Act (NI) 2015.¹⁰⁰⁰

Statistics

At 31 March 2022, 3,624 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.¹⁰⁰¹ This is an increase from 3,530 in the number of children in care in 2020/2021 and the highest number recorded since the introduction of the Children (NI) Order 1995. This represented a rate of 82.2 children per 10,000 population under 18 years old.¹⁰⁰² At 31 March 2022, 792 had been in care for less than a year and 2,449 had been in care for at least five years.¹⁰⁰³ Of the 3,624 children and young people in care at 31 March 2022, 54 per cent were boys, 46 per cent were girls, and 13 per cent were recorded as having a disability. In terms of age, 117 were under one years old, 712 were between one and four years old, 1,299 were between five and 11 years old, 899 were between 12 and 15 years old, and 597 were 16 years old and over.¹⁰⁰⁴ Additionally, 3,000 were fostered, 248 were placed with parents, 241 were placed in residential care and 135 in other placements.¹⁰⁰⁵

Adoption reform

In April 2022, the Adoption and Children (NI) Act 2022, which amends and modernises the legal framework for adoption in NI, received Royal Assent. The wide-ranging reforms are expected to tackle delay in the adoption process and improve support mechanisms, including the introduction of Special Guardianship Orders as a new permanence option.¹⁰⁰⁶ In line with the Commission's case,¹⁰⁰⁷ the 2022 Act also recognises a married couple, same sex couple and civil partners as couples that can apply for adoption.¹⁰⁰⁸ Regulations and guidance are required to give full effect to the 2022 Act. These are due to be implemented on a phased basis over five-years. Additional funding is required, which cannot be obtained while the NI Executive is suspended.¹⁰⁰⁹

Foster care

Unlike legislation in the rest of the UK, the Foster Placement (Children) Regulations (NI) 1996 do not include minimum standards for foster care or a statutory requirement for foster care to be inspected. In 2012, Minimum Kinship Care Standards, which are subject to regular review,

1000 Department of Education, 'Children and Young Persons Strategy 2020-2030' (DoE, 2019).

1001 NI Statistics and Research Agency, 'Children's Social Care Statistics for NI 2021/2022' (DoH, 2022), at Section 3.

1002 Ibid.

1003 Ibid.

1004 Ibid.

1005 Ibid.

1006 Department of Health, 'Press Release: Significant milestone for Adoption and Children Bill', 15 March 2022.

1007 *NI Human Rights Commission's Application* [2013] NICA 37.

1008 Section 159(3), Adoption and Children (NI) Act 2022.

1009 Email correspondence from Department of Health to NI Human Rights Commission, 5 October 2022.

were introduced.¹⁰¹⁰ In 2013, the Department of Health stated that it would update fostering standards in NI, but this remains outstanding.¹⁰¹¹

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.¹⁰¹²

In 2021, the Department of Health and the Department of Education published a new joint strategy on caring for children and young people in NI, which commits to introducing legislation to strengthen the panel assessment and decision-making arrangements for foster carers.¹⁰¹³ Accordingly, the Adoption and Children (NI) Act 2022 places fostering arrangements and fostering panels on a statutory basis. However, neither the 2022 Act nor the Children and Young Persons Strategy commits to the development of foster care standards or the introduction of an inspection regime.

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 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.¹⁰¹⁴ The Department of Justice and Department of Justice jointly advised that, “providing suitably resourced alternatives to secure accommodation or support to young people on discharge will be subject to available resources”.¹⁰¹⁵ 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.¹⁰¹⁶

It was anticipated that an integrated Regional Care and Justice Campus would provide an opportunity to redirect some of the costs currently associated with the running of two centres to more community-based provision. However, in March 2022, the then Minister of Justice, Naomi Long MLA, and then Minister of Health, Robin Swann MLA, decided that the Woodlands Juvenile Justice Centre and the Lakewood Secure Centre will continue to operate independently, operating under a formal partnership agreement and supported by a jointly management Partnership Board.¹⁰¹⁷

1010 Department of Health, ‘Minimum Kinship Care Standards NI’ (DoH, 2019).

1011 Regulatory and Quality Improvement Authority, ‘Review of Statutory Fostering Services Overview Report’ (RQIA, 2013).

1012 Meeting between NI Human Rights Commission and the Fostering Network, 12 May 2020.

1013 Department of Health and Department of Education, ‘A Life Deserved: “Caring” for Children and Young People in NI’ (DoH and DoE, 2021), at 36.

1014 Department of Health and Department of Justice, ‘Consultation on Establishment of a Regional Care and Justice Campus’ (DoH and DoJ, 2020).

1015 Department of Health and Department of Justice, ‘Establishment of a Regional Care and Justice Campus: Consultation Analysis’ (DoH, 2021).

1016 Letter from NI Human Rights Commission to Department of Health, 27 January 2021.

1017 Letter from Department of Justice and Department of Health to Regional Facilities for Children and Young People Stakeholder Reference Group Members, 24 March 2022.

In September 2022, the Criminal Justice Inspection NI praised the high standards of child-centred care provided at the Woodlands Juvenile Justice Centre.¹⁰¹⁸ However, the Criminal Justice Inspection expressed concern that the regional campus is not being progressed, highlighting that it is difficult to justify the current operating model in light of ongoing uncertainty over budgets and pressures on social worker resources.¹⁰¹⁹ The Criminal Justice Inspection recommended that, within 12 months, the current model is critically reviewed to take account of the decision of the former Minister of Justice and former Minister of Health on the future of the joint regional care and justice campus.¹⁰²⁰ The Lead Reviewer for the Independent Review of Children’s Social Care Services in NI, Professor Ray Jones, also maintains an interest in progressing plans for the establishment of a single Secure Care and Justice Centre in NI.¹⁰²¹

Recommendations

The Commission recommends that the Department of Health promptly develops and publicly consults on the regulations and guidance required to give full effect to the Adoption and Children Act 2022.

The Commission recommends that the Department of Health develops and implements minimum standards of foster care without further delay. In addition, the Department of Health should introduce a statutory requirement for foster care to be inspected.

The Commission recommends that the Department of Health and the Department of Justice guarantee that secure accommodation is used as a measure of last resort and for the shortest possible period in practice, requiring the development of suitably resourced and accessible alternatives across the region. This requires ensuring that effective and cost-efficient measures are in place, for example through the Regional Care and Justice Programme, to ensure children in secure accommodation in NI are provided with consistent and appropriate support when secure accommodation is necessary as a measure of last resort.

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.¹⁰²² 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.

1018 Criminal Justice Inspection NI, ‘An Announced Inspection of Woodlands Juvenile Justice Centre 22-28 January 2022’ (CJINI, 2022).

1019 Criminal Justice Inspection NI, ‘Press Release: Inspectors praise high standards of care at Woodlands JJC and call for greater collaboration with Lakewood Secure Care Centre’, 28 September 2022.

1020 Criminal Justice Inspection NI, ‘An Announced Inspection of Woodlands Juvenile Justice Centre 22-28 January 2022’ (CJINI, 2022), at 27.

1021 Department of Health, ‘October Newsletter: Children’s Social Care Services NI’ (DoH, 2022).

1022 This provision applies in England, Wales and NI.

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 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 before a court" and that there was "nothing unfair or irrational in the State's approach".¹⁰²³

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

In 2020, the ECtHR gave judgment in the case of *Gaughran v UK* (2020), 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... [UK] has overstepped the acceptable margin of appreciation.*¹⁰²⁴

In December 2022, the CoE Committee of Ministers are meeting to consider implementation of the ECtHR's judgment.

As of 5 November 2021, approximately 207,189 individuals' fingerprints and 199,537 DNA profiles were held by the Police Service of NI.¹⁰²⁵

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

¹⁰²³ *In the Matter of an Application by JKL (A Minor) to Apply for Judicial Review and the In the Matter of a Decision of the Department of Justice* [2020] NIQB 29, at paras 70 and 72.

¹⁰²⁴ *Gaughran v UK* (2020) ECHR 144, at 96.

¹⁰²⁵ Letter from the Chief Constable of the Police Service of NI, Simon Byrne QPM, to the NI Human Rights Commission, 5 November 2021.

(NI) Order were in violation of the Article 8 ECHR.¹⁰²⁶ The Criminal Justice Act (NI) 2013 was enacted 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 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 consider Article 8 ECHR and provide clear guidance to the public as to how they can apply for their biometric data to be destroyed.¹⁰²⁷

In 2020, with a view to addressing the ECtHR's ruling in *Gaughran v UK*, the Department of Justice consulted on proposals to amend the legislation governing the retention of DNA and fingerprints in NI.¹⁰²⁸ Revised proposals from the Department of Justice following the consultation were considered by the NI Assembly Committee for Justice.¹⁰²⁹

In 2021, the then Minister of Justice, Naomi Long MLA, had planned to address the issue of retention of biometric data through legislation as part of a proposed Justice (Miscellaneous) Provisions Bill. However, the intended legislation progressed in a pared-back form as the then Justice (Sexual Offences and Trafficking Victims) Bill, following approval of the NI Executive. In April 2022, the Justice (Sexual Offences and Trafficking Victims) Act 2022 received Royal Assent. The 2022 Act does not include provisions on biometric data retention.

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 2022.¹⁰³⁰ The Police Service NI also confirmed that, in light of biometric provision not being included in the Justice (Sexual Offences and Trafficking Victims) Act 2022, 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.¹⁰³¹

Recommendations

The Commission recommends that the Department of Justice commences the DNA retention sections of the Criminal Justice Act (NI) 2013 without further delay, ensuring that its implementation complies with *Gaughran v UK (2020)*.

1026 *S and Marper v UK* (2008) ECHR 1581.

1027 NI Human Rights Commission, 'Press Release: Human Rights Commission secures settlement in DNA fingerprint retention case', 9 January 2019.

1028 Department of Justice, 'Consultation on Proposals to Amend the Legislation Governing the Retention of DNA and Fingerprints in NI' (DoJ, 2020), at 96.

1029 NI Assembly Hansard, 'Committee for Justice: Proposals to Amend Legislation Governing the Retention of DNA and Fingerprints - Department of Justice', 15 October 2020.

1030 Protection of Freedoms Act 2012 (Destruction, Retention and Use of Biometric Data) (Transitional, Transitory and Saving Provisions) (Amendment) Order 2020.

1031 Letter from the Chief Constable of the Police Service of NI, Simon Byrne QPM, to the NI Human Rights Commission, 5 November 2021.

The Commission recommends that the Police Service of NI ensures its policy on biometric data retention is human rights compliant, effectively implemented and expeditiously published in accessible formats.

Climate change and environmental regulation

In 2016, the UN CRC Committee recommended that the UK Government and NI Executive:

- a) *set out a clear legal commitment... to scale up and expedite the implementation of plans to reduce air pollution levels, especially in areas near schools and residential areas; [and]*
- b) *place children's rights at the centre of national and international climate change adaptation and mitigation strategies, including through its new domestic climate strategy, as well as in the framework of its international climate change programmes and financial support.*¹⁰³²

In 2019, the UN CEDAW Committee recommended that NI “review its policy on fracking and its impact on the rights of women and girls and consider introducing a comprehensive and complete ban on fracking”.¹⁰³³ The UN CEDAW Committee also recommended that there is “equal participation of rural women and girls in policymaking on disaster mitigation and climate change”.¹⁰³⁴

In 2015, the Commonwealth Forum of National Human Rights Institutions, of which the Commission is a member, adopted the St Julian’s Declaration on climate justice, which commits National Human Rights Institutions to address human rights issues affected by climate change based on climate justice values.¹⁰³⁵

Under the Petroleum (Production) Act (NI) 1964, the Department for the Economy has the power to grant petroleum licences for exploration and extraction. In 2021, Áine Murphy MLA introduced the Onshore Fracking (Prohibition) Bill to the NI Assembly, which aimed to outlaw the exploration and extraction of petroleum by fracking. Due to the dissolution of the NI Assembly, the Bill did not progress.¹⁰³⁶

In June 2022, the Climate Change Act (NI) 2022 received Royal Assent. The legislation includes a target for net zero greenhouse gas emissions by 2050; the appointment of an independent Climate Commissioner; and provisions for a Just Transition Fund to support sectors to deliver their contribution to the Climate Action Plan.¹⁰³⁷ While welcoming the new NI climate legislation, the UK Committee on Climate Change noted that NI

1032 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 68.

1033 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 54(b).

1034 Ibid, at para 54(c).

1035 Commonwealth Forum of National Human Rights Institutions, ‘St Julian’s Declaration on Climate Justice’, 25 November 2015.

1036 Rebecca Black, ‘Fracking prohibition Bill unlikely to be passed this Assembly term’, *Irish News*, 2 March 2022.

1037 Climate Change Act (NI) 2022.

was already playing catchup with the rest of the UK, needing a “major step-up in policy and rapid progress over the 2020s”.¹⁰³⁸ The Committee on Climate Change’s annual progress report found major failures in delivery programmes and “progress has been slow in NI, largely due to agriculture being the dominant sector and emissions remaining fairly flat”.¹⁰³⁹

In 2021, the NI Executive published a strategy outlining a roadmap to deliver a 56 per cent reduction in NI’s energy-related emissions by 2030, on the pathway to deliver net zero by 2050.¹⁰⁴⁰ The UK Government also published a strategy setting out its plans for decarbonising all sectors of the UK economy to meet 2050 targets.¹⁰⁴¹ Additionally, a consultation was undertaken on NI’s first overarching environment strategy.¹⁰⁴² It reflects the UN Sustainable Development Goals and has a number of strategic outcomes based on UK net zero greenhouse gas emissions and improved climate resilience and adaptability. In November 2022, the Environment Strategy for NI was still waiting to be approved by an incoming NI Executive.

In July 2022, the England and Wales High Court ordered the UK Government to outline how its policies will achieve emissions targets set out in the Climate Change Act 2008.¹⁰⁴³ The England and Wales High Court found that the UK Government’s strategy lacked any explanation or quantification of how the strategy’s plans would achieve emissions targets, and as such had failed to meet its obligations under the 2008 Act.¹⁰⁴⁴

The New Decade, New Approach Agreement 2020 includes a commitment to “establish an Independent Environmental Protection Agency to oversee this work and ensure targets are met”.¹⁰⁴⁵ In February 2022, the NI Assembly approved the Environment (2021 Act) (Commencement and Saving Provision) Order (NI) 2022, which introduced a range of measures including a new legal framework for environmental governance and accountability now that the UK has left the EU. The 2022 Order also extends the remit of the Office for Environmental Protection to include NI, which will operate as an independent environmental oversight body across England and NI.

Protocol Article 2

Prior to the UK’s withdrawal from the EU, EU environmental law and governance mechanisms were deeply embedded in NI. The retained EU law set out in the Withdrawal Agreement and provisions in the Protocol have preserved some of these protections. Article 5(4) of the Protocol provides for the continued application of EU law and governance

1038 Letter from UK Climate Change Committee to Minister of Agriculture, Environment and Rural Affairs, Edwin Poots MLA, 24 March 2022.

1039 Ibid.

1040 Department for the Economy, ‘Energy Strategy - Path to Net Zero Energy’ (DfE, 2021).

1041 HM Government, ‘Net Zero Strategy: Build Back Greener’ (UK Gov, 2021).

1042 Department of Agriculture, Environment and Rural Affairs, ‘Draft Environment Strategy for NI’ (DAERA, 2021).

1043 *In the Matter of the Application of Friends of the Earth Limited, Client Earth, Good Law Project and Joanna Wheatley v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841.

1044 Ibid.

1045 NI Office, ‘New Decade, New Approach’ (NIO, 2020), at 44.

mechanisms in some areas of environmental regulation relating to trade set out in Annex 2 of the Protocol, with the potential to provide for further protections if deemed necessary. However, it largely omits other key conservation areas.¹⁰⁴⁶

The EU Charter on Fundamental Rights continues to apply in the application and interpretation of those provisions of EU law which are relevant to the application of Protocol Article 2. Article 37 of the EU Charter on Fundamental Rights states “a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”.

The non-diminution commitment in Protocol Article 2 adds a further dimension to climate change and environmental regulation. The rights, safeguards and equality of opportunity chapter of the Belfast (Good Friday) Agreement 1998 contains a general commitment to the “civil rights and religious liberties of everyone in the community”. Certain rights set out in this chapter are “affirmed in particular”, therefore making up a non-exhaustive list of rights. In its Explainer on the Protocol, the UK Government confirmed that the “key rights and equality provisions in the [Belfast (Good Friday)] Agreement are supported by the ECHR”.¹⁰⁴⁷ The UK Government further acknowledges that “in NI, EU law, particularly on anti-discrimination, has formed an important part of the framework for delivering the guarantees on rights and equality set out in the [Belfast (Good Friday)] Agreement”.¹⁰⁴⁸

The Commission therefore understands the non-diminution commitment to Protocol Article 2 as encompassing the full range of rights set out in the ECHR, to the extent that they are underpinned by EU legal obligations in force on or before 31 December 2020. Many of these rights are relevant in relation to climate change and environmental regulation following UK withdrawal from the EU. The Commission is undertaking research to identify the scope of Protocol Article 2 in relation to environmental protection.

Recommendations

The Commission recommends that the Department of Environment, Agriculture and Rural Affairs ensures climate justice values are adopted in all laws and policies aimed at tackling climate change, including ensuring there is a focus on the specific needs of and preventative measures for those most affected.

The Commission recommends that the Department of Environment, Agriculture and Rural Affairs promptly introduces an independent environmental regulator in NI that is effectively monitored and required to meaningfully engage with civil society.

1046 Mary Dobbs and Viviane Gravey, ‘Environment and Trade’, in Chris McCrudden, *The Law and Practice of the Ireland-NI Protocol* (CUP, 2020), at 247.

1047 NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in NI: What Does It Mean and How Will It Be Implemented?’ (NIO, 2020), at para 3.

1048 Ibid.

The Commission recommends that the NI Executive brings forward legislation for a complete ban on fracking in NI and, in the interim, reviews the current policy on fracking on this basis.

The Commission recommends that any legislative or policy decisions by Department of Environment, Agriculture and Rural Affairs made in relation to climate change and environmental regulation consider the interplay of the ECHR, the EU Charter of Fundamental Rights and Protocol Article 2.

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.¹⁰⁴⁹ It includes provision for a committee to authorise the processing of confidential information, this is a key safeguard against arbitrariness.

In 2021, work was conducted on developing regulations for implementing the duties set out in the 2016 Act. Furthermore, an analysis was conducted on the efficient and effective delivery of health and social care services is already undertaken on a daily basis using anonymised, non-attributable data, in line with best practice in the production of statistics and use of sensitive, confidential personal healthcare data.

In 2022, work continued on developing the encompass programme.¹⁰⁵⁰ 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 to consider access to medical data for secondary purposes.

Recommendations

The Commission recommends that regulations for implementing the duties set out in the Health and Social Care (Control of Data Processing) Act 2016 Act are introduced and enacted by the NI Executive and NI Assembly.

The Commission recommends that the Department of Health urgently establishes a committee to authorise the processing of confidential information under the Health and Social Care (Control of Data Processing) Act 2016.

Rehabilitation of offenders

In 2003, 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

1049 Section 2(1), Health and Social Care (Control of Data Processing) Act (NI) 2016.

1050 Health and Social Care Board, ‘What is Encompass?’. Available at: <http://www.hscboard.hscni.net/encompass/>

treatment of convicted persons after they have served their punishment and to cease any official or unofficial practices of discrimination”.¹⁰⁵¹

In 2015, research reported that engagement with the NI Association for Care and Resettlement of Offenders’ Jobtrack project, which was aimed at increasing the employability of people who had offended, had reduced reoffending by 24 per cent.¹⁰⁵²

In 2021, the NI Department of Justice consulted on reforming rehabilitation periods in NI, seeking views on reducing the length of time that it will take for some convictions to become spent and allowing more sentences to be included in the rehabilitation of offenders scheme in NI.¹⁰⁵³ In its consultation response, the Commission supported the proposals to reform legislation governing the rehabilitation of offenders in NI.¹⁰⁵⁴ The Commission further recommended that the Department of Justice’s approach to a two-part rehabilitation is examined further, taking account of rehabilitation experiences in Scotland and Wales. The Commission also recommended that the Department of Justice considers a review mechanism to comply with Article 8 ECHR and that consideration is given to conflict-related convictions that pre-date the Belfast (Good Friday) Agreement 1998. In 2022, legislative progress has been delayed by the suspension of the NI Executive and NI Assembly.

Commission’s case

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. In June 2022, following on from a declaration that Article 6(1) of the Rehabilitation of Offenders (NI) Order 1978 was incompatible with the applicant’s Article 8 ECHR rights by reason of a failure to provide a mechanism by which the applicant could apply to have their criminal convictions considered spent irrespective of the passage of time and their personal circumstances, the NI High Court declined to give the applicant an award of damages.¹⁰⁵⁵ The NI High Court concluded that taking account of all the circumstances of this case, an award of damages was not necessary to afford just satisfaction to the applicant.¹⁰⁵⁶ In the NI High Court’s view the declaration of incompatibility adequately dealt with the infringement of the applicant’s human rights in the factual context of this case.¹⁰⁵⁷ The Department of Justice has appealed the decision, and a hearing before the NI Court of Appeal is expected in March 2023.

1051 E/CN.4/RES/2004/2, ‘Sub-Commission on Human Rights Resolution on Discrimination Against Convicted Persons Who Have Served Their Sentence’, 13 August 2003.

1052 NI Statistics Research Agency, ‘Reoffending Analysis for a Sample of Offenders who Completed the NI Association for Care and Resettlement of Offenders’ Jobtrack Programme During 2010/2011’ (NISRA, 2015).

1053 Department of Justice, ‘Consultation On Proposals To Reform Rehabilitation Periods in NI’ (DoJ, 2021).

1054 NI Human Rights Commission, ‘Submission to Rehabilitation of Offenders Reform Consultation’ (NIHRC, 2021).

1055 *In the Matter of an Application by JR123 for Judicial Review* [2022] NIQB 42.

1056 *Ibid*, at para 37.

1057 *Ibid*, at para 36.

Recommendations

The Commission recommends that the Department of Justice amends the Rehabilitation of Offenders (NI) Order 1978 to enable an offender to be rehabilitated if their circumstances satisfy Article 8 ECHR compliant criteria. This includes ensuring an effective review mechanism is operational.

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 NI’s recording form of community background of persons stopped and searched under the Justice and Security (NI) Act 2007”.¹⁰⁵⁸

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; [and]*
- 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.*¹⁰⁵⁹

Statistics

In 2021/2022, under the Justice and Security (NI) Act 2007, section 21 powers to stop and question were used 471 times, a three per cent increase compared to 2020/2021. Section 24 powers to stop and search for munitions were used 3,195 times, a 15 per cent decrease from 2020/2021.¹⁰⁶⁰

In 2021/2022, under the Terrorism Act 2000, section 43 powers to stop and search a person reasonably believed to be a terrorist were used 47 times, an increase of 15 compared to 2020/2021. Section 43A powers to stop and search a vehicle reasonably believed to be used for terrorism were used ten times, an increase from three times in 2020/2021. 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 2020/2021.¹⁰⁶¹

In 2021/2022, 22,823 persons were stopped and searched/questioned, 14 per cent fewer than in 2020/2021 and the lowest number of persons

1058 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).

1059 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.

1060 NI Statistics and Research Agency, 'Use of Stop and Search Powers by the Police in NI: 1 April 2021 to 31 March 2022' (NISRA, 2022), at 3.

1061 Ibid.

stopped since 2007/2008.¹⁰⁶² Also 2,416 persons aged 13 to 17 years old were stopped, while 61 children aged 12 years and under were stopped.¹⁰⁶³

Between April and July 2021, the Police Service NI conducted a survey seeking views of stop and search from 11 to 18 year olds.¹⁰⁶⁴ Of 870 respondents who had been stopped and searched, 77 per cent said it was a negative experience, 72 per cent felt their search was unjustified and 65 per cent had decreased confidence in local police as a result of their encounter.¹⁰⁶⁵

Monitoring

In 2020, the NI Court of Appeal considered whether the Police Service NI's Code of Practice for Monitoring Community Background imposed sufficient safeguards to ensure that the impugned powers are not exercised arbitrarily. The NI Court of Appeal agreed with the NI 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.¹⁰⁶⁶

In 2022, the Independent Reviewer of the Justice and Security (NI) Act 2007, Professor Marie Breen-Smyth, highlighted a lack of progress on the provision of safeguards for the use of these 'no-suspicion' powers against children.¹⁰⁶⁷ This includes the introduction of independent youth scrutiny panels, community impact assessments, and child specific guidance in the Code of Practice. There has also been little progress regarding the lack of community background recording of persons stopped and searched under the Justice and Security (NI) Act 2007.¹⁰⁶⁸

Recommendations

The Commission recommends that the Police Service NI ensures that all instances of stop and search have a statutory footing, is non-discriminatory and is proportionate, including taking into consideration the age and maturity of the child.

