



# NIHRC / ECNI Briefing on the Retained EU Law (Revocation and Reform) Bill

16 January 2023

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## Summary of Advice & Recommendations

- 3.2 The Commissions recommend that the Bill be amended to include a Clause confirming that the provisions of the Bill are without prejudice to section 7A of the EU Withdrawal Act 2018.
- 3.4 The Commissions recommend that the Minister establish a comprehensive notification process in terms of law that is going to be sunsetted, extended or preserved.
- 3.9 The Commissions advise that failure to preserve and/or restate all relevant EU-derived subordinate legislation in NI within scope of Protocol Article 2, within set deadlines would result in a breach of Protocol.
- 3.11 The Commission advise that failure to identify and preserve or re-enact relevant Retained Direct EU Legislation within scope of Protocol Article 2, by the end of 2023 – or by 23 June 2026, if extended – will result in breach of Protocol Article 2.
- 3.14 The Commissions recommend that Clause 1(5) be amended to exclude all legislation insofar as it is effective in Northern Ireland and relates to human rights and/or equality, including all legislation that falls within the scope of Protocol Article 2. If this is not practicable, we recommend that that Clause 1(5) be amended to exclude all legislation insofar as it is effective in Northern Ireland.
- 3.18 The Commissions advise that if the Bill is passed as drafted, a breach of international law, in relation to Protocol Article 2, could arise from inaction on the part of devolved authorities or Ministers of the Crown, which may not come to the attention of Parliament in time to be remedied via primary legislation.
- 3.19 The Commissions recommend that, if Clause 1(5) is not amended to exclude all human rights and equality legislation insofar as it is effective in Northern Ireland, the sunset date in Clause 1(1) should be extended to provide adequate time for consultation and appropriate parliamentary scrutiny, in line with constitutional convention.

- 3.20 The Commissions recommend that amendment or repeal of Retained EU Law, affecting human rights and/or equality protections in Northern Ireland, should be progressed on the basis of continuing adherence to the UK constitutional convention of providing for policy change via the primary legislative process, with technical and operational detail addressed in subordinate legislation. This applies to legislation that emanates from either Westminster or from the NI Assembly.
- 3.22 The Commissions recommend that the Bill is amended to remove Clause 3, or that Clause 3 is amended to retain Section 4 of the EU (Withdrawal) Act 2018 to the extent that it preserves retained EU law which gives effect to human rights and equality protections in NI law, including all legislation that falls within the scope of Protocol Article 2.
- 3.26 The Commissions recommend that, for the avoidance of doubt, Clauses 4 and 5 be amended to insert a clarification into the amended Section 5 of the EU (Withdrawal) Act 2018, that it is subject to the obligations arising under Section 7A of that Act.
- 3.28 The Commissions recommend that compliance with Protocol Article 2 be considered in advance of amendment, repeal or revocation of assimilated law and fully explained in associated Explanatory Memoranda/Notes or Human Rights Impact Assessments.
- 3.33 The Commissions recommend that the Minister provide a written assurance that it remains the Government's view that CJEU case-law regarding Protocol Article 2 should be adhered to by domestic courts on an ongoing basis, in line with Protocol Article 13, and that this obligation will not be diminished by the Bill.
- 3.36 The Commissions recommend that, unless Clause 1 is amended to remove all legislation effective in NI from automatic repeal/revocation, the deadline for restating secondary REUL be extended.
- 3.41 The Commissions recommend that Clause 15 be amended to curtail powers to revoke or replace secondary retained EU Law, affecting human rights and/or equality protections in Northern Ireland, to ensure

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.

- 3.42 The Commissions recommend that Ministers engage with stakeholders including the Commissions and human rights and equality organisations before using delegated powers to replace REUL.
- 3.44 The Commissions recommend that Clause 16 be amended to ensure that the delegated power to modify legislation may be used for the purposes of dealing with minor and technical matters only.
- 4.2 The Commissions recommend that compliance with Protocol Article 2 be considered from the earliest stages in the development of policy and legislation.
- 4.3 The Commissions recommend 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.
- 4.4 The Commissions recommend that the Committee ask the Secretary of State to set out, in detail, what consideration was given to compliance with Protocol Article 2 in the development of the Bill and what plans are in place to avoid breach of the commitment.

