



2025 No. 101415/01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
KING'S BENCH DIVISION (JUDICIAL REVIEW)

**In the Matter of an Application for Leave to Apply for
Judicial Review by:**

EQUALITY COMMISSION FOR NORTHERN IRELAND

(the Applicant)

**And in the matter of the application of the judgment of the Supreme Court in *For
Women Scotland Ltd v The Scottish Ministers* in Northern Ireland**

-and-

**Good Law Project and another (1)
Women's Rights Network (2)
Secretary of State for Northern Ireland (3)
Police Service of Northern Ireland (4)
Department of Education (5)**

(the Proposed Notice Parties)

-and-

**Sex Matters (1)
The Rainbow Project (2)
Northern Ireland Commissioner for Children and Young People (3)
[REDACTED] (4)
The Northern Ireland Prison Service (5)**

(the Intervenors)

-and-

**Children's Law Centre (1)
For Women Scotland (2)
Countess Advocacy Company Limited (3)
[REDACTED] (4)**

(the Proposed Intervenors)

RE-AMENDED STATEMENT FILED PURSUANT TO ORDER 53, RULE 3(2)(a)
OF THE RULES OF THE COURT OF JUDICATURE (NORTHERN IRELAND) 1980

[1] The Applicant

Introduction

1.1 The proposed Applicant is the Equality Commission for Northern Ireland, Equality House, 7-9 Shaftesbury Square, Belfast, BT2 7DP (**'the Commission'**, **'the Equality Commission'**, **'ECNI'**, **'the Applicant'**). The Commission is a non-departmental public body established by the Northern Ireland Act 1998 (**'NIA 1998'**). Its powers and duties derive from several statutes which have been enacted over the last decades, providing protection against discrimination on several grounds, including on the grounds of age, disability, race, religious belief and political opinion, sex, gender reassignment and sexual orientation. The Commission has responsibilities arising from Section 75 NIA 1998 in respect of the statutory equality and good relations duties which apply to public authorities (**'Section 75'**). The Commission also has functions under Sections 78B-E NIA 1998, as amended, in respect of the implementation of Article 2 of the Windsor Framework (**'WF'**).

Northern Ireland Equality Law and the Commission's remit

1.2 The key equality provisions in Northern Ireland are Section 75¹, the Equal Pay Act (Northern Ireland) 1970 (**'EPA 1970'**), the Sex Discrimination (Northern Ireland) Order 1976 (**'SDO 1976'**), the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003, the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, and the Fair Employment and Treatment (Northern Ireland) Order 1998 (**'FETO 1998'**) which is supplemented by the Fair Employment (Monitoring) Regulations (Northern Ireland) 1999. These pieces of legislation use terms like *'sex'*, *'men'*, *'women'*, *'male'*, *'female'*, *'same sex'*, *'opposite sex'* and/or *'gender'* without providing comprehensive and/or consistent² definitions as to whether these terms are limited to *'biological sex'* or whether they extend to *'certificated sex'* and/or *'gender'* (see para. 4.3 later for definitions). Hereafter, this legislation is referred to collectively as **'Northern Ireland Equality Law'**.

1.3 The Commission has functions under Northern Ireland Equality Law as set out in **Annex A** at the end of this document.

1.4 The Applicant seeks an advisory declaration as to how it should exercise its functions in Northern Ireland following the decision of the Supreme Court in *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16 (**'FWS'**) which considered the meaning of terms like *'sex'* and *'woman'* in the Equality Act 2010 (which is specific to GB). The Court

¹ This contains the duty which requires public authorities to have *'due regard to the need to promote equality of opportunity ... between men and women generally'* [Section 75(1)(b)]

² Under the SDO 1976, the definition of *'gender reassignment'* refers to a person changing *'sex'* but elsewhere *'gender'* alone is used in several references to a person *'whose gender has become the acquired gender under the Gender Recognition Act 2004'*, for example, in Article 10A(4).

concluded that it means '*biological sex*' notwithstanding section 9(1) of the Gender Recognition Act 2004. This states that when a Gender Recognition Certificate ('**GRC**') is obtained '*... the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)*' (the 2004 legislation applies, with some modifications, in Northern Ireland).

1.5 For the avoidance of doubt, the Commission does not seek to challenge the correctness of *FWS* as a decision regarding the interpretation of the Equality Act 2010 and the relationship between that legislation and the Gender Recognition Act 2004. It wishes to clarify the position under Northern Ireland Equality Law bearing in mind (a) that Northern Ireland has different legislation, and (b) in particular, the potential reach of EU equality law as a result of Article 2 WF which is entitled '*Rights of individuals*', as interpreted by the Supreme Court in *In the matter of an application by Martina Dillon, John McEvoy, Brigid Hughes and Lynda McManus for Judicial Review* [2026] UKSC 15 (hereafter '**the Dillon judgment**' or '**Dillon**'). The effect of Article 2 WF, inter alia, is to require that at least certain equality rights in Northern Ireland law are not diminished as a result of the UK leaving the European Union. The relevant wording is:

'Article 2

Rights of individuals

1. *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.'*

1.6 Annex 1 is significant in this Application, so it should be noted that the provisions of Union law listed there include EU directives pertaining to the treatment of '*women*' etc as follows:

- Council 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 services³;
- 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 occupation⁴;
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation⁵;

³ This is referred to in para 5.18 as the Equal Treatment in Goods and Services Directive.

⁴ This is referred to in para 5.18 as the Recast Directive.

⁵ This is referred to in para 5.18 as the Equal Treatment Directive.

- 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; and
- Council 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.

1.7 Hereafter, all of the directives in Annex 1 are referred to as '**the Annex 1 Directives**'.

1.8 A further complicating factor that arises in determining the scope of *FWS* in Northern Ireland, as it does in the rest of the United Kingdom, is that Northern Ireland Equality Law sits alongside, and sometimes interacts with other legislation, like health and safety legislation, which uses terms like '*women*'. This legislation was not specifically considered in *FWS*. A list of the relevant Northern Ireland legislation appears at **Annex B**. Hereafter, this legislation is referred to collectively as '**Relevant Allied Legislation**'. In this Application, the Commission seeks guidance on the meaning of terms like '*woman*' within the Relevant Allied Legislation so that public bodies, employers and service providers act lawfully in Northern Ireland. In the Commission's view, terms like '*women*' can only mean biological sex when used exclusively in the context of pregnancy and menstruation. Beyond these clear categories, however, there is legislation which interacts with Northern Ireland Equality Law, which will impact on the day-to-day operations of many service providers and employers, and where terms like '*women*' are used without definition.

1.9 In initiating this judicial review, the Commission is acting well within its statutory powers in seeking clarification of the meaning of key terms like '*sex*' under Northern Ireland Equality Law and how it interacts with the Relevant Allied Legislation.

NIA 1998, the Windsor Framework and the Commission's remit

1.10 The Commission has functions under the NIA 1998, as amended, in respect of the implementation of Article 2 WF. Section 78B NIA provides that the Equality Commission '*must monitor the implementation of Article 2(1) of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement.*' In addition, section 78C provides that the Equality Commission '*may—(a) bring judicial review proceedings in respect of an alleged breach (or potential future breach) of Article 2(1) of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement*' (emphasis added).

1.11 In initiating this judicial review, the Commission is acting well within these statutory powers in seeking clarification of the legal position in order to enable it to better fulfil its statutory obligations, including to prevent breaches or future breaches of Article 2 WF.

1.12 This Statement is filed pursuant to Order 53, rule 3(2)(a) of the Rules of the Court of Judicature (Northern Ireland) 1980.

[2] **The Respondent**

2.1 There is no Respondent. As discussed subsequently, if the Court considers that a Respondent is necessary in this case, so that full argument is obtained, it has the power to request the Attorney General to appoint a friend of the court to make the required submissions. The Commission does not consider that this is necessary in this Application.

[3] **The Impugned Decision**

3.1 There is no impugned decision. Instead, this application relates to a highly controversial and important area of law in Northern Ireland in respect of which guidance from the Court is required to ensure that private companies, public authorities and government departments act lawfully now and in the future in relation to their day-to-day operations. Similarly, the Commission is seeking guidance in order to better fulfil its statutory obligations, including to ensure that there are no existing or future breaches of Article 2 WF (as per section 78C NIA 1998), and that it is in a position to produce guidance on the issues concerned.

[4] **The Relief Sought**

4.1 The Commission outlines three possible formulations for the advisory declaration sought. It will consider any revised formulation of the declaration (or the Relevant Allied Legislation to which it would apply) in the event that the Northern Ireland Human Rights Commission ('the NIHRC') joins as a party and/or in light of any proposals from the existing intervenors (or any future intervenors).⁶

4.2 For the avoidance of doubt, the three possible formulations for the advisory declaration are informed by the current debate concerning the meaning of 'sex' and related terms in Northern Ireland Equality Law and the Relevant Allied Legislation. Each is based on a potential interpretation of Northern Ireland law following *FWS*, taking into account the Supreme Court's *Dillon* judgment. They are intended to map out the scope of each of these differing interpretations rather than encapsulate the Commission's policy position (which is to seek clarity from the Court). The Commission proposes that the

⁶ The first three existing Intervenors were given permission to intervene on 1 June 2026. [REDACTED] was subsequently granted permission on 5 June 2026. Any other application for leave to intervene must be filed on or before 28 June 2026. On 12 June 2026, the Children's Law Centre wrote to the ECNI indicating that it also wished to intervene. For Women Scotland and the Countess Advocacy Company Limited indicated that they would be seeking permission to intervene on 24 June 2026. [REDACTED] indicated that they would be seeking permission to intervene on 25 June 2028. At the time of writing, no permission has been granted. The Northern Ireland prison Service was granted leave to intervene on 24 June 2026. The ECNI welcomes an intervention from these organisations.

Court answers a cascading series of sequential legal questions when adjudicating on the three possible formulations, and these are outlined at para. 5.106 below.

Definitions

4.3 In this section and hereafter, the following definitions are used:

- (a) *'Biological sex'* is defined as in para. 7 of FWS (*'... the sex of a person at birth ...'*) and then expanded at para. 171 to be binary (*'... the concept of sex is binary, a person is either a woman or a man ... Although the word "biological" does not appear in this definition, the ordinary meaning of those plain and unambiguous words corresponds with the biological characteristics that make an individual a man or a woman'*).⁷
- (b) *'Certificated sex'* is defined as in para. 7 of FWS (*'... the sex attained by the acquisition of a GRC'*). A GRC is a Gender Recognition Certificate obtained under the Gender Recognition Act 2004.
- (c) *'Gender'* refers to the chosen identity of a person, where that identity is different to their biological sex and they do not have a Gender Recognition Certificate, which will impact on these groups:
 - (i) Persons who have undergone, are currently undergoing, or are intending to undergo, gender reassignment *under medical supervision*⁸; and/or
 - (ii) Persons who have undergone, are currently undergoing, or are intending to undergo, gender reassignment *even where not under medical supervision*; and/or
 - (iii) Persons who identify as being *'non-binary'* or *'gender fluid'*; and/or
 - (iv) Persons with a condition known as Differences in Sex Development (**DSD**)⁹.

4.4 As stated above (at para. 4.2) the three possible formulations for the advisory declaration sought derive from three different interpretations of the current law applying to Northern Ireland, as follows:

⁷ The Commission understands pregnancy, menstruation and breastfeeding to be such biological characteristics as per para. 178 in FWS

⁸ This mirrors the definition of 'gender reassignment' in article 2(2) of the SDO 1976

⁹ This term is used by the NHS here: <https://www.nhs.uk/conditions/differences-in-sex-development/>. Sometimes the term "intersex" is also used. This concept is added to the definition of *'gender'* since the FWS view of *biological sex* is that it is binary.