The Commission recommends that the Police Service NI expedite the development and implementation of a suitable methodology for recording disaggregated data on the community background of individuals, including children, stopped and searched under the Terrorism Act 2000 and the Justice and Security (NI) Act 2007 throughout NI.

¹⁰⁶² Ibid, at 1.

¹⁰⁶³ Ibid, at 6.

¹⁰⁶⁴ Police Service of NI, 'Stop and search survey for young people'. Available at: <https://www.psnipolice.uk/latest-news/stop-and-search-survey-young-people>

¹⁰⁶⁵ Professor Marie Breen-Smyth, 'Report of the Independent Reviewer Justice and Security (NI) Act 2007: Fourteenth Report - 1 August 2020-31 July 2021' (NIO, 2022), at paras 6.8 – 6.10.

¹⁰⁶⁶ *In the Matter of an Application by Stephen Ramsey (No 2)* [2020] NICA 14, at para 68.

¹⁰⁶⁷ Professor Marie Breen-Smyth, 'Report of the Independent Reviewer Justice and Security (NI) Act 2007: Fourteenth Report - 1 August 2020-31 July 2021' (NIO, 2022).

¹⁰⁶⁸ *In the Matter of an application by Stephen Ramsey (No 2)* [2020] NICA 14, at paras 55-58; Professor Marie Breen-Smyth, 'Report of the Independent Reviewer Justice and Security (NI) Act 2007: Fourteenth Report - 1 August 2020-31 July 2021' (NIO, 2022).

Visitation in health and social care settings

During the COVID-19 pandemic, restrictions were placed on visiting care homes. The Commissioner for Older People for NI, Eddie Lynch, expressed concerns of possible breaches of human rights due to older people in care homes being denied visits from families for many months.¹⁰⁶⁹

Similar concerns have been raised in relation to the impact of restrictions on deaf and disabled people. University of Ulster research found that “during 2020, 70 per cent of people living in supported accommodation or residential care were not allowed by service providers to have visitors into their home”.¹⁰⁷⁰ The research continued that “by August 2021, around five per cent of persons with a milder learning disability still had restrictions placed upon them, but these restrictions rose to 25 per cent of those with more severe disabilities”.¹⁰⁷¹ Two thirds of those with severe or profound disabilities were reported by carers to have experienced “isolation, boredom, frustration, and confusion about why things had changed”.¹⁰⁷²

In 2021, the NI Assembly Committee for Health published the findings of an inquiry into the impact of COVID-19 on care homes. 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.¹⁰⁷³ The Committee for Health recommended that “safe and meaningful visiting be facilitated and resourced through the identification, development and implementation of innovative measures”.¹⁰⁷⁴ 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.¹⁰⁷⁵

In 2021, guidance was published to facilitate increased visiting in all care settings.¹⁰⁷⁶ In May 2022, a new risk assessed method of managing visiting during outbreaks was introduced. This replaced the previous requirement for all visiting to cease during an outbreak.¹⁰⁷⁷ The public health guidance remains in the further easing stage of the Pathway. For example, visits including from children are permitted as long as booked in advance and overnight visits are permitted, but enhanced cleaning and screening for COVID-19 symptoms must continue.

In July 2022, the UK COVID-19 Inquiry, chaired by Baroness Heather Hallett, was launched.¹⁰⁷⁸ The inquiry includes a review of the response of the

1069 Commissioner for Older People for NI, ‘Press Release: Commissioner says denial of care home visits a breach of human rights’, 10 March 2021.

1070 University of Ulster, ‘The Impact of COVID-19 on People with Learning Disabilities in NI: Implications for Policy and Practice’ (UU, 2021), at 8.

1071 Ibid.

1072 Ibid.

1073 NI Assembly Committee for Health, ‘Inquiry Report on the Impact of COVID-19 in Care Home’ (NIA, 2021), at para 14.

1074 Ibid, Recommendation 1.

1075 Ibid, Recommendation 2.

1076 Department of Health, ‘COVID-19: Visiting in Care Settings in NI’ (DoH, 2022), at Recommendation 2.

1077 Ibid.

1078 UK COVID-19 Inquiry, ‘Press Release: UK COVID-19 Inquiry launches first investigation’, 21 July 2022.

health and care sector across the UK, including the management of the pandemic in care homes and other care settings.¹⁰⁷⁹

Recommendations

The Commission recommends that the UK Cabinet Office ensures that the UK COVID-19 Inquiry is conducted expeditiously and that it fully examines the response in NI.

The Commission recommends that the Department of Health adopts the recommendations from the UK COVID-19 Inquiry in relation to the management of the pandemic in care homes, ensuring that learning is disseminated across the sector and that a human rights based plan is in place for any future outbreak.

Freedom of Religion and Belief, Expression, Association and Right to Participate in Public and Political Life

Blasphemy

In 2008, the UN Human Rights Committee welcomed the abolition of the common law offence of blasphemy in England and Wales¹⁰⁸⁰ as a positive measure to ensure compliance with Article 19 UN ICCPR on the right to freedom of expression and opinion.¹⁰⁸¹ A similar approach has been followed in Ireland and Scotland.¹⁰⁸²

The common law offences of blasphemy and blasphemous libel remain on the statute books in NI and, whilst a prosecution has not occurred since 1855, an individual may be subject in law to prosecution for committing either of these offences.¹⁰⁸³ In 2021, the then Minister of Justice, Naomi Long MLA, stated that regarding these offences she was “committed to freedom of and from religion and am fully supportive of removing such archaic and unused offences from the law”.¹⁰⁸⁴ In 2022, the then Minister of Justice reiterated her support for introducing legislation to that effect, but that it was not possible to say when a policy consultation on a removal of blasphemy offences could be taken forward in the absence of a NI Executive and a NI Assembly.¹⁰⁸⁵

Recommendations

The Commission recommends that the NI Executive introduces legislation to the NI Assembly to abolish the common law offence of blasphemy and blasphemous libel to ensure compatibility with the ECHR and 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’.*¹⁰⁸⁶

1080 Criminal Justice and Immigration Act 2008.

1081 CCPR/C/GBR/CO/6, ‘UN Human Rights Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI’, 30 July 2008, at para 4.

1082 Thirty-seventh Amendment of the Constitution of Ireland (Repeal of Offence of Publication or Utterance of Blasphemous Matter) Act 2018; Hate Crime and Public Order (Scotland) Act 2021.

1083 BJAC Valentine, ‘Booklet of Criminal Offences in NI’ (LSNI, 2016).

1084 NI Assembly Hansard, ‘Written Answer – Blasphemy – Naomi Long MLA – AQW 14245/17-22’, 17 February 2021.

1085 NI Assembly Hansard, ‘Written Answer – Blasphemy – Naomi Long MLA – AQW 403/22-27’, 30 May 2022.

1086 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.

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 plaintiff of actual malice in order to go forward on actions concerning reporting on public officials and prominent public figures.*¹⁰⁸⁷

The Defamation Act 2013, which does not extend to NI, addressed this recommendation in the rest of the UK. In 2016 and 2017, the Department of Finance¹⁰⁸⁸ and Sir John Gillen¹⁰⁸⁹ recommended that a similar approach was taken in NI.

In 2021, Mike Nesbitt MLA introduced a Private Member's Bill before the NI Assembly which replicated the reforms under the Defamation Act 2013.¹⁰⁹⁰ In 2022, the Defamation (NI) Act 2022 received Royal Assent.

Recommendation

The Commission welcomes enactment of the Defamation (NI) Act 2022. The Commission recommends that prompt steps are taken to ensure effective implementation of the Defamation (NI) Act 2022, including training on its effects for relevant individuals and organisations.

Freedom of expression of journalists

In April 2022, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, presented her examination of the opportunities, challenges and threats to media in the digital age.¹⁰⁹¹ The UN Special Rapporteur highlighted the importance of journalism as a public good and makes specific recommendations to States to protect and promote media freedom and the safety of journalists, including:

*States should adopt laws – or review and revise existing ones – relating to freedom of expression online and offline to ensure they are aligned with international standards. Any restriction of freedom of expression should adhere strictly to the requirements of legality, necessity, proportionality and legitimate aim set out in Article 19(3) of the [UN ICCPR]... and acknowledge the public interest role of journalists.*¹⁰⁹²

In April 2022, the European Commission published proposals to improve the protection of journalists and human rights defenders from abusive court proceedings known as strategic lawsuits against public

1087 Ibid.

1088 Andrew Scott, 'Reform of Defamation Law in NI: Recommendations to the Department of Finance' (DoF, 2016).

1089 Office of the Lord Chief Justice, 'Review of Civil and Family Justice in NI: Review Group's Report on Civil Justice' (OLCJ, 2017).

1090 NI Assembly, 'Defamation Bill - Bill 25/17-22' (NIA, 2021).

1091 A/HRC/50/29, 'Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression: Reinforcing Media Freedom and the Safety of Journalists in the Digital Age', 20 April 2022.

1092 Ibid, at para 108.

participation.¹⁰⁹³ Such lawsuits are a particular form of harassment used primarily to prevent or penalise journalists speaking up on issues of public interest. The proposed EU Directive will be considered by the European Parliament and the EU Council, with the European Commission envisaging the conclusion of legislative process by the end of 2022. The European Commission is also expected to adopt a complementary recommendation to encourage Member States to align their rules with the proposals.¹⁰⁹⁴

In March 2022, graffiti threatening journalists appeared in South Belfast.¹⁰⁹⁵ In June 2022, a threat of violence was made against a Sunday World journalist who was informed by the Police Service of NI that “criminal elements” have been monitoring their movements and that the “use of firearms cannot be ruled out”.¹⁰⁹⁶

Recommendation

The Commission recommends that the Department of Justice ensures that journalists have effective, human rights compliant protection to report on issues of public importance.

The Commission recommends that the Department of Justice and Police Service NI ensure that journalists have an effective remedy for the purposes of stopping and preventing intimidation or reprisals for doing their job.

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”.¹⁰⁹⁷

In 2014, the Stormont House Agreement proposed that responsibility for parades and related protests should, in principle, be devolved to the NI Assembly.¹⁰⁹⁸ In 2022, the Parades Commission for NI remains answerable to the Secretary of State for NI.

In 2014, the Stormont House Agreement also proposed that the Office of Legislative Counsel, working in conjunction with the 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. In 2022, a discussion paper on proposals that was promised in 2015 is still awaited.¹⁰⁹⁹

1093 European Commission, ‘Press Release: Commission tackles abusive lawsuits against journalists and human rights defenders ‘SLAPPs’’, 27 April 2022.

1094 Ibid.

1095 ‘Graffiti threatening journalists appears in Belfast as councillors react to ‘difficult 24 hours’ in city’, *Belfast Telegraph*, 26 March 2022.

1096 ‘Terror group east Belfast UVF believed to be behind ‘sickening’ threat to Sunday World reporter’, *Sunday World*, 9 June 2022.

1097 A/HRC/23/39/Add.1, ‘Report of the UN 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.

1098 Stormont House Agreement, 23 December 2014, at para 17.

1099 NI Office, ‘A Fresh Start: The Stormont House Agreement and Implementation Plan’ (NIO, 2015); Email correspondence from the Executive Office to NI Human Rights Commission, October 2021.

In 2021/2022, the Parades Commission for NI was notified of 2,488 parades and parade-related protests. This included 1,846 Protestant/Unionist/Loyalist, 42 Catholic/Republican/Nationalist and 600 ‘other’ parades.¹¹⁰⁰ Of these, 135 Protestant/Unionist/Loyalist, two Catholic/Republican/Nationalist, and four ‘others’ were considered ‘sensitive’, with the potential to raise concerns and community tensions.¹¹⁰¹ This number is higher than previous years. Due to the COVID-19 pandemic, the traditional parading season in 2021 was largely based around local events.

Recommendation

The Commission recommends that the UK Government devolves responsibility for parades and protests to the NI Assembly, in line with the Stormont House Agreement.

The Commission recommends that the Executive office promptly drafts and submits to the NI Executive a discussion paper setting out a range of options on how issues relating to parades and protests could be addressed in legislation, as required by the Stormont House Agreement. This paper should be considered by the NI Executive, and the outcomes implemented expeditiously.

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.*¹¹⁰²

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.*¹¹⁰³

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 implementation of Section 43A of the Sex Discrimination (NI) Order 1976 enabling the use of gender quotas”.¹¹⁰⁴

1100 Parades Commission for NI, ‘Annual Report and Financial Statements for the Year Ended 31 March 2022’ (PCNI, 2022), at Table 1.

1101 Ibid.

1102 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.

1103 Ibid.

1104 Ibid.

The UN CEDAW Committee also recommended that the UK Government and NI Executive:

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; [and]*
- b) guaranteeing women’s participation in the context of the transitional justice mechanisms envisaged in the draft NI (Stormont House Agreement) Bill.¹¹⁰⁵*

Women’s involvement with peace initiatives is protected by the UN Security Council’s Resolution 1325.

Protocol Article 2 provides specific, enhanced protection against discrimination enshrined in six EU equal treatment Directives listed in Annex 1 of the Protocol. Four of these EU equal treatment Directives provide for specific protection against gender discrimination, including in employment and vocational training, access to goods and services and social security.¹¹⁰⁶ NI equality law must keep pace with any changes made by the EU to improve the minimum protection on or after 1 January 2021, including monitoring all relevant current and future CJEU jurisprudence.

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 1998 as a result of the UK leaving the EU, including the right to equality of opportunity in all social and economic activity, regardless of gender and the “right of women to full and equal political participation”. To the extent that EU obligations fall within scope of Protocol Article 2, such as the EU Pregnant Workers Directive¹¹⁰⁷ and the EU Parental Leave Directive,¹¹⁰⁸ there should be no regression in rights safeguards and equality of opportunity resulting from the UK’s withdrawal from the EU.

In 2020, the Department for Communities began a staged consultation on developing a new Gender Equality Strategy. The Commission is a member of the Co-Design Group for the Gender Equality Strategy. In 2021, the Expert Advisory Panel published its report, which highlighted participation of women in public and political life as a key human rights obligations

¹¹⁰⁵ Ibid.

¹¹⁰⁶ Directive 2006/54/EC, ‘EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation’, 5 July 2006; Directive 2010/41/EU, ‘EU Parliament and EU Council Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity’, 7 July 2010. Directive 2004/113/EC, ‘EU Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services’, 13 December 2004; Directive 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.

¹¹⁰⁷ Directive 92/85/EEC, ‘EU 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.

¹¹⁰⁸ Directive 2010/18/EU, ‘EU Council Directive Implementing the Revised Framework Agreement on Parental Leave’, 8 March 2010.

relevant to gender equality.¹¹⁰⁹ In 2022, the Co-Design Group was working with the Expert Panel for the Gender Equality Strategy to develop recommendations for the Department for Communities' consideration. A public consultation on the Gender Equality Strategy was due to take place in early 2022, but this process has been delayed. The Gender Equality Strategy cannot progress until a new NI Executive is in place.¹¹¹⁰

Public life

The NI Executive set a target of 50/50 gender representation within public appointments by 2020/2021.¹¹¹¹ 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 2020.¹¹¹² Within the most senior grades, representation of women has increased since 2000 (11.3 per cent). However, it decreased to 41.4 per cent in 2021 from 41.5 per cent in 2020.¹¹¹³ In 2021, Jayne Brady was appointed as the new permanent Head of the NI Civil Service.¹¹¹⁴ In 2018/2019, the most recent figures, 163 public appointments were made in NI. The gender was known for 134 of these appointments, of which 36 per cent were women.¹¹¹⁵

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.¹¹¹⁶ Mrs Justice Siobhan Keegan was appointed as Lady Chief Justice. She is the first woman to hold the position of the most senior judge in NI.¹¹¹⁷

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.¹¹¹⁸ Representation of women holding legal positions in Tribunals was 48.6 per cent.¹¹¹⁹

Political life

Women, particularly minority women, remain under-represented in political life in NI. In May 2022, a record number of 32 of the 90 MLAs elected were women. Co-option increased this number to 33 with women therefore holding 35.6 per cent of seats at Stormont. Two of NI's five main political parties have women leaders.

1109 Department for Communities, 'Gender Equality Strategy Expert Advisory Panel Report' (DfC, 2021), at 12.

1110 Letter from Department for Communities to NI Human Rights Commission, 18 July 2022.

1111 NI Statistics and Research Agency, 'Public Appointments Annual Report for NI 2016/17' (TEO, 2018).

1112 NI Statistics and Research Agency, 'Equality Statistics for NI Civil Service' (NISRA, 2021), at 6.

1113 Ibid.

1114 The Executive Office, 'Press Release: New Head of the Civil Service announced', 10 June 2021.

1115 NI Statistics and Research Agency, 'Public Appointments: Annual Report for NI, 2018/2019' (NISRA, 2022), at 14.

1116 Judiciary NI, 'Judiciary of NI'. Available at: <https://judiciaryni.uk/about-judiciary/judicial-members>

1117 Julian O'Neill, 'Mrs Justice Siobhan Keegan becomes NI's first female top judge', *BBC News*, 16 June 2021.

1118 NI Statistics and Research Agency, 'Judiciary in NI: 2019' (NIJAC, 2020), at 2.

1119 Ibid.

Section 43A of the Sex Discrimination (NI) Order 1976 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.¹¹²⁰ 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.¹¹²¹ Public information is not adequately available in different formats and languages, which means that it can be inaccessible. This particularly affects disabled and migrant women.¹¹²²

Funding

The Expert Panel for the Gender Equality Strategy has highlighted continuing issues with resourcing of the women's community groups and civil society.¹¹²³ Women that attend community groups that are experiencing resource issues are distressed by the funding cuts that are placing the continuation of such groups and their activities under threat.¹¹²⁴ Women in NI have stated that attendance at such women's community groups has saved lives, assisted with depression, provided a sense of belonging and support, and improved confidence.¹¹²⁵

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.¹¹²⁶

In 2015, academics developed Gender Principles for Dealing with the Legacy of the Past in NI.¹¹²⁷ 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,¹¹²⁸ but the UK's National Action Plan does not.¹¹²⁹

1120 Sex Discrimination (NI) Order 1976.

1121 Roundtable discussions with NI women's policy groups and NI women's community groups, October 2017, November 2017, February 2018 and March 2018.

1122 Ibid.

1123 Department for Communities, 'Gender Equality Strategy Expert Advisory Panel Report' (DfC, 2021).

1124 'Féile an Phobail and Equality Commission NI: What Every Women Wants – Equality!', An Chultúrlann, 8 August 2018.

1125 Ibid.

1126 Roundtable discussions with NI women's policy groups and NI women's community groups, October 2017, November 2017, February 2018 and March 2018.

1127 Legacy Gender Integration Group, 'Gender Principles for Dealing with the Legacy of the Past' (LGIG, 2015).

1128 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).

1129 HM Government, 'UK National Action Plan on Women, Peace and Security 2018-2022' (UK Gov, 2018).

Recommendation

The Commission recommends that the NI Executive takes effective steps to ensure women's participation in public and political life is proportionate to NI's population.

The Commission recommends that the Department for Communities, and as appropriate other NI Departments, ensure that all existing and future gender equality strategies and policies, including the Gender Equality Strategy for NI, identify and address effectively the barriers hindering women's participation in public and political life.

Right to Work and to Just and Favourable Conditions of Work

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”.¹¹³⁰ 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”.¹¹³¹

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”.¹¹³²

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”.¹¹³³ 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; [and]*
- c) *provide further incentives for men to take parental leave, such as non-transferrable leave, and encourage men to participate equally in childcare responsibilities.*¹¹³⁴

Childcare provision

In 2020, the NI Executive 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 three-four”.¹¹³⁵ 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 Pre-School Education Programme for three- to four-year-olds in NI funds one year of non-compulsory education before a child starts primary school, however this

1130 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 44.

1131 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 50-51.

1132 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 21.

1133 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 46.

1134 Ibid, at para 45.

1135 NI Office, ‘New Decade, New Approach’ (NIO, 2020).

early education initiative is much more limited than the childcare schemes available elsewhere in the UK and Ireland.¹¹³⁶

In 2021, the average cost of a full-time childcare place in NI was £170 per week. The average cost for a day nursery per week is £186, and £166 per week for a childminder.¹¹³⁷ 54 per cent of families report challenges in accessing the formal childcare they need and raise issues of cost, flexibility and accessibility.¹¹³⁸

Parents and carers in NI can apply to the UK-wide Tax-Free Childcare scheme.¹¹³⁹ Those eligible will receive up to a maximum of £2,000 per child per year (£4,000 if the child has a disability) from the UK Government towards approved childcare. In 2021/2022, there were 11,050 accounts in NI using this scheme, an increase from 7,425 in 2020/2021. This is the highest growth of childcare account usage across the UK.¹¹⁴⁰

In 2021, the Universal Credit (NI) Regulations 2016 were amended to make upfront childcare costs available under the Adviser Discretion Fund. This aims to help parents start work, sustain and/or increase their hours or return to work following maternity leave.¹¹⁴¹ Between October 2021 and June 2022, 330 people were supported by this fund. On average, each eligible applicant received £569. It took an average of 16 calendar days to process each application for support.¹¹⁴²

Childcare Strategy

The 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 strategy being adopted.¹¹⁴³

In 2020, the NI Executive committed to publishing a new Childcare Strategy. It is expected that the “design, planning and phased implementation [of a childcare strategy] will take a number of years and may require primary legislation”.¹¹⁴⁴ This was delayed further with staff resources being redirected during COVID-19.¹¹⁴⁵ In 2022, the then Minister of Education, Michelle McIlveen MLA, reiterated the Department of Education’s commitment to progressing the Childcare Strategy as quickly

1136 See UK Government, ‘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>; Welsh Government, ‘Childcare for 3 and 4 year olds’. Available at: <https://gov.wales/childcare-3-and-4-year-olds>; Scottish Government, ‘Early Education and Care’. Available at: <https://www.gov.scot/policies/early-education-and-care/early-learning-and-childcare/>; Government of Ireland, ‘Early Childhood Care and Education Programme’. Available at: <https://www.gov.ie/en/publication/2459ee-early-childhood-care-and-education-programme-ecce>

1137 Employers for Childcare, ‘NI Childcare Survey 2021’ (Efc, 2021).

1138 Ibid.

1139 UK Government, ‘Tax-Free Childcare’. Available at: <https://www.gov.uk/tax-free-childcare>

1140 UK Government, ‘Tax-Free Childcare Statistics Commentary March 2022’. Available at: <https://www.gov.uk/government/statistics/tax-free-childcare-statistics-march-2022/tax-free-childcare-statistics-commentary-march-2022>

1141 Department for Communities, ‘Press Release: Communities Minister removes significant barrier to employment for parents’, 25 October 2021.

1142 NI Assembly Hansard, ‘Written Question: Advisor Discretion Fund - Nicola Brogan MLA - AQW1780/22-27’, 20 June 2022.

1143 Office of the First Minister and Deputy First Minister, ‘Towards a Childcare Strategy - A Consultation Document’ (OFMDFM, 2012).

1144 NI Assembly Hansard, ‘Written Answers: Update on Childcare Strategy - Peter Weir MLA - AQO 507/17-22’, 24 July 2020.

1145 Ibid.

as possible.¹¹⁴⁶ Independent research reviewing childcare services in NI is underway and expected to be completed by end of the 2022.¹¹⁴⁷

Recommendation

The Commission recommends that the Department of Education ensures that childcare facilities and arrangements in NI are available, affordable and accessible. This includes ensuring that a flexible and accessible childcare model is in place that operates outside traditional working hours.

The Commission recommends that the Department of Education develops, implements and monitors an up-to-date Childcare Strategy for NI, that has a measurable action plan and is adequately resourced. Parents, carers, guardians and representative organisations should be involved at every stage of the process.

The Commission 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, commitments were made 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 for veterans in NI, and to ensure the work of the War Memorials Trust is better promoted and understood in NI.¹¹⁴⁸

The Armed Forces Act 2021, much of which extends to NI, enshrines the Armed Forces Covenant in law. The 2021 Act aims to prevent service personnel and veterans being disadvantaged when accessing essential services like healthcare, education and housing. The 2021 Act will also improve access to justice through improvements to the Service Justice System.