## 1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (NIHRC) is a national human rights institution accredited with ‘A’ status by the United Nations. Pursuant to section 69(1) of the Northern Ireland Act 1998, the Commission reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI).
- 1.2 The Equality Commission for Northern Ireland (ECNI) is an independent public body established under the Northern Ireland Act 1998. Its powers and duties derive from a number of equality statutes providing protection against discrimination on the grounds of age, disability, race, religion and political opinion, sex and sexual orientation. It also oversees the statutory duties on public authorities on the promotion of equality of opportunity and good relations under section 75 of the Northern Ireland Act 1998.
- 1.3 NIHRC and ECNI, pursuant to section 78A(1) and 78B(1) of the Northern Ireland Act 1998 respectively, monitor the implementation of Article 2(1) of the Protocol on Ireland/Northern Ireland (‘Protocol Article 2’) to the EU Withdrawal Agreement. Protocol Article 2 is a UK Government commitment to ensure no diminution of certain rights, safeguards and equality of opportunity protections, as a result of the UK’s withdrawal from the EU. The Commissions offer the following advice in accordance with these functions.
- 1.4 The Commissions have welcomed assurances by the UK Government of its commitment to Protocol Article 2 and its acknowledgement that the commitment is ‘non-controversial’.<sup>1</sup> However, the Commissions have identified a number of concerns about the impact of the Retained EU Law (Revocation and Reform) Bill on the operation of Protocol Article 2 and believe that, without amendment, certain provisions create a risk of breach of this international legal commitment. As detailed below, in providing for automatic repeal/revocation of a large volume of legislation within a short period, there is a risk that human rights and equality

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<sup>1</sup> UK Government, ‘NI Protocol: the way forward’, (UK Gov, 2021), at para 37. See also Letter from Conor Burns MP, Minister of State in the NI Office to Lord Jay of Ewelme, Chair of the House of Lords EU Affairs Committee Sub Committee on the Ireland/ Northern Ireland Protocol, 24 November 2021.

legislation relevant to Protocol Article 2 would not be preserved, restated or re-enacted in time. Further, the delegated powers in the Bill present a risk of policy change without due scrutiny.

- 1.5 The Commissions are also concerned at the speed of this Bill's passage through Parliament and the rapidly approaching sunseting deadline of the end of 2023.<sup>2</sup> We believe this could lead to a lack of consultation on policy changes with equality and human rights stakeholders in NI, as well as with the two Commissions as the dedicated mechanism. This concern is heightened by the lack of reference to consideration of Protocol Article 2 in the Explanatory Memo. In fact, the Explanatory Notes to the Bill do not refer to any consideration of compliance with Protocol Article 2. It is important that the Bill does not result in changes that would weaken Protocol Article 2 or its associated rights, safeguards and oversight mechanisms.
- 1.6 In addition, it should be noted that, in taking forward any legislative policy changes, NI Departments, and other relevant designated public bodies, must comply with their public sector equality duties under Section 75 of the Northern Ireland Act 1998 and their public sector Disability Duties and requirements set out in their respective equality schemes.<sup>3</sup> This includes requirements relating to conducting equality screenings and equality impact assessments (EQIAs). Where this must be done before the sunseting deadline, it is difficult to see how the relevant public authorities could comply with these statutory duties in light of timelines proposed by the Bill.

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<sup>2</sup> Under Clause 1(1), all EU-derived subordinate legislation and all retained direct EU legislation is revoked at the end of 2023 unless preserved under Clause 1(2) or unless the date is extended under Clause 2.

<sup>3</sup> Duties under Section 75 of the NI Act 1998. For further information on the disability duties see [ECNI - Disability Duties for Public Authorities - Equality Commission NI \(equalityni.org\)](https://www.equalityni.org/ECNI-Disability-Duties-for-Public-Authorities). The Disability Discrimination Act 1995 Section 49A requires designated public authorities to have due regard to the need to promote positive attitudes towards disabled persons, and to the need to encourage participation by disabled persons in public life.

## 2.0 Article 2 of the Ireland/NI Protocol

2.1 Protocol Article 2 derives from recognition by the UK and EU that equality and human rights were central to the Belfast (Good Friday) Agreement and should be protected in the context of the UK's withdrawal from the EU. It is an important safeguard providing a degree of certainty and stability in the context of wider change.

