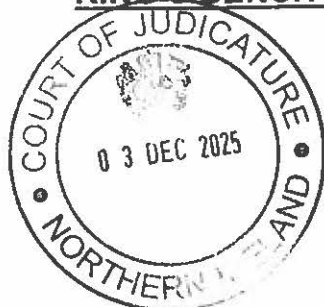


IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
KING'S BENCH DIVISION (JUDICIAL REVIEW)



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

EQUALITY COMMISSION FOR NORTHERN IRELAND

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

**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

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)].

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 paragraph 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) and concluded that it means 'biological sex' notwithstanding section 9(1) of the Gender Recognition Act 2004 which 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. The effect of Article 2 WF is to require that Northern Ireland law provides the same equality protections after the UK left the European Union as was provided when the United Kingdom was a Member State (as set out in Annex 1 WF).

1.6 A further complicating factor that arises in determining the scope of *FWS* in Northern Ireland is that Northern Ireland Equality Law sits alongside, and sometimes interacts with other legislation, like health and safety legislation, which uses terms like 'women'. Some of this legislation relates to matters which exclusively link to pregnancy and menstruation. In the Commission's view, terms like 'women' can only mean biological sex when used 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

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).

on the day-to-day operations of many service providers and employers, and where terms like 'women' are used without definition. This legislation was not considered in *FWS*. A list appears at **Annex B**. Hereafter, it is referred to collectively as '**Relevant Allied Legislation**'. The Applicant seeks guidance on the meaning of terms like 'woman' within the Relevant Allied Legislation so that public bodies, employers and service providers act compliantly.

1.7 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

1.8 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).

1.9 In initiating this judicial review, the Commission is acting well within these statutory powers in seeking clarification of the legal position in order to prevent breaches or future breaches of Article 2 WF.

1.10 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.

[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 urgently 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 ensure that there are no existing or future breaches of Article 2 WF (as per section 78C NIA 1998).

[4] The Relief Sought

- 4.1 The Commission outlines three possible formulations for the advisory declaration. 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 an intervention by an interested organisation.
- 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*. 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).

Definitions

4.3 In this section and hereafter, the definitions below are used.

- (a) *'Biological sex'* is defined as in paragraph 7 of *FWS* ('... the sex of a person at birth ...') and then expanded on at paragraph 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').³
- (b) *'Certificated sex'* is defined as in paragraph 7 of *FWS* ('... the sex attained by the acquisition of a GRC').
- (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*⁴; 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

³ The Commission understands pregnancy, menstruation and breastfeeding to be such biological characteristics as per paragraph 178 in *FWS*.

⁴ This mirrors the definition of 'gender reassignment' in article 2(2) of the SDO 1976.

- (iv) Persons with a condition known as Differences in Sex Development (DSD)⁵.

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

4.4 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'⁶.
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 Legislation⁷:

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'

⁵ 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.

⁶ The Commission recognises that the Court will need to adopt a definition of 'gender' here.

⁷ In so far as not exclusively linked to pregnancy or menstruation.

4.5 **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 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 Legislation⁸:

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

4.6 **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,

⁸ Ibid.

3. In relation to the Relevant Allied Legislation⁹.

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.

- 4.7 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 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.

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**).

⁹ Ibid.

- 5.4 The Petitioner, 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. 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, which issued (a) an 'interim update' in the immediate aftermath of *FWS* that *EHRC* states is not 'guidance' (which has now been withdrawn), and (b) amendments to its statutory Code of Practice for Service Providers, which are now awaiting Ministerial approval.

Northern Ireland Equality Legislation

- 5.6 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.
- 5.7 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**.
- 5.8 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

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

- 5.9 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*.
- 5.10 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 1998¹⁰), 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.
- 5.11 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

- 5.12 The Commission has functions under the NIA 1998, as amended, in respect of the implementation of Article 2 of the WF (see paragraph 1.8 above).
- 5.13 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*') part of the Belfast-Good Friday Agreement ('*B-GFA*') in Northern Ireland after the exit of the United Kingdom from the European Union, where those rights were underpinned by European Union law (including the Equality Directives listed in Annex 1 of the WF) prior to exit. 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.
- 5.14 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 Grounding Affidavit by Geraldine McGahey, Chief Commissioner, on behalf of the ECNI, which accompanies this

¹⁰ Please see the later caveats concerning the Human Rights Act 1998 at paragraph 0.