In 2021, the review of aftercare service for veterans in NI commenced and continues to progress.¹¹⁴⁹ The review considers whether the remit of the aftercare service should be widened to cover all British Armed Forces veterans living in NI with service-related injuries and conditions.¹¹⁵⁰

1146 NI Assembly Hansard, 'Written Question: Review of Childcare Services - Nicola Brogan MLA - AQW 2465/22-27', 30 June 2022.

1147 Ibid.

1148 NI Office, 'New Decade, New Approach' (NIO, 2020), at 49.

1149 NI Office, 'Written Statement - Update on Delivery of the UK Government's Commitments in New Decade, New Approach - Lord Caine', 23 March 2022.

1150 NI Office, 'NI Office Outcome Delivery Plan: 2021 to 2022' (NIO, 2021), at Section E.7.

Recommendation

The Commission recommends that the UK Government and the Executive Office ensure commitments made to Armed Forces veterans are fully and promptly realised. This requires meaningful co-operation with the 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 should:

- a) *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; [and]*
- b) *reconsider its active policy of recruitment of children into the armed forces and ensure that recruitment practices do not actively target persons under the age of 18 and ensure that military recruiters' access to school be strictly limited.*¹¹⁵¹

Children aged 16 and 17 years old can be recruited to the British Armed Forces, provided it is voluntary and there are safeguards in place.¹¹⁵² The UK continues to be the only country in Europe that routinely recruits 16 and 17 year olds into the armed forces. Such recruitment can adversely affect the child's mental and physical health.¹¹⁵³ In 2022, there is little political support for increasing the recruiting age to 18 years old.¹¹⁵⁴

Recommendation

The Commission recommends that the Ministry of Defence raises the minimum age of recruitment for the British Armed Forces to 18 years old. While awaiting legislative amendments, the Ministry of Defence should reconsider any recruitment policy that specifically targets children and strictly limit military recruiters' access to schools.

Employment equality

NI equality law must dynamically align with any changes made by the EU to the six Annex 1 Equality Directives, which improve the minimum levels

1151 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)-85(d).

1152 Article 3, Optional Protocol to the UN CRC on the Involvement of Children in Armed Conflict 2000.

1153 British Medical Journal, 'Press Release: Stop recruiting children, UK Armed Forces urged', 25 February 2019.

1154 UK Parliament Hansard, 'Public Bill Committee: Armed Forces Bill (First sitting)', 25 March 2021.

of protection available on or after 1 January 2021, including monitoring relevant current and future CJEU case law.¹¹⁵⁵

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:

- *EU Racial Equality Directive*,¹¹⁵⁶
- *EU Employment Equality (Framework) Directive*,¹¹⁵⁷
- *EU Equal Treatment Directive*,¹¹⁵⁸ and
- *EU Self-Employment Equal Treatment Directive*.¹¹⁵⁹

Additional EU obligations, relevant to employment equality, include the EU Parental Leave Directive, the EU Pregnant Workers Directive¹¹⁶⁰ and other safeguards for part-time workers¹¹⁶¹ and agency workers.¹¹⁶² These fall within scope of Protocol Article 2, requiring no diminution in standards in place on 31 December 2020.

Parental Bereavement (Leave and Pay Bill)

In 2021, the Commission provided written evidence to the NI Assembly Committee for the Economy welcoming the then Parental Bereavement (Leave and Pay) Bill to make provision for leave and pay for employees whose children have died. The Commission advised that in the development and implementation of the regulations which give effect to the scheme, the Department for the Economy should be mindful of the obligation to ‘keep pace’ with any improvements to rights in the Protocol Annex 1 Equality Directives on or after 1 January 2021, including monitoring relevant CJEU case law.¹¹⁶³ In March 2022, the Parental Bereavement (Leave and Pay) Act (NI) 2022 received Royal Assent.

1155 Article 13, Ireland/NI Protocol to the UK-EU Withdrawal Agreement 2020; Directive 2000/43/EC, ‘EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin’, 29 June 2000; Directive 2000/78/EC, ‘EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation’, 27 November 2000; Directive 2004/113/EC, ‘EU Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the Access To and Supply of Goods and Services’, 13 December 2004; Directive 2006/54/EC, ‘EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation’, 5 July 2006; Directive 2010/41/EU, ‘EU Parliament and EU Council Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity’, 7 July 2010; Directive 79/7/EEC, ‘EU Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security’, 19 December 1978.

1156 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.

1157 Directive 2000/78/EC, ‘EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation’, 27 November 2000.

1158 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.

1159 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.

1160 Directive 92/85/EEC, ‘European Economic Committee 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.

1161 Directive 97/81/EC, ‘EU Council Directive Concerning the Framework Agreement on Part-time Workers’, 15 December 1997.

1162 Directive 2008/104/EC, ‘EU Parliament and Council Directive on Temporary Agency Work’, 19 November 2008.

1163 NI Human Rights Commission, ‘NI Human Rights Commission Submission to Committee for Economy on the Parental Bereavement (Leave and Pay) Bill’ (NIHRC, 2021).

Fair Employment (School Teachers) Act (NI) 2022

In January 2022, a private member's bill was introduced into the NI Assembly aiming to amend the Fair Employment and Treatment (NI) Order 1998 and remove the religious discrimination exemption in the employment of schoolteachers in NI.¹¹⁶⁴

In March 2022, the Commission wrote to the NI Assembly Committee for the Executive, welcoming the then Fair Employment (School Teachers) Bill and advised of the 'keep pace' obligation in Protocol Article 2.¹¹⁶⁵ Whereas the particular exemption was permitted under EU law, the Commission advised that the removal of the blanket exemption of teachers from anti-discrimination legislation would provide a more robust framework for the protection of rights under the ECHR and Protocol Article 2 for those working in the teaching profession. In May 2022, the Fair Employment (School Teachers) Act (NI) 2022 received Royal Assent.

Civil Service Nationality Rules

The Civil Service Nationality Rules govern eligibility for employment in the Civil Service across the UK, on the grounds of nationality. These rules must be followed by government departments in their recruitment and appointment procedures.¹¹⁶⁶ From 31 December 2020, there have been changes to the eligibility criteria for certain civil service posts based on immigration status.¹¹⁶⁷

In 2021, the Commission sought a legal opinion in relation to the Civil Service Nationality Rules, Protocol Article 2 and any potential diminution of rights. This issue raises a question in relation to the cohort of people protected by Protocol Article 2. This issue was raised at a meeting of the NI Assembly Committee for the Executive Office, where the Commission, alongside the Equality Commission NI and the Irish Equality and Human Rights Commission briefed members on the dedicated mechanism and Protocol Article 2 issues.¹¹⁶⁸ In April 2022, the Commission wrote to the Cabinet Office seeking confirmation of the criteria for designation of reserved and non-reserved posts, as only UK nationals are eligible for employment in reserved posts, and what changes have been made to the criteria following UK withdrawal from the EU. The Commission is keeping this matter under review.

Recommendations

The Commission advises that in the development or implementation of any laws or policies in the area of employment, including within civil service employment, the UK Government and relevant NI Executive departments, consider the extent to which Protocol Article 2 is engaged; ensure that there is no diminution of the rights and

¹¹⁶⁴ NI Assembly, 'Fair Employment (School Teachers) Bill - 51/17-22' (NIA, 2022).

¹¹⁶⁵ Letter from NI Human Rights Commission to the NI Assembly Committee for the Executive Office, 2 March 2022.

¹¹⁶⁶ Cabinet Office, 'Civil Service Nationality Rules: Guidance on Checking Eligibility (Updated February 2021)' (CO, 2021).

¹¹⁶⁷ Section 5, Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020. The 2020 Act contains a power to make changes to legislation as a consequence of, or in connection to the end of free movement.

¹¹⁶⁸ NI Assembly, 'Committee for the Executive Office: Minutes of the Proceedings', 15 December 2021.

safeguards which fall within its scope; and monitor any proposed changes by the EU to the six Annex 1 Equality Directives, as well as relevant CJEU case law.

The Commission advises that in the development or implementation of any laws or policies in the area of employment, including within civil service employment, the UK Government and relevant NI Executive departments, consider the extent to which Protocol Article 2 is engaged; ensure that there is no diminution of the rights and safeguards which fall within its scope; and monitor any proposed changes by the EU to the six Annex 1 Equality Directives, as well as relevant CJEU case law.

The Commission advises that in developing Regulations and implementing the Parental Bereavement (Leave and Pay) Act (NI) 2022, the Department for the Economy should consider the extent to which Protocol Article 2 is engaged, including monitoring any developments in EU law, as well as relevant CJEU case law, to ensure compliance with Protocol Article 2.

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”.¹¹⁶⁹

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”.¹¹⁷⁰ 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”.¹¹⁷¹

The obligation under Protocol Article 2 to ‘keep pace’ with the Annex 1 Equality Directives includes the EU Gender Equality (Employment) Directive which protects against discrimination in employment on the grounds of gender.¹¹⁷² NI equality law must align with any improvements made by the EU to these rights, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.¹¹⁷³

In 2022, NI was recorded as the fourth top performing UK region for women’s empowerment.¹¹⁷⁴ Yet, in 2021, considering all employees regardless of working pattern, women earned 5.7 per cent less than males in NI - for every £1 earned by men, women earned £0.94.¹¹⁷⁵ The NI

1169 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.

1170 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.

1171 Ibid.

1172 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.

1173 Article 13, Ireland/NI Protocol to the UK-EU Withdrawal Agreement 2020.

1174 Price Waterhouse Cooper, ‘Women in Work Index 2022’ (PWC, 2022), at 20.

1175 NI Statistics and Research Agency, ‘Employee Earnings in NI’ (NISRA, 2021), at 26.

Statistics and Research Agency states that “the gender pay gap in NI is due to the higher proportion of women part-time employees than male part-time employees and the higher proportion of part-time jobs that are low paid”.¹¹⁷⁶

The Employment Act (NI) 2016 creates reporting requirements and requires action plans to be adopted by certain employers and the Executive Office aimed at tackling the issue. Regulations are required to clarify which employers fall within scope of the reporting requirements. In 2017, requirements to report on the gender pay gap were introduced in England, Wales and Scotland.¹¹⁷⁷ In 2021, Ireland introduced the Gender Pay Gap Information Act 2021.¹¹⁷⁸ In 2022, mandatory reporting is not yet in place in NI, with progress delayed due to suspension of the NI Executive and NI Assembly.

In 2021, the Expert Advisory Panel for the Gender Equality Strategy made several recommendations related to addressing the gender pay gap in NI.¹¹⁷⁹ Progress on implementing the findings of the Expert Advisory Panel and publishing a draft gender equality strategy for public consultation cannot progress without a functioning NI Executive.

In 2021, the EU Commission issued a proposal for a new gender EU Pay Transparency Directive.¹¹⁸⁰ The proposed EU Directive is designed to “strengthen the existing enforcement tools and procedures in regard to the rights and obligations laid down in this Directive and the equal pay provisions set out in Directive 2006/54/EC [EU Gender Equality (Employment) Directive]”.¹¹⁸¹

Article 4 of EU Gender Equality (Employment) Directive states:

for the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.

*In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.*¹¹⁸²

The Commission, with the Equality Commission NI, initiated ongoing work to explore the extent to which this proposed EU Pay Transparency Directive amends or replaces the EU Gender Equality (Employment) Directive. Considerations include the legal basis for this new measure; the purpose of the new measure; the degree of overlap on the substance

¹¹⁷⁶ Ibid.

¹¹⁷⁷ Equality Act 2010 (Gender Pay Gap Information) Regulations 2017. The 2017 Regulations came into force on 6 April 2017. They apply to all private and voluntary sector employers with 250 or more employees in England, Wales and Scotland. Public sector employers with 250 or more employees that are listed in the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 are also required to publish information on their gender pay gap.

¹¹⁷⁸ Gender Pay Gap Information Act 2021.

¹¹⁷⁹ Department for Communities, ‘Gender Equality Strategy Expert Advisory Panel Report’ (DfC, 2021).

¹¹⁸⁰ COM(2021)93, ‘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’, 4 March 2021.

¹¹⁸¹ Ibid.

¹¹⁸² 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.

of the rights and safeguards between the new measure and the Annex 1 Equality Directives, any relevant CJEU case law; and the extent to which the new measure facilitates the implementation and/or enforcement of an Annex 1 Equality Directive.

In 2021, the then Minister of State at the NI Office, Robin Walker MP, wrote to the House of Commons European Scrutiny Committee indicating that, whilst the UK Government remained committed to ensuring that matters of pay transparency are dealt with, it did “not believe that there is any requirement to go further than the requirements to assess this already included in the Protocol”.¹¹⁸³ There was no clear indication in the UK Government’s response that, should the proposed EU Directive become law, it is committed to ensuring that relevant protections in NI’s equality legislation would be amended to keep pace with its provisions.

Recommendations

The Commission recommends the Department for the Economy, supported by the NI Executive and NI Assembly, ensures that the gender pay gap and insecure, low paid employment of women in NI is effectively addressed and monitored. 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 Department for the Economy requires employers to publish a narrative with their gender pay gap data and that this is evaluated. Immediate steps should be taken to address any issues identified.

The Commission recommends the Department for the Economy closely monitors the development of the proposed EU Pay Transparency Directive and considers the extent to which it amends or replaces provisions the EU Gender Equality (Employment) Directive. In line with the ‘keeping pace’ obligations under Protocol Article 2, the Department should pay particular attention whether the proposed EU Directive strengthens enforcement and implementation of the EU Gender Equality (Employment) Directive.

The Commission recommends that, regardless of whether or not required under the ‘keeping pace’ requirement associated with Protocol Article 2, the Department for the Economy should ensure that NI law keeps pace with changes that enhance equality and human rights protections in line with the proposed EU Pay Transparency Directive, if introduced.

Menopause

In 2016, the UN CEDAW Committee recommended that the UK Government and NI Executive:

1183 Letter from Minister of State for NI, Robin Walker MP, to Chair of the European Scrutiny Committee, Sir William Cash MP, 15 July 2021.

*adopt specific measures, including temporary special measures, to facilitate access for women belonging to marginalised groups, such as 'Black, Asian and Minority Ethnic' women and women with disabilities to the labour market to increase employment rates among those groups of women and reduce the concentration of such women in low-paying jobs.*¹¹⁸⁴

Equality laws in NI protect against discrimination relating to pregnancy and maternity,¹¹⁸⁵ but there is currently no specific protection against discrimination relating to menopause. Menopause-related claims in the UK are often argued on the grounds of sex, age and disability discrimination.¹¹⁸⁶ The current law does not reflect the intersectional nature of menopause in many cases.¹¹⁸⁷ Certain groups may face particular challenges related to menopause including lesbian, gay, bisexual, transgender, queer, intersex+ people, younger women and ethnic minority women.¹¹⁸⁸

In 2021, guidance on promoting equality in employment for women affected by menopause was published.¹¹⁸⁹ It noted that “women make up nearly half of the working population in NI and with the recent change in pension age, it is likely that more women will be working into later life”.¹¹⁹⁰ A survey conducted by the Irish Congress of Trade Unions found that “not only did women face real challenges in the workplace as a result of menopausal symptoms, but that often there was little or no support available to them”.¹¹⁹¹ A shortage of hormone replacement therapy in NI has also contributed to women’s distress and difficulties in managing their symptoms.¹¹⁹²

Recommendations

The Commission recommends that the Executive Office and Department for the Economy identify, develop, implement and monitor effective measures to ensure perimenopausal and menopausal women have equal access to employment throughout their working life and the necessary support to ensure such access is practically available. Every stage of this process should be based on meaningful engagement with perimenopausal and menopausal women and their representative organisations. It should also involve consulting on revising equality legislation and policies to include menopause as a protected characteristic.

1184 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 44(f).

1185 See for example Equal Pay Act (NI) 1970, Sex Discrimination (NI) Order 1976; Maternity and Parental Leave etc. Regulations (NI) 1999.

1186 *Merchant v BT plc* [2012] ET/140135/11; *A v Bonmarche Ltd (In Administration)* [2019] 4107766/2019; *Donnachie v Telent Technology Services Ltd* [2020] 1300005/2020.

1187 House of Commons Women and Equalities Committee, ‘Menopause and the Workplace’ (HoC, 2022), at 30.

1188 Ibid, at 11.

1189 NI Committee Irish Congress of Trade Unions, Equality Commission for NI and Labour Relations Agency, ‘Promoting Equality in Employment for Women Affected by Menopause: Guidance for Employers, Trade Union Representatives and Employees’ (ICTUNI, 2021).

1190 Ibid, at 2.

1191 Ibid, at 3.

1192 Marie-Louise Connolly, ‘Hormone replacement therapy: NI shortage “distressing” for women’, *BBC News*, 8 November 2021.

The Commission recommends that the Department of Health takes immediate steps to ensure perimenopausal and menopausal women have access to the medication and treatments that they need to treat their menopause symptoms on a long-term and affordable basis, with a view to supporting all women's enjoyment of rights, including access to work.

Right to An Adequate Standard of Living and To Social Security

Asylum and refugee law and resettlement

In 2016, the UN CRC Committee 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”.¹¹⁹³ The UN CRC Committee also noted 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”.¹¹⁹⁴

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 1998 as a result of the UK leaving the EU. The UK Government recognises that Protocol Article 2 applies to “everyone who is subject to NI law”.¹¹⁹⁵ The commitment in the Belfast (Good Friday) Agreement 1998 to the civil rights and religious liberties of “everyone in the community” includes asylum seekers and refugees. Protocol Article 2 requires the Executive Office to ensure NI law ‘keeps pace’ with any changes in the EU Racial Equality Directive,¹¹⁹⁶ and the EU Gender Equality (Goods and Services) Directive¹¹⁹⁷ which enhance protections, and relevant CJEU case law.

The non-exhaustive list of rights which are “affirmed in particular” in the relevant chapter of the Belfast (Good Friday) Agreement 1998 include the right to freely choose one’s place of residence and the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity.¹¹⁹⁸ To the extent that they are underpinned by EU legal obligations in force on 31 December 2020, the non-diminution commitment in Protocol Article 2 encompasses the full range of rights set out in the ECHR.

Additional EU obligations which underpin the non-diminution commitment of relevance refugees and asylum seekers include the EU Reception Directive,¹¹⁹⁹ the EU Qualification Directive¹²⁰⁰ and the EU

1193 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 76-77.

1194 Ibid.

1195 NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in NI: What Does It Mean and How Will It Be Implemented?’ (NIO, 2020), at para 8.

1196 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.

1197 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.

1198 Belfast (Good Friday) Agreement, 10 April 1998, at Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

1199 Directive 2003/9/EC, ‘EU Council Directive Laying Down Minimum Standards for the Reception of Asylum Seekers’, 27 January 2003.

1200 Directive 2004/83/EC, ‘EU 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.

Procedures Directive.¹²⁰¹ The EU Charter on Fundamental Rights also continues to apply in the context of those provisions of EU law within scope of Protocol Article 2. In particular, the EU Reception Directive lays down minimum standards for the reception of asylum seekers and requires states to make provisions on material reception conditions to ensure an adequate standard of living.¹²⁰²

While immigration and asylum matters are ultimately the responsibility of the UK Home Office, NI Executive departments are responsible for providing services to refugees and people seeking asylum to support their resettlement in NI.

Resettlement schemes

In 2022, the Afghan Relocations and Assistance Policy,¹²⁰³ the Afghan Citizens Resettlement Scheme,¹²⁰⁴ the Ukraine Family Scheme¹²⁰⁵ and the Homes for Ukraine Scheme¹²⁰⁶ were available in NI. As of 31 March 2022, no arrivals were reported in NI under these schemes.¹²⁰⁷ However, since March 2022, the Commission is aware that several Ukrainians have resettled in NI under the Ukrainian-focused schemes with official figures pending. In April 2022, the Executive Office set up four Ukraine Assistance Centres across NI to provide individuals with advice on key services including health, education, jobs, benefits, housing and immigration.¹²⁰⁸

In 2020, the Syrian Vulnerable Persons Relocation Scheme came to an end. There were 438 families comprising of 1,814 individuals resettled in NI under this scheme.¹²⁰⁹ In 2022, the House of Commons NI Affairs Committee noted the success of the consortium model adopted by the Syrian scheme in NI for enabling joint working between the public and voluntary sectors.¹²¹⁰ However, the NI Affairs Committee raised concerns regarding access to and provision of services for families once they had settled. The NI Affairs Committee recommended that the NI Executive reflect on and learn lessons from the Syrian scheme for future schemes.¹²¹¹

Unaccompanied children seeking asylum

The Immigration Act 2016 commits the Secretary of State to “make arrangements to relocate to the UK and support a specific number of

1201 Directive 2005/85/EC, 'EU Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status', 1 December 2005.

1202 Directive 2003/9/EC, 'EU Council Directive Laying Down Minimum Standards for the Reception of Asylum Seekers', 27 January 2003.

1203 Executive Office, 'Press Release: Executive agrees to support Afghan refugees', 7 September 2021.

1204 Ibid.

1205 Home Office, 'Guidance: Apply for a Ukraine Family Scheme visa'. Available at: <https://www.gov.uk/guidance/apply-for-a-ukraine-family-scheme-visa>.

1206 Home Office, 'Guidance: Apply for a visa under the Ukraine Sponsorship Scheme (Homes for Ukraine)'. Available at: <https://www.gov.uk/guidance/apply-for-a-visa-under-the-ukraine-sponsorship-scheme>.

1207 Email correspondence from the Executive Office to the NI Human Rights Commission, 22 August 2022.

1208 NI Direct, 'Ukraine assistance centres'. Available at: <https://www.nidirect.gov.uk/articles/ukraine-assistance-centres>.

1209 Department for Communities, 'Syrian Vulnerable Persons Relocation Scheme'. Available at: <https://www.communities-ni.gov.uk/publications/syrian-vulnerable-persons-relocation-scheme>.

1210 NI Affairs Committee, 'The Experiences of Minority Ethnic and Migrant People in NI' (HoC, 2022), at para 26.

1211 Ibid, at para 28.

unaccompanied refugee children from other countries in Europe”.¹²¹² The UK Government committed to transferring 480 children.¹²¹³

In 2021/2022, 66 unaccompanied children seeking asylum arrived in NI and were referred to the Health and Social Care Trusts.¹²¹⁴ In March 2022, the Trusts were supporting a total of 136 unaccompanied children seeking asylum and young people. Of these 136, 61 aged under 18 years old and 75 aged over 18 years old were in receipt of leaving and after care support services.¹²¹⁵

Reform of UK refugee and asylum law

In 2021, the UK published a new plan for immigration.¹²¹⁶ The Commission raised concerns relating to the proposals.¹²¹⁷ In May 2022, the Nationality and Borders Act received Royal Assent. The Commission remains concerned about the creation of a two-tier system of legal protections and the penalising of refugees who arrive in the UK through irregular means. The changes to procedures and the appeals processes also remove important safeguards and undermines the long-established principle that refugees and people seeking asylum should receive the benefit of the doubt in their applications.¹²¹⁸

Use of hotels as contingency accommodation

In 2019, the Mears Group PLC was sub-contracted by the Home Office to provide accommodation and support for people seeking asylum in NI.¹²¹⁹ The £113m contract is due to run until August 2029. There are two distinct types of asylum accommodation provided for by the Home Office while asylum claims are processed – initial accommodation and dispersal accommodation.¹²²⁰ Initial accommodation is short-term housing that is to be used for a period of three to four weeks. After this period, if required, individuals should be moved to longer-term dispersal accommodation to await the full determination of their asylum claim.¹²²¹

In 2020, the COVID-19 pandemic and the sharp rise in the number of people seeking asylum arriving to the UK increased the demand for asylum accommodation. To deal with the high intake, the use of hotels as ‘contingency accommodation’ increased significantly.¹²²² However the continued pressure on the system means such accommodation is being used for much longer than three to four weeks with no set timeframe

1212 Section 67, Immigration Act 2016.

1213 Home Office, ‘Policy Statement: Section 67 of the Immigration Act 2016’ (HO, 2017).

1214 Email correspondence from the Executive Office to the NI Human Rights Commission, 22 August 2022.

1215 Ibid.

1216 Home Office, ‘New Plan for Immigration’ (HO, 2017).

1217 NI Human Rights Commission, ‘Response to Call for Evidence by the Joint Committee on Human Rights on the Nationality and Borders Bill’ (NIHRC, 2021).

1218 Ibid, at paras 4.5-4.25 and 7.1-7.12.

1219 UK Government, ‘Contracts Finder – Asylum Accommodation and Support Services Contract NI’. Available at: <https://www.contractsfinder.service.gov.uk/Notice/af043016-dd83-4308-8b3c-0d134a3a89c9>.