Interpretation 1: Where EU law requires terms like 'woman' in Northern Ireland Equality Law that was underpinned by an EU Equality Directive, to extend beyond 'biological sex'

4.5 A declaration in the following terms:

1. Article 2 WF applies so as to require Northern Ireland Equality Law to be interpreted to conform to EU law where EU law provided an underpinning to Northern Ireland Equality Law prior to the end of the transition period.
2. EU law currently requires that 'men', 'women', 'sex' and related terms in EU equality law should be interpreted to refer to 'biological sex' and consistently with 'certificated sex' and/or to 'gender'¹⁰.
3. Northern Ireland Equality Law requires, in those areas where EU law provided an underpinning to Northern Ireland Equality Law, the same meaning of 'men', 'women', 'sex' and related terms as is currently adopted in EU equality law.

AND,

4. In relation to the Relevant Allied Legislation¹¹:

EITHER:

- (a) There is a no presumption that 'men', 'women', 'sex' and related terms have the same meaning as under Northern Ireland Equality Law.

OR

- (b) There is a presumption that 'men', 'women', 'sex' and related terms have the same meaning as under Northern Ireland Equality Laws.

Interpretation 2: Where EU law does not require terms like 'woman' in Northern Ireland Equality Law that was underpinned by an EU Equality Directive to extend beyond 'biological sex'

4.6 **Or alternatively**, a declaration in the following terms:

1. Article 2 WF applies so as to require Northern Ireland Equality Law to be interpreted to conform to EU law where EU law provided an underpinning

¹⁰ The Commission recognises that the Court will need to adopt a definition of 'gender' here.

¹¹ In so far as not exclusively linked to pregnancy or menstruation.

to Northern Ireland Equality Law prior to the end of the transition period.

2. EU law does not currently require 'men', 'women', 'sex' and related terms to be interpreted as extending beyond 'biological sex'.
3. Northern Ireland Equality Law does not currently require, in those areas where EU law provided an underpinning to Northern Ireland Equality Law, that 'men', 'women', 'sex' and related terms extend beyond 'biological sex'.

AND,

4. In relation to the Relevant Allied Legislation¹²:

EITHER:

- (a) There is a no presumption that 'men', 'women', 'sex' and related terms have the same meaning as under Northern Ireland Equality Law.

OR

- (b) There is a presumption that 'men', 'women', 'sex' and related terms have the same meaning as under Northern Ireland Equality Laws.

Interpretation 3: Where Article 2 WF does not apply so that EU law does not apply and terms like 'woman' refer to 'biological sex', applying the same interpretation as adopted in FWS

4.7 **Or alternatively**, a declaration in the following terms:

1. Article 2 WF does not apply so as to require Northern Ireland Equality Law to be interpreted to conform to the current interpretation of EU law even where EU law provided an underpinning to Northern Ireland equality law prior to the end of the transition period.
2. Northern Ireland Equality Law should be interpreted consistently with the approach in FWS which means that 'men', 'women', 'sex' and related terms mean 'biological sex' only.

AND,

3. In relation to the Relevant Allied Legislation¹³:

¹² Ibid.

¹³ Ibid

EITHER:

(a) There is a no presumption that 'men', 'women', 'sex' and related terms have the same meaning as under Northern Ireland Equality Law.

OR

(b) There is a presumption that 'men', 'women', 'sex' and related terms have the same meaning as under Northern Ireland Equality Laws.

4.8 Such further or other relief as this Honourable Court shall deem meet; and all necessary and consequential directions.

[5] **Grounds**

5.1 The Applicant seeks an advisory declaration as to how it should exercise its functions in Northern Ireland following the decision of the Supreme Court in *FWS*.

5.2 To repeat, and for the avoidance of doubt, the Commission does not seek to challenge the correctness of *FWS* as a decision regarding the interpretation of the Equality Act 2010 and the relationship between that legislation and the Gender Recognition Act 2004. It wishes to clarify the position under Northern Ireland Equality Law bearing in mind (a) that Northern Ireland has different legislation, and (b) in particular, the potential reach of EU equality law as a result of Article 2 WF as interpreted by the Supreme Court in *Dillon*.

For Women Scotland

5.3 In *FWS*, the Supreme Court considered the meaning of 'man', 'woman' and 'sex' in the Equality Act 2010 ('**EA 2010**'). The issue arose in response to the definition of the term 'woman' in the Gender Representation on Public Boards (Scotland) Act 2018 ('**2018 Act**'). Statutory guidance produced by the Scottish Ministers stated that, under the 2018 Act, the definition of a 'woman' was the same as in the EA 2010. Section 212 of the EA 2010 defines 'woman' as 'a female of any age'. The statutory guidance also stated that a person with a GRC recognising their gender as female is considered a woman. A GRC is a document that allows people to change their gender legally, and the conditions under which a person can receive one are set out in the Gender Recognition Act 2004 ('**GRA 2004**').

5.4 The Petitioner in *FWS*, For Women Scotland Limited, challenged the lawfulness of the statutory guidance. It argued that the definition of a 'woman' under the EA 2010 refers to biological sex only, meaning that a biological male with a GRC in the female gender is not considered a woman under the EA 2010. The Scottish Ministers opposed this argument contending that the definition of a 'woman' under the EA 2010 also refers to 'certificated sex', meaning that it includes a biological man with a GRC in the female

gender. This interpretation was supported by the Inner House of the Court of Session. The Supreme Court, in its decision handed down on 16 April 2025, reached a different conclusion on how to define 'sex' than the Inner House of Court of Session.

- 5.5 The Supreme Court in *FWS* unanimously decided that the terms 'man', 'woman' and 'sex' in the EA 2010 refer to biological sex only, as any other interpretation would render the EA 2010 incoherent and impracticable to operate. Therefore, a person with a GRC in the female gender does not come within the definition of a 'woman' under the EA 2010 and the statutory guidance issued by the Scottish Ministers was incorrect. The Supreme Court was at pains to state that its interpretation of the EA 2010 does not remove protection against unlawful discrimination from those transgender people, whether they have GRCs or not, who are separately protected against unlawful discrimination on the ground of gender reassignment.
- 5.6 As a result of the decision of the Supreme Court, several organisations in Great Britain have reviewed their policies to reflect the Supreme Court's decision. This has included the Equality and Human Rights Commission ('EHRC') in Great Britain. On 21 May 2026, the Minister for Women and Equalities laid the EHRC's updated code of practice for services, public functions and associations in Parliament. Parliament has 40 days from the laying date to review the code. If Parliament does not disapprove the code, the UK government will set a date for it to come into force, and the EHRC will publish it on its website in a final form.¹⁴

Northern Ireland Equality Legislation

- 5.7 The judgment of the Supreme Court in *FWS* arose out of the need to interpret the EA 2010. This legislation does not apply in Northern Ireland. *FWS* also considered the meaning of the GRA 2004, especially the effect of section 9(1) and (3). The GRA 2004 applies in Northern Ireland, but with modifications.
- 5.8 The Commission recognises that in carrying out its advisory roles, it has a responsibility to advise on the meaning of the legislation for which it has statutory responsibilities. The Commission itself also has a duty to promote equality of opportunity between 'men and women generally' and 'for persons who intend to undergo, are undergoing or have undergone gender reassignment'. This is explained in greater detail in **Annex A**.
- 5.9 Applying the interpretation of the EA 2010 that the Supreme Court adopted in *FWS* to the interpretation of Northern Ireland Equality Law would lead to the default position being that terms like 'sex', 'same sex', 'opposite sex', 'men' and 'women' would be interpreted as referring to 'biological sex' only and would not be affected by a person's

¹⁴ There is also ongoing and evolving litigation in the GB about the effect of *FWS* in a series of contexts including the workplace and in the goods, facilities and service context.

possession of a GRC issued under the GRA 2004 (or their 'gender' - as defined above - more generally).

- 5.10 The Commission does not consider that the differences in the drafting of Northern Ireland Equality Law, or the interaction between the GRA 2004 and Northern Ireland Equality Law, would in and of themselves require Courts and Tribunals in Northern Ireland to depart from *FWS*.
- 5.11 Unless the Courts and/or Tribunals in Northern Ireland are required to depart from *FWS* due to the application of Article 2 WF (or due to the application of the Human Rights Act 1998¹⁵), in the Commission's opinion, *FWS* should be considered as prescribing the legally required default interpretation of Northern Ireland Equality Law. It can be said with significant certainty that the Supreme Court interpreted the term 'sex' in the EA 2010 to mean '*biological sex*', and '*women*' and '*men*' to refer to '*biological sex*', and that a GRC did not change a person's legal sex for the purposes of the EA 2010. The Commission understands this to be the central holding of the Court. By extension, a person's '*gender*' is irrelevant to the actual meaning of these terms.
- 5.12 To put it another way, if the *FWS* approach should be followed in Northern Ireland as a matter of law, the ECNI would not interpret 'sex' in Northern Ireland Equality Law to mean '*certificated sex*' or '*gender*'.

Article 2(1) WF

- 5.13 The Commission has functions under the NIA 1998, as amended, in respect of the implementation of Article 2(1) of the WF (see para. 1.10 above).
- 5.14 In broad terms, Article 2 WF requires there to be no diminution in the rights, safeguards, or equality of opportunity provisions set out in the Rights, Safeguards and Equality of Opportunity ('**RSEO**') chapter of the Belfast-Good Friday Agreement ('**B-GFA**') in Northern Ireland as a result of the exit of the United Kingdom from the European Union, where those rights were underpinned by European Union law (including the Directives listed in Annex 1 of the WF) prior to exit. For the convenience of the Court, the text of Article 2(1) WF is repeated here:

'Article 2

Rights of individuals

1. 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

¹⁵ Please see the later caveats concerning the Human Rights Act 1998 at para. 5.84.

provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.'

- 5.15 There are several significant questions that arise when it comes to the application of this obligation in the context of the implications of the *FWS* judgment and the *Dillon* judgment.
- 5.16 The Commission has reached the view that these uncertainties are so important that it must seek guidance from the Court. This application is a significant part of what the Commission regards as a way forward in addressing what is an important and highly controversial political as well as legal issue. The first Affidavit by Geraldine McGahey, Chief Commissioner, on behalf of the ECNI, which accompanies this Statement, sets out the strategy adopted, the role of this proposed Judicial Review in this strategy, and the rationale for it. The third affidavit by Ms McGahey sets out the approach towards sequencing the legal questions to be answered by the Court.
- 5.17 Turning to the legal issues that arise under Article 2 WF, the Supreme Court in *Dillon* recently confirmed that Article 2 WF is capable of having direct effect, that is, of being enforceable in domestic law. The *Dillon* judgment sets out the approach that this Court is required to adopt in order to determine if the requirement in Article 2 WF to '*ensure no diminution of rights, safeguards or equality of opportunity*' has direct effect, regard being had to its wording and to the purpose and nature of the Agreement:
- (a) **First**, there must be a clear and precise obligation in EU law (*Dillon*, paras 112, 116 and 117).
 - (b) **Secondly**, Article 2(1) and a directly effective provision of one of the Annex 1 Directives can be the source of that '*clear and precise obligation*' in EU law, at least, when read in conjunction with the RSEO chapter (*Dillon*, para 118).¹⁶
 - (c) **Thirdly**, Article 2(1) WF may '*also*' have this effect when read with '*... other EU instruments falling within the ambit of the rights listed with bullet points in paragraph 1 of the RSEO chapter ...*' (*Dillon*, para 118).
- 5.18 This Order 53 Statement already notes at para. 1.6 above that Annex 1 of the WF lists EU anti-discrimination Directives, including those that provide an EU law underpinning for the SDO 1976, the EPA 1970 and the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003, e.g. Council Directive 2004/113/EC (**the Equal Treatment in Goods and Services Directive**), Directive 2006/54/EC (**the Recast Directive**) and Council Directive 2000/78/EC (**the Equal Treatment Directive**).

