

UK Government commitment to “no diminution of rights, safeguards and equality of opportunity” in Northern Ireland: What does it mean and how will it be implemented?

I. Introduction

1. The UK Government’s approach to withdrawal from the European Union (EU) has been underpinned by our steadfast commitment to upholding the Belfast (‘Good Friday’) Agreement (“the Agreement”) in all its parts. This includes its provisions on citizenship and identity. We acknowledge the importance of the rights and equality protections set out in the Agreement, which recognise the unique circumstances of Northern Ireland’s history and the need to put rights and equality central to creating a peaceful and shared future in Northern Ireland.
2. Specific provisions in relation to rights and equality in Northern Ireland appear in the chapter of the Agreement entitled “Rights, Safeguards and Equality of Opportunity”.¹ In this chapter, all participants affirmed their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community, as well as to a specific series of rights, including the right to equal opportunity.
3. The UK is committed to ensuring that rights and equality protections continue to be upheld in Northern Ireland. The key rights and equality provisions in the Agreement are supported by the European Convention on Human Rights (ECHR), which has been incorporated into Northern Ireland law pursuant to the commitment in the Agreement to do so. The Government is committed to the ECHR and to protecting and championing human rights. However, the Government also acknowledges that, in Northern Ireland, 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 Agreement.
4. As such, in the December 2017 UK-EU Joint Report,² the UK committed “to ensuring that no diminution of rights is caused by its departure from the European Union, including in the area of protection against forms of discrimination enshrined in EU law”. It also committed to “facilitating the related work of the institutions and bodies, established by the 1998 Agreement, in upholding human rights and equality standards”.
5. This commitment is now reflected in Article 2 (“Rights of individuals”) of the Ireland/Northern Ireland Protocol to the Withdrawal Agreement. It is therefore binding on the UK Government and Parliament, the Northern Ireland Executive and the Assembly as a matter of international law. Our international obligations under the

¹ This chapter of the Agreement begins with the heading “Human Rights” and ends with the paragraph preceding the heading “Decommissioning”.

² Joint report on progress during phase 1 of negotiations under Article 50 TEU on the UK’s orderly withdrawal from the EU, December 2017:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/665869/Joint_report_on_progress_during_phase_1_of_negotiations_under_Article_50_TEU_on_the_United_Kingdom_s_orderly_withdrawal_from_the_European_Union.pdf

Withdrawal Agreement became UK domestic law when Parliament passed the EU (Withdrawal Agreement) Act 2020 in January 2020.

II. What does “no diminution of rights, safeguards, and equality of opportunity” mean?

6. The Protocol commitment means that the UK Government must ensure that the protections currently in place in Northern Ireland for the rights, safeguards and equality of opportunity provisions set out in the relevant chapter of the Agreement are not diminished as a result of the UK leaving the EU. We do not envisage any circumstances whatsoever in which any UK Government or Parliament would contemplate any regression in the rights set out in that chapter, but the commitment nonetheless provides a legally binding safeguard. It means that, in the extremely unlikely event that such a diminution occurs, the UK Government will be legally obliged to ensure that holders of the relevant rights are able to bring challenges before the domestic courts and, should their challenges be upheld, that appropriate remedies are available (see para. 29 below for more detail).
7. As well as preventing any reduction of the relevant rights, safeguards and equality of opportunity protections that are currently in place, the UK Government’s commitment also has a future-facing element. This means that any relevant new protections implemented in domestic law in Northern Ireland between now and the end of the transition period will also fall within the scope of the ‘no diminution’ commitment. In addition, in the event that certain provisions of EU law setting out minimum standards of protection from discrimination - those listed in Annex 1 to the Protocol - are updated or replaced by the EU, relevant domestic law in Northern Ireland will be amended, as necessary, to reflect any substantive enhancements to those protections (see paras. 11 and 12 below for more detail). Enforcement will be a matter for UK courts, and there will not be any direct application in Northern Ireland of the EU law in Annex 1. And, lastly, future developments in best practices in the area of human rights and equalities in the rest of the UK, the EU and the rest of the world will be taken into consideration as the commitment is implemented.