Statement, sets out the strategy adopted, the role of this proposed Judicial Review in this strategy, and the rationale for it.

- 5.15 Turning to the legal issues that arise under Article 2 WF, the first question is whether there is a right in the relevant part of the B-GFA that provides the 'peg' on which to hang an Art. 2 WF 'no diminution' obligation. There are two possible rights that are particularly relevant in the context of this application: the general term 'civil rights', and the specific right to 'equality of opportunity' on various grounds, including 'gender'.
- 5.16 As regards the meaning and scope of 'civil rights', the Commission is aware that this is one of the issues that the Supreme Court has been asked to consider in *Dillon & Ors v Secretary of State for Northern Ireland* [2024] NICA 59 (**Dillon**). The hearing in *Dillon* took place in October 2025 with a judgment expected much later this year or more likely next year. If the Supreme Court adopts the approach suggested by the Commission, which is, in part, that the meaning and scope of the term 'civil rights' in the B-GFA should be informed by the Charter of Fundamental Rights of the EU (**the Charter**), general principles of EU law, the European Convention on Human Rights (**EHRC**), the jurisprudence of the European Court of Human Rights (**ECtHR**) would be relevant to the scope and interpretation of Article 2 WF in this context, including as regards the issue of whether the unequal treatment of transgender individuals or, conversely, of those who are women (or men) as defined by '*biological sex*', would be subject to the UK's obligations vis a vis Northern Ireland.
- 5.17 As to the specific right to '*equality of opportunity*' in the B-GFA, the word '*gender*' replaced '*sex*' in previous drafts of the relevant section of the B-GFA. It certainly encompasses the promotion of equality of opportunity between men and women defined biologically, but the question is whether it is wider than that. It is arguable that the term '*gender*' is such as to include transgender individuals within its scope. If '*gender*' in the B-GFA extends beyond biological sex, then that would provide a sufficient basis on which to argue that there is a right protected under the B-GFA that should not be diminished, additional to '*civil rights*'. It is, however, uncertain whether the change of language from '*sex*' to '*gender*' is sufficient to encompass gender reassignment or gender identity more broadly.
- 5.18 In addition, if *FWS* applies, as the default interpretation of Northern Ireland Equality Law, it would be deeply unsatisfactory if '*gender*' had a different meaning to '*sex*' due to issues of '*administrative feasibility*', as per paragraph 66 of *FWS*.
- 5.19 Assuming that a B-GFA right can be identified, the next issue then becomes whether there was an underpinning of that right in Northern Ireland law prior to Brexit, and Northern Ireland Equality Law clearly fulfils that requirement.
- 5.20 Assuming that, the next issue is whether there were EU law underpinnings to that law, and the answer is equally clearly 'yes'. Annex 1 WF listing the anti-discrimination

Directives, includes those that provide an EU law underpinning for the SDO 1976, the EPA 1970 and the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003, i.e. 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). Hereafter referred to as '**the Equality Directives**'.

- 5.21 Assuming that, 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 Northern Ireland than applies to the same or equivalent provisions of the EA 2010. And, if so, would this different interpretation be 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*?
- 5.22 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.

European Union Law

- 5.23 The EU Equality Directives, included in Annex 1 of the WF, are, with one exception, silent about the questions raised in this application, with only one, Directive 2006/54/EC (the Recast Directive), addressing the matter in one of its Recitals, as noted below at paragraph 5.27. The answers to the questions posed in paragraph 5.22 depend, 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, and the CJEU's subsequent jurisprudence (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; and *MB v Secretary of State for Work and Pensions*, Case C-451/16) that draws on, develops, and may modify, that case.¹¹
- 5.24 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. Since the UK's exit from the EU, that route to seeking clarification is not, however,

¹¹ The forthcoming judgment of the CJEU in *Shipov*, Case C-43/24 may also be relevant in this context.

open to UK Courts generally, and (in the context of Northern Ireland) not in the context of Art. 2 WF. It is available 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, employers, service providers, education authorities, and other public bodies are left with having to interpret the existing judgments of the CJEU as best they can.