2.2 Protocol Article 2 states:

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

2.2 The commitment means that the UK Government must ensure there is no diminution of rights, safeguards and equality of opportunity, as set out in the relevant chapter of the Belfast (Good Friday) Agreement 1998, resulting from the UK's withdrawal from the EU.<sup>4</sup>

2.3 Protocol Article 2 includes a commitment to ‘keep pace’ with EU law developments falling within the six EU Equality Directives listed in Annex 1 to the Protocol.<sup>5</sup> That means that if the minimum standards in the Annex 1 Directives are updated or replaced, the UK Government must

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<sup>4</sup> Belfast (Good Friday) Agreement 1998.

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



ensure that domestic legislation in Northern Ireland reflects any substantive enhancements in relevant protections.<sup>6</sup>

2.4 In addition to the six Directives, there is other relevant EU law that underpins rights set out in the relevant chapter of the Belfast (Good Friday) Agreement. The UK Government has acknowledged that these include, but are not limited to, the Victims' Directive;<sup>7</sup> the Parental Leave Directive;<sup>8</sup> and the Pregnant Workers' Directive.<sup>9</sup> The UK Government has committed to ensuring that there will be no diminution of protections as were contained in relevant EU law on 31 December 2020.<sup>10</sup> The Commissions consider that there are additional EU measures that will also fall within the scope of Protocol Article 2. Following an extensive exercise, the Commissions have recently published a working paper setting out their view as to which EU laws and obligations underpin the rights and safeguards in the relevant part of the Belfast (Good Friday) Agreement.<sup>11</sup> The measures which have already been identified include additional protections for victims<sup>12</sup> and employment protections for workers.<sup>13</sup>

2.5 The UK has incorporated the Withdrawal Agreement, including the Protocol, into domestic law through the EU (Withdrawal Agreement) Act 2020. Section 7A EU (Withdrawal) Act 2018 (EUWA) provides that all rights, obligations and remedies from the Withdrawal Agreement,

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<sup>6</sup> [Northern Ireland Office, 'UK Government Commitment to "no diminution of rights, safeguards and equality of opportunity" in Northern Ireland: What does it mean and how will it be implemented?', \(NIO, 2020\), at para 13.](#)

<sup>7</sup> [Directive 2012/29/EU](#), 'Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

<sup>8</sup> [Directive 2010/18/EU](#), 'Council Directive implementing the revised Framework Agreement on parental leave', 8 March 2010.

<sup>9</sup> [Directive 92/85/EEC](#), 'Council Directive on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding', 19 October 1992.

<sup>10</sup> Ibid.

<sup>11</sup> [Working Paper: the Scope of Article 2\(1\) of the Ireland/ Northern Ireland Protocol](#) (NIHRC and ECNI, 2022)

<sup>12</sup> [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.

<sup>13</sup> [Directive 97/81/EC](#), '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.

including Protocol Article 2, are recognised and available in domestic law. The Commissions have been given additional powers to oversee the UK Government's commitment under Protocol Article 2.<sup>14</sup> The Commissions are responsible for providing advice to government and monitoring, supervising, enforcing and reporting on the ongoing implementation of this commitment.

### **3.0 The Retained EU Law (Revocation and Reform) Bill and Article 2 of the Protocol**

- 3.1 The Commissions advise that the complexity of the Bill and the challenges it poses for the accessibility of the statute book and interpretation of enduring obligations under the UK EU Withdrawal Agreement - and Protocol Article 2, in particular - merit consideration of a clarifying interpretive clause.
- 3.2 **The Commissions recommend that the Bill be amended to include a Clause confirming that the provisions of the Bill are without prejudice to section 7A of the EU Withdrawal Act 2018.**
- 3.3 Given the volume of legislation under consideration, there is a risk of inadvertent failure on the part of the UK Government or devolved authority to identify and exempt required REUL from the sunset provisions or extend it ahead of restatement.
- 3.4 **The Commissions recommend that the Minister establish a comprehensive notification process in terms of law that is going to be sunsetted, extended or preserved.**
- 3.5 A further over-arching concern about the Bill is the extent of delegated powers. Procedures for the amendment, repeal or restatement of retained EU law should be considered in light of UK constitutional conventions as to the appropriate use of primary and subordinate legislation, to ensure robust democratic scrutiny of policy change. For the Commissions, this is particularly important in respect of policy change

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<sup>14</sup> Sections 78A-E, Northern Ireland Act 1998

impacting human rights and equality. Recommendations below address this point under the relevant clauses.