1220 UK Visas and Immigration, ‘A Home Office Guide to Living in Asylum Accommodation’ (HO, 2019).

1221 Ibid.

1222 Independent Chief Inspector of Borders and Immigration, ‘An Inspection of Contingency Asylum Accommodation May 2021-November 2021’ (UK Gov, 2022).

for being moved to dispersal accommodation.¹²²³ There have also been reports that when the move from contingency accommodation to dispersal accommodation occurs it is conducted in a threatening way, without any form of advance notice and without any meaningful support to ensure access to education, healthcare and support services.¹²²⁴

In May 2022, the Independent Chief Inspector of Borders and Immigration reported that the use of hotels as contingency accommodation across the UK have negatively affected the experiences of people seeking asylum in the UK. Some issues raised included a lack of choice and quality of food, and a lack of play and leisure activities for children and families.¹²²⁵ One senior accommodation provider told inspectors that the mental health of people seeking asylum, including children, was being affected by the long stays.¹²²⁶

In 2022, the Commission met with civil society organisations and individuals with lived experiences of hotel accommodation in NI run by the Mears Group PLC.¹²²⁷ Their direct accounts of the living conditions in the hotels are consistent with UK-wide reports, including raising issues of inadequate access to good quality and culturally appropriate food, restrictions on private and family life, and insufficient access to basic services such as education and health. It was reported that these issues are particularly challenging for children and persons with disabilities.¹²²⁸ These issues, among many others, were additionally reported in civil society submissions to the CoE Advisory Committee on the Framework Convention for the Protection of National Minorities.¹²²⁹ In August 2022, the Commission wrote to the Mears Group PLC to highlight its grave concerns regarding contingency accommodation in NI and to seek a meeting.¹²³⁰ In October 2022, the Commission met with Mears Group PLC and the Home Office to discuss its concerns

Recommendations

The Commission recommends that the Home Office and the Executive Office urgently review the support and accommodation provided to refugees and people seeking asylum in NI to ensure it is adequate, fit for purpose and culturally appropriate in compliance with international human rights standards and Protocol Article 2. This review should be conducted in consultation with refugees, people that are seeking asylum and their representative organisations.

The Commission recommends that the Executive Office develops appropriate safeguards through statutory regulations and guidance

1223 Meetings between NI Human Rights Commission and civil society organisations, May 2022, August 2022 and October 2022.

1224 Ibid.

1225 Independent Chief Inspector of Borders and Immigration, 'An Inspection of Contingency Asylum Accommodation May 2021-November 2021' (UK Gov, 2022), at paras 9.7 and 9.41.

1226 Ibid, at paras 9.29 and 10.17.

1227 Meetings between NI Human Rights Commission and civil society organisations, May 2022, August 2022 and October 2022.

1228 Ibid.

1229 Children's Law Centre and South Tyrone Empowerment Programme, 'Joint Submission to Framework Convention on National Minorities Advisory Committee: Rights of Asylum Seeker Children Living in Contingency Accommodation (Hotel Buildings) in NI, run by Mears Group PLC' (CLC and STEP, 2022).

1230 Letter from the NI Human Rights Commission to the Mears Group PLC, 23 August 2022.

to ensure the enactment of the Nationality and Borders Act 2022 does not have a negative effect on refugees and people seeking asylum.

The Commission recommends that the Home Office and the Executive Office urgently develops and resources a realistic, long-term strategy aimed at expeditiously ending the use of hotels for contingency asylum accommodation in NI, particularly for families and persons with disabilities. The strategy should be culturally appropriate, take into account individual's specific needs and be developed in consultation with refugees, people that are seeking asylum and their representative organisations.

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”.¹²³¹ 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”.¹²³²

In 2019, the UN CEDAW Committee recommended that the UK Government “take measures to enable asylum-seeking and refugee women to access employment and appropriate housing”.¹²³³

The UK Government recognises that Protocol Article 2 applies to “everyone who is subject to NI law”.¹²³⁴ The commitment in the Belfast (Good Friday) Agreement 1998 to the civil rights and the religious liberties of “everyone in the community” includes asylum seekers. Protocol Article 2 requires the UK Government to ensure NI law ‘keeps pace’ with any changes in the EU Racial Equality Directive,¹²³⁵ and the EU Gender Equality (Goods and Services) Directive¹²³⁶ which enhance protections, and relevant CJEU case law.

The non-exhaustive list of rights which are “affirmed in particular” in the relevant chapter of the Belfast (Good Friday) Agreement 1998 include the right to freely choose one’s place of residence and the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity. To the extent that they are underpinned by EU legal obligations in force on 31 December 2020, the non-diminution

1231 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 25.

1232 Ibid.

1233 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 55(c).

1234 NI Office, ‘UK Government Commitment To “No Diminution of Rights, Safeguards and Equality of Opportunity” In NI: What Does It Mean and How Will It Be Implemented?’ (NIO, 2020), at para 8.

1235 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.

1236 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.

commitment in Protocol Article 2 encompasses the full range of rights set out in the ECHR.

Additional EU obligations falling within scope of Protocol Article 2 include the EU Reception Directive, which sets out minimum standards for the reception of asylum seekers, including “the material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence”.¹²³⁷ The EU Directive also provides specific protections for vulnerable persons during the asylum process.¹²³⁸

People seeking asylum are not able to work in the UK, including NI. Section 95 of the Immigration and Asylum Act 1999 provides for support for people seeking asylum and their dependents who appear to the Home Secretary to be destitute or who are likely to become destitute. In 2021, this support was increased from £39.63 to £40.85 per week for each supported person.¹²³⁹ Up to £5 per week is available for people seeking asylum that are pregnant or a mother of a child under three years old.¹²⁴⁰ At June 2022, 2,413 people seeking asylum were in receipt of section 95 support in NI, compared to 810 people seeking asylum at June 2021.¹²⁴¹ Of those 2,413 persons, 23 were in receipt of subsistence only and 2,390 in dispersed accommodation.¹²⁴²

The Immigration Act 2016 amended the Asylum and Immigration Act 1999 by creating a new power to support rejected people seeking asylum 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.¹²⁴³ Those refused asylum will be given somewhere to live and £40.85 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 under certain conditions.¹²⁴⁴

In 2021, it was reported that people seeking asylum find it difficult to make their support payments stretch to cover their living costs, particularly when local, more expensive shops are the only or most convenient option.¹²⁴⁵ It is also not possible for the asylum support payments to be made online. It has been reported that children are facing extreme poverty, homelessness and destitution due to their parent’s or carer’s immigration status.¹²⁴⁶ This situation was exacerbated by the COVID-19 pandemic.¹²⁴⁷

1237 Article 13, Directive 2003/9/EC, ‘EU Council Directive Laying Down Minimum Standards for the Reception of Asylum Seekers’, 27 January 2003.

1238 Article 17-20, Directive 2003/9/EC, ‘EU Council Directive Laying Down Minimum Standards for the Reception of Asylum Seekers’, 27 January 2003.

1239 Home Office, ‘Report On Review of Weekly Allowances Paid To Asylum Seekers and Failed Asylum Seekers: 2021’ (HO, 2022).

1240 Gov.UK, ‘What You’ll Get’. Available at: <https://www.gov.uk/asylum-support/what-youll-get>.

1241 Office for National Statistics, ‘Immigration Statistics: Asylum and Protection - Section 95 Support By Local Authority’ (ONS, 2021).

1242 Office for National Statistics, ‘Immigration Statistics: Asylum and Resettlement - Asylum Seekers In Receipt of Support’ (ONS, 2022).

1243 Schedule 11, Immigration Act 2016.

1244 Gov.UK, ‘What You’ll Get’. Available at: <https://www.gov.uk/asylum-support/what-youll-get>.

1245 British Red Cross, ‘The Longest Year: Life Under Local Restrictions - NI Briefing’ (BRC, 2021).

1246 NI Commissioner for Children and Young People, ‘A Hostile Environment: Children and Families Affected By Immigration Status and NI Recourse to Public Funds’ (NICCY, 2021), at 42.

1247 Ibid.

In 2021, 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.¹²⁴⁸ In March 2022, the Commission raised these issues with the CoE Advisory Committee on the Framework Convention for the Protection of National Minorities.¹²⁴⁹

In May 2022, it was reported that households having food and energy bills greater than their disposable income in 2022/2023 will be a particular concern in NI.¹²⁵⁰ People seeking asylum are at an even greater risk of destitution as they currently have no means to supplement their income.

Recommendations

The Commission recommends the UK Home Office urgently increases the level of financial support provided to people seeking asylum to reflect the rising cost of living across the UK.

The Commission continues to call on the UK Home Office to review the restrictions placed on people seeking asylum, which prevent the taking up of work while claims are being processed.

The Commission recommends that the UK Home Office ensure that payments to people seeking asylum can be used online.

The Commission advises the UK Home Office to embed consideration of Protocol Article 2 with respect to financial support for asylum seekers in NI to ensure there is no diminutions of rights, including the provisions set out in the EU Reception Directive, and monitor any proposed changes by the EU to the six Annex 1 Equality Directives, as well as relevant CJEU case law.

Carers

In 2019, the UN CEDAW Committee noted with concern “that reductions in social care services increase the burden on primary caregivers, who are disproportionately women”.¹²⁵¹

In 2022, there are at least 290,000 unpaid carers in NI.¹²⁵² Before the COVID-19 pandemic, the care provided by unpaid carers in NI was worth £4.6 billion per year.¹²⁵³ During the COVID-19 pandemic, it is estimated that this increased to £6.9 billion per year.¹²⁵⁴

1248 NI Human Rights Commission, ‘Response to the NI Affairs Committee Inquiry into the Experience of Minority Ethnic and Migrant People in NI’ (NIHRC, 2021).

1249 NI Human Rights Commission, ‘Submission to the CoE Advisory Committee on the Framework Convention for the Protection of National Minorities – Parallel Report to the CoE Advisory Committee on the Fifth Monitoring Report of the UK’ (NIHRC, 2022), at para 4.81.

1250 National Institute of Economic and Social Research, ‘What Can Be Done About the Cost of Living Crisis?’ (NIESR, 2022).

1251 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 17.

1252 Carers Week, ‘Make Caring Visible, Valued and Supported- Carers Week 2022 Report’ (CW, 2022), at 23.

1253 Carers NI, ‘Unpaid Carers, Poverty and the Cost of Living Crisis in NI’ (CNI, 2022), at 5.

1254 Carers UK, ‘Unseen and Undervalued: The Value of Unpaid Care During the COVID-19 Pandemic’ (CUK, 2020), at 4.

In 2022, nearly 30 per cent of carers in NI live in poverty. This is higher than those without caring responsibilities and is the highest rate of carer poverty in the UK.¹²⁵⁵ It is estimated that at least 44 per cent of carers in NI are concerned they will not be able to heat their homes safely because of growing costs.¹²⁵⁶ UK-wide data shows that one in five households receiving Carers Allowance are living in food insecurity.¹²⁵⁷

Approximately 3.5 per cent of young adults aged up to 24 years old in NI are unpaid carers.¹²⁵⁸ In 2021/2022, young carers were in the top five applicants for Action for Children’s Crisis Fund.¹²⁵⁹ Some young carers miss education opportunities due to the pressure to get a job and contribute to their household’s income.¹²⁶⁰ This also limits young carers opportunities for social interaction.¹²⁶¹

In 2022, the Department of Health consulted on proposals to reform adult social care, including evaluating the current carers strategy and introducing an independent Carers’ Champion.¹²⁶² The Commission responded to the consultation highlighting the need for legislative provision for access to respite care services.¹²⁶³

In October 2022, the Independent Advisory Panel recommended that Carer’s Allowance is reformed “including an additional carers recognition payment, a young carer’s recognition payment, a payment where more than one child is being cared for, a relaxation of the earnings rules which when exceeded, end entitlement to benefit”.¹²⁶⁴

Recommendations

The Commission recommends that the Department of Health promptly develops, implements and monitors an up-to-date NI Carers Strategy and measurable action plan. Carers and their representative organisations should be involved at every stage of this process. The strategy should also include 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 that is proportional to the rising cost of living. Also to introduce an additional carers recognition payment, a young carer’s recognition payment, a payment where more than one child is being cared for, a relaxation of the earnings rules which when exceeded, end entitlement to benefit.

1255 Joseph Rowntree Foundation, ‘Poverty in NI 2022’ (JRF, 2022), at 31.

1256 Carers NI, ‘Unpaid Carers, Poverty and the Cost of Living Crisis in NI’ (CNI, 2022), at 8.

1257 Ibid, at 11.

1258 Ibid.

1259 Action for Children, ‘Families In Crisis: A Vital Lifeline’ (AfC, 2022), at 8.

1260 Carers NI, ‘Unpaid Carers, Poverty and the Cost of Living Crisis in NI’ (CNI, 2022), at 12.

1261 Ibid.

1262 Department of Health, ‘Reform of Adult Social Care NI Consultation Document’ (DoH, 2022), at 70.

1263 NI Human Rights Commission, ‘Response to Consultation on Reform of Adult Social Care in NI’ (NIHRC, 2022), at 30.

1264 Independent Advisory Panel, ‘Welfare Mitigation Review: Independent Advisory Panel Report’ (DfC, 2022), at 8.

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, the [UN ICESCR] Committee draws the attention of the... [UK Government] to its statement on poverty and the UN ICESCR”.¹²⁶⁵

The UN CRC Committee also noted that “the rate of child poverty remains high...and affects children in Wales and NI the most”.¹²⁶⁶ 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.*¹²⁶⁷

In 2019/2020, approximately 100,000 (22 per cent) children in NI were recorded as living in relative poverty and approximately 75,000 (17 per cent) living in absolute poverty.¹²⁶⁸ Independent research conducted between 2017 and 2020 found that, while the poverty rate varies between different groups within NI, it is highest among children at 24 per cent.¹²⁶⁹

In 2022, the School Holiday Food Grant scheme was extended until summer 2022.¹²⁷⁰ This measure introduced due to COVID-19 provides families of children entitled to free school meals with further financial support over the school holidays. The Education Authority NI is also able to provide food parcels to children who cannot attend school for five days or more due to COVID-19.¹²⁷¹ These measures will assist more than 100,000 children across NI.

In September 2022, the UK Government introduced a new law requiring schools in England to follow new statutory guidance on uniform costs, instructing them to keep prices down.¹²⁷² Schools must also have arrangements with their suppliers to ensure that second-hand uniforms are available to parents who need them. A similar approach has not been taken in NI. Uniform grants are available to families who meet certain qualifying criteria in NI, however further action needs to be taken to

¹²⁶⁵ 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.

¹²⁶⁶ Ibid, at para 70(a).

¹²⁶⁷ Ibid, at para 70(e).

¹²⁶⁸ Department for Communities, ‘NI Poverty Bulletin 2019-2020’ (DfC, 2021).

¹²⁶⁹ Joseph Rowntree Foundation, ‘Poverty in NI 2022’ (JRF, 2022), at 5.

¹²⁷⁰ Robbie Meredith, ‘Free school meals: Meals to be funded during holidays until 2022’, *BBC News NI*, 20 November 2020.

¹²⁷¹ Department of Education, ‘Addendum Arrangements for the Provision of Milk, Meals and Related Facilities’, 25 March 2022.

¹²⁷² UK Government, ‘Press Release: New law to make school uniform costs affordable for all’, 29 April 2021.

make school uniforms more affordable in NI.¹²⁷³ In November 2022, the Department of Education is reviewing free school meals and uniform grant eligibility criteria in NI, which will also consider current thresholds for Universal Credit/Working Tax Credit and the potential to legislate on uniform policy.¹²⁷⁴ Any legislative change cannot progress while the NI Executive and NI Assembly is suspended.

Child Poverty Strategy

In 2020, the New Decade, New Approach Agreement committed to publishing an updated Child Poverty Strategy.¹²⁷⁵ In May 2022, an extension to the most recent Child Poverty Strategy for NI,¹²⁷⁶ came to an end. The Department for Communities intends child poverty to be dealt with under the NI Executive's wider anti-poverty strategy for NI.¹²⁷⁷

In 2021, an Expert Advisory Panel for the Anti-poverty Strategy published a report setting out key recommendations about the themes and key actions the strategy should include.¹²⁷⁸ In 2021/2022, the Co-Design Group for the Anti-poverty Strategy, which was set up to guide the drafting of the strategy, met regularly. In September 2022, an updated report by the Co-Design Group was published for the Department for Communities to consider.¹²⁷⁹ The Anti-Poverty Strategy is due to be publicly consulted on, however the strategy cannot progress in the absence of an NI Executive and NI Assembly.¹²⁸⁰

Recommendations

The Commission recommends that the Department for Communities promptly introduces and adequately resources an anti-poverty strategy for NI that contains specific actions to eradicate child poverty in NI, including by establishing concrete and time-limited targets with measurable indicators, and regular monitoring and reporting on the reduction of child poverty in NI.

Cost of living

In 2016, the UN ICESCR Committee, recommended that an anti-poverty strategy was adopted in NI.¹²⁸¹ In 2019, the former UN Special Rapporteur on Extreme Poverty, Professor Philip Alston, warned that “in NI, the suspension of the devolved coalition government forecloses the possibility

1273 Rebecca McGirr, 'Cost of living: Minister urged to 'step up' over uniform costs', *BBC News NI*, 6 August 2022.

1274 NI Assembly Hansard, 'Written Question: Cost of School Uniforms - Alan Chambers MLA - AQW 447/22-27', 24 May 2022.

1275 NI Office, 'New Decade, New Approach' (NIO, 2020).

1276 NI Executive, 'The Executive's Child Poverty Strategy' (NIE, 2016).

1277 Department for Communities, 'Press Release: Minister announces extension to Child Poverty Strategy', 11 September 2020.

1278 Anti-Poverty Strategy Expert Advisory Panel, 'Recommendations for an Anti-Poverty Strategy' (DfC, 2021).

1279 Anti-Poverty Strategy Co-Design Group, 'A Position Paper on the Development of an Anti-poverty Strategy for NI From Members of the Anti-poverty Strategy Co-Design Group' (NICVA, 2022).

1280 Email Correspondence from the Department for Communities and NI Human Rights Commission, 3 August 2022.

1281 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.

of any major efforts to tackle poverty and results in an accountability vacuum".¹²⁸²

Anti-poverty Strategy

In 2020/2021, 17 per cent of individuals in NI were in relative poverty and 13 per cent were in absolute poverty. This remains consistent with 2019/2020 estimates, with the caveat that data collection for 2020/2021 resulted in a reduced sample size due to COVID-19.¹²⁸³

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 section 28E of the NI Act 1998.¹²⁸⁴

In 2020, the New Decade, New Approach Agreement renewed the commitment to developing an Anti-poverty Strategy for NI.¹²⁸⁵ The Department for Communities established an Expert Advisory Panel for the Anti-poverty Strategy and is undertaking ongoing engagement with a Co-Design Group and cross-departmental working group made up of key stakeholders. In 2021, an Expert Advisory Panel for the Anti-poverty Strategy published a report setting out key recommendations about the themes and key actions the strategy should include.¹²⁸⁶ In 2021/2022, the Co-Design Group for the Anti-poverty Strategy met regularly. In September 2022, an updated report by the Co-Design Group was published for the Department for Communities to consider.¹²⁸⁷ The Anti-Poverty Strategy is due to be publicly consulted on, however the strategy cannot progress in the absence of an NI Executive and NI Assembly.¹²⁸⁸

Fuel poverty

In 2011, the last fuel poverty strategy in NI was published and has not been updated.¹²⁸⁹ In 2022, increasing energy prices are expected to impact on those living in NI to a greater extent than other parts of the UK.¹²⁹⁰ Fuel poverty often affects the most marginalised groups, particularly children and people with disabilities.¹²⁹¹ In November 2022, in addition to a payment of £100 for all home oil users, an energy price cap was instated backdated to October 2022, in line with the rest of the UK.¹²⁹² A cost-of-living support package for those on means tested benefits has also been put in place. In July 2022, a one-off fuel poverty payment of £326 was

1282 A/HRC/41/39/Add.1, 'Report of the UN Special Rapporteur on Extreme Poverty and Human Rights: Visit to the UK of Great Britain and NI', 23 April 2019, at para 87.

1283 Department for Communities, 'Poverty Bulletin: NI 2020/21' (DfC, 2022).

1284 *Brian Gormally's Application* [2015] NIQB 59.

1285 NI Office, 'New Decade, New Approach' (NIO, 2020), at 9.

1286 Anti-Poverty Strategy Expert Advisory Panel, 'Recommendations for an Anti-Poverty Strategy' (DfC, 2021).

1287 Anti-Poverty Strategy Co-Design Group, 'A Position Paper on the Development of an Anti-poverty Strategy for NI From Members of the Anti-poverty Strategy Co-Design Group' (NICVA, 2022).

1288 Email Correspondence from the Department for Communities and NI Human Rights Commission, 3 August 2022.

1289 Department for Communities, 'A New Fuel Poverty Strategy for NI' (DfC, 2011).

1290 Pippa Cerar, 'Two-thirds of UK families could be in fuel poverty by January, research finds', *The Guardian*, 18 Aug 2022.

1291 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 29.

1292 John Campbell, 'Cost of living: Home heating oil customers to get £100 payment', *BBC News*, 21 September 2022.

made. In October 2022, a further one-off payment of £324 was made.¹²⁹³ In November 2022, the expected £400 energy support discount has been delayed for households in NI due to the suspension of the NI Executive.¹²⁹⁴

Recommendation

The Commission recommends that the Department for Communities ensures that an anti-poverty strategy for NI that reflects the findings and recommendations of the consultation process, is introduced, effectively implemented and adequately resourced without further delay.

The Commission recommends that the Department for Communities incorporates measures to comprehensively combat fuel poverty, including introducing, implementing and monitoring an up-to-date effective and adequately resourced long-term strategy that includes a comprehensive action plan.

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.*¹²⁹⁵

In 2016, it was reported that UK Government and NI Executive 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”.¹²⁹⁶

The Crisis Fund, which is managed by the Racial Equality Unit in the Executive Office, aims “to help minority ethnic individuals with no other means of support through emergency situations, such as vulnerable migrants, refugees and people seeking asylum and other vulnerable groups”.¹²⁹⁷ It is not a permanent arrangement, but has proved to be “critical in alleviating short-term hardships for destitute people seeking asylum and refugees”.¹²⁹⁸

In 2021/2022, the Executive Office allocated £202,000 to the Crisis Fund,¹²⁹⁹ supporting 2,366 people, including 932 children, from 57 countries.¹³⁰⁰ The Executive Office reported that the primary causes of

1293 NI Direct, ‘Cost of Living support’. Available at: <https://www.nidirect.gov.uk/articles/cost-living-support>

1294 ‘Energy Bills Support Scheme: Stormont impasse “hindering” £400 payment’, *BBC News*, 10 November 2022.

1295 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.

1296 NI Community of Refugees and Asylum Seekers, ‘The Effects of Destitution on Refugees in NI’ (NICRAS, 2016), at 6.

1297 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.

1298 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).

1299 NI Assembly Hansard, ‘Written Answers: Racial Equality Unit - Gerry Carroll MLA - AQW 24178/17-22’, 5 November 2021.

1300 Email correspondence from the Executive Office to NI Human Rights Commission, 6 September 2022.

destitution that led to reliance on the Crisis Fund “were asylum issues (including No Recourse to Public Funds), benefits issues and employment issues”.¹³⁰¹ The Commission has repeated concerns that the Crisis Fund should be put on a permanent footing with guaranteed funding, and that the UK Government and NI Executive addresses the causes of destitution more broadly.¹³⁰² The Executive Office has stated that:

*the Crisis Fund is not intended to address indefinite gaps in welfare coverage but is there to support individual cases such as a refugee waiting for their benefit payment or a person seeking asylum facing destitution through an unexpected and necessary expense.*¹³⁰³

Recommendations

The Commission recommends that the Executive Office places 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 people seeking asylum, refugees, migrants and other vulnerable groups.