- 5.25 The Commission's legal analysis is that the trend of the CJEU appears to be that 'sex' and 'women' in the Equality 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 (although, as explored later, another uncertainty is whether *P v S* requires 'sex' to also mean 'gender assignment' or whether it simply requires adequate protection against discrimination for people with that protected characteristic).
- 5.26 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)).
- 5.27 Recital 3 of the Preamble to Directive 2006/54, 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*'.
- 5.28 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). In some respects, however, these amendments may not have fully aligned the SDO 1976 with the principle that transgender people should be protected from discrimination, e.g. 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.

5.29 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 Equality 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.

5.30 In the Commission's opinion, there are significant uncertainties as to the precise scope and application of the CJEU's interpretation of EU equality law in this respect. To take some further examples:

- 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?
- How far does *P v S* 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?
- How far would the CJEU accord 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.
- Another uncertainty arises as to what EU law requires 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 Equality Directives to include 'gender reassignment'? What is the impact of the Charter of Fundamental Rights and the ECHR 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?

- Assuming *P v S* requires that Northern Ireland Equality Law be interpreted differently, what is the appropriate comparator in a claim of discrimination?
 - None of the named CJEU cases involved what might be called 'conflict of rights' situations, where one person's right (say, a transgender woman) is alleged to conflict with another person's right (say, a woman defined biologically). How would the CJEU address the interpretation of EU law where a conflict is said to exist? To what extent, for example, would it consider (as it contemplated in paragraph 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?
 - 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?
- 5.31 This last issue is a particularly important and pressing one. The *P v S* case arose in the 1990s, as we have seen, 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, the EA 2010 does not apply this medicalised approach to its definition of 'gender reassignment'.
- 5.32 A recent 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).'¹²

¹² See also the Opinion of AG Ćapeta in C-769/22 *Commission v. Hungary*: 'According to an established line of case-law, less favourable treatment of persons because of gender reassignment ('transsexualism') represents discrimination on the grounds of sex. The recent judgment in *Mousse* confirms that the prohibition on sex discrimination also extends to discrimination on the grounds of gender identities that do not correspond to the sex assigned at birth and which do not include a physical change of gender ('transgender identity')' (paragraph 62).

- 5.33 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 was content that proof of a change of gender identity was required but rejected that there needed to be proof of surgery. 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.
- 5.34 The precise import of these data protection cases is, however, uncertain, in at least two respects. First, *Richards*, the case cited in *Mousse*, concerned a '*transsexual who has undergone a gender reassignment operation*' (paragraph 2). It is, therefore, unclear what the CJEU in *Mousse* considers a '*change of gender identity*' to mean. Second, there are likely to be disputes about what lessons may be derived from data protection cases in which there was no allegation of discrimination.
- 5.35 This is why Interpretations 1 to 2, which are premised on EU Law applying, all 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.
- 5.36 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. Which areas are beyond European Union competence requires careful assessment. This means that 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 part 3 of Interpretations 1 and 2 are qualified with the language "*in those areas where EU law provided an underpinning to Northern Ireland Equality Law*".
- 5.37 Finally, the question arises as to how far the terms of Northern Ireland Equality Law can be read to conform to European Union equality law. For example:
- The language of article 3 of the SDO is different to s 13 EA 2010: does this mean that the SDO does not cover discrimination by perception in relation to 'sex' and, thus, a person who is perceived to be a biological women because they are transgender is unable to bring a claim for direct sex discrimination where they are

a biological male? (By way of context, in GB, the language of s 13 EA 2010 is broader so as to clearly permit association claims as explained in the Explanatory Notes which accompanied it.) Does EU law require such a person to be able to make such a claim? If so, what is the scope for a purposive interpretation of Article 3 if EU law applies?