¹⁶ Technically, the Directives in Annex 1 had no application in the *Dillon* case and were not relied on by the Applicants in that case (as noted in para. 118), so any comments about Annex 1 are *obiter*.

5.19 The Supreme Court concludes its consideration of the direct effect of Article 2(1) with a brief paragraph that essentially constitutes the *ratio decidendi* on the issue:

'While the provisions of paragraphs 1, 11 and 12 of the RSEO chapter do not themselves have direct effect, article 2(1) of the Windsor Framework may be capable of having direct effect in conjunction with other EU instruments falling within the ambit of the RSEO chapter if the Demirel requirements are satisfied in respect of the obligation imposed. The particular EU instrument relied on by the applicants is the Victims Directive' (Dillon, para 125).¹⁷

5.20 Drawing these strands together, Article 2(1) is therefore capable of being directly effective, *'in so far as a directly effective provision of one of the Annex 1 Directives is also engaged.'*

5.21 However, *Dillon* also leaves three legal questions undecided which are pertinent to the Commission's application.

Question 1: What is the relationship between the bullet point rights in para. 1 of the RSEO chapter (hereafter 'the bullet point rights') and the Annex 1 Directives?

5.22 The Annex 1 Directives were *not* relied on as giving rise to direct effect in *Dillon*. One issue is whether the Annex 1 Directives are capable of direct effect when read together with Article 2(1) on a 'freestanding' basis or whether they must first fall *'within the ambit'*¹⁸ of one or more of the bullet point rights.

5.23 The ECNI's understanding is that the United Kingdom, in respect of Northern Ireland, is required to meet the substantive requirements of the Annex 1 Directives, when read together with Article 2(1) WF, and to that extent may be said to exist on a 'freestanding' basis (although a court determination is required to confirm this analysis). In the Commission's view, para. 118 in *Dillon* is limited to the legal issue under consideration in that case – namely the circumstances in which paras. 1, 11 and 12 of the RSEO chapter can have direct effect; it does not follow from this analysis in that context that

¹⁷ The reference to the *Demirel* requirements is a reference to the judgment of the CJEU in Case 12/86 *Demirel v Stadt Schwabisch Gmund* [1987] ECR 3719. This a case which establishes the test of direct effect for an international agreement between the EU and non-member states. Namely, the relevant provision contain 'a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure...' (see para 112 in *Dillon*).

¹⁸ This is a broad term: see *Royal Cayman Islands Police Association v Commissioner of the Royal Cayman Islands Police Service* [2021] UKPC 21.

the Annex 1 Directives more generally are limited by the RSEO chapter and the Commission considers that the better interpretation of Article 2(1) WF is that the Annex 1 Directives are not so limited (to use the language adopted so far in this Order, the Annex 1 Directives are 'freestanding').

5.24 The Commission considers that the language of Article 2(1) WF reflects a 'freestanding' analysis by focusing on the prohibition against discrimination as enshrined in EU law within the Annex 1 Directives without limiting those rights to the express language of the bullet point rights ('... including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 ...').

5.25 If the Annex 1 Directives have this 'freestanding' basis, then the EU-based prohibition on sex discrimination within the Annex 1 Directives is theoretically capable of creating obligations that have direct effect provided the *Demirel* requirements are met. (Of course, the complex question of what the EU based prohibition on sex discrimination means in practice in relation to biological women and transwomen would still require resolution especially in a 'conflict of rights' situation – see para 5.39 (6) and following below).

5.26 There is a wider significance to the issue of the relationship between the Annex 1 Directives and the bullet point rights. The Annex 1 Directives are broader than the bullet point rights. For example, the bullet point rights do not refer expressly to age or sexual orientation discrimination. These protected characteristics do fall within the Equal Treatment Directive which is an Annex 1 Directive. If the Annex 1 Directives are not 'freestanding' under Article 2 (1) WF (and instead only can have direct effect in so far as they fall within the ambit of the bullet point rights), and if the bullet point rights are exhaustive rather than illustrative,¹⁹ then the scope of the WF, in so far as it protects individual rights as guaranteed in Europe, is narrower. This is plainly an issue of some significance and practical importance.

Question 2: If the Annex 1 Directives must fall within the ambit of one of the bullet point rights, what is their scope and in particular do the bullet point rights extend beyond biological sex?

5.27 If the Annex 1 Directives are limited by the RSEO chapter (which, to repeat, is not the Commission's preferred interpretation of *Dillon* and Article 2(1) WF), the ECNI's alternative submission is that the relevant bullet point right would be 'equality of opportunity in all social and economic activity' on the ground of 'gender' (RSEO, sixth

¹⁹ Contrary to *Dillon*, para. 123(6), where the Court refers to 'the examples listed in para. 1 of the RSEO (emphasis added)

bullet point, para. 1). But what does 'gender' mean here? That bullet point certainly encompasses the promotion of equality of opportunity between men and women defined biologically, but the question is whether it is wider than that. The word 'gender' replaced 'sex' in previous drafts of the sixth bullet point, in para. 1 of the RSEO chapter.²⁰ It is arguable that the term 'gender' is capable of extending beyond 'biological sex' and is capable, therefore, of including transgender individuals within its scope and / or people with a GRC – see para 5.33 and following below. If so, this could mean that the Annex 1 Directives read with the bullet point rights extended to the protection of transgender individuals.

5.28 The ECNI also notes however that it would be deeply unsatisfactory if terms like 'gender' in the RSEO chapter had a different meaning to that within Northern Ireland Equality Law generally due to issues of 'administrative feasibility', as per para. 66 of FWS.

Question 3: If the Annex 1 Directives must fall within the ambit of one of the bullet point rights, can they only have direct effect if they are concerned with ending sectarian conflict?

5.29 This question arises because in para 119 of the *Dillon* judgment, the Supreme Court stated that the RSEO chapter, and by extension the bullet point rights, are concerned with ending sectarian conflict. Respectfully, it is unclear whether this is commentary or part of the Supreme Court's analysis of the scope of the RSEO chapter. If it is the latter, then this analysis is *obiter* as this was not a live issue in *Dillon*. However, it begs the question, whether the Annex 1 Directives, in so far as they are limited by the bullet point rights, only have direct effect if they relate to ending sectarian conflict. If so, the ECNI accepts that the issues which relate to this Application are not concerned with ending sectarian conflict, narrowly defined.

5.30 However, the ECNI does not consider that the bullet point rights must be interpreted as applying only to situations concerned with the 'sectarian conflict'. There is no analysis by the Supreme Court of the history of these provisions of the B-GFA within *Dillon* and a full examination of the bullet point rights reveals that they are concerned with rights that go beyond the sectarian conflict. The Commission considers that the better view is that the bullet point rights are not so limited, and were not intended to be limited, to the 'sectarian conflict', and that this is clear from the text of RSEO itself.

²⁰ The drafting history of RSEO, para. 1, is set out in Prof Christopher McCrudden, 'The origins of 'civil rights and religious liberties' in the Belfast-Good Friday Agreement', (2024) 75 *Northern Ireland Legal Quarterly* 29-73.

- 5.31 Assuming that *Dillon* means that Article 2(1) WF has direct effect within the scope of this Application, the next issue is whether Article 2 WF requires Courts and Tribunals in Northern Ireland to adopt a different interpretation of Northern Ireland Equality Law than applies to the same or equivalent provisions of the EA 2010. And, if so, is this different interpretation that the meaning of 'sex' and 'women' in the Directives is different from that adopted by the Supreme Court in its interpretation of the EA 2010 in *FWS*?
- 5.32 Article 2 WF specifies that there should be no '*diminution*' of B-GFA specified rights as a result of Brexit. Several critical questions arise, therefore: (i) whether the application of the interpretation adopted by the Supreme Court in *FWS* to Northern Ireland would result in a '*diminution*' in the rights of transgender people in Northern Ireland; or (ii) whether the non-application of the *FWS* interpretation in Northern Ireland would result in a '*diminution*' in the rights of biological women; or (iii) whether EU law prior to Brexit matched the *FWS* interpretation. Much depends, therefore, on the scope and meaning of EU law. This is why Interpretations 1 to 3 all grapple, at the outset, with the extent to which EU law applies and if so, **what it requires** since without that 'baseline' it is not possible to assess if there is a '*diminution*'.

European Union Law

- 5.33 The texts of the European Union Directives are, with two exceptions, silent about the questions raised in this application concerning the meaning of 'women' etc in EU law, and even then these two Directives only address the matter in their Recitals, as noted below at para. 5.37. The answers to what 'women' etc means in EU law depends, as a result of this, primarily on the proper interpretation of the caselaw of the Court of Justice of the European Union (CJEU), in particular the judgment of the Court in the seminal case of *P v S and Cornwall County Council*, Case C-13/94, decided in 1996 ('*P v S*'), and the CJEU's subsequent jurisprudence that draws on, develops, and may modify, *P v S* (including *K.B. v. National Health Service Pensions Agency*, Case C-117/01; *Sarah Margaret Richards v. Secretary of State for Work and Pensions*, Case C-423/04; *MB v Secretary of State for Work and Pensions*, Case C-451/16); *Shipova*, Case C-43/24; and *Commission v Hungary*, Case C-769/22).
- 5.34 Were this issue to have arisen prior to the exit of the UK from the European Union, and the question had arisen in a Northern Ireland Court, then it would have been an obvious case for referral to the CJEU which could have answered the questions posed as to the implications of EU law. Since the UK's exit from the EU, that route to seeking clarification is not, however, open to UK Courts generally, and (in the context of Northern Ireland) not in the context of Art. 2 WF. (It is available in Northern Ireland only in the context of *other* provisions of the WF that refer to European Union law.) Given the absence of a referral possibility to the CJEU, courts and tribunals are given the responsibility of having to interpret the existing judgments of the CJEU as best they can, and in good faith.

- 5.35 The Commission's legal analysis is that the trend of CJEU jurisprudence appears to be that 'sex' and 'women' in the Annex 1 Directives (which in turn underpin Northern Ireland Equality Law) should be open to being interpreted so that the principle of equal treatment in relation to 'sex' applies to transgender individuals. The CJEU in *P v S* held that discrimination on the grounds of gender reassignment '*is based essentially if not exclusively, on the sex of the person concerned.*' This arguably creates a point of friction with the *FWS* decision.
- 5.36 An authoritative study of the issue conducted for the European Commission concluded that: '*According to the case-law of the Court of Justice of the European Union, discrimination against trans people may amount to discrimination on the grounds of sex in so far as people who intend to undergo, are undergoing and have undergone gender reassignment are concerned*' (Silvan Agius & Christa Tobler, *Trans and intersex people: Discrimination on the grounds of sex, gender identity and gender expression*, European Network of Legal Experts in the non-discrimination field (2021)).
- 5.37 Recital 3 of the Preamble to Directive 2006/54, one of the Annex 1 Directives, explicitly provides that '*the scope of the principle of equal treatment for men and women ... applies to discrimination arising from the gender reassignment of a person.*' More recently, the Pay Transparency Directive (2024/1500) states at Recital 5: '*The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from gender reassignment.*'
- 5.38 A plausible interpretation of the CJEU jurisprudence, therefore, is that it is arguable that EU law requires a different interpretation of Northern Ireland Equality Law to that arrived at by the Supreme Court in *FWS* in respect of the EA 2010, in so far as it does not fully comply with the jurisprudence of the CJEU interpreting the Annex 1 Directives. Northern Ireland Courts and Tribunals would be required, applying Article 13(2) WF to interpret Northern Ireland Equality Law as far as possible to comply with the CJEU's interpretation of the relevant Directives.
- 5.39 In the Commission's opinion, there are, however, significant uncertainties as to the precise scope and application of the CJEU's interpretation of EU equality law in this respect. To take some examples:
- 1) How is *P v S* to be reconciled with *Grant v South-West Trains*, Case C-249/96, in which the CJEU refused to interpret 'sex' as providing protection from discrimination on the basis of sexual orientation?
 - 2) How far does *P v S* and its progeny protect people with differences in sex

development (commonly referred to as 'intersex persons') or someone with no gender identity or a fluid identity who does not want to change their 'gender' to the one which is 'opposite' to their biological sex?

