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Lord Jay of Ewelme

Chair of the Protocol on Ireland/Northern Ireland Sub-Committee

By email: hlprotocol@parliament.uk

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ARTICLE 2 OF THE PROTOCOL ON IRELAND/NORTHERN IRELAND

Thank you for your letter of 25 October 2021 relating to Article 2 of the Ireland/Northern Ireland Protocol, which you sent in your role as the Chair of the Protocol on Ireland/Northern Ireland Sub-Committee. The Secretary of State has asked me to reply on his behalf as this is within my portfolio.

I am writing to answer a series of questions set out in that letter, following the public evidence session the Sub-Committee held with representatives from the Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission for Northern Ireland (ECNI) on Article 2 of the Protocol on Ireland/Northern Ireland.

I apologise for the delay in responding to your letter and I hope that my response provides some further clarity on the issues raised around the Article 2 commitment.

Annex A: Responses to Questions Set out in the Letter of 26 March

1. Question: The Government's July 2021 Command Paper on the Northern Ireland Protocol: the way forward stated that the Protocol's provisions "that ensure there is no diminution of human rights in Northern Ireland as a result of the UK's withdrawal from the European Union are not controversial". In view of this, and notwithstanding the continuing tensions over the trade and institutional framework elements of the Protocol, can you commit to upholding the Article 2 provisions and the dedicated mechanism framework for their implementation, come what may?

Response: The Government is firmly committed to Article 2 of the Protocol under which it is required to ensure that the rights, safeguards and equality of opportunity protections set out in the relevant chapter of the Belfast (Good Friday) Agreement, including in the area of protection against discrimination as underpinned by the six relevant EU directives listed in Annex 1, are not diminished as a result of the United Kingdom's withdrawal from the EU.

This commitment reflects the UK Government's unwavering commitment to the Belfast (Good Friday) Agreement.

The Government continues to work closely with the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland to operationalise the dedicated mechanism and ensure the processes and structures are embedded appropriately. We are committed to continuing to work with both Commissions in their roles within the dedicated mechanism framework.

2. Question: Can you clarify the respective responsibilities of the UK Government and the Northern Ireland Executive, in the context of transferred, reserved and excepted powers under the devolution settlement, in upholding Article 2? How is the Government liaising with Executive Ministers and officials in order to meet your respective obligations?

Response: Primary legislation made by the Northern Ireland Assembly would have no effect so far as it is incompatible with Article 2. Further, the Secretary of State has the power to refuse to submit such incompatible legislation for Royal Assent.

Ministers of the Northern Ireland Executive and Northern Ireland departments have no power to make subordinate legislation, or do any act, so far as the legislation or act is incompatible with Article 2. Further, the Secretary of State has the power to revoke subordinate legislation if he considers any provision within it to be incompatible with Article 2.

NIO officials meet regularly with officials from the Executive Office on matters relating to Article 2 and we look forward to continuing this.

3. Question: Can you provide assurances that the Commissions will have adequate and continuing resources to fulfil their monitoring role? Should the workload increase, as it may well do should relevant UK and EU law start to diverge, what measures are in place to ensure that capacity and resources can be increased?

Response: The UK Government is firmly committed to providing the resources to the Dedicated Mechanism that are required to allow it to fulfill its functions. We have firmly supported Article 2 and have also helped set up the Dedicated Mechanism and have provided a proper funding settlement to both NIHRC and ECNI for this work. The UKG will continue to support the Dedicated Mechanism and work related to the proper implementation of Article 2.

4. Question: What further clarity can you provide on these questions, including the scope of Article 2, the definition of a "right, safeguard or equality of opportunity", and what is meant by being "underpinned by an EU law obligation", in order to help the Commissions to carry out their monitoring role in a thorough and meaningful way?

Response: The rights, safeguards and equality of opportunity protections captured in the Rights, Safeguards and Equality of Opportunity Chapter of the Belfast (Good Friday) Agreement, so far as they were given effect to in domestic law in Northern Ireland on or before 31 December 2020, are in scope of the commitment.

Ultimately it will be a matter for the domestic courts to decide whether or not a right is in scope of the commitment, and whether any alleged diminution of that right is in fact attributable to the UK's withdrawal from the EU.

Some of the rights contained in the 'Rights, Safeguards and Equality of Opportunity' chapter of the Belfast (Good Friday) Agreement are underpinned by a series of protections against discrimination enshrined in EU law. "Underpinned" in this context means that the relevant protection was contained in an EU directive which had been transposed into domestic law in Northern Ireland whilst the UK was a Member State, and continues to have legal effect in the UK. The relevant directives listed in Annex 1 to the Protocol provide the supporting framework for the anti-discrimination commitments set out in the relevant chapter of the Agreement.

5. Question: EU Pay Transparency Directive, the voting rights of EU citizens arriving after the end of the transition period, and on access to kosher and halal food. On these matters, the ramifications of the Article 2 provisions were not yet clear.

What is your assessment of the interaction of these issues with the provisions of Article 2? What update can you provide on the Government's efforts, including in dialogue with the EU, to resolve these issues?