Homelessness

In 2016, the UN ICESCR Committee, noting the “exceptionally high levels of homelessness in England and NI” urged the UK Government and NI Executive to take immediate measures, including allocating appropriate funds to local authorities, adequate provision of reception facilities and social rehabilitation centres.¹³⁰⁴ The UN ICESCR Committee also recommended that the private rental sector is effectively regulated through tenure protection and accountability mechanisms, and specific measures taken to tackle issues arising from constraints imposed by housing allowance.¹³⁰⁵ The UN ICESCR Committee further recommended that the UK Government and NI Executive adopt all necessary measures to avoid the criminalisation of ‘rough sleeping’ and develop appropriate policies and programmes to facilitate the social reintegration of homeless persons.¹³⁰⁶

1301 Ibid.

1302 NI Human Rights Commission, ‘Response to the NI Affairs Committee Inquiry into the Experience of Minority Ethnic and Migrant People in NI’ (NIHRC, 2021); NI Human Rights Commission, ‘Response to Public Consultation on Draft Refugee Integration Strategy’ (NIHRC, 2022), at para 2.15; NI Human Rights Commission, ‘Submission to the CoE Advisory Committee on the Framework Convention for the protection of National Minorities – Parallel Report to the CoE Advisory Committee on the Fifth Monitoring Report of the UK’ (NIHRC, 2022), at 34-35.

1303 The Executive Office, ‘Draft Refugee Integration Strategy 2022-2027’ (TEO, 2021), at 32.

1304 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 52.

1305 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(b).

1306 Ibid, at para 52.

Statistics

In 2020/2021, 9,889 households were accepted as statutorily homeless,¹³⁰⁷ a decrease from 11,323 in 2019/2021.¹³⁰⁸ 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.

In 2020, a total of 18 people were estimated to be sleeping rough in NI, a 50 per cent decrease from 36 people in 2019.¹³⁰⁹ The decrease could be attributed to temporary measures taken to protect homeless from COVID-19, which included ensuring all rough sleepers had a bed available to them for the night.¹³¹⁰ In 2022, there has been a marked increase in deaths of rough sleepers, particularly women, on the streets of Belfast.¹³¹¹ It is reported that a lack of accommodation, additional services and mental health treatment plus the cost of living crisis are contributors.¹³¹²

COVID-19

In 2020, the Private Tenancies (Coronavirus Modifications) Act 2020 came into force. The 2020 Act protected private tenants from eviction during the period of the health crisis by extending the notice to quit period from four to 12 weeks. It ceased to apply after 4 May 2022.¹³¹³

In 2021, the Department of Communities provided £9 million to fully fund the NI Housing Executive’s COVID Reset Plan on homelessness.¹³¹⁴ This plan aimed to safeguard homeless people against COVID-19, and to enable homeless services to work effectively and respond safely during the pandemic. The plan included providing support for rough sleepers, securing temporary accommodation and access to out of hours services, day centres and young people’s services.¹³¹⁵ On 31 March 2022, the implementation of the plan ended.

Private Tenancies Act (NI)

In April 2022, the Private Tenancies Act (NI) came into force. It amends the Private Tenancies Order (NI) 2006, giving enhanced safety standards and restrictions on the frequency of rent increases. One immediate change provides for minimum lengths of notices to quit by both landlord and tenant.¹³¹⁶ The Department for Communities must also hold a consultation on rent decreases and controls within six months of the

1307 NI Statistics and Research Agency, ‘NI Housing Statistics 2020-2021’ (DfC, 2021).

1308 NI Statistics and Research Agency, ‘NI Housing Statistics 2019-2020’ (DfC, 2020).

1309 NI Housing Executive, ‘2020 Rough Sleeping Count/Estimates’ (NIHE, 2020).

1310 NI Housing Executive, ‘The Way Home – Homelessness Response to COVID-19’ (NIHE, 2021).

1311 Rory Carroll and Simon Hattenstone, ‘Protest march called in Belfast after the deaths of 14 homeless people’, *The Guardian*, 22 July 2022.

1312 Ibid.

1313 Letter from the Department for Communities to the NI Human Rights Commission, 31 August 2021.

1314 Department for Communities, ‘Press Release: ‘Homelessness action plan fully funded – Minister Hargey’, 18 May 2021.

1315 NI Housing Executive, ‘The Way Home – Homelessness Response to COVID-19’ (NIHE, 2021).

1316 Article 11, Private Tenancies Act (NI) 2022.

legislation coming into force.¹³¹⁷ As of November 2022, no consultation on these issues had been held.

Recommendations

The Commission recommends that the Department for Communities leads a collaborative cross-departmental approach with the goal of eliminating all forms of homelessness in NI. This should include working with partners in the voluntary and community sector to identify effective early intervention models and to address the causes and impacts of homelessness.

The Commission recommends that the Department for Communities and Department of Health take immediate, gender-sensitive steps to identify and address factors contributing to deaths of rough sleepers in NI.

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.*¹³¹⁸

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”.¹³¹⁹

Social housing supply

On 30 June 2022, the number of applicants on the social housing waiting list was 44,229.¹³²⁰ Of these applicants, 31,663 were in housing stress.¹³²¹

In 2015, the NI Housing Executive reported that an overall requirement of 190,000 new dwellings was required in NI between 2008 and 2025, an annual figure of 11,200.¹³²² Current targets fall short of this. In 2020/2021, the total housing stock was 814,210,¹³²³ an increase of only 6,398 dwellings from 2019/2020.¹³²⁴ In 2020/2021, there were 653 new dwelling

¹³¹⁷ Article 5C(6), Private Tenancies Act (NI) 2022.

¹³¹⁸ 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).

¹³¹⁹ Ibid, at para 50(e).

¹³²⁰ Department for Communities, 'NI Housing Bulletin: April-June 2022' (NISRA, 2022).

¹³²¹ Ibid.

¹³²² NI Housing Executive, 'NI Housing Market Review and Perspectives 2015-2018' (NIHE, 2015), at 23.

¹³²³ NI Statistics and Research Agency, 'NI Housing Statistics 2020-2021' (DfC, 2021).

¹³²⁴ Department for Communities, 'NI Housing Statistics 2019-2020' (DfC, 2020).

completions in the social sector, but this has decreased annually from 1,214 completions in 2017/2018.¹³²⁵

In 2017, the current Housing Strategy for NI expired.¹³²⁶ In 2020, the NI Executive committed to “including housing as a specific priority in the Programme for Government”.¹³²⁷ It 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”.¹³²⁸ It further committed to “set a long-term trajectory for the rental charges for NI Housing Executive homes which is sustainable and is affordable to tenants”.¹³²⁹

In 2020, the NI Executive also committed to reclassifying 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”.¹³³⁰ The Housing (Amendment) Act (NI) 2020 delivered this commitment and ended the statutory right to buy scheme for Housing Associations.

In 2021, the Department for Communities consulted on a new Housing Supply Strategy.¹³³¹ In its response, the Commission 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.¹³³² Implementation of the Housing Supply Strategy has been delayed due to the absence of a functioning NI Executive or agreed budget.¹³³³

In June 2022, the then Minister for Communities, Deirdre Hargey MLA, remains committed to taking measures to improve housing provision in the absence of an updated housing supply strategy.¹³³⁴ The former Minister for Communities added that “almost £380 million had been invested to deliver new social housing starts in the past two years”, and that “the 2021/2022 budget expenditure of £171.8 million represented the highest level of Social Housing Development Programme related investment activity since the NI Housing Executive took on responsibility for managing its delivery in 2007”.¹³³⁵

Housing selection scheme

Social housing in NI is allocated through a points-based system, which uses common criteria to assess the housing needs of all social

1325 NI Statistics and Research Agency, ‘NI Housing Statistics 2020-2021’ (DfC, 2021).

1326 Department for Social Development, ‘Facing the Future: The Housing Strategy for NI 2012-2017’ (DSD, 2012).

1327 NI Office, ‘New Decade, New Approach’ (NIO, 2020).

1328 Ibid, at 9.

1329 Ibid.

1330 Ibid.

1331 Department for Communities, ‘Consultation On the New Housing Supply Strategy Call For Evidence’ (DfC, 2021), at para 5.37.

1332 NI Human Rights Commission, ‘Response to Public Consultation on New Housing Supply Strategy Call for Evidence’ (NIHRC, 2021).

1333 NI Assembly Hansard, ‘Written Answers: Social Housing - Minister for Communities, Deirdre Hargey MLA - AQW 259/22-27’, 1 June 2022.

1334 NI Assembly Hansard, ‘Written Answers: Housing Stock - Minister for Communities, Deirdre Hargey MLA - AQW 1551/22-27’, 23 June 2022.

1335 Ibid.

housing applicants.¹³³⁶ The housing selection scheme is approved by the Department for Communities and implemented by the NI Housing Executive for all social housing, including housing provided for and managed by housing associations. Under this scheme applicants are assessed and awarded points according to their housing need. The level of points awarded determines the applicant's position on the social housing waiting list. Applicants may qualify for points under four categories – intimidation, insecurity of tenure, housing conditions and health or social well-being.¹³³⁷

In 2022, the Commission assisted several individuals who have not been awarded intimidation points, despite being victims of intimidation. Intimidation points are awarded to applicants whose home has been destroyed or seriously damaged or they are in serious and imminent risk of being killed or seriously injured as a result of a terrorist, racial or sectarian attack, or because of an attack motivated by hostility because of an individual's disability or sexual orientation or result of an attack due to neighbourhood nuisance or other similar forms of anti-social behaviour.¹³³⁸ Yet, the definition of intimidation for this purpose excludes other common scenarios of intimidation such as domestic violence, coercive control or being intimidated on other grounds, such as nationality. There is no official appeals mechanism, with only an informal complaints procedure available. The Commission has found that the complaints procedure is lengthy, the impact of which is exacerbated given the vulnerability of the individuals and households involved.

Segregation

Across NI, 90 per cent of NI Housing Executive estates are segregated.¹³³⁹ The NI Housing Executive's Community Cohesion Strategy addresses segregation, with several actions aimed at supporting research into segregation and encouraging mixed housing schemes.¹³⁴⁰ Yet, intimidation continues. Between August 2021 and July 2022, 145 households presented themselves as homeless due to intimidation.¹³⁴¹ In 110 of these cases, the reason cited was intimidation from paramilitaries, and another seven were due to sectarian intimidation.¹³⁴² Public authorities have been criticised for not addressing the root of the problem and not having a strategy in place that offers mitigating measures.¹³⁴³

Data collection

In 2015, the Equality Commission for NI found that, despite monitoring guidance for public authorities, there is a lack of robust housing and

1336 Article 22, Housing (NI) Order 1981.

1337 NI Housing Executive, 'Housing Selection Scheme Rules' (NIHE, 2014).

1338 Ibid, at Rule 23.

1339 Department for Communities, 'Housing Supply Strategy 2022 - 2037: Call for Evidence Summary Report' (DfC, 2021), at 28.

1340 NI Housing Executive, 'Community Cohesion Strategy 2015-2020' (NIHE, 2015).

1341 NI Assembly Hansard, 'Written Answers: Housing Stock - Minister for Communities, Deirdre Hargey MLA - AQW 2764/22-27', 16 August 2022.

1342 Ibid.

1343 Brett Campbell, 'Belfast families living in fear on mixed estate where Catholics forced to flee', *Belfast Telegraph*, 29 September 2017.

communities data relating to several equality grounds.¹³⁴⁴ In 2019, the Equality Commission for NI 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”.¹³⁴⁵ In 2022, the Commission raised these concerns with the CoE Advisory Committee on the Framework Convention for the Protection of National Minorities.¹³⁴⁶

Recommendations

The Commission recommends that the Department for Communities promptly designs, implements, monitors and adequately resources an up-to-date housing supply strategy for NI through meaningful consultation with individuals that are affected and their representative organisations.

The Commission recommends that the Executive Office, Department for Communities and Department of Justice take concrete steps to promptly and robustly eradicate paramilitary and sectarian intimidation that causes families to be forced out of their homes. This requires a collaborative approach with housing providers, Police Service NI and community representatives.

The Commission recommends that the Department for Communities, in cooperation with the NI Housing Executive, revises the housing selection scheme to ensure that it considers properly an applicant’s circumstances and reflects up-to-date common challenges faced by individuals and households in NI, particularly in relation to intimidation points. This requires meaningful consultation with individuals affected and their representative organisations.

The Commission recommends that the Department for Communities, in cooperation with the NI Housing Executive, ensures that an official mechanism to appeal housing selection decisions is in place, which is effectively implemented and monitored. This includes ensuring the appeals process and its outcomes are promptly and effectively implemented.

The Commission recommends that the Department for Communities ensures that comprehensive equality data on housing in NI is regularly gathered, monitored, evaluated and published. This data should be disaggregated in a way that reflects NI society. The Department for Communities in cooperation with housing providers, Police Service NI and community representatives should take prompt, effective steps to address and eradicate any inequalities that are identified.

1344 Equality Commission for NI, ‘Investigation Report under Schedule 9 of the NI Act 1998: Department for Social Development - Housing Policy Proposals’ (ECNI, 2015).

1345 Equality Commission for NI, ‘Equality in Housing and Communities: Policy Recommendations’ (ECNI, 2019).

1346 NI Human Rights Commission, ‘Submission to the CoE Advisory Committee on the Framework Convention for the Protection of National Minorities – Parallel Report to the CoE Advisory Committee on the Fifth Monitoring Report of the UK’ (NIHRC, 2022), at para 5.37.

Social security

In 2016, the UN ICESCR Committee recommended that the UK Government:

- 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; [and]*
- 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.*¹³⁴⁷

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.*¹³⁴⁸

In 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 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.*¹³⁴⁹

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

¹³⁴⁷ 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 41-42.

¹³⁴⁸ Ibid, at para 19.

¹³⁴⁹ 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 UN CRPD: Report of the UN CRPD Committee', 24 October 2017, at para 114(a).

*allocations, are in place for persons with disabilities affected by austerity measures.*¹³⁵⁰

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’”.¹³⁵¹ The UN CEDAW Committee further recommended that the UK Government “repeal the two-child tax credit limit”.¹³⁵²

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, 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.¹³⁵³ Similar assessments have been conducted in England, Wales and Scotland.

In 2022, after several years of uncertainty, bedroom tax mitigations have been extended indefinitely.¹³⁵⁴ The Welfare Supplementary Payment (Amendment) Regulations (NI) 2022 extend all other existing mitigations, including benefit cap mitigations, until March 2025. The 2022 Regulations also ensure that claimants do not lose their bedroom tax if they move home and that any person who is responsible for children can get an extra payment to cover the benefit cap with the payment being the full value of the cut to their benefits.

Five-week wait for Universal Credit

New applicants to Universal Credit will usually wait five weeks for their first payment. This wait is due to a one-month assessment period and an additional seven days for the payment to arrive in the applicant’s account.¹³⁵⁵ Applicants who do not have enough to live on can contact their work coach and apply for a Universal Credit Contingency Fund short-term expenses grant.¹³⁵⁶ In 2021, the House of Commons Committee for Work and Pensions found that a significant portion of people face financial difficulties during the five week wait, with some unable to keep

1350 Ibid, at para 114(d).

1351 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).

1352 Ibid, at para 52(b).

1353 NI Human Rights Commission, ‘Cumulative Impact Assessment of Tax and Social Security Reforms’ (NIHRC, 2019), at para 52(b).

1354 Department for Communities, ‘Press Release: 37,000 now have long term protection from the bedroom tax’, 1 March 2022.

1355 Gov.UK, ‘Universal Credit’. Available at: <https://www.gov.uk/universal-credit/how-youre-paid>

1356 NI Direct, ‘Help While Waiting For Universal Credit Payment’. Available at: <https://www.nidirect.gov.uk/articles/help-while-waiting-universal-credit-payment>

up with bills and rent, and forced to go without essentials, such as heating or food.¹³⁵⁷

In October 2022, the Independent Advisory Panel recommended:

*an interim solution of increasing the Universal Credit Contingency Fund budget for paying grants during the five week wait to at least £5million, introducing new interpretative guidance to enable payments to be more readily made under the fund, changing the Fund's name to Universal Credit – New Claims Payment and promoting the availability of the payment. In addition, we recommend introducing a savings rule set at £1,000 and amending regulations to loosen the criteria to ensure claimants facing financial hardship and difficulties short of a crisis or destitution can more easily access the fund. A longer term solution is proposed through urgently setting up a Departmental led working party to examine alternative solutions including advance payments of a grant, an increase to existing benefit run ons or a Welfare Supplementary Payments scheme. Reference groups of claimant users and advice workers should be set up to advise the Departmental working group. mitigating the five week wait for Universal Credit.*¹³⁵⁸

Private renters

In 2019, Housing Rights NI found that loss of private rented accommodation was the third largest reason for homelessness presentation.¹³⁵⁹ The mitigation package does not specifically protect private renters, and as such, cuts to housing benefits for private tenants remains a concern. Requests have been made for mitigations to be strengthened to include funding for a specialist financial inclusion service for low-income private renters, including access to a grant to provide financial support.¹³⁶⁰

Two-child tax limit

In 2021, the average family size in NI was 2.57 children.¹³⁶¹ 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.¹³⁶² This also applies to Universal Credit, as it is introduced.

Concerns have been raised with one of the exemptions, namely a child being born as a result of rape or non-consensual conception where the mother no longer lives with the rapist.¹³⁶³ 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

¹³⁵⁷ UK Parliament Hansard, 'Committee for Work and Pensions: Universal Credit – The Wait For A First Payment – Thirteenth Report of Session 2019-2021' (CWP, 2020).

¹³⁵⁸ Independent Advisory Panel, 'Welfare Mitigation Review: Independent Advisory Panel Report' (DfC, 2022), at 15.

¹³⁵⁹ Housing Rights NI, 'Falling Behind: Exploring the Gap Between Local Housing Association and the Availability of Affordable Private Rented Accommodation in NI' (HRNI, 2019), at 14.

¹³⁶⁰ Email correspondence from Housing Rights NI to the NI Human Rights Commission, 3 October 2022.

¹³⁶¹ Statista, 'Average Household Size in the UK in 2021, By Region'. Available at: <https://www.statista.com/statistics/295548/average-household-size-in-the-uk-by-region/>

¹³⁶² Gov.UK, 'Child Tax Credits: Support for a Maximum of 2 Children'. Available at: <https://www.gov.uk/guidance/child-tax-credit-exceptions-to-the-2-child-limit>

¹³⁶³ Ibid.

to access child tax credits. The policy is discriminatory towards women, and towards poor women in particular”.¹³⁶⁴

Furthermore, specific to NI, the law in NI obligates anyone that is aware of a crime to report it to the police or face prosecution.¹³⁶⁵ Fears have been reported that the non-reporting of a rape declared through the two-child limit process will lead to prosecution of the mother, support network or an employee involved in processing the claim.¹³⁶⁶ In 2020, the then Attorney General of NI, John Larkin KC, issued updated guidance stating that:

*in the vast majority of cases involving rape and other serious sexual offences, a failure to report what has happened to the police will not amount to an offence. This is because a victim or someone in whom they have confided will be considered to have a reasonable excuse for not disclosing the information confided to the Police Service NI.*¹³⁶⁷

In July 2022, the Universal Credit (Removal of Two Child Limit) Bill, sponsored by Lord Bishop of Durham, was introduced to the House of Lords. This Bill aims to remove the limit on the number of children or qualifying young persons included in the calculation of an award of universal credit. In November 2022, the Universal Credit (Removal of Two Child Limit) Bill was at the Third Reading Stage in the House of Lords, with the date for progression to be announced.

In October 2022, the Independent Advisory Panel recommended that the two-child limit in Universal Credit, Child Tax Credit and Housing Benefit is offset.¹³⁶⁸

Personal Independent Payment

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.¹³⁶⁹

In 2020, the Department for Communities sponsored a second independent review of the assessment process for the Personal Independence Payment.¹³⁷⁰ 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”.¹³⁷¹ The Department for Communities published its response to the independent review, accepting the majority of its recommendations in

¹³⁶⁴ Women’s Aid Federation NI, ‘Press Release: Women’s Aid NI statement on 2-child tax credit rule and ‘rape clause’, 30 March 2017.

¹³⁶⁵ Section 5 of the Criminal Law Act (NI) 1967.

¹³⁶⁶ Meetings between NI Human Rights Commission and civil society organisations, October 2017 and February 2018.

¹³⁶⁷ Attorney General for NI, ‘Human Rights Guidance for the Public Prosecution Service NI and the Police Service NI: The Application of Section 5 of the Criminal Law Act (NI) 1967 To Victims of Serious Sexual Offences and Those to Whom They Make Disclosures’ (AGNI, 2020), at para 3.

¹³⁶⁸ Independent Advisory Panel, ‘Welfare Mitigation Review: Independent Advisory Panel Report’ (DfC, 2022), at 14.

¹³⁶⁹ *RF v Secretary of State for Work and Pensions and Others* [2017] EWHC 3375.

¹³⁷⁰ Marie Cavanagh, ‘Personal Independence Payment: A Second Independent Review of the Assessment Process’ (DfC, 2020).

¹³⁷¹ *Ibid*, at 9.

full, with the exception of recommendations 6, 9 and 11, which it partially accepted.¹³⁷²

In 2021, the NI Public Service Ombudsman found that the Department for Communities repeatedly failed 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".¹³⁷³ The NI Public Service Ombudsman concluded that there was "systemic maladministration having identified repeated failures which are likely to reoccur if left remedied".¹³⁷⁴ The Department for Communities stated it would "carefully consider all the recommendations of the report".¹³⁷⁵

Separate payments

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. Separate payments are not available for online applicants, as you can only provide one bank account per application. The Department for Communities has responsibility for managing social security in NI, but it must use the computer system provided by the UK Department for Work and Pensions. The review of this computer system is currently included in the Department of Work and Pensions backlog of IT changes for its Universal Credit system, but a delivery date is yet to be confirmed.¹³⁷⁶ However, until this is completed, claimants wishing for separate payments must apply in person.¹³⁷⁷ There is a lack of awareness among staff and the wider community that separate payments are an option and when applying in person new claimants may be automatically directed to apply online.

Recommendations

The Commission recommends the Department of Work and Pensions and Department for Communities ensures that social security is accessible, promptly available and guarantees an adequate standard of living to recipients, which is guided by a cumulative impact assessment that is regularly monitored. This includes ensuring that any delay in access, such as the five week wait for Universal Credit, is immediately remedied.

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

1372 Department for Communities, 'The Second Independent Review of the Personal Independence Payment Assessment Process - Department for Communities' Response' (DFC, 2021).

1373 NI Public Service Ombudsman, 'Personal Independence Payment and the Value of Further Evidence: An Investigation by the NI Public Ombudsman into Personal Independence Payment' (NIPSO, 2021), at 82.

1374 Ibid, at 6.

1375 Department for Communities, 'Press Release: Communities Minister Commits to Further Improvements in PIP Delivery', 17 June 2021.

1376 Email correspondence from the Department for Communities to the NI Human Rights Commission, 6 September 2022.

1377 NI Direct, 'How and when you get paid Universal Credit'. Available at: <https://www.nidirect.gov.uk/articles/how-and-when-you-get-paid-universal-credit>.

Commission recommends that the Department for Communities, with support from the NI Executive, implements a comprehensive and secure mitigation package as long as necessary in NI.

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.

The Commission recommends that the accessibility and assessment issues with Personal Independent Payment are promptly and effectively remedied in line with the NI Public Service Ombudsman's recommendations.

Travellers' accommodation

In 2016, the UN ICESCR Committee recommended that the UK Government and NI Executive ensures “the provision of sufficient, adequate and secure” accommodation.¹³⁷⁸ This includes ensuring “adequate access to culturally appropriate accommodation and stopping sites”.¹³⁷⁹

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 1998 as a result of the UK leaving the EU, including the right “to equal opportunity in all social and economic activity, regardless of ... ethnicity”.¹³⁸⁰ Protocol Article 2 provides specific protection against discrimination in the six Annex Equality Directives, including the EU 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.¹³⁸¹

In 2018, the Commission published its investigation report into Travellers' accommodation in NI.¹³⁸² 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

1378 E/C.12/GBR/CO/5, 'UN ICESCR Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 22 May 2009, at para 30; 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.

1379 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(d).

1380 Belfast (Good Friday) Agreement, 10 April 1998, at Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

1381 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.

1382 NI Human Rights Commission, 'Out of Sight, Out of Mind: Travellers' Accommodation in NI' (NIHRC, 2018).

inadequate efforts made for participation of Travellers in decision-making processes.¹³⁸³

In 2019, the Commission noted mixed progress to its 45 recommendations aimed at addressing the investigation's findings.¹³⁸⁴ In 2022, this mixed progress continues.

In 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.¹³⁸⁵

In 2021, the NI Housing Executive published its updated Irish Traveller Accommodation Strategy.¹³⁸⁶ The Department of Communities also consulted on a draft Housing Supply Strategy, which highlighted access to appropriate accommodation for Irish Travellers is limited.¹³⁸⁷ 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.¹³⁸⁸ In 2022, publication of the Housing Supply Strategy has been delayed by the suspension of the NI Assembly and NI Executive.