- 3) How far would the CJEU have accorded the UK the equivalent of what in the European Court of Human Rights is described as a '*margin of appreciation*' in deciding how to apply *P v S*? The development of EU law in this area is related to the human rights case law of the ECtHR, and the ECtHR has held that the '*margin of appreciation*' in the field of gender recognition is wide (see *Parry v United Kingdom* (Application no. 42971/05)). Would an equivalent margin of appreciation be accorded by the CJEU, given the application of the Charter provisions which mirror the ECHR, and how wide would it be? This issue is itself not free from doubt in that it can be argued that the case law of the ECtHR indicates that the width of the margin of appreciation may vary depending on the issue in question, and that it may be narrow in gender recognition cases where the interest of others are not affected, but may be wider where such interests are affected and call for balancing.
- 4) What, precisely, does EU law require a Member State to do by way of protecting people with transgender status. Does it impose an obligation of result, namely that protections must be put in place by the Member State (but how that is achieved is up to that Member State), or does it go further and require 'sex' in the Annex 1 Directives to include '*gender reassignment*', for example?
- 5) Assuming *P v S* requires that Northern Ireland Equality Law be interpreted differently, what is the appropriate comparator in a claim of sex discrimination?
- 6) How would the CJEU address the interpretation of EU law where a conflict is said to exist? None of the named CJEU cases involved what might be called 'conflict of rights' situations, where one person's right (say, a transgender woman's) is alleged to conflict with another person's right (say, that of a woman defined biologically). What is the impact of the Charter of Fundamental Rights on the development of European law in this area, which protects amongst other matters, respect for private life, and recognises limits on rights where those limits are necessary for the protection of the rights of others, including biological women? To what extent, for example, would the CJEU consider (as it contemplated in para. 23 of *P v S*) that the principle of equal treatment for transgender people was subject to a *genuine occupational requirement* defence in certain employment situations?
- 7) Do the protections against unlawful discrimination for transgender people that the CJEU recognises as arising from European Union equality law apply only to a person who has/will/intends to undergo a medicalised process of transition, or would the CJEU now adopt a position closer to that in the EA 2010? Indeed, is

having a GRC relevant for EU law purposes at all?

- 8) How would the CJEU reconcile a definition of 'sex' in the Annex 1 Directives that encompassed more than biological sex with other EU Directives that seek to protect the welfare of women in the workplace, such as (a) Council Directive 89/654/EEC concerning the minimum safety and health requirements for (most) workplaces and which, amongst other things, make special provision for rest breaks for pregnant women and nursing mothers and the provision of separate sanitary facilities for men and women, and (b) Council Directive 92/85/EEC ('the Pregnant Workers Directive') which introduced measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding? We have indicated previously (para. 1.8 above) that, in the Commission's view, terms like 'women' can only mean biological sex when used exclusively in the context of pregnancy and menstruation, but we wish the Court to consider whether this is the correct interpretation in light of these EU Directives.

5.40 Three of these issues, (4), (6) and (7), require further analysis.

An obligation of result?

- 5.41 We turn first to issue (4), regarding the appropriate methods of transposition of the EU Equality Directives in the domestic law of the Member States. Does *P v S* and subsequent case law require 'sex' to also mean 'gender assignment' or does it simply require adequate protection against discrimination for people with that protected characteristic?
- 5.42 The Commission notes at the outset that although the judgment of the Supreme Court in *FWS* was focused on domestic law, namely the interpretation of the EA 2010, it was an interpretation of domestic law whose development was heavily influenced by EU law and the ECtHR case law. This was also the case as regards Northern Ireland legislation. Following *P v S*, the SDO 1976 was amended so as to bring Northern Ireland law into line with the CJEU's evolving jurisprudence (Sex Discrimination (Gender Reassignment) (Amendment) Regulations (NI) 1999, the Sex Discrimination (Amendment of Legislation) Regulations 2008, and the Sex Discrimination Order 1976 (Amendment) Regulations (NI) 2016).
- 5.43 The Equality Commission understands that the choices that Government and Parliament faced in amending domestic law to give effect to the CJEU's judgment in *P v S* were two-fold: either to deem 'discrimination on the grounds of sex' to include 'discrimination on the ground of gender reassignment', or, instead, to create a new and separate ground of prohibited discrimination on the ground of gender reassignment to give effect to the CJEU's judgment. Government and Parliament chose the latter. It is not obvious that this was an impermissible approach to take, at

least at that time. It is arguable that the CJEU's opinions in cases such as *P v S* envisaged that prohibiting discrimination on the ground of gender reassignment would be sufficient and did not necessarily require the meaning of 'sex' for the purposes of prohibiting 'sex discrimination' to have anything other than a binary biological meaning. The Supreme Court's judgment appears to reflect this approach (*FWS*, at para. 264), stating that its conclusion that 'sex' in the Equality Act 2010 '*does not remove or diminish the important protections available under the EA 2010 for trans people with a GRC as we have explained. To the contrary, this potentially vulnerable group remains protected in the ways we have described.*'

- 5.44 Even assuming that this approach is endorsed, it remains the case that, in some respects, however, the amendments made to Northern Ireland legislation to implement *P v S* may not have fully aligned the SDO 1976 with the EU principle that transgender people should be protected from discrimination. For example, indirect discrimination on the ground of '*gender reassignment*' is not prohibited in respect of the provision of goods and services. In so far as a Member State's national law only partially implements a directly effective Directive, as interpreted by the CJEU, that Directive may still be relied on in national Courts.

What constitutes 'transitioning'?

- 5.45 Turning to the second particularly significant issue, identified above as (7), the *P v S* case arose in the 1990s, at a time when a medicalised understanding of transition was often the norm. This medicalised approach to transition was incorporated in Northern Ireland law in 1999 and found its way into the SDO 1976. However, in contrast, the EA 2010 does not apply this medicalised approach to its definition of 'gender reassignment'.
- 5.46 A judgment of the CJEU in *Mousse*, C-394/23, 9 January 2025, although dealing with the scope of EU data protection requirements, suggests that the scope of the protection against sex discrimination in an EU Directive may extend to a transgender individual even where that person has not undergone gender reassignment under medical supervision. Paragraph 62 of the judgment states that: '*... In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of that directive is also such as to apply to discrimination arising from a change in a person's gender identity (see, by analogy, judgment of 27 April 2006, *Richards* C-423/04...)* (emphasis added)'.
- 5.47 This view arguably gains further support from another more recent data protection case, C-247/23, *Deldits*, 10 March 2025. The main finding in *Deldits* was that it was unlawful for record-keeping purposes (rectifying the records of the sex of people held on the national register of asylum seekers) to require a transgender person to provide proof that they had undergone gender reassignment surgery before they were recorded in their acquired gender. The CJEU considered that proof of a change of

gender identity was required but rejected the argument that there needed to be proof of surgery.

- 5.48 The CJEU's judgment in C-43/24 *Shipova*, another case about personal information held on a civil data register, albeit that it had the effect of restricting the complainant's freedom of movement between Member States, was handed down on 12 March 2026. In the course of its judgment, the CJEU stated that to '*... tolerate discrimination based on the difference between biological sex and gender identity would be tantamount, as regards a transgender 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*' (para 54). This conclusion is arguably premised on a finding that '*... the recognition of a person's gender identity cannot be made conditional on surgical treatment that is not desired by that person*' (para 50).
- 5.49 If there is a requirement for an expanded definition of transgender to encapsulate non-medicalised changes in gender, there are ramifications more generally. It may necessitate that a different balance be struck if the rights of others are more adversely impacted, given that those protected as having undergone gender reassignment would be a wider group than is currently protected under the SDO 1976 definition.
- 5.50 This is why Interpretations 1 to 2, which are premised on EU Law applying, both seek to address what the implications are for Northern Ireland Equality Law. In other words, even if EU law applies, that is not the end of the enquiry. There also needs to be consideration of what EU law requires terms like 'sex' to mean.

Role of the Charter of Fundamental Rights?

- 5.51 In that context, the role of the Charter of Fundamental Rights has come to take on considerable significance. This is the third particularly significant issue identified above (as (6)). Whilst the Supreme Court in *Dillon* has rejected explicitly (at paras. 158 - 159) a submission that '*a breach of a Charter right could breach article 2(1) of the Windsor Framework independently*' (emphasis added), the Charter remains relevant to Article 2(1) WF in two ways: *indirectly* as a set of interpretative principles and, according in *Dillon*, *directly* where three conditions are satisfied, namely where:
- (a) The Charter right operates within the ambit of a specified RSEO right (*Dillon*, para 148);
 - (b) The Charter right is '*anchored*' to a directly effective provision of EU law within the ambit of RSEO (*Dillon*, paras. 150 and 157); and
 - (c) The relevant Charter right itself would be directly effective in EU law.
- 5.52 Where all three conditions are satisfied, that Charter right cannot be diminished as a result of the UK leaving the EU, meaning that the UK is required to produce the same *result* as would have been the case prior to Brexit.

5.53 The important judgment of the CJEU in C-769/22 *Commission v Hungary*, handed down on 21 April 2026 now makes clear, if it was not so before the judgment, that the Charter is relevant to the Annex 1 Directives in both ways: as relevant to the interpretation of these Directives, **and** directly where the Member State is implementing those Directives.

5.54 In this context, Charter Article 21(1) is particularly relevant. It states: '*Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*'

5.55 The CJEU considered that Article 21 provides extensive protection against discrimination based on gender identity, where that differs from biological sex. In para. 133 of the judgment, the CJEU states, drawing on Article 21 of the Charter:

'As regards, in particular, discrimination based on sex, according to settled case-law this cannot be confined simply to discrimination based on the fact that a person is of one sex or another. In view of the purpose of Article 21(1) of the Charter and the nature of the rights which it seeks to safeguard, the scope of that article is such as to apply not only to discrimination arising from a change of gender of the person concerned, that is to say, from gender reassignment, but also to discrimination based on deviation from the self-identity corresponding to the sex assigned at birth (see, to that effect and by analogy, judgments of 27 April 2006, Richards, C-423/04, EU:C:2006:256, paragraph 24; of 26 June 2018, MB (Change of gender and retirement pension), C-451/16, EU:C:2018:492, paragraph 35; and of 9 January 2025, Mousse, C-394/23, EU:C:2025:2, paragraph 62 and the case-law cited).'

5.56 On the one hand, this may be thought to bring a degree of greater clarity to the meaning of 'sex' and related terms in EU law. On the other hand, on a strict reading of the judgment, it is perhaps arguable that all that Article 21 is interpreted as requiring is that 'gender reassignment discrimination' and 'gender identity discrimination' must be prohibited, in addition to sex discrimination, rather than that the meaning of terms like 'sex' must be interpreted to include 'gender reassignment' and 'gender identity'.

Interpreting Northern Ireland Equality Law

5.57 Even assuming that Article 2 WF requires that Northern Ireland Equality Law must be interpreted as European Union law requires, and assuming that this requires a departure from the Supreme Court in *FWS*, that obligation only arises where the relevant Northern Ireland law implemented European Union law. European Union law only extends to those areas that are within EU competence. That would include where a Member State (or the UK prior to Brexit) is implementing the Annex 1 Directives. The Supreme Court's approach in *FWS* would appear to apply where Northern Ireland Equality Law did **not** implement European Union law, and where Northern Ireland law

is drafted essentially the same as GB equality law. This is why Interpretations 1 and 2 are qualified with the language "*in those areas where EU law provided an underpinning to Northern Ireland Equality Law*".