III. Who is covered by the commitment?

8. The commitment to no diminution of rights, safeguards and equality of opportunity applies to Northern Ireland. This means that everyone who is subject to Northern Ireland law - irrespective of whether such law has been passed by the Northern Ireland legislature or Westminster - will be covered.

IV. Which rights are in scope and what amounts to a breach?

9. The commitment in the Protocol applies to the rights, safeguards and equality of opportunity provisions set out in the chapter of the Agreement of the same name. The relevant provisions include, but may not be limited to:

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

10. To make out a case that a diminution of rights, safeguards or equality of opportunity has occurred, it will be necessary to evidence (i) that the right, safeguard or equality of opportunity provision or protection is covered by the relevant chapter of the Agreement; (ii) that it was enshrined or given effect to in the domestic legal order in Northern Ireland on or before the last day of the transition period; and (iii) that the alleged diminution occurred as a result of the UK's withdrawal from the EU, or, in other words, that the alleged diminution would not have occurred had the UK remained in the EU.

11. Some of the rights listed above are underpinned by a series of protections against discrimination enshrined in EU law. Those protections, which have all been transposed into the domestic legal order in Northern Ireland, are listed in Annex 1 to the Protocol. The pieces of legislation included in Annex 1 are all designed to tackle discrimination on grounds of protected characteristics (gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation) and to promote equal treatment.³

12. The directives in Annex 1 have been specifically referenced because of the important supporting framework that they provide for the anti-discrimination commitments set out in the relevant chapter of the Agreement. These instruments set minimum standards of protection, which the UK, including Northern Ireland, routinely exceeds. But, to provide a reassurance that, at the very least, the minimum standards of rights

³ The directives included are as follows: Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC; Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

protections required by the listed directives will continue to be relevant in Northern Ireland after the end of the transition period, we have committed to ensuring that, if the EU decides to amend or replace the substantive rights in those directives to improve the minimum levels of protection available, the corresponding substantive rights protections in Northern Ireland will also develop to take account of this. This will ensure that Northern Ireland will not fall behind minimum European standards in anti-discrimination law.

13. It should be noted that the directives in Annex 1, which have a future-facing dimension, represent only a subset of the protections in scope of the wider 'no diminution' commitment. There are other pieces of EU law that are relevant to the "Rights, Safeguards and Equality of Opportunity" chapter of the Agreement which have been implemented in retained EU law - via the EU (Withdrawal) Act 2018 - or domestic law in Northern Ireland. These include, but are not limited to, the Victims' Directive,⁴ the Parental Leave Directive⁵ and the Pregnant Workers' Directive,⁶ as well as specific measures aimed at protecting the rights of persons with disabilities. We do not envisage any circumstances in which those rights would be rolled back. However, provided that the rights in question are relevant to the aforementioned chapter of the Agreement, they are in scope of the UK Government's commitment that there will be no diminution of rights as a result of the UK leaving the EU.
14. The Charter of Fundamental Rights does not form part of domestic law anywhere in the UK, including Northern Ireland, now that we have left the EU. The Charter did not create any new rights, but was instead intended to catalogue the rights that already existed in EU law. Those rights, codified by the Charter, came from a wide variety of sources, including the treaties, EU legislation and case law, that recognised fundamental rights as general principles. We have brought EU underlying rights and principles into our domestic legal regime by the EU (Withdrawal) Act 2018. As a result, where the rights and principles underpinning the Charter exist elsewhere in directly applicable EU law, or EU law which has been implemented in domestic law, or retained EU case law, that law will continue to be operational. In addition, the Act requires our domestic courts to interpret retained EU law that has not been modified in accordance with the general principles of EU law as those principles existed immediately before the end of the transition period.
15. In the context of the 'no diminution' commitment, this means that, to the extent that a substantive Charter right, as captured in retained EU or domestic law, is relevant to a right in the "Rights, Safeguards and Equality of Opportunity" chapter of the Agreement, that right cannot be diminished as a result of the UK leaving the EU.

⁴ Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

⁵ Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC.

⁶ Directive 92/85/EEC of 19 October 1992 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 (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).