***Clause 1 – Sunset of EU-derived subordinate legislation and retained direct EU legislation; and Clause 2 – Extension of sunset under section 1***

- 3.6 Clause 1(5) protects ‘Northern Ireland legislation’ from automatic repeal or revocation, which is welcome as it includes Acts of the Northern Ireland Assembly and some Orders in Council.<sup>15</sup>
- 3.7 However, the exception is too narrow to protect all legislation relevant to Protocol Article 2. The ‘no diminution’ commitment embraces a range of rights and equality standards set out in Retained Direct EU Law and subordinate legislation, all of which will be automatically repealed or revoked unless excepted, preserved, or re-enacted within set deadlines. The Commissions have published a list of EU legislation identified by the Commissions to date as falling within the scope of Protocol Article 2 and a further list of domestic legislation that implements that EU legislation in NI, identified to date.<sup>16</sup> This is an ongoing task and is indicative rather than comprehensive, as well as requiring periodic updates.
- 3.8 By way of example, EU Directive 2004/113<sup>17</sup> was transposed via a UK-wide statutory instrument, The Sex Discrimination (Amendment of Legislation) Regulations 2008, which introduced protection from discrimination on grounds of gender reassignment in the provision of goods, facilities, services, or premises. It amended the Sex Discrimination Act 1975 in Great Britain and the Sex Discrimination (NI) Order 1976. The 2008 Regulations were revoked in Great Britain by the Equality Act 2010 but are still in force in Northern Ireland. The Directive in question is one of those listed in Annex 1 to the Protocol, with which NI law is required to ‘keep pace’, yet this legislation will fall unless preserved and/or restated in time.

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<sup>15</sup> Section 24, Interpretation Act 1978

<sup>16</sup> [Working Paper: The Scope of Article 2 of the Ireland/Northern Ireland Protocol \(ECNI and NIHRC, December 2022\)](#) (See Table of EU Law at Annex 1)

<sup>17</sup> Council Directive 2004/113/EC, ‘EU Council Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services’, 13 December 2004; Directive 2006/54/EC

- 3.9 The Commissions advise that failure to preserve and/or restate all relevant EU-derived subordinate legislation in NI within scope of Protocol Article 2, within set deadlines would result in a breach of Protocol Article 2.
- 3.10 The Commissions consider that a number of EU Regulations, currently classified as Retained Direct EU Law, are also within the scope of Protocol Article 2. These include, for example, [Regulation \(EC\) No 1107/2006](#)<sup>18</sup> of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air. The UK Government has recognised that the rights of disabled people fall within the relevant chapter of the Belfast (Good Friday) Agreement<sup>19</sup> and therefore within the scope of Protocol Article 2.<sup>20</sup> Retained Direct EU Law (like EU derived subordinate legislation) can be indefinitely preserved under Clause 1(2) of the Bill. If not preserved, RDEUL cannot be ‘restated’ or reproduced under the Bill and must be re-enacted, completing its passage by December 2023, or June 2026 if the instrument has been extended under Clause 2.
- 3.11 The Commission advise that failure to identify and preserve or re-enact relevant Retained Direct EU Legislation within scope of Protocol Article 2, by the end of 2023 – or by 23 June 2026, if extended – will result in breach of Protocol Article 2.
- 3.12 In addition to those areas of retained direct EU law and EU derived subordinate legislation within scope of Protocol Article 2, the Commissions are concerned that broader human rights and equality provisions outside the scope of Protocol Article 2 are also at risk of being automatically repealed or revoked unless preserved or restated within the deadline.

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<sup>18</sup> [Regulation \(EC\) No 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air](#)

<sup>19</sup> The “right to equal opportunity in all social and economic activity regardless of class, creed, disability, gender or ethnicity” is affirmed in the Belfast (Good Friday) Agreement 1998, Rights, Safeguards and Equality of Opportunity chapter, paragraph 1.

<sup>20</sup> NI Office, ‘[UK Government Commitment](#) to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at para 13.