5.58 Where EU law does apply, the question arises as to how far the terms of Northern Ireland Equality Law can be read to conform to European Union equality law (including as interpreted in light of the Charter). For example:

- Should the SDO 1976 be 're-interpreted' to permit indirect discrimination claims in all goods, facilities and services contexts?
- Does the prohibition on harassment need to be read more broadly to cover transsexual people being harassed in relation to their perceived 'sex'?
- Should there be protection against direct and indirect discrimination, victimisation and harassment in areas like private membership clubs? Or, in the absence of such a possibility, would the Directives themselves have direct effect, and, thus, be able to be relied on directly in domestic litigation?

5.59 In determining what Courts or Tribunals may do when interpreting Northern Ireland Equality Law '*as far as possible*' to conform to any divergent CJEU interpretation, would they be permitted to take account of the UK Supreme Court's dicta in *FWS* regarding the need and desirability when interpreting a domestic statute, like the SDO 1976, to give its terms clear, constant and predictable meanings so that all people would be more easily able to understand their legal rights or their legal duties? Given that the Supreme Court in *FWS* considered that the EA 2010 would be inoperable if these principles were not followed, would an Industrial Tribunal or Court in Northern Ireland be permitted to give weight to that consideration when considering any divergent CJEU interpretation in respect of interpreting Northern Ireland Equality Law, and, if so, what weight?

5.60 These matters are not expressly covered by the Interpretations 1 to 3. However, the Commission anticipates that the Court's judgment would likely provide useful analysis which would inform the answer to these questions.

Section 75 NIA 1998

5.61 It will be recalled that Section 75(1) contains a duty as follows:

"A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity ... (b) between men and women generally ..."

- 5.62 Like the rest of the Northern Ireland Equality Legislation, there is no definition of 'men' and 'women' in the NIA 1998.
- 5.63 Section 75 has its origins in the RSEO chapter itself (RSEO, para. 3), in which the UK undertook to enact what became Section 75 and thus can be considered one of the 'safeguards' referred to in Article 2(1) WF. Otherwise, however, the interplay between Article 2 WF and Section 75 is unclear in several respects. For example, in making its pronouncements regarding the relevance of reading the rights in the RSEO chapter through the lens of the 'sectarian conflict', the Supreme Court's refers (in para. 119 of *Dillon*) to para. 1 of RSEO; it is unclear how far, if at all, RSEO para. 3 should also be read similarly (the Commission submits not). So, too, Section 75 is a broadly-based 'mainstreaming' requirement on designated public authorities, which raises the question as to whether Section 75 was 'underpinned by EU law'.
- 5.64 While EU law does not mandate an identical mainstreaming duty to that in Section 75, the Northern Ireland duty helped to implement and satisfy UK obligations regarding Northern Ireland contained in several of the Annex 1 Directives (including the Employment Equality Framework Directive (Council Directive 2000/78/EC)) which prohibit discrimination and, in some cases, explicitly permit 'positive action' to achieve substantive equality. Section 75 acted as an institutional, proactive enforcement tool to ensure these EU-level equal treatment principles were continuously considered by designated public authorities.
- 5.65 Since Section 75 implements, in part, EU obligations, EU law would have required it to be interpreted, 'as far as possible' in conformity with EU law, including the jurisprudence of the CJEU. This obligation arises from the so-called 'indirect effect' of EU law (Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA*, ECLI:EU:C:1990:395, [1990] ECR I-04135). Given that Article 4 of the Withdrawal Agreement requires that the WF is to be interpreted using the same interpretative principles as apply in the Member States, this leads to a conclusion that the meaning of 'men' and 'women' in Section 75 should reflect the CJEU's interpretation as set out in the jurisprudence considered previously.
- 5.66 On the other hand, if the Supreme Court in *Dillon* is interpreted as requiring that an obligation to mainstream under EU law is 'directly effective', then a different result may arise. The Recast Directive requires gender mainstreaming by Member States in relation to employment-related policies, stating at Article 29: '*Gender mainstreaming: Member states shall actively take into account the objective of equality between men and women when formulating and implementing laws [...]*'. The Equal Treatment in Goods and Services Directive, however, does not appear to require gender mainstreaming in its respective field since it does not contain any equivalent to Article 29.

- 5.67 If the Recast Directive is interpreted to mean that '*gender*' goes beyond biological sex, and therefore that Article 2 WF requires gender mainstreaming in respect of Section 75 to reflect this, the question arises as to whether Section 75 has different meanings of '*sex*' and '*gender*' depending on whether proposed policies relate to employment (Recast Directive underpins mainstreaming) or goods/services (Goods and Services Directive does not underpin mainstreaming). However, it is open to some doubt whether Article 29 is 'directly effective'. It is high-level and general, and therefore may not satisfy the conditions for the direct effect of Article 2(1) WF set out in the *Dillon* judgment (there are other potential issues too, such as the sectarian conflict issue and the extent to which Annex 1 Directives are freestanding – see paras. 5.22 to 5.32 above).
- 5.68 It was submitted in para. 5.17 above that the Supreme Court in *Dillon* decided that one way in which the direct effect of Article 2(1) may arise is where Article 2(1) is viewed as capable of having direct effect in conjunction with '*other EU instruments falling within the ambit of*' the bullet point rights. The question therefore arises as to whether there are *other* directly effective provisions of EU law that provide a broad-based support for mainstreaming initiatives that operate within the ambit of the RSEO chapter.
- 5.69 Putting aside the sectarian conflict question, Article 2 TEU might be such a provision. It sets out the foundational values of the Union and states that: '*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*' (emphasis added).
- 5.70 The recent judgment of the CJEU in Case C-769/22 *Commission v Hungary*, which considers the scope and meaning of Article 2 TEU, has now been handed down. It is a difficult judgment but it is at least clear from the judgment: that Article 2 TEU applies to the Member States (paras. 536-543), that Hungary was in violation of Article 2 TEU, but that a necessary condition for the application of Article 2 TEU was that the Court had already determined that Hungary was independently and seriously in violation of several Directives and the Charter of Fundamental Rights (paras. 544-547, 550-551), and that Article 2 TEU applied to Member States only when acting in areas where the Member State was implementing EU law (para. 550). These issues aside, however, it is unclear whether Article 2 TEU is directly effective.
- 5.71 In the view of the Commission, and bringing these strands together, it does not appear to be the case that there is an argument that Section 75 is *required* under EU law to be read as covering biological sex and more since, at the very least:

- (a) It is doubtful that Article 29 of the Recast Directive could be relied on as a clear and precise EU law obligation in relation to mainstreaming; and
- (b) It is doubtful that it could be said that a failure to interpret 'men' and 'women' in Section 75 to go beyond biological sex would be a breach of Article 2 TEU – the facts in Hungary are extreme and very likely do not translate to any argument concerning compliance (or not) with mainstreaming obligations.

5.72 If there are no directly effective EU law underpinnings to Section 75, then the Supreme Court's approach in *FWS* is likely to apply to the interpretation of Section 75 by default, unless the doctrine of 'indirect effect' is applied. If it does not apply, this may mean, therefore, that different interpretations apply as between Section 75 and the rest of Northern Ireland Equality Law. This is hardly ideal (recalling the issue of '*administrative feasibility*', as per para. 66 of *FWS*) but that would appear to be the conclusion, unless there is a means of arguing that a consistent interpretation is required across all Northern Ireland Equality Law, for example by applying the doctrine of 'indirect effect', where EU law means that 'sex' extends beyond biological sex.

5.73 This is why Interpretations 1 to 3 all address the meaning of 'women' in the context of Northern Ireland Equality Law which includes Section 75. It is crucial to understand what obligations are placed on public authorities, especially since all of these organisations will also be subject to the SDO 1976, and the Relevant Allied Legislation, which also uses terms like 'women'.

The Relevant Allied Legislation

5.74 Northern Ireland Equality Law sits alongside, and may interact with other legislation, like health and safety legislation, which also uses terms like 'woman'. *FWS* did not consider legislation parallel to the EA 2010 which used words like 'woman'.²¹ However, there would clearly be issues of '*administrative feasibility*' (as per para. 66 of *FWS*), if 'sex' etc had a different meaning in parallel legislation where the duty bearer was regulated by Northern Ireland Equality Law *and* that parallel legislation. Moreover, as expressed in *FWS*, it is important that legislation is workable and practical (para. 160).²²

5.75 Some of the parallel 'allied' legislation relates to matters which exclusively link to pregnancy and menstruation. As set out previously (para. 1.8), in the Commission's

²¹ The Supreme Court was careful to say that its judgment was limited to the EA 2010 only and not any parallel legislation which would need to be considered '*in the light of the wording, context and policy of the statute in question*' (para. 108).

²² It is recognised that this comment was in the context of a consistent interpretation of 'sex' within the EA 2010. However, in the Commission's view, similar points can be made about related and parallel legislation.

view, terms like 'woman' can only mean biological sex when used in the context of pregnancy²³ and menstruation.²⁴

5.76 A good example is the Factories Act (Northern Ireland) 1965 which states in section 85: 'An occupier of a factory shall not knowingly allow a woman or girl to be employed therein within four weeks after she has given birth to a child'. In the Commission's view, the focus on women or girls who have recently given birth can only reasonably carry a biological meaning.

5.77 A further example is the legislation in Northern Ireland concerning rights before, during and after pregnancy (e.g. statutory maternity pay²⁵, statutory maternity allowance²⁶, ante-natal care²⁷, ordinary maternity leave²⁸, additional maternity leave²⁹, and when breastfeeding³⁰). In the Commission's view, this can only relate to the biological sex of females.^{31 32}

²³ Article 4 of the SDO 1976 states that there is no direct or indirect sex discrimination in relation to the special treatment afforded to women in connection with pregnancy or childbirth.

²⁴ This is consistent with FWS which stated: '... Since as a matter of biology, only biological women can become pregnant, the protection is necessarily restricted to biological women (para. 177).

²⁵ Under the Social Security Contributions and Benefits (Northern Ireland) Act 1992, 'statutory maternity pay' is defined by reference to pregnancy – see section 160.

²⁶ Under the Social Security Contributions and Benefits (Northern Ireland) Act 1992, 'state maternity allowance' is defined by reference to pregnancy – see section 35.

²⁷ Article 83 of the Employment Rights (NI) Order 1996 defines this by reference to pregnancy.

²⁸ Paragraph 4 in the Maternity and Parental Leave etc Regulations (Northern Ireland) 1999 defines 'ordinary maternity leave' by reference to pregnancy.

²⁹ Paragraph 5 in the Maternity and Parental Leave etc. Regulations (Northern Ireland) 1999 defines 'additional maternity leave' by reference to ordinary maternity leave.

³⁰ The Employment Rights (NI) Order 1996 provides various protections by reference to 'maternity grounds'. Article 98 of the Employment Rights (NI) Order 1996 defines 'maternity grounds' by reference to pregnancy giving birth or breastfeeding a child.

³¹ The Commission's view here is consistent with section 12 GRA 2004: 'The fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child.'

³² There are also rights in relation to fatherhood, for example, the Paternity and Adoption Leave Regulations (Northern Ireland) 2002 define the entitlement to paternity as including matters such as being 'the father of the child'. The Commission does not consider that the definition of fatherhood is impacted by 'gender' and is a matter of pure biology. Moreover section 12 GRA 2004 states: 'The fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child.'