16. Neither the ‘no diminution’ commitment nor the listing of directives in Annex 1 will lead to the direct application of EU law in Northern Ireland. There will be no direct recourse to the EU Court of Justice (CJEU) in enforcing the commitment, and neither the European Commission nor any other body of the EU institutions will have a direct role in supervising the commitment. When a UK court is considering the interpretation of any of the directives listed in Annex 1, this will be done in conformity with any relevant case law of the CJEU. When considering matters relating to the ‘no diminution’ commitment, the UK courts will, under the EU (Withdrawal) Act 2018, be free to have regard to judgments of the CJEU made after the end of the transition period, where relevant. In addition, where a domestic court is interpreting retained EU law there are enhanced provisions for the role of CJEU jurisprudence. In essence, if the retained EU law has remained on the domestic statute books unmodified since the end of the transition period, the court must interpret the retained EU law in accordance with relevant judgments of the CJEU made before the end of the transition period. If the retained EU law has been modified, it may also be interpreted by the court in line with CJEU jurisprudence from before the end of the transition period if doing so is consistent with the intent of the modifications.

V. How will the UK implement its commitment?

A “dedicated mechanism”

17. The UK Government will implement its commitment to no diminution of rights, safeguards and equality of opportunity by establishing a “dedicated mechanism”. This mechanism is not a new structure in itself; rather, it is a framework for ensuring compliance with the commitment, comprising dedicated monitoring, advising, reporting and enforcement activities and drawing on the existing human rights and equality bodies established under the Agreement, namely the Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission for Northern Ireland (ECNI), who will oversee the status of the rights, safeguards and equality of opportunity protections covered by the relevant chapter of the Agreement.

18. The EU (Withdrawal Agreement) Act 2020 conferred new statutory functions, and related powers, on NIHRC and ECNI to monitor, supervise, advise and report on and enforce the ‘no diminution’ commitment. These powers build on the existing statutory functions of NIHRC and ECNI in a way that complements, but does not in any way hinder, the ongoing exercise of those functions as envisioned by the Agreement and their statutory independence as two distinct rights and equalities bodies.

19. In addition, as provided for in the Agreement, the Joint Committee of NIHRC and the Irish Human Rights and Equality Commission (IHREC) acts as a forum for the consideration of human rights issues on the island of Ireland. In the context of the Article 2 commitment, ECNI, NIHRC and IHREC will work together to provide oversight of, and reporting on, rights and equalities issues falling within the scope of the commitment that have an island of Ireland dimension. This arrangement, however, does not alter the constitutional status of the Joint Committee as set out in

the Agreement. This work of the Joint Committee is consistent with its core function as set out in the Agreement, and any activities undertaken and reports produced jointly by the three bodies will respect existing reporting structures and statutory roles and responsibilities.

20. NIHRC and ECNI have welcomed the Article 2 commitment as an important step in ensuring the ongoing protection and promotion of rights and equalities in Northern Ireland and have agreed to play a role in the dedicated mechanism. Following consultation with NIHRC and ECNI, the Government has confirmed that it will provide each Commission with additional resources, commensurate with the needs they have identified, for their expanded functions as part of the dedicated mechanism.

Functions of the Commissions in the dedicated mechanism

21. NIHRC and ECNI already have complementary functions in terms of the protection and promotion of human rights and equalities in Northern Ireland. As part of the dedicated mechanism, NIHRC and ECNI will have separate statutory functions but can continue to work together, as they deem appropriate, to monitor and supervise the rights and equality landscape in Northern Ireland to ensure that there is no diminution of relevant rights as a result of the UK leaving the EU.

22. More specifically, and as set out in Schedule 3 of the EU (Withdrawal Agreement) Act 2020, each of the bodies will have the following statutory functions in relation to the Article 2 commitment:

- Monitoring the implementation of Article 2(1);
- Reporting on implementation to the Secretary of State for Northern Ireland and the Executive Office in Northern Ireland, upon request or on other occasions that the Commissions think appropriate;
- Advising the Secretary of State and the Executive Committee of the Northern Ireland Assembly of legislative and other measures which ought to be taken to implement the commitment;
- Advising the Northern Ireland Assembly (or a committee of the Assembly) whether a Bill is compatible with Article 2(1);
- Promoting understanding and awareness of the importance of Article 2(1);
- Powers to bring, or intervene in, legal proceedings in respect of an alleged breach (or potential future breach) of Article 2(1);
- Powers to assist persons in relevant legal proceedings.