- 3.13 The Commissions acknowledge the challenge involved in comprehensive identification of all instruments relevant to Protocol Article 2, in order to except them from the application of Clause 1 before the Bill completes its passage. Wider consideration of all instruments affecting human rights or equality would present a greater challenge. If this cannot be achieved, however, it may be more practical to except from the operation of Clause 1, all legislation to the extent that it has effect in Northern Ireland, particularly given the UK Government's commitments under the Protocol as a whole.
- 3.14 **The Commissions recommend that Clause 1(5) be amended to exclude all legislation insofar as it is effective in Northern Ireland and relates to human rights and/or equality, including all legislation that falls within the scope of Protocol Article 2. If this is not practicable, we recommend that that Clause 1(5) be amended to exclude all legislation insofar as it is effective in Northern Ireland.**
- 3.15 Whereas the power in Clause 1(2) to preserve specified instruments extends to Ministers in devolved authorities, the power in Clause 2 to extend the sunset date in Clause 1(1), is granted to UK Ministers only.
- 3.16 The Commissions are concerned that the potential for divergence on both policy and the application of sunset dates will exacerbate the challenges and complexities of identifying relevant human rights and equality measures at risk of being repealed or revoked by the sunset provision in Clause 1. Moreover, the complexity of identifying retained direct EU law and EU derived subordinate legislation of relevance to Protocol Article 2, increases the risk of inadvertent infringement.
- 3.17 The legislative risks identified above, in relation to Clause 1 are exacerbated as a fully functioning NI Executive and Assembly is currently not in place and it is not clear when it might be in place to oversee, identify and correct such potential legislative pitfalls.
- 3.18 **The Commissions advise that if the Bill is passed as drafted, a breach of international law, in relation to Protocol Article 2, could arise from inaction on the part of devolved authorities or Ministers of the Crown,**

which may not come to the attention of Parliament in time to be remedied via primary legislation.

- 3.19 The Commissions recommend that, if Clause 1(5) is not amended to exclude all human rights and equality legislation insofar as it is effective in Northern Ireland, the sunset date in Clause 1(1) should be extended to provide adequate time for consultation and appropriate parliamentary scrutiny, in line with constitutional convention.
- 3.20 The Commissions recommend that amendment or repeal of Retained EU Law, affecting human rights and/or equality protections in Northern Ireland, should be progressed on the basis of continuing adherence to the UK constitutional convention of providing for policy change via the primary legislative process, with technical and operational detail addressed in subordinate legislation. This applies to legislation that emanates from either Westminster<sup>21</sup> or from the NI Assembly.

*Clause 3 – Sunset of retained EU rights, powers, liabilities etc.*

- 3.21 Clause 3 of the Bill removes an additional layer of protection for human rights and equality protections in domestic law. For example, in research undertaken for the NIHRC, rights under the EU Trafficking Directive,<sup>22</sup> which the Commissions have identified as falling within scope of Protocol Article 2,<sup>23</sup> were identified as being safeguarded in UK law by Section 4 of the EU (Withdrawal) Act 2018.<sup>24</sup> Repeal of section 4 EUWA would have no bearing on enduring obligations under Protocol Article 2 but could create a risk of confusion in this regard. A complex, inaccessible, and confusing statute book could lead to inadvertent breach of these obligations. Moreover, where there are measures which protect equality and human rights which were retained EU law by virtue of Section 4 of the 2018 Act and are outside the scope of Protocol Article 2, these

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<sup>21</sup> As regards laws that impact on rights relating to human rights and equality in Northern Ireland

<sup>22</sup> [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.

<sup>23</sup> This is teased out further in paragraph 6.18 below. See also NIHRC and ECNI, 'Joint NIHRC/ECNI Briefing Paper on the Modern Slavery and Human Trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill' (NIHRC and ECNI, 2021); NIHRC and ECNI, 'Annual Report of the NIHRC and the ECNI on the implementation of Protocol Article 2 2021 – 2022' (NIHRC and ECNI 2022), at para 4.131.

<sup>24</sup> Alison Harvey, 'Human Trafficking and Article 2 of the Ireland/Northern Ireland Protocol' (NIHRC 2022).

safeguards, unless otherwise preserved, will fall resulting in a loss of rights.

- 3.22 The Commissions recommend that the Bill is amended to remove Clause 3, or that Clause 3 is amended to retain Section 4 of the EU (Withdrawal) Act 2018 to the extent that it preserves retained EU law which gives effect to human rights and equality protections in NI law, including all legislation that falls within the scope of Protocol Article 2.