- 5.78 Equally, in Period Products (Free Provision) Act (Northern Ireland) 2022, the Commission considers that the language '*... a person who needs to use period products, means a person who menstruates (whether that person is a woman, girl or other person)*' must refer to biological sex (although '*other person*' will likely also include people with a '*gender*' that is not female).
- 5.79 Beyond these examples of, in the Commission's view, very clear categories, however, there is legislation which interacts with Northern Ireland Equality Law, and which will impact on the day-to-day operations of many service providers and employers, where terms like '*woman*' are used without definition.
- 5.80 A good example is the Workplace (Health, Safety and Welfare) Regulations (Northern Ireland) 1993. Paragraph 20 requires '*suitable and sufficient sanitary conveniences*' which includes the requirement that '*separate rooms containing conveniences are provided for men and women ...*'. There is no definition of '*women*'. Does this require sanitary conveniences to be segregated by '*biological sex*' or by '*gender*'? The SDO 1976, for its part, states under Article 52 that it does not '*render unlawful any act done by a person in relation to a woman*' in specified circumstances concerning '*the protection of women*'. Does '*woman*' have the same meaning under the health and safety rules and the SDO 1976?
- 5.81 The Commission therefore seeks guidance also on the meaning of terms like '*woman*' in these contexts so that public bodies, employers and service providers act compliantly with Northern Ireland Equality Law in so far as it interacts with the Relevant Allied Legislation in their day-to-day operations.
- 5.82 In other words, Northern Ireland Equality Law does not exist in a vacuum. It interacts with parallel legislation which also uses terms like '*sex*'. To help public bodies, employers and service providers in their day-to-day operations, guidance is needed as to the meaning of '*sex*' etc in the Relevant Allied Legislation. Noting the comments at para. 108 in *FWS*³³, the Commission is seeking only guidance as to whether there is a presumption that '*sex*' etc has the same meaning in Relevant Allied Legislation as Northern Ireland Equality Law.
- 5.83 Moreover, some of the organisations providing services which are governed by the Relevant Allied Legislation will be subject to Section 75 and the understanding of words like '*women*' to be adopted in that context, with the effect that the clarification of the interpretation of terms like '*women*' etc across Northern Ireland Equality Law and the Relevant Allied Legislation is now required.

Human Rights Act 1998

³³ '*We note only that the effect of the rule in section 9(1) on the very many statutes referring to men and women, whether enacted before or after the GRA 2004, must be carefully considered in the light of the wording, context and policy of the statute in question*'.

5.84 The Commission is clear that the Human Rights Act 1998 ('HRA') falls into the remit of the NIHRC. Indeed, the ECNI has no powers directly to address the HRA. The analysis above has, as a result, deliberately steered clear of the implications of Articles 3, 8 and 14 ECHR for the definition of 'sex' etc. This is despite acknowledging that the HRA has potentially significant implications for the meaning of 'sex' and that those bodies subject to Section 75 will also have obligations under it. We have asked the NIHRC to consider joining as a party to this application so that all relevant legal arguments are appropriately ventilated, with the Court being assisted by both statutory bodies. International human rights law may also be relevant. There are two types of international human rights law. The first has been implemented in Northern Ireland, i.e. the ECHR via the HRA. The ECNI wants the NIHRC to address that legislation. The second is non-implemented conventions like the UN Convention on the Rights of the Child which may also be relevant. This Convention is relevant to the work of the Northern Ireland Commissioner for Children and Young People ('NICCY') and the Commission is grateful that the NICCY is an Intervenor.

Jurisdiction of the Court to grant an advisory declaration

5.85 The Court has power on an application for judicial review to grant a declaration, pursuant to s 18(1)(d) of the Judicature (Northern Ireland) Act 1978 ('the 1978 Act'). Section 23 of the 1978 Act makes specific provision for declarations to be made by the High Court.

Declaratory judgments

(1) No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby.

(2) The High Court may make binding declarations of right in any action or other proceeding whether or nor any consequential relief is or could be claimed therein.

(3) Notwithstanding that the events on which a right depends may not have occurred, the High Court may in its discretion make a binding declaration of right if it is satisfied that—

(a) the question for decision involves a point of general public importance or that it would in the circumstances be unjust or inconvenient to withhold the declaration; and

(b) the interests of persons not parties to the proceedings would not be unjustly prejudiced by the declaration.'

5.86 The relief sought by the Commission in this Application is an *advisory* declaration. The justification for the Commission seeking such relief, from the perspective of the ECNI, is set out in the accompanying Affidavits. It will be seen that the declaration sought is

drafted in three alternatives. The reason for this is to reflect the legal uncertainties set out above, and to provide the Court, and potential interveners, the opportunity to consider the wide range of issues.

- 5.87 Two separate issues arise: (1) does the Northern Ireland High Court have the ability to grant an advisory declaration in the exercise of its supervisory jurisdiction by way of judicial review ('the jurisdiction question')? (2) if so, in what circumstances would the Court consider exercising its discretion to grant an advisory Declaration ('the exercise of discretion question')? The Commission considers that the High Court does have such a jurisdiction, and that the circumstances of this Application are suitable for exercising its discretion.
- 5.88 Regarding the jurisdictional question, the current approach in England and Wales is clear: that the courts possess an inherent jurisdiction to make advisory Declarations as a matter of discretion: (*R v Secretary of State for the Home Department, ex p Mehari* [1994] QB 474 (DC) at 491; *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin), at [15] and [46]; *Devon Partnership NHS Trust v Secretary of State for Health and Social Care* [2021] 1 WLR 2945, at [11]-[12]. (See also Wade and Forsyth's *Administrative Law* (12th ed) at 460: '*... it is clear that the courts have the jurisdiction to make advisory declarations*'.) As a result, whether or not to grant an advisory Declaration is, in the Commission's submission, a matter of discretion and not a jurisdictional issue.
- 5.89 The jurisdiction of the Northern Ireland courts to grant advisory declarations is less comprehensively explored in the case law, but there is no reason in principle why there should not be an equivalent inherent jurisdiction to do so, and what judicial pronouncements that have been made have recognised this. Carswell LCJ, in *Re McConnell's Application for Judicial Review* [2000] NIJB 116 stated, at 120: '*It is not the function of the courts to give advisory opinions to public bodies, but if it appeared that the same situation was likely to recur frequently and the body concerned had acted incorrectly they might be prepared to make a declaration, to give guidance which would prevent the body from acting unlawfully and avoid the need for further litigation in the future* (emphasis added).' This is precisely the situation here.
- 5.90 Although the Northern Ireland Court of Appeal noted in *Re Burns & McCready* [2022] NICA 20, at para.14, that '*We are not aware of an advisory opinion having been issued in Northern Ireland to date*', the Court nevertheless considered it clear that the Northern Ireland High Court has jurisdiction, in exceptional cases, to issue an advisory declaration on questions of law if it is satisfied that the questions for decision involve matters of general public importance. The Court stated at para.14, drawing on judgments from England and Wales: '*... it is clear that the court has discretion when asked to take such a course. It is equally clear that there must actually be a real point of law to declare upon*.' The Court continued, at para. 16: '*... courts must proceed with caution. Any declarations on points of law of general importance are only made where*

there is an identified point of law and there are important reasons in the public interest for doing so.'

5.91 Turning to the 'exercise of discretion question', and drawing on the case law in both jurisdictions, it is clear that the Courts have not articulated any firm principles as to when they will grant an advisory declaration, other than to state that they will only be made when it is in the public interest to do so (*R (Customs and Excise Commissioners) v Canterbury Crown Court* [2002] EWHC 2584, at [27] (Laws LJ)) or there is a 'demonstrably good reason to do so' (*R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2759 (Admin) at para. 47(iii)). The importance of the 'public interest' in resolving the legal issue is also well illustrated by *London Borough of Islington v Camp* [2004] LGR 58 in which the Court entertained the claim despite there being no dispute or proposed action, because to do so served a useful purpose in the public interest.

5.92 One circumstance in which the public interest has been held to be furthered, supporting the granting of an advisory declaration, is where to do so would enable a public authority to ascertain its own duties or powers (*Wimbledon and Putney Conservators v Tuely* [1931] Ch 90, and in particular to reduce the likelihood of the public authority taking action which would be found unlawful subsequently. As stated by the High Court for England and Wales in *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2759 (Admin) at para. 46, per Simon Brown LJ: 'Advisory declarations have two main functions: first, to reduce the danger of administrative activities being declared illegal retrospectively, and, secondly, to assist public authorities by giving advice on legal questions which is then binding on all.' Again, both these concerns apply in the context of this Application.

5.93 For an advisory declaration to be granted to a public authority that is anxious to have a legally authoritative statement of the extent of its statutory powers, there is no requirement that those powers should have first been exercised by the public authority (*Runslip-Northwood Urban DC* (1935) 145 LT 208). Nor is it the case that the public authority seeking this clarification must itself take a particular stance on the disputed issues (*Islington LBC v Camp* [2004] LGR 58). So, too, in *R v Secretary of State for Employment, ex p EOC* [1994] 2 WLR 404 (HL), a declaration was made when there was no formal decision under challenge.

5.94 The Courts have made clear that advisory declarations will be refused in certain circumstances. The courts have jurisdiction to grant advisory declarations, 'but not to speculators and busybodies, to those who ask hypothetical questions or to those who have no sufficient interest. The Court does not know with sufficient certainty what issues or point of law will actually arise in the circumstances of this case.' (*Re Burns & McCreedy* [2022] NICA 20). The present proposed action could not be further away from these scenarios.

- 5.95 The Commission clearly has sufficient interest in the matters raised in this application. As set out previously, Section 78C NIA 1998 provides that the Equality Commission 'may—(a) *bring judicial review proceedings in respect of an alleged breach (or potential future breach) of Article 2(1) of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement*' (emphasis added).
- 5.96 One of the recurring issues that causes the Courts some concern in considering whether to grant an advisory declaration is the danger of forming an opinion without the benefit of adversary argument. In the ordinary run of litigation, the respondent would normally be in the position of advancing such arguments. In the Commission's Application to this Court, there is no named respondent. It is submitted that section 78C not only provides the ECNI a power to initiate these proceedings, but it also implicitly empowers the Court to proceed by way of judicial review even where there is no Respondent. It is also clear that the Court will have before it the range of different legal arguments that it will need in order to reach its opinion on the matters raised even without there being a named respondent because of the extensive set of those who are potential Notice Parties, and interveners who have already been granted permission to intervene.³⁴
- 5.97 Drawing on these cases, the Commission applies to the High Court for an advisory declaration, as it believes that the conditions for its award are satisfied here. The relevant questions are whether Article 2 WF applies to equality legislation, and whether, if it does, EU law requires a departure from the FWS interpretation of 'sex' in Northern Ireland in respect of the SDO 1976, the EPA 1970, and/or Section 75, and an identification of the foundational principles that underpin the protection of people in relation to biological sex and transgender status.
- 5.98 Were the High Court to be willing to issue an advisory declaration limited to the broad issues of principle, the Commission would be on firmer ground as to what direction its future guidance should take. An advisory declaration would also be helpful to the performance of our other statutory functions, including providing advice or assistance to aggrieved persons and advising Government. The meaning of 'sex' etc. is highly contentious, and litigation is an inevitability. Without clarification from the Courts, the Commission may take a direction that ultimately proves to require review or amendment with the inevitable waste of time and resources for all involved including employers, service providers and public bodies.
- 5.99 We have already noted the specific risk for employers and service-providers which face the risk of litigation from aggrieved employees and service-users if they follow ECNI guidance which proves to be legally flawed. As stated in De Smith, at 18-038:

³⁴ If, however, the Court considers that it is necessary for additional argument to be made for or against the proposed declaration, the Court may consider requesting the Attorney-General to appoint a friend of the court to present appropriate argument, see *Re Parliamentary Privilege Act 1770* [1958] AC 331. See further Sir Harry Woolf, *Protection of the Public: A New Challenge*, at 49 50.

'In many situations all that is required is for the legal position to be clearly set out in a declaration for a dispute of considerable public importance to be resolved. It usually relates to events which have already occurred. However ... it is increasingly being used to pronounce upon the legality of a future situation and in that way the occurrence of illegal action is avoided.' Asking this Court to provide guidance now, with the broad range of interested parties and interveners involved, will likely create certainty more quickly and more efficiently.