23. In addition and, as indicated in paragraph 19 above, in the context of the Article 2 commitment ECNI, NIHRC and IHREC will work together to provide oversight of, and reporting on, rights and equalities issues falling within the scope of the commitment that have an island of Ireland dimension. It is the UK Government's view that the Agreement does not require North-South equivalence of rights and equality protections; nevertheless the UK Government recognises that there is a role for the dedicated mechanism in considering best practice in the area of human rights and

equalities issues insofar as they have an island of Ireland dimension. This is fully consistent with the provisions of the Agreement.

24. Consistent with current reporting and accountability structures, NIHRC and ECNI will provide regular reports to the UK Government and the Northern Ireland Executive (with corresponding obligations on the UK Government and Northern Ireland Executive to lay the reports before Parliament and the Assembly, respectively). This will allow any changes to the rights and equalities landscape to be identified and, where appropriate, further action taken. Ad hoc reports may also be submitted if an urgent issue emerges. Similarly, NIHRC, ECNI and IHREC will be able to report separately to the Governments of the UK and Ireland, as appropriate, on any issues with an island of Ireland rights and equalities dimension that they have jointly addressed in the context of monitoring the 'no diminution' commitment.
25. In order to ensure that any issues identified in the bodies' reports are adequately addressed, there will be an obligation on the UK Government and the Executive, where the Commissions request a response, to respond to any recommendations contained in the reports, outlining what action the Government or Executive has taken or proposes to take to address the recommendations.
26. In addition, NIHRC, ECNI and the Joint Committee of NIHRC and IHREC will also be able to bring any matter of relevance to the attention of the Specialised Committee established under Article 14(c) of the Protocol.

Enforceability of the rights covered by the commitment

27. By virtue of being included in the UK-EU Withdrawal Agreement, the 'no diminution' commitment is binding on the UK Government and Parliament, as well as on the Northern Ireland Executive and Assembly, as a matter of international law.
28. To ensure that the 'no diminution' commitment is maintained, the UK Government has amended the Northern Ireland Act 1998 so that the Northern Ireland Assembly will be acting outside of its legislative competence, or the Northern Ireland Executive acting outside its powers, if they act in breach of Article 2(1).
29. Recourse to effective remedies for individuals will include the existing routes to enforce substantive human rights and equality protections - including, going forward, as they relate to retained EU law - through the UK domestic courts (there will be no recourse to the CJEU). In addition, the amended provisions of the Northern Ireland Act 1998 will give rise to a route of judicial review for individuals to challenge the compatibility of Northern Ireland Executive or Assembly actions or legislation with the Article 2(1) commitment. Given that, under Article 4 of the Withdrawal Agreement, incorporated into domestic law through the EU (Withdrawal Agreement) Act 2020, all provisions in the Withdrawal Agreement and the provisions of Union law that it makes applicable in the UK have the same legal effect in the UK as in the EU

and its Member States, individuals will also be able to bring challenges to the Article 2(1) commitment directly before the domestic courts.

Resourcing of the dedicated mechanism

30. The UK Government has consistently acknowledged that, if NIHRC and ECNI are to properly carry out their expanded functions, they will need additional resources. Following consultation with NIHRC and ECNI, the Government has confirmed that it will provide each Commission with additional resources, commensurate with the needs they have identified, for their expanded functions as part of the dedicated mechanism. The additional resources will ensure proper scrutiny of the Government's implementation of the Article 2 commitment and cover, among other things, new policy and research functions and communications and education activities.

VI. Further information

31. This document has been produced by the UK Government and is designed to give an initial overview of what our commitment to "no diminution of rights, safeguards and equality of opportunity" means, how it can apply for individuals, and how it will be operationalised through the dedicated mechanism structure. It is for information only. Further materials will be published in due course.