*Clauses 4 and 5 – abolition of supremacy of EU law and EU general principles*

- 3.23 Clauses 4 and 5 amend Section 5 of the EU (Withdrawal) Act to abolish the principle of supremacy of EU law from domestic law and provide that retained direct EU law must be given effect in a way that is compatible with domestic enactments and to provide that no general principle of EU law is part of domestic law after the end of 2023.
- 3.24 The UK-EU withdrawal Agreement is given effect in UK law through Section 7A of the EU (Withdrawal Agreement) Act. Article 4 of the UK-EU Withdrawal Agreement sets out the methods and principles relating to the effect, implementation and application of that Agreement, including Protocol Article 2. Article 4(1) provides that the provisions in the Agreement and any EU law made applicable by it “shall produce in respect of and in the UK the same legal effects as those which they produce within the [EU] and its Member States”. In accordance with Article 4(3) provisions of the Withdrawal Agreement referring to EU law or to concepts should be interpreted and applied in accordance with the methods and general principles of EU law.
- 3.25 The principle of supremacy and general principles of EU law continue to be relevant to the interpretation and implementation of the UK-EU Withdrawal Agreement, including Protocol Article 2 and the Annex 1 Equality Directives. Clauses 4 and 5 create unhelpful confusion and this could risk undermining Protocol Article 2.

- 3.26 The Commissions recommend that, for the avoidance of doubt, Clauses 4 and 5 be amended to insert a clarification into the amended Section 5 of the EU (Withdrawal) Act 2018, that it is subject to the obligations arising under Section 7A of that Act.

*Clause 6 – Assimilated law*

- 3.27 Clause 6 renames REUL as “assimilated law” after the end of 2023. As noted above, the categorisation of EU-derived domestic provisions as REUL, assimilated law, does not affect treaty obligations. Re-categorising legislation, and increasing the number of categories may, however, present a degree of risk to compliance with treaty obligations if it obscures or makes less obvious the link between domestic provisions and, in this case, EU law relevant to the Protocol Article 2 commitment.
- 3.28 The Commissions recommend that compliance with Protocol Article 2 be considered in advance of amendment, repeal or revocation of assimilated law and fully explained in associated Explanatory Memoranda/Notes or Human Rights Impact Assessments.

*Clause 7 – Role of courts*

- 3.29 Clause 7 of the Bill amends section 6 of the EU (Withdrawal) Act 2018, to facilitate the departure of domestic courts from the case-law of the Court of Justice of the European Union (CJEU).
- 3.30 However, Section 6(6A) of the EUWA states that “Subsections (1) to (6) are subject to relevant separation agreement law (for which see section 7C).” Section 7C references the Withdrawal Agreement and highlights, for example Article 4 of the Withdrawal Agreement and Protocol Articles 12 and 13. These provisions are essential to the effective implementation of Protocol Article 2 and require, amongst other things, continuing adherence to CJEU case-law in certain circumstances.
- 3.31 In this context, Clause 7 does not appear to undermine the obligations of courts as regards Protocol Article 2, but the present Bill must be read in light of Clause 20 of the Protocol Bill in respect of which the Commissions



have raised concerns as regards required adherence to CJEU jurisprudence.<sup>25</sup>

- 3.32 The Commissions note that Clause 7(3) substitutes Section 6(5) of the EUWA to require higher courts which are considering departing from retained EU case law, to have regard (amongst other things) to “the fact that the decisions of a foreign court are not (unless otherwise provided) binding”. The reference to requirements ‘otherwise provided’ may offer useful signpost to the obligations flowing from section 7A of the EUWA.
- 3.33 **The Commissions recommend that the Minister provide a written assurance that it remains the Government’s view that CJEU case-law regarding Protocol Article 2 should be adhered to by domestic courts on an ongoing basis, in line with Protocol Article 13, and that this obligation will not be diminished by the Bill.**