Avoiding satellite litigation and focusing on the core substantive issues

- 5.100 Were the Commission to attempt to issue guidance without a clear judicial decision, it is almost certain that it will be the subject of judicial review whatever view it took of the application of *FWS*. Indeed, the likelihood of litigation targeting the ECNI and resulting from *FWS* is no longer theoretical. As predicted by the Commission early in this process, several organisations are concerned, as is the Commission, to have the legal position clarified and have sought to do so by launching judicial reviews of the Commission. There are already two cases that the Commission is aware of because it is the Respondent in both (taken by the Good Law Project: Application 2025 No. 058765/01, and the Women's Rights Network Northern Ireland: Application 2026 No. 005776/01). In both, the issue of the application of the *FWS* judgment in Northern Ireland is central to the case, although the Good Law Project and the Women's Rights Network Northern Ireland take very different views as to the correct approach to take.³⁵
- 5.101 The Good Law Project, in its own name, seeks to resolve the legal issues that the Commission has identified previously. It seeks, essentially, to limit the application of the *FWS* decision in Northern Ireland and has chosen to do so by way of contentious proceedings against the Commission. The litigation by Women's Rights Network Northern Ireland in its own name also seeks to resolve the legal issues identified in this application in contentious proceedings against the Commission but in precisely the opposite direction: by applying the *FWS* decision to the interpretation of Northern Ireland Equality Law.
- 5.102 The applicants in these cases are thus expected to propose very different views of the correct legal position in Northern Ireland to the Court (whilst simultaneously criticising the Commission for its approach towards how to resolve the meaning of 'sex' etc.). It is respectfully suggested that the most efficient way forward is to focus first and primarily on the substantive legal issues (like the meaning of 'sex' etc.) rather than satellite issues as to whether the ECNI is adopting the right approach to the resolution of these difficult issues.

³⁵ On 25 June 2026, the Commission received a Pre-action Protocol Letter which set out the grounds which the proposed applicant, a trans woman, considered would support an application for judicial review of the Commission. In brief, these grounds, similar to Good Law Project, challenge the alleged failure of the Commission to issue guidance following *FWS*, causing a detriment to the proposed applicant.

5.103 That aside, the involvement of Women's Rights Network Northern Ireland and the Good Law Project as intervenors (or notice parties) in this application would better ensure that the relevant legal issues were fully considered from all angles, and the Commission has urged these and other relevant organisations to seek leave to intervene. In particular, since the Commission does not have a remit in relation to the Human Rights Act 1998, which prohibits discrimination on the ground of sex in certain situations (Article 14) and contains a right to privacy (Article 8), the Commission has urged the NIHRC to become a party to this application (see para 5.84 above). To date, it has chosen not to do so, but it is feasible that organisations like the Women's Rights Network Northern Ireland or the Good Law Project – could as intervenors (or notice parties) advance the human rights arguments (with, no doubt, opposing interpretations) thereby creating a broad range of views for the Court.

5.104 The ECNI considers that this Application is an important step towards creating greater legal certainty and is concerned that all organisations with a genuine interest in this area should be involved as parties or intervenors (as appropriate) in this proposed action.

5.105 The application that the ECNI now makes is intended to resolve the issues of principle, and to attempt to do so in a way that addresses all the central issues that have already arisen, or that can be predicted as likely to arise in the near future, in the interests of reducing costs for potential applicants and the Commission, and also making the most efficient use of scarce judicial resources.

Sequencing

5.106 The leave hearing is currently scheduled for up to two weeks beginning 30 November 2026. The Commission proposes that the Court approaches its Application in a cascading manner such that the relevant legal issues are answered sequentially as follows:

- (a) Does the Court have jurisdiction to grant an advisory declaration, and if it does would it consider that it is arguable that the Court would exercise its discretion to grant such a declaration?

If the answer is 'no' to either of these questions, then the further questions proposed below become otiose. If the answer to both these questions is 'yes', then the Commission proposes that the Court should consider whether the test for granting leave should be applied (as proposed next). This sequence would also be followed in determining the merits of the application if leave is granted.

- (b) Does Article 2 WF, taken together with the Annex 1 Directives, apply to legal issues concerning the meaning of 'women' etc in Northern Ireland Equality

Legislation in so far as it is underpinned by these directives and so must be interpreted in light of the CJEU's interpretation of these directives?

If the answer is 'no' to (b), then Parts 1 and 2 in 'Interpretation 3' in para. 4.7 must be upheld, and the analysis moves to (d).³⁶

If the answer is 'yes' to (b), then Court must consider (c):

- (c) What is the effect of the CJEU's interpretation of the Annex 1 Directives on the meaning of '*women*' etc in Northern Ireland Equality Legislation? At this stage, the Court will be choosing between Parts 1, 2 and 3 in 'Interpretation 1' in para. 4.5 or 'Interpretation 2' in para. 4.6.³⁷

The analysis then moves to (d):

- (d) In light of the answers to (b) and (c) (if it arises): What is the impact on the meaning of '*women*' etc in the Relevant Allied Legislation? At this stage, the Court will be determining whether or not there is a presumption that '*women*' etc means the same in this legislation as in the Northern Ireland Equality Legislation.

5.107 The Commission submits that this is the most logical order for the legal issues to be determined whilst also ensuring that judicial resources are expended as efficiently as possible, and costs are minimised.

[6] **Interim relief**

The Applicant does not seek interim relief.

[7] **The grounds upon which the Applicant seeks interim relief are:**

Not applicable.

[8] **Expedition**

The Applicant does not request an expedited hearing.

[9] **Human Rights: Declaration of Incompatibility**

Not applicable.

³⁶ This is subject to the qualification in para. 4.1.

³⁷ This is subject to the qualification in para. 4.1.

[10] **Devolution issues**

The Court should give consideration to whether these proceedings raise a devolution issue within the terms of para. 1(d) of Schedule 10 to the Northern Ireland Act 1998, namely '*any question arising under [the Northern Ireland Act 1998] about excepted or reserved matters*', given that the Applicant's case relates in part to Section 75 of the Northern Ireland Act which is a reserved matter under para. 42(b) of Schedule 3 to that Act.

[11] **Service**

It is hereby certified that this re-amended Statement and all accompanying documents were served or will be served as follows:

- Good Law Project, via A & L Goodbody Solicitors, by email on 30 June 2026
- Women's Rights Network, via McIvor Farrell Solicitors, by email on 30 June 2026
- The Rainbow Project LTD, via Phoenix Law Solicitors, by email on 30 June 2026
- Sex Matters, via Carson McDowell Solicitors, by email on 30 June 2026
- Secretary of State for Northern Ireland, via the Crown Solicitors Office, by email on 30 June 2026
- Department of Education via the Departmental Solicitors Office, by email on 30 June 2026
- Northern Ireland Human Rights Commission, by email on 30 June 2026
- Northern Ireland Commission for Children and Young People, by email on 30 June 2026
- [REDACTED] via Quigley, Grant and Kyle Solicitors, by email on 30 June 2026
- Children's Law Centre, by email on 30 June 2026
- The Police Service of Northern Ireland via Crown Solicitors Office, by email on 30 June 2026
- For Women Scotland via McIvor Farrell Solicitors, by email on 30 June 2026

- The Countess Advocacy Company Limited via McIvor Farrell Solicitors, by email on 30 June 2026
- [REDACTED] via Phoenix Law, by email on 30 June 2026
- The Northern Ireland Prison Service via email Departmental Solicitor's Office on 30 June 2026.

[12] **Legal Aid**

The Applicant is not a legally assisted person.

[13] **Protective Costs Order**

There is no application for a Protective Costs Order by the ECNI. The Commission is in the process of communicating with all parties (proposed Notice Parties, Intervenors, Proposed Intervenors) seeking an agreement that the parties bear their own costs in relation to the ECNI's application for judicial review. The Court will be updated in due course in so far as any agreement is reached.

[14] **PAP Requirements**

- 14.1 I, Patricia Cosgrove, Solicitor, the solicitor whose signature appears at the end of this document, refer to the Applicant's grounding affidavit dated 2 December 2025 and second Affidavit dated 18 December 2025 and the third Affidavit dated 30 June 2026, and certify that, in my honest opinion, the pre-action protocol requirements of the JR Practice Direction have been fully observed by the Applicant.

[15] **JR Practice Direction**

I, Patricia Cosgrove, the solicitor whose signature appears at the end of this document, certify that there has been full compliance with the JR Practice Direction, except where the Practice Direction could not be complied with due to the nature of the action.

[16] **Proposed litigation timetable**

A leave hearing is taking place for two weeks starting on 30 November 2026.

[17] **Legal representation**

Name and address of Applicant's solicitor:

Patricia Cosgrove, Solicitor
Equality Commission for Northern Ireland
Equality House
7 – 9 Shaftesbury Square
Belfast
BT2 7DP

Email: PCosgrove@equalityni.org

Tel: 028 90 500 600

Name of Applicant's counsel:

Christopher McCrudden BL
Blackstone Chambers, London
Email: ChristopherMcCrudden@blackstonechambers.com

Dee Masters BL
Cloisters Chambers, London
Email: deemasters@cloisters.com

Name of other relevant legal representatives

Potential Interveners/Potential Interested Parties

Good Law Project - A & L Goodbody Solicitors
Women's Rights Network - McIvor Farrell Solicitors
Secretary of State for Northern Ireland - Crown Solicitors Office
Department of Education – Departmental Solicitors Office
Northern Ireland Human Rights Commission (NIHRC) – Michael Black NIHRC
Children's Law Centre – Eamonn McNally, Children's Law Centre
The Police Service of Northern Ireland – Crown Solicitors Office
Department of Education by Departmental Solicitors Office
For Women Scotland via McIvor Farrell Solicitors
The Countess Advocacy Company Limited via McIvor Farrell Solicitors
■ via Phoenix Law

Actual Interveners

Sex Matters - Carson McDowell Solicitors

The Rainbow Project LTD - Phoenix Law Solicitors
Northern Ireland Commission for Children and Young People (NICCY) - Joanne McGurk

██████████ – Quigley, Grant & Kyle Solicitors
The Northern Ireland Prison Service – Departmental Solicitor's Office

SIGNATURE OF RESPONSIBLE SOLICITOR:

Signed: *Patricia Cosgrove*

Solicitor for the Applicant

Solicitor's email address: PCosgrove@equalityni.org

Dated this 30th day of June 2026.

Amended 18th Day of December 2025

Re-amended 30 June 2026

Annex A: Commission's remit in relation to Northern Ireland Equality Law

EPA 1970	Under Art 54 SDO 1976, the Commission has a duty to keep the EPA 1970 under review.	
SDO 1976	Art 54	The Commission has a duty to work towards the elimination of discrimination, the elimination of harassment, the promotion of equality of opportunity between ' <i>men and women generally</i> ', to promote equality of opportunity for persons intending to undergo, are undergoing or have undergone gender reassignment and to keep under review the working of the SDO 1970 and the EPA 1970.
	Art 56	<p>The Commission has a duty to '<i>keep under review the relevant statutory provisions in so far as they require men and women to be treated differently</i>'.</p> <p>The '<i>relevant statutory provisions</i>' are listed in Schedule 4, which lists a series of statutory provisions including health and safety legislation which includes the provisions of Part II of the Health and Safety at Work (Northern Ireland) Order 1987 and health and safety regulations made under that Part.</p>
	Art 56A	In respect to the field of employment the Commission may issue codes of practice on matters such as the elimination of discrimination or harassment, the promotion of equality of opportunity between ' <i>men and women generally</i> ', the promotion of equality of opportunity for persons intending to undergo, are undergoing or have undergone gender reassignment
NIA 1998	S75(1)	<i>"A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity ... (a) between men and women generally ..."</i>
	Schedule 9, para. 1	<i>"The [Commission] shall- (a) keep under review the effectiveness of the duties imposed by section 75; (b) offer advice to public authorities and others in connection with those duties; and (c) carry out the functions conferred on it by the following provisions of this Schedule."</i>

Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003	Reg 30	The Commission has a duty to work towards the elimination of discrimination and harassment, to promote equality of opportunity between persons of differing sexual orientation ³⁸ and to keep the regulations under review.
	Reg 32	The Commission may issue codes of practice on matters such as the elimination of discrimination or harassment, the promotion of equality of opportunity in any field to which the regulations apply.
Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006	Reg 27	The Commission has a duty to work towards the elimination of discrimination and harassment, to promote equality of opportunity between persons of differing sexual orientation ³⁹ and to keep the regulations under review.
	Reg 29	The Commission may issue codes of practice on matters such as the elimination of discrimination or harassment, the promotion of equality of opportunity in the field of housing.
FETO 1998	Art 52	Employers must serve on the Commission a ' <i>monitoring return</i> ' containing prescribed information.
Fair Employment (Monitoring) Regulations (Northern Ireland) 1999	Reg 5 and Sch 1	The ' <i>monitoring return</i> ' shall include the number of employees (and other categories such as job applicants) who are female and male by reference to their ' <i>community background</i> '.