In 2022, the NI Housing Executive Travellers' Forum, of which the Commission is a member, was established. The forum has a consultative and advisory role to inform the NI Housing Executive's work.

Recommendations

The Commission continues to call for the Executive Office, Department for Communities, the Department for Infrastructure, local councils, NI Housing Executive and housing associations ensure the full 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.

The Commission advises the Department for Communities to embed consideration of Protocol Article 2 in its housing supply strategy and monitor any proposed changes by the EU to the six Annex 1 Equality Directives, as well as relevant CJEU case law, and pay particular attention to the ongoing consultation by the EU on the Racial Equality Directive.

1383 Ibid.

1384 NI Human Rights Commission, 'Implementation of Travellers' Accommodation Recommendations' (NIHRC, 2019).

1385 Department for Communities, 'Design Guide for Travellers' Sites in NI' (DfC, 2020).

1386 NI Housing Executive, 'Irish Traveller Accommodation Strategy 2020-2025' (NIHE, 2020).

1387 Department for Communities, 'Consultation on the New Housing Supply Strategy Call For Evidence' (DfC, 2021), at 24.

1388 NI Human Rights Commission, 'Response to Public Consultation on New Housing Supply Strategy Call for Evidence' (NIHRC, 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.¹³⁸⁹

In 2018, use of the Unauthorised Encampments (NI) Order 2005 was considered by the Commission as part of its Travellers’ accommodation investigation, which confirmed that the 2005 Order “has a disproportionate impact on the Traveller communities and threatens their nomadic culture”.¹³⁹⁰

The Department for Communities accepts that the powers under the 2005 Order have a particular impact on Travellers in NI, but has stated that annual monitoring of the impact of the 2005 Order “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”.¹³⁹¹ 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.¹³⁹²

In 2022, the Department for Communities has no plans to repeal the 2005 Order. Any proposed change to legislation would require the approval of the Minister for Communities and NI Executive and the agreement of the NI Assembly.¹³⁹³

Recommendations

The Commission recommends that Department for Communities, supported by the NI Executive and NI Assembly, ensures that the Unauthorised Encampments (NI) Order 2005 is promptly repealed.

1389 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).

1390 NI Human Rights Commission, ‘Out of Sight, Out of Mind: Travellers’ Accommodation in NI’ (NIHRC, 2018), at 288.

1391 Letter from Permanent Secretary of Department for Communities, Leo O’Reilly, to the NI Human Rights Commission, 18 May 2018.

1392 NI Housing Executive, ‘Our Cooperation Policy for Travellers’. Available at: http://www.nihe.gov.uk/index/advice/advice_for_travellers/co-operation_policy.htm.

1393 NI Human Rights Commission, ‘Implementation of Travellers’ Accommodation Recommendations’ (NIHRC, 2019), at 9.

Right to Health

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”.¹³⁹⁴

The UN CRC Committee also recommended that the UK Government and NI Executive ensure that migrant, refugee and asylum-seeking children are provided with “sufficient support... to access basic services [including health care]”.¹³⁹⁵

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”.¹³⁹⁶

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”.¹³⁹⁷ 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”.¹³⁹⁸

Everyone in NI is entitled to free emergency healthcare at the point of service, including irregular migrants.¹³⁹⁹ People seeking asylum who have made an application to be granted temporary protection, asylum or humanitarian protection are also entitled to free primary and secondary healthcare.¹⁴⁰⁰ This includes people seeking asylum who have exhausted the appeals process and remain in NI. 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.

Several 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 people seeking asylum. It offers initial health

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.

1395 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.

1396 CERD/C/GBR/CO/21-23, 'UN CERD Committee Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of UK', 26 August 2016.

1397 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.

1398 Ibid.

1399 NI Direct, 'Health and Medical Emergencies Services for Visitors to NI'. Available at: <https://www.nidirect.gov.uk/articles/health-and-medical-emergencies-services-visitors-northern-ireland>

1400 Provision of Health Services to Persons Not Ordinarily Resident Regulations (NI) 2015; Health and Personal Services (General Medical Services Contracts) (Amendment) Regulations (NI) 2015.

assessments, health promotion advice, and information on accessing health services in NI.¹⁴⁰¹

In 2021, the House of Commons NI Affairs Committee heard evidence on the lack of healthcare provision for irregular migrants who are traumatised or have complex needs.¹⁴⁰² Delays issuing asylum registration cards and HC2 certificates, which are required to register and receive full support for many health care services, were also reported.¹⁴⁰³ In July 2022, the Home Office published guidance on HC2 applications.¹⁴⁰⁴

The Commission has received reports that there are several barriers to migrants, including irregular migrants, accessing healthcare. Travelling to healthcare appointments remains difficult for people seeking asylum or those with irregular status, as financial support is provided by vouchers which cannot be used for transport. Due to delays in the decision-making process, pregnant migrant women do not receive financial support until late in their pregnancy. Furthermore, there have been reports of a lack of access to translation and interpretation services.¹⁴⁰⁵

Registering for and accessing General Practitioner services and National Health Service dental services remains challenging for irregular migrants, with long waiting times for appointments.¹⁴⁰⁶ Concerns have been raised by residents seeking asylum that are currently in temporary and contingency hotel accommodation about the lack of access to healthcare information, inadequate provision for medical needs and significant delays in health assessments.¹⁴⁰⁷ The Commission is further aware of instances where migrants are being questioned about immigration status at point of contact with health services.¹⁴⁰⁸ There are also difficulties in accessing mental health services and reports of declining mental health amongst disabled migrants.¹⁴⁰⁹

UK's withdrawal from the EU

Following the UK's withdrawal from the EU, 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 UK.¹⁴¹⁰ The deadline to apply for the EU Settlement Scheme was 30 June 2021.¹⁴¹¹ 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.¹⁴¹² Concerns have been raised regarding

1401 Belfast Health and Social Care Trust, 'Press Release: Screening Service for new entrants to NI', 24 May 2012.

1402 House of Commons NI Affairs Committee, 'Inquiry into the Experience of Minority Ethnic and Migrant People in NI - Oral Evidence', 8 September 2021, at Question 19.

1403 Ibid, at Question 22.

1404 Home Office, 'Guidance to Support HC2 Applications for Asylum Seekers' (HO, 2022).

1405 NI Human Rights Commission, 'Submission to the NI Affairs Committee Inquiry into the Experience of Minority Ethnic and Migrant People in NI' (NIHRC, 2021).

1406 Meeting between NI Human Rights Commission and NI Council for Racial Equality, 9 August 2022.

1407 Children's Law Centre and South Tyrone Empowerment Programme, 'Joint Submission to Framework Convention on the Protection of National Minorities Advisory Committee: Rights of Asylum Seeker Children Living in Contingency Accommodation (Hotel Buildings) in NI, Run by Mears Group PLC' (CLC and STEP, 2022).

1408 Roundtable on Access to Healthcare and Protocol Article 2 hosted by the NI Human Rights Commission, 6 June 2022.

1409 Independent Mechanism in NI Disability Forum Meeting, 2 August 2022.

1410 UK Government, 'Stay in the UK ('Settled Status'): Step by Step'. Available at: <https://www.gov.uk/eusetledstatus>

1411 Home Office, 'EU Settlement Scheme: Information for Late Applicants' (HO, 2021).

1412 Amelia Gentleman, 'High court rejects bid to extend UK's EU settlement scheme', *The Guardian*, 11 March 2021.

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.¹⁴¹³

In 2021, the Independent Monitoring Authority issued judicial review proceedings against the Home Office, challenging the policy where EU or EEA citizens who fail to apply for settled status before the expiry of their pre-settled status automatically lose their rights.¹⁴¹⁴ In November 2022, the substantive hearing of the judicial review was due to take place before the England and Wales High Court.¹⁴¹⁵

Recommendations

The Commission recommends that the Department of Health takes effective steps to identify and minimise procedural barriers to migrant women accessing healthcare. This includes introducing guidance for healthcare professionals on providing effective access.

The Commission recommends that the Department of Health issues an amendment or policy direction 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 the Department of Health and the Home Office minimise any procedural or informational barriers to accessing healthcare services for people in temporary and contingency accommodation that are seeking asylum.

The Commission recommends that the Home Office provides further guidance on the rights of people with pending and late applications to the EU Settlement Scheme, to applicants to the Scheme and to healthcare professionals to ensure no diminution of the current provision and protect the rights to the highest attainable standard of healthcare.

The Commission recommends that the Department of Health provides clear, accessible and complete information on rights to healthcare post-EU withdrawal, including access to cross-border and island-of-Ireland services to ensure no diminution of the current provision and protect the rights to the highest attainable standard of healthcare.

Access to reproductive healthcare

In 2016, the UN ICESCR Committee recommended that the UK Government and NI Executive “amend the legislation on termination of

1413 Migration Observatory, ‘Press Release: Vulnerable EU citizens are at risk of becoming “irregular migrants” after Brexit’, 24 September 2021.

1414 Independent Monitoring Authority, ‘Press Release: Judicial Review claim issued by Independent Monitoring Authority’, 14 December 2021.

1415 Independent Monitoring Authority, ‘Press Release: Independent Monitoring Authority receives permission for judicial review hearing against Home Office’, 30 June 2022.

pregnancy in NI to make it compatible with other fundamental rights, such as women's rights to health, life and dignity".¹⁴¹⁶

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,¹⁴¹⁷ 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 non-biased, scientifically sound and rights-based counselling and 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, including on safe and modern contraception, including oral and emergency, long term or permanent and adopt a protocol to facilitate access at pharmacies, clinics and hospitals; [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.*¹⁴¹⁸

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.*¹⁴¹⁹

In 2020/2021, the British Pregnancy Advisory Service estimated over 300 bookings were made for women and girls living in NI.¹⁴²⁰ 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.

1416 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 62.

1417 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).

1418 Ibid, at paras 85(d), 86(a), 86(b) and 86(c).

1419 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.

1420 NI Human Rights Commission, 'Monitoring Report on Reproductive Healthcare Provision in NI' (NIHRC, 2021).

In 2020/2021, there were 1,373 notifications to the Department of Health of early medical abortions under the new provision provided by the health and social care trusts across NI.¹⁴²¹

In 2020, abortion was legalised in NI 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.¹⁴²² Abortion is also permitted on the grounds of immediate necessity, a risk to life or grave permanent injury to physical or mental health of the pregnant woman, a diagnosis of a severe foetal impairment or fatal foetal abnormality.¹⁴²³ Consequently, 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. These services were not commissioned or funded by the Department of Health. In 2021, a number of these services had to be suspended due to staffing issues. In 2022, these services remain suspended in the Northern and South Eastern Health and Social Care Trusts.¹⁴²⁴ The remaining Health and Social Care Trusts have not had the resources to take referrals from women and girls in these Trust areas. Those affected are forced to access termination services in England through the Central Booking System, pay for a service in Ireland or access unregulated services. In 2022, Marie Stopes International operated the Central Booking System and the British Pregnancy Advisory Service operated a partial Central Access Point for women and girls in NI.

In 2021, the NI High Court held that the Secretary of State for NI was in breach of his obligations under section 9 of the NI (Executive Formation etc) Act 2019, but did not make declarations against the other respondents.¹⁴²⁵ The Commission's monitoring report on reproductive healthcare provision in NI also found that the UN CEDAW recommendations have not been fully implemented in NI and highlighted two overarching issues.¹⁴²⁶ First, the lack of commissioning and funding of abortion services, and second, the lack of guidance on implementation of the Abortion (NI) Regulations 2020 and subsequent Abortion (NI) (No 2) Regulations 2020.

Following the Abortion (NI) Regulations 2021, the then Secretary of State for NI, Brandon Lewis MP, issued a direction to the Department of Health, the then Minister of Health, Robin Swann MLA, the Health and Social Care Boards in NI, the then First Minister, Paul Givan MLA, and the then Deputy First Minister, Michelle O'Neill MLA, to commission and make abortion services available in NI.¹⁴²⁷ This was to be done soon as possible, and no later than 31 March 2022, to ensure immediate support for interim services of early medical abortion.¹⁴²⁸ The direction also included "an immediate

1421 Email correspondence from the Department of Health to the NI Human Rights Commission, 12 April 2021.

1422 Regulations 3 and 4, Abortion (NI) (No 2) Regulations 2020.

1423 Regulations 5, 6 and 7, Abortion (NI) (No 2) Regulations 2020.

1424 Informing Choices, 'Press Release: Northern Trust Resumes Early Medical Abortion Service' 4 January 2021; Amnesty International NI, 'Press Release: NI: Abortion services cease at South Eastern Trust following Health Department failure', 5 January 2021; Eimear McGovern, 'NI health trust pauses abortion service referrals due to shortage of nurses', *Belfast Telegraph*, 23 April 2021.

1425 *Re NI Human Rights Commission for Judicial Review* [2021] NIQB 91.

1426 NI Human Rights Commission, 'Monitoring Report on Reproductive Healthcare Provision in NI' (NIHRC, 2021), at para 6.1.

1427 NI Office, 'Press Release: Secretary of State issues updated direction to NI's Department of Health to make abortion services available', 21 July 2021.

1428 *Ibid.*

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”.¹⁴²⁹

In May 2022, the then Secretary of State for NI laid further regulations that remove the need for the Department of Health to seek Executive Committee approval in relation to commissioning abortion services in NI. This means that the Department of Health will have no further barriers to commission and fund services.¹⁴³⁰ The Commission welcomed this development, but was “concerned that there is no deadline specified for services to be made available”.¹⁴³¹ In September 2022, the Commission wrote to the new Secretary of State for NI, Chris Heaton-Harris seeking clarity on the Secretary of State’s intentions in respect of commissioning of abortion services in NI. In October 2022, the new Secretary of State for NI announced that the UK Government would commission abortion services in NI.¹⁴³² It remains the responsibility of the Department of Health to administer the funding provided by the UK Government.¹⁴³³

Severe Fetal Impairment Abortion Amendment Bill

In 2021, Commission provided advice on the Severe Fetal Impairment Abortion Amendment Bill. This Bill aimed to amend the Abortion (NI) (No 2) Regulations 2020 to remove the ground for an abortion in cases of severe fetal impairment. The Commission 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.¹⁴³⁴ The Commission 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 Bill had not reached the final stage by the end of the NI Assembly’s mandate and did not continue.

Family planning

There are several barriers to contraceptive use in NI.¹⁴³⁵ These barriers include inadequate and inconsistent sexual health education, a lack of public awareness of different methods and their effectiveness, a failure to provide postpartum contraception, a lack of provision within general practice, and a lack of provision within community clinics. This has been a

1429 Ibid.

1430 NI Office, ‘Press Release: Secretary of State issues updated direction to NI’s Department of Health to make abortion services available’, 26 May 2022.

1431 NI Human Rights Commission, ‘Press Release: NI Human Rights Commission’s Chief Commissioner Responds to UK Government Abortion Regulations’, 19 May 2022.

1432 Amy Cochrane, ‘Secretary of State to commission abortion services in NI – three years after legalisation’, *Belfast Telegraph*, 24 October 2022.

1433 Ibid.

1434 NI Abortion and Contraception Task Group, ‘Report on Sexual and Reproductive Health in NI’ (NIACT, 2018); 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 45.

1435 Ibid.

long-standing issue in NI that impacts the provision of and access to safe, non-biased and scientifically accurate family planning.¹⁴³⁶

Recommendations

The Commission recommends that the Secretary of State for NI and the Department of Health promptly commission and ensure ring-fenced, long-term funding and, working with the Health and Social Care Trusts, ensure that the funding is promptly administered for the purpose of expeditiously guaranteeing access to safe abortion services locally under the UN CEDAW recommendations and in line with the Abortion (NI) (No 2) Regulations 2020.

The Commission recommends that the Department of Health introduces Non-Invasive Prenatal Testing for women in NI.

The Commission recommends that the Department of Health ensures that non-biased, scientifically sound and rights-based counselling and information on all methods of contraception are available, affordable and fully accessible to everyone in NI. This includes adopting a protocol that facilitates access at pharmacies, clinics and hospitals.

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.¹⁴³⁷

In 2020, the New Decade, New Approach Agreement committed to “reconfigure hospital provision to deliver better patient outcomes, more stable services and sustainable staffing”.¹⁴³⁸ This included making improvements to “urgent and emergency care” by the end of that year.¹⁴³⁹ Implementation of this commitment was delayed due to COVID-19.

In 2020, the COVID-19 Urgent and Emergency Care Action Plan, ‘No More Silos’, was published.¹⁴⁴⁰ It enabled some of the emerging conclusions from the ongoing review of urgent and emergency care to be rapidly implemented following the first wave of COVID-19, while the Department of Health continued to work towards publication of the final report.¹⁴⁴¹ For example, the ‘Phone First’ service was trialled across a number of Emergency Departments in NI to protect against overcrowding in hospitals, while ensuring rapid access and assessment of patients needing urgent care.¹⁴⁴²

¹⁴³⁶ NI Abortion and Contraception Task Group, ‘Report on Sexual and Reproductive Health in NI’ (NIACT, 2018).

¹⁴³⁷ NI Human Rights Commission, ‘Press Release: A and E Inquiry Findings Published’, 27 May 2015.

¹⁴³⁸ NI Office, ‘New Decade, New Approach’ (NIO, 2020).

¹⁴³⁹ Ibid.

¹⁴⁴⁰ Department of Health, ‘COVID-19 Urgent and Emergency Care Action Plan: No More Silos’ (DoH, 2020).

¹⁴⁴¹ NI Assembly Hansard, ‘Written Question: Urgent Care Centre - Paula Bradshaw MLA - AQW 26497/17-22’, 15 December 2021.

¹⁴⁴² Department of Health, ‘Press Release: New ‘Phone First’ service for Emergency Departments’, 16 November 2020.

In 2021, the then Minister of Health, Robin Swann MLA, reported that a compassion and care in the emergency department toolkit had been established.¹⁴⁴³ New complaints procedures have been developed and escalation plans introduced in each Health and Social Care Trust in NI.

In 2022, the Department of Health published its review of urgent and emergency care service in NI for public consultation.¹⁴⁴⁴ It identified three overriding strategic priorities, including creating an integrated urgent and emergency care service; capacity, co-ordination and performance; and intermediate care, a regionalised approach. It also recommends a minimum set of standards for establishing the new system.¹⁴⁴⁵ In May 2022, the Commission met with the Department of Health to discuss the proposals.¹⁴⁴⁶ The proposals are being finalised, with an accompanying investment and implementation plan, for consideration by the Minister of Health.¹⁴⁴⁷

In 2022, the Joint Equality, Good Relations and Human Rights Forum, of which the Commission is a member, continues to act as an information sharing resource between the Health and Social Care Trusts, the Department of Health and wider public authorities on equality and human rights legislation and health and social care policy and developments.

Recommendations

The Commission recommends that any resulting proposals from the Department of Health's Review of Urgent and Emergency Care Service in NI take account of recommendations from the Commission's inquiry report into emergency healthcare in NI.

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.*¹⁴⁴⁸

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

¹⁴⁴³ 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.

¹⁴⁴⁴ Department of Health, 'Review of Urgent and Emergency Care Services in NI: Consultation Report and Strategic Priorities' (DoH, 2022).

¹⁴⁴⁵ Ibid, at Annex A.

¹⁴⁴⁶ Meeting between NI Human Rights Commission and Department of Health, 26 May 2022.

¹⁴⁴⁷ Department of Health, 'Review of Urgent and Emergency Care Services in NI: Consultation Report and Strategic Priorities' (DoH, 2022).

¹⁴⁴⁸ CRC/C/GBR/CO/5, 'UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 3 June 2016, at para 60(a).

*step up efforts to foster research, data and good practices of, and speed up the development of supported decision-making regimes.*¹⁴⁴⁹

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 years or over.

The 2016 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 2016 Act is also yet to be commenced. In 2019, the first phase of the 2016 Act came into operation with the commencement of the research provisions and provisions in relation to deprivation of liberty, offences and money and valuables in residential care and nursing homes. In January 2022, the Department of Health published a consultation on the Reform of Adult Social Care in which it indicated its intention to implement the 2016 Act in full.¹⁴⁵⁰ However, no timeframe for this was provided. The Commission responded to the consultation recommending that a human rights based approach is adopted that includes a participatory process that is sufficiently resourced and effectively monitored.

Recommendations

The Commission recommends that the Department of Health ensures that the Mental Capacity (NI) Act 2016 is commenced in full without further delay.

The Commission recommends that the Department of Health, working with the NI Executive and NI Assembly, ensures that the required legislative steps are taken to address issues with substitute decision making.

The Commission recommends that the Department of Health, working with the NI Executive and NI Assembly, ensures that similar legislative protections concerning mental capacity are introduced for under 16-year-olds in NI, subject to recognition of evolving capacity.

The Commission recommends that the Department of Health ensures that any reform of adult social care adopts a human rights based approach, including that it is a participatory process that is sufficiently resourced and effectively monitored.

1449 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.

1450 Department of Health, 'Reform of Adult Social Care NI Consultation Document' (DoH, 2022), at 47.

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”.¹⁴⁵¹

In 2017, poor mental health was the largest cause of disability in NI and is estimated to be between 20 and 25 per cent higher in NI than in the rest of the UK.¹⁴⁵² The legacy of violence and socio-economic factors are cited as major contributors to the high levels of mental health in NI, with deprivation being a major predictor of area level mental wellbeing.¹⁴⁵³ In 2020, civil society representatives reported that, in addition to adequate funding, there needs to be a focus on early intervention.¹⁴⁵⁴

In 2020, the Department of Health published a Mental Health Action Plan.¹⁴⁵⁵ In 2021, the then Minister of Health, Robin Swann MLA, stated that substantial progress has been made against the actions contained within the action plan.¹⁴⁵⁶ Key achievements included: 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 Young People’s Mental Health Services and Forensic Mental Health Managed Care Networks; and the launch of a Mental Health Innovation Fund.

In 2021, a new ten-year Mental Health Strategy was launched setting the strategic direction for mental health in NI.¹⁴⁵⁷ It consists of 35 actions across three themes. Additionally, a new regional Mental Health Crisis Service was announced¹⁴⁵⁸ and pre-consultation for suicide prevention and post-vention services was conducted by the Public Health Agency.¹⁴⁵⁹ A £10 million Mental Health Support Fund for vital support to mental health charities was also announced. The grant scheme is open to community and voluntary sector organisations with charitable purposes offering services for people with mental ill health throughout NI.¹⁴⁶⁰

Suicides

In 2019, the Department of Health published a new Suicide Prevention Strategy for NI. This strategy includes a specific action to support, encourage and procure community-based suicide prevention services.¹⁴⁶¹

1451 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.

1452 Jennifer Betts and Janice Thompson, ‘Mental Health in NI’ (RAISE, 2017).

1453 Ibid.

1454 Roundtable discussion with civil society representatives, 23 September 2020.

1455 Department of Health, ‘Mental Health Action Plan’ (DoH, 2020).

1456 Department of Health, ‘Press Release: Update on Implementation of Mental Health Action Plan’, 11 June 2021.

1457 Department of Health, ‘Press Release: Minister of Health publishes new 10 year Mental Health Strategy’, 29 June 2021.

1458 Department of Health, ‘Press Release: New regional mental health crisis service’, 24 August 2021.

1459 Department for Health, ‘Press Release: Minister Swann welcomes pre-consultation for suicide prevention and post-vention services’, 15 February 2021.

1460 Department of Health, ‘Press Release: Fund will provide vital support to mental health charities’, 10 May 2021.

1461 Department of Health, ‘Protect Life 2 - Suicide Prevention Strategy’ (DoH, 2019).

In 2020, there were 219 recorded suicides in NI.¹⁴⁶² Of these, 59 women and 160 men died from suicide in NI.¹⁴⁶³ Annually since 2001, more than 70 per cent of people dying from suicide have been male.¹⁴⁶⁴ Additionally, NI's most deprived areas had a suicide rate that was almost twice that of the least deprived areas.¹⁴⁶⁵ In 2020, suicides were highest for men between 35 and 39 years old, and for women the highest number of suicides were between 40 and 44 years old.¹⁴⁶⁶ Overall, one in every four deaths by suicide was someone under 30 years old.¹⁴⁶⁷

In 2021, a new Regional Suicide Prevention Care Pathway was launched as part of the Towards Zero Suicide initiative.¹⁴⁶⁸ It 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.