#### *Clauses 12 -17 – Delegated Powers*

- 3.34 The Commissions are concerned by the breadth of delegated powers provided under the Bill and the potential for inadvertent breach of Protocol Article 2 or wider diminution of human rights and equality via Ministerial action or inaction in the absence of detailed parliamentary scrutiny.
- 3.35 The tight deadlines for restatement of REUL by the end of 2023, and assimilated law by June 2026, and the scale of the task to be achieved in that time creates a risk of gaps in legislative coverage. It may also contribute to further uncertainty and potential breach of Protocol Article 2, if REUL essential to the no diminution commitment is not preserved or restated within set deadlines.
- 3.36 **The Commissions recommend that, unless Clause 1 is amended to remove all legislation effective in NI from automatic repeal/revocation, the deadline for restating secondary REUL be extended.**

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<sup>25</sup> [NIHRC and ECNI Briefing on the Protocol Bill \(NIHRC and ECNI, 2022\)](#)

3.37 The Commissions are mindful of concerns expressed about increasing reliance on delegated powers given the limited scrutiny of such legislation, deriving from the speed with which it is considered, the volume of instruments and the absence of detailed debate or amending stages. A recent expression of this is seen in the House of Lords Sub-Committee on the Constitution which reported in 2018:

As part of our scrutiny of bills, and from the work of the DPRRC [Delegated Powers and Regulatory Reform Committee], we have identified a number of recurring problems with delegated powers. We have observed an increasing and constitutionally objectionable trend for the Government to seek wide delegated powers, that would permit the determination as well as the implementation of policy.<sup>26</sup>

3.38 REUL gives effect to a significant body of policy relating to human rights and equality, including employment legislation, as well as EU Regulations providing for the rights of disabled people, much of which will fall unless preserved or restated by Ministers. Under Clause 15(1), Ministers may revoke secondary REUL without replacing it, creating potential policy change with limited scrutiny. In addition to powers in subsection (2) to replace secondary REUL with provisions with ‘the same or similar objectives’, Ministers are given significant additional powers to replace REUL with ‘alternative provision’, in subsection (3), which is of particular concern.

3.39 When exercising these powers, Ministers are not under a duty, under the Bill, to consult with respect to the piece of REUL that is being replaced. Even though the powers granted are time limited, the Commissions believe those powers are too widely drawn and will provide insufficient scrutiny, potentially leading to conflict with obligations under Protocol Article 2.

3.40 It is acknowledged that during the UK’s membership of the EU, significant change was introduced via subordinate legislation, but it is worth noting

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<sup>26</sup> The Legislative Process: The Delegation of Powers, 16th Report of Session 2017-19, HL Paper 225, House of Lords Select Committee on the Constitution, at paragraphs 50 and 110

that this was in the context of the policy having been decided by Member States, including the UK, at EU level and set out in EU legislation.

- 3.41 The Commissions recommend that Clause 15 be amended to curtail powers to revoke or replace secondary retained EU Law, affecting human rights and/or equality protections in Northern Ireland, to ensure 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.
- 3.42 The Commissions recommend that Ministers engage with stakeholders including the Commissions and human rights and equality organisations before using delegated powers to replace REUL.
- 3.43 Clause 16 provides for powers to be granted to Ministers to modify and amend REUL, restated law, assimilated law or provisions replacing REUL, as they consider appropriate, to take account of 'changes in technology' or 'developments in scientific understanding'. The use of this power is subject only to the negative scrutiny procedure and so changes made under it will not require active parliamentary approval. Unlike Clause 15 this power will not be time-limited.
- 3.44 The Commissions recommend that Clause 16 be amended to ensure that the delegated power to modify legislation may be used for the purposes of dealing with minor and technical matters only.

## 4.0 Consideration of compliance with Protocol Article 2

- 4.1 The Explanatory Notes to the Bill make no reference to any consideration being given to ensuring compliance with Protocol Article 2. The Commissions have previously recommended that this should be the case regarding all relevant legislation.<sup>27</sup>
- 4.2 The Commissions recommend that compliance with Protocol Article 2 be considered from the earliest stages in the development of policy and legislation.
- 4.3 The Commissions recommend 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.
- 4.4 The Commissions recommend that the Committee ask the Secretary of State to set out, in detail, what consideration was given to compliance with Protocol Article 2 in the development of the Bill and what plans are in place to avoid breach of the commitment.

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<sup>27</sup> See also recommendations in 'Legislative Scrutiny and the Dedicated Mechanism for Monitoring Article 2 of the Ireland/Northern Ireland Protocol', Paul Evans, Alexander Horne and Tasneem Ghazi (ECNI, 2021).

## Contact us

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