Response: As you will be aware, the Government is in intensive discussions with the EU with the aim of delivering significant changes to the Northern Ireland Protocol. If we can put the Protocol on a durable footing, we have the opportunity to move past the difficulties of the past year and move forward to a new, better equilibrium.

The Jewish and Islamic communities in Northern Ireland must continue to have access to the products they require for religious observance. Where over the last year issues in the supply of Kosher products have arisen we have worked with the Community, Kosher suppliers, and traders to ensure that the goods required were transported safely to Northern Ireland.

We continue to monitor issues raised by the EU Pay Transparency Directive and the voting rights of EU citizens arriving after the end of the transition period to determine whether they fall within the scope of Article 2. We will continue to discuss these with the Commissions.

6. Question: What work is the Government doing to enhance public awareness of Article 2, and of the relevant work of the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland? As Ms Kilpatrick astutely commented, "a human right is of no benefit whatever if you cannot actually enforce it".

Response: The Government has published an explainer on the commitment to "no diminution of rights, safeguards and equality of opportunity" in Northern Ireland on gov.uk.

We welcome the work both Commissions have undertaken in raising public awareness of Article 2.

We will continue to consider whether further work should be done in this space and will liaise with the Commissions where appropriate.

7. Question: What work is being done to foster engagement with equality and human rights stakeholders and civil society groups in Northern Ireland? What steps is the Government taking to enhance the transparency of its processes for engagement?

Response: The Government will continue to consider further engagement within Northern Ireland on Article 2. We recognise the excellent work both Commissions have done in raising awareness of this commitment to the public.

There has been extensive engagement with key influencers in the voluntary community sector, SOLACE NI, faith leaders, women's sector, academics and the Unionist/Nationalist communities. These engagements have been vital in delivering key UK Government messages around the Protocol, understanding community sentiment, and the difficulties experienced in normal day to day life having left the EU.

8. Question: What steps will you take to ensure that the UK-EU governance bodies established under the Protocol prioritise human rights and equality concerns, including engagement with key stakeholders in Northern Ireland? We would like to express our disappointment that the Commissions have not yet had the opportunity to meet with the Joint Consultative Working Group (JCWG) and would stress the importance of meetings between the two Commissions and the JCWG. What update can you give on the Government's proposal that the JCWG should hold a dedicated meeting on implementation of Article 2?

Response: My officials recently spoke to the UK's representatives at the JCWG to reaffirm the importance of human rights and equalities within the Protocol and to pass on a further invitation to meet the two Commissions. The UK's JCWG representatives are happy to meet with the Commissions and I am pleased to say that an initial meeting took place earlier this month.

We will continue to engage with the UK's JCWG representatives on issues of human rights and equality.

9. Question: How can the Government assist the Commissions in developing formal and informal relationships, with the UK Government, the Northern Ireland Executive and the EU institutions?

Response: We will continue to meet regularly with both Commissions and to assist in developing relationships between them and other stakeholders where possible.

10. Question: What steps is the Government taking to ensure that the human rights and equality Commissions, as well as Parliament (including this Committee), are kept informed of developments in EU law relevant to Article 2 of the Protocol? Will you agree to ensure that:

- a) Explanatory Memoranda for draft UK legislative proposals that are likely to engage Article 2(1) of the Protocol are submitted, and set out what consideration has been given by the Government to ensure conformity with Article 2 (1)?
- b) Explanatory Memoranda for draft EU proposals which amend or replace the Directives listed in Annex 1 of the Protocol, as well as other relevant EU legislation that the Commissions judge are relevant to the provisions of Article 2, such as the Victims Directive and the Parental Leave

Directive, are submitted, and set out what consideration has been given by the Government to ensuring conformity with Article 2 (1)?

Response: I am aware there are ongoing discussions to establish the future arrangements for scrutiny of legislation applying under the Protocol and that Lord Frost is leading this engagement with the EU Committees and set out the Government's proposed commitments on scrutiny of Protocol related legislation in a letter to the Committee of 23 September. I understand that further discussions about the scope and framework for these arrangements are expected in the coming weeks.

11. Question: What assessment has the Government made of the practical implications of divergence in human rights and equality protections?

Response: In the event that there is a divergence in human rights and equality protections which is within the scope of Article 2, the Government will take any necessary steps to ensure its obligations under that Article are met.

We consider that individuals will be able to bring proceedings in respect of an alleged breach of Article 2(1) of the Protocol directly before the domestic courts, in accordance with Article 4 of the Withdrawal Agreement (although the direct effect of individual provisions of the Withdrawal Agreement will ultimately be a matter for the courts).

This includes proceedings against the UK Government and means that, if domestic legislation were found to be incompatible with the commitment in Article 2(1) of the Protocol, a court would be able to disapply that legislation.

In addition, the new fetters on the legislative competence and powers of the Northern Ireland Assembly and Northern Ireland Ministers and departments which the Act inserts into the Northern Ireland Act 1998 will give rise to a route of judicial review for individuals to challenge the compatibility of the Northern Ireland Executive or Assembly actions or legislation with the Article 2(1) commitment.

I realise that this is a very detailed reply however I am keen to answer your questions as extensively as possible. If you have any further questions in light of my reply then I look forward to hearing from you again.

Yours,