Children and mental health

In NI, it is estimated that 12.6 per cent of children and young people have an emotional disorder such as anxiety or depression.¹⁴⁶⁹ Similar to the adult population, it is estimated that children and young people in NI have a 25 per cent higher rate of common mental health disorders than England, Scotland and Wales.¹⁴⁷⁰

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.¹⁴⁷¹ In 2020, in monitoring the NI Executive's response, the NI Commissioner for Children and Young People 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.¹⁴⁷²

Perinatal mental health

In 2021, funding was approved by the Department of Health for a New Perinatal Mental Health Delivery Model for the development of a new specialist perinatal mental health service for NI. In 2022, this is being implemented on a phased basis. The Public Health Agency is also progressing work on a business case for a dedicated mother and baby unit for NI.¹⁴⁷³

1462 NI Statistics and Research Agency, 'Review of Suicide Statistics in NI, 2015-2020' (NISRA, 2022).

1463 Ibid.

1464 Ibid.

1465 Ibid.

1466 Ibid, at 18.

1467 Ibid.

1468 Department of Health, 'Press Release: Suicide Prevention Care Pathway launched', 10 September 2021.

1469 Youth Wellbeing NI, 'Mental Health of Children and Parents in NI: Results of the Youth Wellbeing Prevalence Survey' (YWNI, 2020), at 11.

1470 Ibid.

1471 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).

1472 NI Commissioner for Children and Young People, 'Still Waiting: Monitoring Report' (NICCY, 2020).

1473 Letter from the Department of Health to NI Human Rights Commission, 17 November 2022.

Mental Health Review Tribunal

In 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, with conditions, an individual who had been convicted of a criminal offence and subsequently detained due to a Hospital Order under the Mental Health (NI) Order 1986. The NI High Court, while recognising the gap in the law, ruled that the Review Tribunal does not have the power to direct a conditional discharge from detention with conditions where the patient has capacity.

Recommendations

The Commission recommends that the Department of Health introduces a dedicated mental healthcare budget that effectively addresses objective need, including Child and Adolescent Mental Health Services. This includes ensuring that a sufficient budget is allocated to the Mental Health Strategy for the purposes of 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 a Review Tribunal when seeking to release with conditions an individual who had been detained under the Mental Health (NI) Order 1986, but now has capacity.

National Health Service waiting lists

NI's health service is exceptionally slow at providing patients with planned care, compared to health services elsewhere in the UK. For example, a person in NI is at least 48 times as likely as a person in Wales to wait more than a year for care.¹⁴⁷⁴

Waiting lists in NI were further affected by the disruption to healthcare services due to COVID-19. In 2021, the then Minister of Health, Robin Swann MLA, identified that it could take five to ten years to return National Health Service waiting times to an acceptable level.¹⁴⁷⁵ The NI Executive was informed by the Department of Health that, without any intervention, waiting lists could rise to 600,000-700,000 by 2026.¹⁴⁷⁶ Subsequently, the former Minister of Health unveiled a £700 million five-year plan to reduce the backlog of patients and to build service capacity to meet annual demand.¹⁴⁷⁷

In 2021, a judicial review of National Health Service waiting times was initiated by two women. The Commission provided a letter of support to the NI High Court in respect of the leave application, which was

1474 Mark Dyan and Deirdre Heenan, 'Change Or Collapse: Lessons From the Drive to Reform Health and Social Care in NI (Nuffield Trust, 2019).

1475 Department of Health, 'Oral Statement to the Assembly by Health Minister Robin Swan -13 April 2021 - Trust Rebuilding Plans' (DoH, 2017), at 7.

1476 Jonathan McCambridge, 'NI waiting lists "will double in five years" without urgent intervention', *Belfast Telegraph*, 26 July 2021.

1477 Department of Health, 'Oral Statement to the Assembly by Health Minister Robin Swan -13 April 2021 - Trust Rebuilding Plans' (DoH, 2017), at 7.

subsequently granted. In May 2022, the case was heard, the judgment is awaited.

In September 2022, a report by the NI Fiscal Council indicated that lower rates of efficiency in NI compared to England reflected in persistently longer waiting lists in NI.¹⁴⁷⁸

Recommendations

The Commission recommends that the Department of Health closely monitors implementation of the five-year plan to reduce the backlog of patients and to build service capacity to meet annual demand. The Commission further recommends that the Department of Health takes immediate steps, including providing the necessary resources, to address any identified issues with a view to ensuring timely and adequate access to healthcare in NI.

Oral health

In 2013, the Oral health Strategy for NI expired and has not been updated.¹⁴⁷⁹

In 2019, the House of Commons NI Affairs Committee 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.¹⁴⁸⁰ In 2017/2018, 4,724 children had teeth extracted under a general anaesthetic in NI.¹⁴⁸¹ 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".¹⁴⁸² Yet, there remains no commitment to introduce an up-to-date oral health strategy for NI.

The British Dental Association reports that poor oral health affects children's participation in education,¹⁴⁸³ affects employment prospects for working-age adults,¹⁴⁸⁴ and can lead to a higher risk of health problems and malnutrition for older people.¹⁴⁸⁵ 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.¹⁴⁸⁶ 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.¹⁴⁸⁷

1478 NI Fiscal Council, 'Sustainability Report 2022 – Special focus – Health' (NIFC, 2022), at 10.

1479 Department of Health, Social Services and Public Safety, 'Oral Health Strategy for NI' (DHSSPS, 2007).

1480 NI Statistics and Research Agency, 'Hospital Statistics: Acute Episode Based Activity 2017/2018' (NISRA, 2018).

1481 Email correspondence from the British Dental Association to the NI Human Rights Commission, 2019.

1482 House of Commons NI Affairs Committee, 'Health Funding in NI' (NIAC, 2019), at viii.

1483 Office of National Statistics, 'Children's Dental Health Survey 2013: NI report' (ONS, 2015).

1484 House of Commons NI Affairs Committee, 'Health Funding in NI' (NIAC, 2019), at para 151.

1485 National Health Service, 'The Health Risks of Gum Disease'. Available at: <https://www.nhs.uk/live-well/healthy-body/health-risks-of-gum-disease/>.

1486 Letter from the British Dental Association to Permanent Secretary to Department of Health, 18 December 2018.

1487 British Dental Association, 'NI: Building better oral healthcare after COVID', 18 March 2021. Available at: <https://www.bda.org/news-centre/blog/Pages/Northern-Ireland-Building-better-oral-healthcare-after-COVID.aspx>.

In 2019, the Department of Health committed to establishing child oral health and older persons oral health options groups.¹⁴⁸⁸ In 2021, after delays due to COVID-19, this work recommenced.¹⁴⁸⁹

In 2021, the British Dental Association highlighted the need to ensure that the regulatory framework within which dental practices operate, continues to support patient safety and high-quality service delivery. The then Minister of Health, Robin Swann MLA, committed to reducing the frequency of Regulatory Quality Improvement Authority inspections of individual dental practices.¹⁴⁹⁰

In March 2022, the British Dental Association warned that dental practices providing National Health Service services may struggle to remain financially viable and could widen oral health inequalities. According to the British Dental Association, better funding, a new General Dental Services Contract, the development of a dental Workforce Strategy and action on inequalities is required.¹⁴⁹¹ The British Dental Association concluded that the Department of Health's Rebuilding Support Scheme is inadequate for incentivising General Dental Services to increase health service treatments and get through high patient backlogs.¹⁴⁹²

In July 2022, the then Minister of Health, Robin Swann MLA, advised that a General Dental Services Contract Reform Group has been established to help address these concerns.¹⁴⁹³

In August 2022, a BBC investigation found that 90 percent of dental practices in NI were not accepting new adult patients and 88 percent were not accepting child patients.¹⁴⁹⁴

Under the Barnett Formula, the NI Executive receives additional funds through revenue raised from the soft drinks industry levy, an exact figure for which is not available. However, these funds are not ring-fenced to address oral health.¹⁴⁹⁵ In June 2022, the then Minister of Finance, Conor Murphy MLA, indicated his willingness to consider proposals that will help address the issue, but advised that in the absence of a NI Executive it is not possible to agree ring-fenced funding.¹⁴⁹⁶

Recommendations

The Commission recommends that the Department of Health promptly develops, implements and monitors an up-to-date Oral Health Strategy for NI. Affected individuals and their representative organisations should be meaningfully consulted at every stage.

1488 British Dental Association, 'Press Release: Moving the agenda forward: prioritising oral health in NI', 6 November 2019.

1489 British Dental Association, 'Press Release: Updates From Week Commencing 15 March 2021 - NI - Building Better Oral Healthcare after COVID-19', 9 March 2021.

1490 Department of Health, 'Press Release: Constructive and positive meeting with British Dental Association', 21 October 2021.

1491 British Dental Association, 'Press Release: NI - Dental reform manifesto launched', 7 March 2022.

1492 British Dental Association, 'Press Release: NI - Our response to the DoH "Rebuilding Support Scheme"', 16 March 2022.

1493 NI Assembly Hansard, 'Written Question: Number of people who have seen a dentist in 2021/22 - Claire Sugden MLA - AQW 2671/22-27', 20 July 2022.

1494 'Disappearing Dentists: Most practices in NI not taking new NHS patients', *BBC News*, 8 August 2022

1495 Department of Finance, 'Freedom of Information: DOF/2018-0380', 21 May 2018.

1496 NI Assembly Hansard, 'Written Question: Soft Drinks Industry Levy - Mark Durkan MLA - AQW712/22-27', 1 June 2022.

The Commission recommends that the Department of Health takes effective steps to address inequalities in dental care, including the provision of adequate funding to General Dental Services to ensure health service dentistry is accessible across NI.

The Commission recommends that the Department of Health works with the Department of Finance to ensure that adequate funding for oral health-related programmes is ring-fenced through the Soft Drinks Industry Levy.

Period poverty

In 2019, several UN Special Rapporteurs raised concerns at the global inaccessibility and prohibitive expense of sanitary hygiene products.¹⁴⁹⁷

In 2021, 27.5 per cent of pupils surveyed who have a period in NI have had difficulty accessing period products.¹⁴⁹⁸ Of the pupils surveyed, 83.2 per cent who had difficulty accessing period products experienced this because they did not have what they needed with them in school.¹⁴⁹⁹ Of the pupils surveyed, 6.5 per cent had difficulty accessing period products because their parents could not afford them, while 11.8 per cent said they themselves could not afford them.¹⁵⁰⁰ Of the pupils surveyed, 9.7 per cent who menstruate in NI have missed school multiple times because they did not have sufficient period products.¹⁵⁰¹

In May 2022, the Period Poverty (Free Provision) Act 2022 received Royal Assent. It requires that the relevant department must ensure that period products are obtainable free of charge by all persons who need to use them. This includes there being sufficient products to meet the person's needs while in NI. The relevant department has one year to establish the arrangements for fulfilling these statutory obligations, which is to be reviewed on an annual basis. At minimum free period products must be available in health and education settings. In November 2022, the Department of Education had consulted on what public bodies' premises should the 2022 Act apply to.¹⁵⁰² The resulting regulations are due to be in place by 11 May 2023.

Recommendations

The Commission recommends the Department of Education, Department of Health, Department for Communities, Department for the Economy and Department of Justice ensure provision for free period products is as wide as possible to avoid divergence in access, for example, places of detention and civil society organisations that provide essential public services should be included. Steps should be

1497 Officer of the UN High Commissioner for Human Rights, 'Press Release: International Women's Day - Women's menstrual health should no longer be a taboo, say UN human rights experts', 8 March 2019.

1498 Council for the Curriculum, Examinations and Assessment, 'Period Poverty Survey Findings Report: December 2021' (CCEA, 2021), at 2.

1499 Ibid.

1500 Ibid.

1501 Ibid.

1502 Department of Education, 'Consultation on Period Products (Free Provision) Regulations' (DoE, 2022).

taken to ensure provision does not become an undue burden on the organisations and premises affected.

The Commission recommends that the UK Government works with the NI Executive to ensure that period products that are not free are not inaccessibly priced and are fully accessible as the need requires.

Relationships and sexuality 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.*¹⁵⁰³

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"¹⁵⁰⁴ and "that access to abortion services and contraceptives are not statutory requirements of the advisory curriculum".¹⁵⁰⁵ 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".¹⁵⁰⁶

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.*¹⁵⁰⁷

This resulted in women having difficulties in obtaining modern forms of contraception.¹⁵⁰⁸

The UN CEDAW Committee recommended that the NI Executive "make age-appropriate, comprehensive and scientifically accurate education on

1503 CRC/C/GBR/CO/5, 'UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 3 June 2016, at para 63(b).

1504 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.

1505 Ibid.

1506 Ibid.

1507 Ibid.

1508 Ibid.

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”.¹⁵⁰⁹

In 2019, the UN CEDAW Committee reiterated this recommendation in its concluding observations on the UK.¹⁵¹⁰

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,¹⁵¹¹ however, a school can provide such education in line with its ethos.¹⁵¹²

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.¹⁵¹³ However, this programme is not mandatory.

In 2019, the Education Authority NI published its non-statutory guidance for supporting transgender pupils in schools, education other than at school centres, and youth services.¹⁵¹⁴

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.¹⁵¹⁵

Policy developments

In 2019, 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.¹⁵¹⁶

1509 Ibid.

1510 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.

1511 Education (NI) Order 2006.

1512 NI Curriculum, ‘Relationships and Sexuality Education Guidance: An Update for Post-Primary Schools’ (NIC, 2019).

1513 Women’s Aid, ‘Primary Schools’. Available at: <https://www.womensaidni.org/about-us/our-work/preventative-education/working-with-children-in-primary-schools/>

1514 Education Authority NI, ‘Guidance for Schools, EOTAS Centres and Youth Service on Supporting Transgender Young People’ (EANI, 2019).

1515 Meeting between Informing Choices and NI Human Rights Commission, 7 August 2020; NI Human Rights Commission roundtable with civil society organisations, 2 September 2020; Meeting between Brook and NI Human Rights Commission, 30 September 2020.

1516 Sir John Gillen, ‘Report into the Law and Procedures in Serious Sexual Offences in NI - Part 1’ (DoJ, 2019).

In 2020, the New Decade New Approach Agreement made several commitments to the review and reform education in NI and made a commitment to implementation the Gillen Review recommendations.¹⁵¹⁷

Also in 2020, the NI Commissioner for Children and Young People noted the need to focus on raising standards and improving access to the curriculum for all pupils including access to relationships and sexuality education.¹⁵¹⁸

In 2021, the Expert Panel for a Gender Equality Strategy and the Expert Panel for a Lesbian, Gay, Bisexual, Transgender, Queer (Or Questioning), Intersex + Strategy recommended that inclusive relationships 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.¹⁵¹⁹ There is also cross-party support “to introduce standardised, comprehensive relationships and sexuality education in our schools” as part of any forthcoming strategy to prevent violence against women and girls.¹⁵²⁰ A campaign by Raise Your Voice, a civil society organisation working on tackling sexual harassment and sexual violence, has also showed wide ranging support for this approach from civil society organisations and several MLAs.¹⁵²¹

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”.¹⁵²²

In 2021, using its powers of investigation, the Commission commenced research for the publication of the second monitoring report on relationship and sexuality education. The investigation is expected to be completed by April 2023 and will include engagement with key stakeholders involved in the provision of relationship and sexuality education.

Recommendation

The Commission recommends that the Department of Education and other relevant public authorities take prompt, concrete steps to fully implement the obligations on relationship and sexuality education set out in the NI (Executive Formation etc) Act 2019, in line with the UN CEDAW Committee’s recommendations.

1517 NI Office, ‘New Decade, New Approach’ (NIO, 2020).

1518 NI Commission for Children and Young People, ‘Statement on Children’s Rights in NI’ (NICCY, 2020).

1519 Robbie Meredith, ‘Sex education in NI schools is insufficient, says expert panel’, *BBC News*, 13 March 2021.

1520 NI Assembly Hansard, ‘Strategy to Prevent Violence Against Women and Girls – Sinead Bradley MLA’, 23 March 2021.

1521 Raise your Voice, ‘Press Release: Open letter call for comprehensive RSE’, 8 April 2021.

1522 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.

Safe access zones

In 2018, the UN CEDAW Committee recommended that the NI Executive “protect women from harassment by pro-life protesters by investigating complaints and prosecuting and punishing perpetrators”.¹⁵²³ The Abortion (No 2) 2020 Regulations do not address this recommendation.

In 2020, Informing Choices NI and Health and Social Care Trusts in NI 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 clinic within the Northern Health and Social Care Trust carrying graphic placards and being verbally abusive towards staff.¹⁵²⁴

In 2021, 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.¹⁵²⁵

In 2021, Clare Bailey (former) MLA introduced a Private Member’s Bill to the NI Assembly which aimed to “introduce safe access zones around registered pregnancy advisory bureaux and clinics, in which anti-termination activity could not take place”.¹⁵²⁶ The purpose of the Abortion Services (Safe Access Zones) Bill was 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”. The Commission provided evidence to the NI Assembly Health Committee in favour of the Bill.¹⁵²⁷ In March 2022, it was passed by the NI Assembly.

In May 2022, the Attorney General for NI, Dame Brenda King, referred the Abortion Services (Safe Access Zones) Bill to the UK Supreme Court for clarity on whether the offence created by the Bill is a proportionate interference with the rights of those who wish to express opposition to abortion services.¹⁵²⁸ In July 2022, the case was heard by the UK Supreme Court, to which the Commission provided an intervention. In November 2022, the judgment remained awaited.

1523 Ibid.

1524 NI Human Rights Commission, ‘Monitoring Report on Reproductive Healthcare Provision in NI’ (NIHRC, 2021).

1525 Ibid.

1526 NI Assembly, ‘Pro-Forma for Development of a Members’ Bill – Safe Access Zones Bill (Public Health and Well Being)’ (NI Assembly, 2020).

1527 NI Human Rights Commission, ‘Response to the Committee for Health Call for Evidence: Abortion Services (Safe Access Zones) Bill’ (NIHRC, 2021).

1528 Brian Farmer, ‘Court considers Bill’s implications for NI abortion protests’, *Belfast Telegraph*, 19 July 2022.

Recommendation

The Commission recommends that the Abortion Services (Safe Access Zones) Bill is promptly given Royal Assent as a first step in ensuring women and girls are protected from harassment when accessing family planning information and abortion services in line with the UN CEDAW Inquiry recommendations. This law should be implemented effectively to enable complaints of such harassment to be effectively investigated, and that perpetrators are held to account.

Right to Education

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”.¹⁵²⁹

Unregulated academic selection continues in NI. Its effects have not been thoroughly examined by the Department of Education NI since 2000.¹⁵³⁰

Independent research indicates that unregulated post-primary academic selection is damaging children’s mental health.¹⁵³¹ Also that it has significant social, educational and economic consequences for pupils and “magnifies inequalities” for specific disadvantaged groups of children.¹⁵³² It has been reported that academic selection “is traumatic for many children, creating damage which often endures into adulthood” and 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”.¹⁵³³

In 2020, the Association of Quality Education and Post Primary Transfer Consortium cancelled post-primary transfer tests due to uncertainty around the duration of COVID-19 lockdowns.¹⁵³⁴ In 2021, almost all grammar schools in NI did not use any academic criteria to select pupils.¹⁵³⁵ Instead, parents filled out an online form managed by the Education Authority NI stating at least four schools in order of preference. The individual Boards of Governors made the decision on which pupils were admitted based on their criteria.¹⁵³⁶

In February 2022, grammar schools formally established the Schools’ Entrance Assessment Group, which oversees a single common entrance assessment. This group also deals with concerns regarding the dual testing organisations in NI.¹⁵³⁷ It is anticipated that the new testing format will consist of two papers held on two Saturdays two weeks apart. The first tests are scheduled for November 2023.¹⁵³⁸

1529 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).

1530 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).

1531 Participation and the Practice of Rights, ‘Could Make Or Break a Child: The State of Human Rights and Academic Selection in NI’ (PPR, 2019).

1532 Ibid.

1533 Ulster University, ‘Transforming Education in NI - Academic Selection and the Transfer Test’ (IEF, 2021).

1534 Robbie Meredith, ‘Transfer tests: Education Minister rejects test suspension call’, *BBC News*, 19 May 2020.

1535 Robbie Meredith, ‘Transfer tests: More than 23,500 children find out school places’, *BBC News*, 13 June 2021.

1536 Meeting between NI Human Rights Commission and Department of Education, 20 July 2022.

1537 NI Assembly Hansard, ‘Written Question: Single Post-primary Transfer Test - Claire Sugden MLA - AQW 2295/22-27’, 15 July 2022.

1538 Ibid.

Recommendations

The Commission recommends that the Department of Education introduces a non-selective system of post-primary school admission and that the two-tier system of education in NI is abolished. This process should be undertaken through meaningful consultation with schools, parents and children.

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; [and]*
- 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.*¹⁵³⁹

Protocol Article 2 also provides specific protection against discrimination in the six Annex 1 Equality Directives, including the EU Racial Equality Directive which protects against discrimination on the grounds of race and ethnicity in the area of education.¹⁵⁴⁰ 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.¹⁵⁴¹

In 2021, the Addressing Bullying in Schools (NI) Act 2016 came into force.¹⁵⁴² The 2016 Act places statutory duties on grant-aided schools to take steps to prevent bullying and to record bullying incidents. This includes addressing the motivation, method and how of each incident. The 2016 Act does not place a requirement on schools to report incidences of bullying to the Department of Education or the Education Authority NI.

¹⁵³⁹ 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.

¹⁵⁴⁰ Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000; Directive 2000/78/EC, 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000; Directive 2004/113/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment Between Men and Women in the Access To and Supply of Goods and Services', 13 December 2004; Directive 2006/54/EC, 'EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation', 5 July 2006; Directive 2010/41/EU, 'EU Parliament and EU Council Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity', 7 July 2010.; Directive 79/7/EEC, 'EU Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security', 19 December 1978.

¹⁵⁴¹ Article 13, Ireland/NI Protocol to the UK-EU Withdrawal Agreement 2020.

¹⁵⁴² Department of Education, 'Press Release: Schools to implement Addressing Bullying Act', 21 April 2021.

There is evidence that specific groups of children in NI feel particularly affected by bullying.¹⁵⁴³ For example, as reported in 2016, of 532 lesbian, gay, bisexual, transgender, queer (or questioning) and intersex+ post-primary pupils surveyed, 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.¹⁵⁴⁴ In 2021, the Executive Office published an assessment of the current racial equality strategy, which highlighted that in 2019, 45 per cent of young people said they had witnessed racist bullying or harassment in their school.¹⁵⁴⁵

Recommendations

The Commission recommends that the Department of Education conducts a review of the operation of the Addressing Bullying in Schools (NI) Act 2016 to examine its effectiveness at addressing the impact and prevalence of bullying in NI schools with immediate steps taken to address and monitor the findings of the review.

The Commission recommends that the Department of Education and the Education Authority NI take specific steps to address bullying experienced by particular groups of children in NI, such as by lesbian, gay, bisexual, transgender, queer (or questioning) and intersex+ pupils and children from ethnic minorities. 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.

The Commission advises the Department of Education to embed consideration of Protocol Article 2 in relation to bullying of minority ethnic children in schools and to monitor any proposed changes by the EU following the ongoing consultation by the EU on the EU Racial Equality Directive, as well as relevant CJEU case law, in line with the 'keeping pace' obligations under Protocol Article 2.

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; [and]*
- b) *among children subject to permanent or temporary school exclusions, there is a disproportionate number of boys, Roma, Gypsy*

1543 Department for Communities, 'Lesbian, Gay, Bisexual, Transgender, Queer (Or Questioning), Intersex+ Strategy Expert Advisory Panel - Themes and Recommendations' (DfC, 2021).

1544 Public and Corporate Economic Consultants, 'Department of Education: Post Primary School Experiences of 16-21 Year Olds' (PACEC, 2016).

1545 NI Statistics and Research Agency, 'NI Racial Equality Indicators Report: 2014-2019' (TEO, 2021), at 18.

*and Traveller children, children of Caribbean descent, children living in poverty and children with disabilities.*¹⁵⁴⁶

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”.¹⁵⁴⁷

In 2020, the CoE’s Committee of Ministers adopted a recommendation that calls on its 47 Member States, including the UK, to include the history of Roma and/or Travellers in school curricula and teaching materials.¹⁵⁴⁸

Protocol Article 2 provides specific protection against discrimination in the six Annex 1 Equality Directives, including the EU Racial Equality Directive which protects against discrimination on the grounds of race and ethnicity in the area of education.¹⁵⁴⁹ 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.¹⁵⁵⁰ Additional EU obligations which underpin the non-diminution commitment of relevance to refugees and asylum seekers, include the EU Reception Directive,¹⁵⁵¹ the EU Qualification Directive¹⁵⁵² and the EU Procedures Directive.¹⁵⁵³

Children of migrant families

In 2021/2022, there were 18,356 children of migrant families enrolled in NI schools.¹⁵⁵⁴ This was an increase from 17,694 in 2020/2021 and equated to 5 per cent of all school enrolments.¹⁵⁵⁵ Of the 18,356 children of migrant families, 2,943 had special educational needs (17 per cent) and 5,003 were entitled to free school meals (28 per cent).¹⁵⁵⁶

In 2019, the Department of Education consulted on the effectiveness of its ‘Newcomer’ Pupils Policy, which the Commission responded to.¹⁵⁵⁷ In November 2022, the outcome of the consultation is still awaited.