³⁸ Sexual orientation is defined to mean 'a sexual orientation towards – (a) persons of the same sex; (b) persons of the opposite sex; (c) persons of the same sex and of the opposite sex' (Regulation 2(2)).

³⁹ Sexual orientation is defined to mean 'a sexual orientation towards – (a) persons of the same sex (b) persons of the opposite sex; (c) persons of the same sex and of the opposite sex' (Regulation 2(2)).

Annex B: Relevant Allied Legislation

Workplace (Health, Safety and Welfare) Regulations (Northern Ireland) 1993

- 1 Regulation 20 ('sanitary conveniences'), regulation 21 ('washing facilities') and regulation 24 ('facilities for changing clothes') require employers to whom the regulations apply to provide '*suitable and sufficient*' facilities for people at work. For this purpose, facilities are not '*suitable and sufficient*' unless separate facilities are provided for '*men and women*' (subject to some prescribed qualifications).
- 2 Regulation 25 ('facilities for rest and for eating meals') also provides that '*[s]uitable facilities shall be provided for any person at work who is a pregnant women or nursing women or nursing mother to rest.*' The Commission considers that this can only relate to biological sex only (see paragraphs 5.75 to 5.78 above).
- 3 Schedule 1, Part II sets out the minimum number of sanitary conveniences by reference the number of '*females*' and '*males*'.
- 4 There is no definition of '*women*' etc.
- 5 These regulations give effect to Council Directive 89/654/EEC concerning the minimum safety and health requirements for (most) workplaces. The directive does not define '*women*' etc.
- 6 The regulations are made pursuant to the Health and Safety at Work (Northern Ireland) Order 1978. This order contains no definition of '*women*' etc.
- 7 This provision would interact with the SDO 1976. Part III covers the field of employment goods, facilities and services subject to various exceptions.

Construction (Design and Management) Regulations (Northern Ireland) 2016

1. These regulations apply to construction sites. They largely replicate for construction sites what the 1993 regulations do for other workplaces. There is no definition of '*women*' etc.
2. These regulations transpose Council Directive 92/57/EEC. The directive does not define '*women*' etc.
3. This provision would interact with the SDO 1976. Part III covers the field of employment subject to various exceptions.

Offshore Installations and Wells (Design and Construction, etc.) Regulations (NI) 1996

1. These regulations apply to offshore installations. They largely replicate for those sites what the 1993 regulations do for other workplaces (except construction sites).
2. These regulations transpose Council Directive 92/91/EEC. The directive does not define 'women' etc.
3. This provision would interact with the SDO 1976. Part III covers the field of employment subject to various exceptions.

Categories of Tourist Establishment (Statutory Criteria) Regulations (NI) 1992

1. These regulations are concerned with the regulation of tourist accommodation. The regulations lay down various standards that different classes of 'tourist accommodation' must satisfy. Of relevance are the following provisions:

Hotels – Schedule 1 (para. 7) requires hotels to provide 'general toilets' accessible from the public areas and which must be *'provided separately for men and women'*. There are also rules about the 'sanitary fittings' depending on whether the toilet is for a woman or man.

Hostels – Schedule 5 (para. 7) requires hostels to provide *'[t]oilets and shower or bathroom facilities shall be provided for men and women in separate rooms, with separate entrances clearly designated and provided with doors or curtains affording privacy in such rooms.'*

2. There is no definition of 'women'.
3. These provisions would interact with the SDO 1976. Part IV covers goods, facilities and services subject to various exceptions.

Licensing (Requirements for Restaurants) Regulations (Northern Ireland) 1998

1. The regulations lay down various standards that licensed restaurants must satisfy. Of relevance is para. 4(1)(b) of the Schedule which states that a licensed restaurant must provide for the exclusive use of its customers *'separate toilets for male and female customers, which must be kept clean and properly maintained and supervised.'* There are also rules about sanitary fittings.
2. There is no definition of 'female'.
3. These provisions would interact with the SDO 1976. Part IV covers goods, facilities and services subject to various exceptions.

Residential Care Homes Regulations (Northern Ireland) 2005

1. Amongst other things, these regulations, lay down rules for the regulation and conduct of residential homes by their registered provider or manager.
2. Regulation 13 imposes a duty to promote and make proper provision for the health and welfare of residents and for their care, treatment and supervision. When providing this, the registered provider or manager shall so far as practicable, ascertain and take into account the residents' wishes and feelings, and shall make suitable arrangements to ensure that a home is conducted in a manner which respects the privacy and dignity of residents and with due regard to the sex of the resident.
3. This provision would interact with the SDO 1976. Part IV covers goods, facilities and services subject to various exceptions.

Independent Health Care Regulations (Northern Ireland) 2005

1. Amongst other things, these regulations, lay down rules for the regulation and conduct of independent healthcare facilities by their registered provider or manager.
2. The duties imposed by regulation 16 ('care and welfare of patients') are similar to those in the Residential Care Homes Regulations (Northern Ireland) 2005.
3. This provision would interact with the SDO 1976. Part IV covers goods, facilities and services subject to various exceptions.

School Premises (Standards) Regulations (Northern Ireland) 1973

1. These regulations prescribe the standards to which the premises of grant-aided schools are to conform.
2. Regulation 10 pertains to the provision of sanitary fittings in grant-aided schools and states: '*10(1) ...water closets shall be provided in every such school, and in the case of every school which includes boys, urinals may be provided, which closets and urinals are hereinafter collectively referred to as sanitary fittings. 10(2) For all pupils above the age of 6 separate sanitary fittings shall be provided for boys and girls. 10(3)... there shall be provided at least 1 sanitary fitting for every 15 girls...and at least 1 sanitary fitting for every 15 boys...*'.
3. There is no definition of 'girls' etc.
4. These provisions would interact with the SDO 1976. Part IV, articles 24–28 cover education subject to various exceptions.

Employment and Training Act (Northern Ireland) 1950

1. These regulations allow the Department for Communities or the Department for the Economy to make such arrangements as it considers appropriate for the purpose of assisting persons to select, train for, obtain and retain employment suitable for their ages and capacities or of assisting persons to obtain suitable employees (including partners and other business associates) (section 1). Arrangements under this section may *'include arrangements for encouraging increases in the opportunities for employment and training that are available to women and girls ...'* (Section 1). There is no definition of *'women'* or *'girls'*.
2. This provision would interact with the SDO 1976. Part IV covers goods, facilities and services subject to various exceptions. Part III covers the field of employment and vocational training subject to various exceptions.

Prison and Young Offenders Centre Rules (Northern Ireland) 1995

1. These rules regulate the management of prisons. They prescribe rules such as:

'General principles – regulation 2(1)(f)

Facilities and privileges shall be available to prisoners ... without discrimination on the basis of ... sex ...'

'Searches -- regulation 16(7)

Any search for which a prisoner must undress may only be carried out by an officer of the same sex as the prisoner.'

'Supervision

31.-(1) Prisoners may be supervised by officers of either sex.

(2) In circumstances in which privacy would be expected a prisoner will be supervised by an officer of the same sex.'

'General control of admission to the prison

49.-(1) No person may enter the prison without the governor's permission, unless he is entitled to do so.

(2) Any person entering or leaving the prison may be stopped, examined and, with their consent, searched.

(3) Such person shall be searched only by officers of the same sex as that person.'

'Control of visitors to prisoners

73 (4) No search of a visitor shall be made in the presence of any prisoner or other visitor or by, or in the presence of, an officer of the other sex.'

'Custody arrangements for women prisoners – regulation 90

- (1) *Women prisoners shall be held in separate accommodation.*
- (2) *Prisoners of both sexes may participate together in work, education or other approved activities subject to the approval of the governor.'*

2. There is no definition of 'women' or 'sex'.
3. These provisions would interact with the SDO 1976. Part IV covers goods, facilities and services subject to various exceptions. They also interact with Part III which regulates the employment field.
4. Regulation 92 addresses pregnant prisoners. The Commission considers that this can only relate to biological sex. The Commission considers that this can only relate to biological sex only (see paragraphs 5.75 to 5.78 above).

Juvenile Justice Centre Rules (Northern Ireland) 2008

1. The relevant provisions are rule 4 which lays down aims and principles to be achieved by those who run such centres.

Rule 4(2)(g) states '*shall have due regard to the need to promote equality of opportunity betweenmale and female generally*'.

Rule 4(h) states '*due regard shall be paid to the privacy of the children consistent with safety, security and communal living.*'

Rule 26 ('girls in custody') states there shall be '*...a policy for the care of girls in custody...which makes such provision or arrangements as are considered necessary and appropriate to meet the needs and reasonable preferences of girls, including the provision of separate accommodation within a centre*' and '*[t]he director may vary the regime to meet the needs of girls.*'

2. There are no definitions of 'girls' etc.
3. These provisions would interact with the SDO 1976. Part IV covers goods, facilities and services subject to various exceptions.

Prisons Act (Northern Ireland) 1953

1. Section 10 states: '*(1) The Department [of Justice] shall appoint a group of independent monitors (to be known as "the independent monitoring board") for each prison, young offenders centre and remand centre. (2) In the case of a prison used as a women's prison at least two of the monitors shall be women.*'
2. There is no definition of 'women'.

3. This provision engages with articles 13A-13B of the SDO that prohibit a discrimination when appointing 'office holders' subject to exceptions.

Short-term Holding Facility Rules 2018/409

1. These rules are for the purpose of regulating and managing the operation of 'short-term holding facilities', i.e. places used solely for the detention of immigration detainees for short periods.
2. Examples of relevant rules are: Rule 10: '*Every detained person must be searched [by an authorised officer]... but such a search must not be carried out within the presence of a person of the opposite sex.*' Rule 14: '*A detained person must be provided with separate sleeping accommodation from detained persons of the opposite sex, where possible.*' Rule 30(3): '*A detained person is entitled, if they so request, to be [medically] screened only by a health care professional of the same sex and the manager must ensure that a detained person is aware of that entitlement prior to any screening.*' Rule 31: '*The manager must ensure that a detained person has access to a health care professional...A detained person is entitled, if they so request, to be seen only by a health care professional of the same sex.*'
3. There are no definitions of 'girls' etc.
4. These provisions would interact with the SDO 1976. Part IV covers goods, facilities and services subject to various exceptions.

Police and Criminal Evidence (NI) Order 1998

1. The Police Service of Northern Ireland has statutory powers under Police and Criminal Evidence (NI) Order 1989 (PACE). PACE states at sections 55, 55A, 56 that certain searches/processes must be 'same sex'. There is no definition of 'sex' in PACE.
2. These provisions would interact with the SDO 1976. Part IV covers goods, facilities and services subject to various exceptions. They also interact with Part III which regulates the employment field.