In 2021, the Department of Health consulted on proposals for a new regional model of service for separated and unaccompanied children seeking asylum in NI. In its consultation response, the Commission

1546 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.

1547 A/HRC/41/54/Add.2, ‘Report of the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance: Visit to the UK of Great Britain and NI’, 27 May 2019, at para 23.

1548 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.

1549 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.

1550 Article 13, Ireland/NI Protocol to the UK-EU Withdrawal Agreement 2020.

1551 Directive 2003/9/EC, ‘EU Council Directive Laying Down Minimum Standards For the Reception of Asylum Seekers’, 27 January 2003.

1552 Directive 2004/83/EC, ‘EU 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.

1553 Directive 2005/85/EC, ‘EU Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status’, 1 December 2005.

1554 NI Statistics and Research Agency, ‘Newcomer Pupils 2021/2022’ (DoE, 2022).

1555 Ibid.

1556 Ibid.

1557 NI Human Rights Commission, ‘Response to Department of Education’s Consultation on Supporting Newcomer Children’ (NIHRC, 2019).

recommended that the Department of Health and the Department Education collaborated on initiatives to assist long-term settlement and integration of children seeking asylum in NI. In 2022, the outcome of the consultation is awaited.

In 2022, the Education Authority NI's Intercultural Education Service has been providing support to the rising numbers of school-age children seeking asylum living in contingency accommodation in NI:

*by offering a varied complement of provision including welcome clubs for primary and post primary pupils; laptops and Wi-Fi connections; English for speakers of other languages... classes; assistance with school registration, free school meals, uniform grants and transport applications; arranging visits by Educational Psychology staff; and making statutory assessment referrals where necessary.*¹⁵⁵⁸

However, civil society organisations have expressed serious concerns regarding timely access to education for people in contingency accommodation, with reports of some children being out of education for up to six months.¹⁵⁵⁹ Support from the Department of Education and the Education Authority NI is provided on an ad-hoc and short-term basis, which impacts provision, including access to language supports, uniform grants, free school meals and free school transport.¹⁵⁶⁰

Educational underachievement

In 2021, the Expert Panel on Educational Underachievement in NI published its final report finding that:

*children from... Traveller [communities]... Roma children and children [with experience of care]... 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.*¹⁵⁶¹

The Expert 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 ... children [of migrant families]".¹⁵⁶² The final report and accompanying action plan contains 47 actions spanning a number of NI Executive Departments.¹⁵⁶³ However, without agreement about funding this action plan, no progress can be made while the NI Executive is suspended.¹⁵⁶⁴

1558 NI Assembly Hansard, 'Written Question: Asylum seeking children - Kate Nicholl MLA - AQW 516/22-27', 14 June 2022.

1559 Children's Law Centre and South Tyrone Empowerment Programme, 'Joint Submission to CoE Framework Convention on the Protection of National Minorities Advisory Committee: Rights of Asylum Seeker Children Living in Contingency Accommodation (Hotel Buildings) in NI, Run by Mears Group PLC' (CLC and STEP, 2022).

1560 Ibid.

1561 Expert Panel on Educational Underachievement, 'A Fair Start: Final Report and Action Plan' (DoE, 2021).

1562 Ibid, at 65.

1563 Ibid.

1564 NI Assembly Hansard, 'Written Question: A Fair Start - Diane Dodds MLA - AQW 3017/22-27', 26 January 2022.

Recommendation

The Commission recommends that the NI Executive, as a matter of priority, expeditiously agrees and makes provision for the funding required to implement the action plan based on the Expert Panel on Educational Underachievement in NI's findings. In the interim, the Department of Education should take steps, where it is not able to address issues in their entirety in the absence of an NI Executive, to ensure these issues are not exacerbated by the delay.

The Commission recommends that the Department of Education promptly updates and publishes its proposals for the revised policy for children of migrant families, including an action plan that will guide its effective implementation. This should take a human rights-based approach in line with international human rights standards and Protocol Article 2. It should also include reconsidering the use of the term 'newcomer pupils'.

The Commission recommends that the Department of Education works with the Education Authority NI to develop and deliver teacher training that promotes cultural awareness within schools and considers ways to provide a curriculum bespoke to pupils' specific needs and experiences. This should include meaningfully consulting with parents, guardians, children and representative organisations at every stage of the process.

The Commission recommends that the Department of Education urgently reviews and adequately funds the Education Authority NI's Intercultural Education Service. The resulting process and funding should have sufficient flexibility built in to ensure all children seeking asylum in NI at any given time have timely access to education and other necessary supports, such as language classes, uniform grants, school meals and transport.

Integrated education

In 2016, the UN CRC Committee recommended that the UK Government and NI Executive "actively promote a fully integrated education system".¹⁵⁶⁵

In 2022, there are 70 grant-aided integrated schools in NI, made up of 38 grant-maintained integrated schools and 32 controlled integrated schools.¹⁵⁶⁶ In 2021/2022, there were 25,794 pupils educated in integrated education, an increase of 933 from 2020/2021.¹⁵⁶⁷

In April 2022, the Integrated Education Act 2022 received Royal Assent. A small team has been established within the Department of Education tasked with implementing the 2022 Act.¹⁵⁶⁸ The 2022 Act

¹⁵⁶⁵ 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).

¹⁵⁶⁶ Department of Education, 'Integrated Schools'. Available at: <https://www.education-ni.gov.uk/articles/integrated-schools>.

¹⁵⁶⁷ NI Statistics and Research Agency, 'Annual Enrolments At Schools and In Funded Pre-school Education in NI 2021-2022' (DoE, 2022), at para 6.2.

¹⁵⁶⁸ Meeting between NI Human Rights Commission and Department of Education, 20 July 2022.

widens the statutory definition of integrated education, places the ethos for integration on a statutory footing and requires the Department of Education to publish a strategy within six months of its enactment. However, amendments passed during the Committee Stage removed a duty on the Department of Education to actively promote integrated education system and a requirement that all new schools would be integrated. The Commission had previously welcomed these provisions.¹⁵⁶⁹

In July 2022, the then Secretary of State for NI, Brandon Lewis MP, announced a £1.9 million funding package to boost integrated education in NI.¹⁵⁷⁰ The funding will go to the Integrated Education Fund and the NI Council for Integrated Education in a bid to raise awareness of and support the transformation process for schools.

Recommendation

The Commission recommends that the Department of Education fully utilises the Integrated Education Act 2022 and promptly takes action to ensure integrated education provision in NI meets demand, including providing the necessary support for 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”.¹⁵⁷¹ Additionally, the UN ICESCR Committee recommended:

*that the... [UK] 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.*¹⁵⁷²

The Shared Education Act (NI) 2016 places an obligation on the Department of Education to promote shared education, which is educating together those of different religious belief and those who are experiencing socio-economic deprivation and those who are not.¹⁵⁷³

In 2020/2021, 66 per cent of Young Life and Times respondents either strongly agreed or agreed that they were better able to respect the views of other people since taking part in shared education.¹⁵⁷⁴

¹⁵⁶⁹ NI Human Rights Commission, ‘Submission to Committee for Education Inquiry into Integrated Education Bill’ (NIHRC, 2021).

¹⁵⁷⁰ UK Government, ‘Press Release: Secretary of State for NI boosts integrated education in NI with £1.9m funding package’, 6 July 2022.

¹⁵⁷¹ 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.

¹⁵⁷² Ibid, at para 64.

¹⁵⁷³ Section 2, Shared Education Act (NI) 2016.

¹⁵⁷⁴ NI Statistics and Research Agency, ‘Attitudes to Shared Education: Findings From the 2020/2021 Young Life and Times and Kids’ Life and Times Surveys’ (DoE, 2022).

In 2019, 48 per cent of schools in NI and 87,385 children and young people in NI (25 per cent of the NI school population) were participating in shared education.¹⁵⁷⁵ In 2021, 48 per cent of schools remained involved in shared education, but due to a suspension of face-to-face education as a result of COVID-19, only 17,476 children and young people (5 per cent of the NI school population) participated in shared education.¹⁵⁷⁶ However, reacting to COVID-19 also provided the opportunity for collaboration and to develop structures and networks through shared education partnerships.

The PEACE IV Shared Education Programme has been funded by the EU with matching funding from the NI Executive and Government of Ireland.¹⁵⁷⁷ The Department of Education has stated that the UK leaving the EU will have no impact on current funding.¹⁵⁷⁸ However, civil society organisations have expressed concerns as to how these programmes will be sustained long-term in the future.¹⁵⁷⁹ In 2022, discussions are ongoing regarding a potential extension of that funding.¹⁵⁸⁰ The Department of Education is also engaging with the Special EU Programmes Body who is responsible for managing the forthcoming PEACEPLUS cross-border collaboration programme.¹⁵⁸¹ This includes the proposed investment area of Shared Learning Together, however the programme is currently being considered by the European Commission and is not yet approved.¹⁵⁸²

In 2022, work is ongoing within the Department of Education for a mainstreaming strategy which will set out the vision for shared education.¹⁵⁸³

Recommendation

The Commission recommends that the Department of Education ensures that long-term, secure funding for shared education is guaranteed in NI. This includes ensuring 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 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

1575 Department of Education, 'Advancing Shared Education: Third Report to the NI Assembly' (DoE, 2022).

1576 Ibid.

1577 Department of Education, 'Shared Education'. Available at: <https://www.education-ni.gov.uk/articles/what-shared-education>.

1578 Department of Education, 'Shared Education: Second Report to the NI Assembly' (DoE, 2020).

1579 Roundtable discussion with civil society organisations, 23 September 2020.

1580 Meeting between NI Human Rights Commission and Department of Education, 20 July 2022.

1581 Special EU Programmes Body, 'PEACEPLUS Programme'. Available at: <https://www.seupb.eu/PEACEPLUS>.

1582 Department of Education, 'Shared Education'. Available at: <https://www.education-ni.gov.uk/articles/what-shared-education>.

1583 Meeting between NI Human Rights Commission and Department of Education, 20 July 2022.

*placement of children in specialised institutions and classes and make mainstream schools fully accessible to children with disabilities.*¹⁵⁸⁴

The Special Educational Needs Disability Act (NI) 2016 has not been fully commenced as many provisions require supporting regulations, which are not yet in place. In 2022, after a consultation process,¹⁵⁸⁵ the Department of Education continues to develop Special Educational Needs Regulations and a Code of Practice,¹⁵⁸⁶ but progress is subject to a functioning NI Executive and NI Assembly. The Department of Education has been pre-emptively providing support to schools to enable them to comply with provisions once implemented.¹⁵⁸⁷ The Department of Education's Special Educational Needs Governance Group, chaired by the Department of Education's Permanent Secretary, meets bi-monthly to ensure progress across all areas.¹⁵⁸⁸

In 2021/2022, a total of 64,486 pupils had special educational needs, compared to 67,824 in 2020/2021.¹⁵⁸⁹ Of the 64,486 pupils, 22,187 had a statement of special educational needs. In 2021/2022, there were 6,653 children enrolled in special schools in NI, compared to 6,403 in 2020/2021.¹⁵⁹⁰

In August 2022, there were 33 children with statements of special educational needs identified as requiring either a new or change of placement for September 2022 who were waiting to receive confirmation.¹⁵⁹¹

In 2019, the Education Authority NI conducted an internal audit of its special educational needs assessment processes, which found significant failings in its management and delivery of services.¹⁵⁹² For example, it found that the statementing process for 85 per cent of pupils in NI was not completed within the 26-week statutory period.

In 2020, the NI Audit Office issued a follow up report on special educational needs in NI from an earlier inquiry in 2017.¹⁵⁹³ It found that none of the ten recommendations made in 2017 had been fully implemented.¹⁵⁹⁴ The NI Audit Office advised there is an evident need for an urgent review and overhaul of the Special Educational Needs processes in place in the Education Authority NI.

In 2021, the NI Assembly Public Accounts Committee recommended that the Department of Education commission an independent review

1584 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 56(b).

1585 Department of Education, 'New SEN Framework'. Available at: <https://www.education-ni.gov.uk/articles/review-special-educational-needs-and-inclusion>.

1586 Meeting between NI Human Rights Commission and Department of Education, 20 July 2022.

1587 Meeting between NI Human Rights Commission and Department of Education, 20 July 2022.

1588 Ibid.

1589 NI Statistics and Research Agency, 'Special Educational Needs 2021/2022' (DoE, 2022).

1590 Ibid.

1591 NI Assembly Hansard, 'Written Question: Special Educational Needs - Connie Egan MLA - AQW 2731/22-27', 26 August 2022.

1592 NI Assembly Hansard, 'Committee for Education: Special Educational Needs Assessment and Statementing Audit - Education Authority NI', 4 March 2020.

1593 NI Audit Office, 'Impact Review of Special Educational Needs' (NIAO, 2020).

1594 Ibid.

to assess the effectiveness of the Education Authority NI's special educational needs service provision and processes.¹⁵⁹⁵

In April 2022, the Department of Education confirmed the appointment of Ipsos to take forward an independent review of special education needs.¹⁵⁹⁶ The independent review will examine why NI has higher rates of special educational needs than other jurisdictions. It will also consider effective funding models and benchmark good practice and international standards.¹⁵⁹⁷ The Department of Education has established a Steering Group to oversee the project, which is expected to be completed by the end of 2022.

Recommendation

The Commission recommends that the Department of Education, supported by the NI Executive and NI Assembly, ensures that the revised Special Educational Needs Regulations and Code of Practice are progressed as a matter of priority.

The Commission recommends that the Department of Education, and the Education Authority NI, 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 the Department of Education ensures 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 recommended that the UK Government and NI Executive:

- a) *abolish all methods of restraint against children for disciplinary purposes in all institutional settings, both residential and non-residential, and ban the use of any technique designed to inflict pain on children;*
- b) *ensure that restraint is used against children exclusively to prevent harm to the child or others and only as a last resort; [and]*
- c) *systematically and regularly collect and publish disaggregated data on the use of restraint and other restrictive interventions on children in order to monitor the appropriateness of discipline and behaviour*

1595 NI Assembly Public Accounts Committee, 'Report on Impact Review of Special Educational Needs' (NIA, 2021).

1596 Department of Education, 'Independent Review of Special Education Needs'. Available at: <https://www.education-ni.gov.uk/articles/independent-review-special-education-needs>.

1597 Meeting between NI Human Rights Commission and Department of Education, 20 July 2022.

*management for children in all settings, including in education, custody, mental health, welfare and immigration settings.*¹⁵⁹⁸

A school staff member is permitted under section 4 of the Education (NI) Order 1998 to restrain any pupil at the school where such force is “reasonable in the circumstances”.¹⁵⁹⁹ The accompanying non-statutory guidance has not been updated since 1999.¹⁶⁰⁰ It 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.¹⁶⁰¹ 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,¹⁶⁰² with lack of training on the use of restraint for educational professionals being raised as a contributor.¹⁶⁰³

In 2021, the NI Public Services Ombudsman found recurring themes from maladministration investigations into the use of such practices in schools in NI, including issues with record-keeping, inadequate policies and procedures, and a lack of appropriate complaint investigations by Board of Governors.¹⁶⁰⁴ The NI Commissioner for Children and Young People, following its review of use of restraint, concluded that the current policy, guidance, and legislative frameworks around the use of restrictive practice in educational settings are not fit for purpose and need immediate reform.¹⁶⁰⁵

In light of the urgency of this issue, the Department of Education published interim guidance which reminded that reasonable force and restraint should only be used as a measure of last resort.¹⁶⁰⁶ It noted that all instances should be recorded, parents/carers should be informed and follow up support provided to the pupils and staff involved.

In 2022, the Department of Education published its review of the use of restraint and seclusion practices in educational settings.¹⁶⁰⁷ The final report made six recommendations for change to guidance and policy, to ensure the protection of children and young people from harm and to promote compliance with the UN CRC.¹⁶⁰⁸ The then Minister of Education, Michelle McIlveen MLA, accepted all recommendations and work has commenced

1598 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 40(b)-40(d).

1599 Section 4(2), Education (NI) Order 1998.

1600 Department of Education, ‘Pastoral Care: Guidance on the Use of Reasonable Force to Restrain or Control Pupils’ (DoE, 1999).

1601 Ibid.

1602 British Association of Social Workers, ‘Policy Statement: Restraint and Seclusion of Children and Young People in Schools and Educational Facilities’ (BASWNI, 2019).

1603 Ibid.

1604 NI Public Services Ombudsman, ‘Overview Report: The Use of Restrictive Practices in NI Schools’ (NIPSO, 2021).

1605 NI Commissioner for Children and Young People, ‘Neither Seen nor Heard: Rights Based Review on the Use of Restraint and Seclusion in Educational Settings’ (NICCY, 2021).

1606 Department of Education, ‘DE Circular 2021/13 - Interim Guidance on the Use of Restraint and Seclusion in Educational Settings’ (DoE, 2021).

1607 Department of Education, ‘Review of the Use of Restraint and Seclusion in Educational Settings in NI’ (DoE, 2022).

1608 Ibid.

on developing updated statutory guidance. This is due to be finalised by 2023/2024 academic year, but is subject to a functioning NI Executive.¹⁶⁰⁹

Recommendations

The Commission recommends that the Department of Education is supported by the NI Executive to promptly provide, implement, and monitor 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, supported by the NI Executive and NI Assembly, repeals Section 4(1) (c) of the Education (NI) Order 1998 and takes effective steps to ensure that restrictive interventions are not used to maintain good order and discipline. The relevant guidance should also be updated to reflect any change.

The Commission recommends that the Department of Education introduces 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. Schools should also be required 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, including understanding that the use of restraint should be a last resort and the steps to take to ensure this is the case. For example, training should be provided on alternative interventions to restrictive practices, particularly pertaining to children and young people with special educational needs.

Right to Participate in the Cultural Life of the Community

Minority culture and languages

In 2017, the CoE Advisory Committee for the Framework Convention for the Protection of National Minorities 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”.¹⁶¹⁰ The CoE Advisory Committee also advised the UK Government to “engage in a dialogue to create the political consensus needed for adopting legislation”.¹⁶¹¹ In April 2022, the CoE Advisory Committee for the Framework Convention for the Protection of National Minorities visited the UK, including NI, for the purposes of its fifth cycle monitoring of the UK. The CoE Advisory Committee’s report is awaited. In 2021, the CoE 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 NI. It cannot but reiterate its previous recommendations to this effect”.¹⁶¹² In respect of Ulster-Scots, the CoE Committee of Experts recommended the UK Government:

*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.*¹⁶¹³

Designation

A commitment was made to recognise Ulster Scots as a national minority under the CoE Framework Convention for the Protection of National Minorities.¹⁶¹⁴ Without designation, Ulster Scots can enjoy protection of the Article 6 of the Framework Convention, which focuses on tolerance and non-discrimination. However, being recognised as a national minority affords Ulster Scots use and protection of all the rights contained within the CoE Framework Convention. On 25 May 2022, the then Secretary of State for NI, Brandon Lewis MP, announced that the UK Government “is recognising officially Ulster Scots as a national minority under the CoE Framework Convention for National Minorities”.¹⁶¹⁵

¹⁶¹⁰ 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.

¹⁶¹¹ Ibid, at 49.

¹⁶¹² MIN-LANG(2021)3, ‘Evaluation by the CoE Committee of Experts of the Implementation of the Recommendations for Immediate Action Contained in the Committee of Experts’ Fifth Evaluation Report on the UK and Isle of Man’ (ECRML, 2021), at para 28.

¹⁶¹³ CM/RecChL(2020)1, ‘Recommendation of the CoE Committee of Ministers to Member States on the Application of the European Charter for Regional or Minority Languages by the UK’, 1 July 2020, at para 59.

¹⁶¹⁴ NI Office, ‘New Decade, New Approach’ (NIO, 2020), at 49.

¹⁶¹⁵ House of Commons, ‘Daily Report - Recognition of Ulster Scots as a National Minority and Funding for An Ciste Infheistíochta Gaeilge, the Irish Language Investment Fund’, 25 May 2022.

Legislation

In 2020, the First Minister and Deputy First Minister were committed to “sponsor and oversee a new framework both recognising and celebrating NI’s diversity of identities and culture, and accommodating cultural difference”.¹⁶¹⁶ 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.¹⁶¹⁷ The framework was also to include recognition of the status of the Irish language and Ulster Scots language in NI.¹⁶¹⁸ The three Bills that were intended to provide for this legislative framework were published with the New Decade, New Approach Agreement 2020. In 2020, the NI Act 1998 (Amendment No 1) Bill, NI Act 1998 (Amendment No 2) Bill, and NI Act (Amendment No 3) Bill were to be presented to the NI Assembly, but this did not happen.¹⁶¹⁹

In May 2022, after a commitment in the Queen’s Speech, the Identity and Language (NI) Bill was introduced to the House of Lords. This Bill brought together and refined the provisions set out in the legislation attached to the New Decade, New Approach Agreement 2020. In June 2022, the Bill was at Committee Stage in the House of Lords.¹⁶²⁰ The Commission provided advice on both iterations of the Bill.¹⁶²¹

In November 2022, the Identity and Language (NI) Act 2022 was awaiting Royal Assent.

Strategies

In 2017, the NI High Court held that “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”.¹⁶²² In 2020, a commitment was made to publish an Irish Language Strategy and an Ulster Scots Strategy.¹⁶²³

In 2021, following several delays, a Co-Design Group for the Irish Language Strategy and a Co-Design Group for the Ulster Scots Strategy were established by the Department for Communities. The two groups are currently considering recommendations proposed by their respective expert panels for the purposes of advising the Minister for Communities. The Commission is a member of both groups. In May 2022, the then

¹⁶¹⁶ NI Office, ‘New Decade, New Approach’ (NIO, 2020), at 16.

¹⁶¹⁷ Ibid.

¹⁶¹⁸ Ibid.

¹⁶¹⁹ Ibid, at 36.

¹⁶²⁰ UK Parliament, ‘Identity and Language (NI) Bill - Government Bill’. Available at: <https://bills.parliament.uk/bills/3168>

¹⁶²¹ NI Human Rights Commission, ‘Office for Identity and Cultural Expression Provisions of the 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); NI Human Rights Commission, ‘Briefing on the Identity and Language (NI) Bill’ (NIHRC, 2022).

¹⁶²² *In the Matter of an Application by Conradh na Gaeilge* [2017] NIQB 27.

¹⁶²³ NI Office, ‘New Decade, New Approach’ (NIO, 2020), at 16.

Secretary of State for NI, Brandon Lewis MP, also announced “£4 million in funding for An Ciste Infheistíochta Gaeilge, the Irish Investment Fund”.¹⁶²⁴

Recommendations

The Commission welcomes the UK Government’s designation of Ulster Scots as a national minority. The Commission recommends that the Department for Communities, supported by the NI Executive, ensures that the necessary steps are promptly taken to ensure that the additional rights that this affords Ulster Scots are fulfilled, respected and protected.

The Commission recommends that the Department for Communities, supported by the NI Executive and NI Assembly, ensures that human rights compliant legislation to protect, promote and progress Irish language in NI is promptly enacted. Additionally, that the Department for Communities promptly introduces and implements an Irish Language Strategy. These initiatives should be developed through meaningful engagement with the Irish Language Commissioner, Irish language speakers and their representative organisations.

The Commission recommends that the Department for Communities, supported by the NI Executive and NI Assembly, ensures human rights compliant legislation to protect and promote Ulster Scots is promptly enacted. Additionally, that the Department for Communities promptly introduces and implements an Ulster Scots Strategy. These initiatives should be developed through engagement with the Ulster Scots Commissioner, individuals that identify as Ulster Scots and their representative organisations.

¹⁶²⁴ House of Commons, ‘Press Release: Daily Report - Recognition of Ulster Scots as a National Minority and Funding for An Ciste Infheistíochta Gaeilge, the Irish Language Investment Fund’, 25 May 2022.



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