- 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 harassment into 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?
- 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* felt 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 when considering any divergent CJEU interpretation in respect of interpreting Northern Ireland Equality Law?

5.38 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

5.39 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 ..."

5.40 Like the rest of the Northern Ireland Equality Legislation, there is no definition of 'men' and 'women' in the NIA 1998.

- 5.41 As to the application of EU law to Section 75, there are more uncertainties. The interplay between Article 2 WF and Section 75 is unclear. Section 75 is a broadly-based 'mainstreaming' requirement on designated public authorities, so that raises the question as to whether Section 75 was 'underpinned by EU law'.
- 5.42 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. 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).
- 5.43 Alternatively, there are other provisions of EU law that provide a broad-based support for mainstreaming initiatives carried out by the EU institutions themselves, in particular Article 2 of the Treaty on European Union (TEU) and so would apply beyond employment.
- 5.44 Article 2 TEU 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.*'
- 5.45 This obligation applies to the EU Institutions, but it is currently uncertain (i) whether Article 2 TEU also applies to the *Member States*, and (ii) whether it applies to the Member States where a State is operating in areas *beyond EU competence*.
- 5.46 The Advocate General's Opinion of 5 June 2025, in the controversial case of Case C-769/22 *Commission v Hungary*, has advised the CJEU (i) that Article 2 TEU does apply to the Member States, and that Hungary was in violation of Article 2 TEU, but (ii) that it was unnecessary to decide in this case whether Article 2 TEU applied to Member States when acting in areas that were not within EU competence. The CJEU may or may not agree with the Advocate General on either or both of these issues. The case is currently outstanding, and the decision may have very significant legal ramifications. Much will hinge on the conclusions of the CJEU in that case for the scope of European Union law underpinnings of Section 75.

- 5.47 In the view of the Commission, if Article 2 TEU applies broadly, then there is at least an *arguable* case that there are EU law underpinnings to Section 75 that go beyond the underpinnings that the Recast Directive may provide, and, therefore, that the interpretation of section 75, in respect of the meaning of 'men' and 'women', could be open to its application beyond 'biological sex', regardless of whether the sphere is the employment field or goods, facilities and services, but the extent of any such application would depend on the approach adopted by the CJEU in respect of the scope of application of Article 2 TEU.
- 5.48 If there are no 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. If so, 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 paragraph 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.
- 5.49 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 NIA 1998. 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

- 5.50 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'.¹³ However, there would clearly be issues of 'administrative feasibility' (as per paragraph 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 (paragraph 160).¹⁴

¹³ 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' (paragraph 108).

¹⁴ 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.

- 5.51 Some of the parallel 'allied' legislation relates to matters which exclusively link to pregnancy and menstruation. In the Commission's view, terms like 'woman' can only mean biological sex when used in the context of pregnancy¹⁵ and menstruation.¹⁶
- 5.52 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.
- 5.53 A further example is the legislation in Northern Ireland concerning rights before, during and after pregnancy (e.g. statutory maternity pay¹⁷, statutory maternity allowance¹⁸, ante-natal care¹⁹, ordinary maternity leave²⁰, additional maternity leave²¹, and when breastfeeding²²). This can only relate to the biological sex of females.^{23 24}
- 5.54 Equally, in Period Products (Free Provision) Act (Northern Ireland) 2022, 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).
- 5.55 Beyond these examples of very clear categories, however, there is legislation which interacts with Northern Ireland Equality Law, and which will impact on the day-to-day

¹⁵ 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.

¹⁶ 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*' (paragraph 177).

¹⁷ Under the Social Security Contributions and Benefits (Northern Ireland) Act 1992, 'statutory maternity pay' is defined by reference to pregnancy – see section 160.

¹⁸ Under the Social Security Contributions and Benefits (Northern Ireland) Act 1992, 'state maternity allowance' is defined by reference to pregnancy – see section 35.

¹⁹ Article 83 of the Employment Rights (NI) Order 1996 defines this by reference to pregnancy.

²⁰ Paragraph 4 in the Maternity and Parental Leave etc Regulations (Northern Ireland) 1999 defines 'ordinary maternity leave' by reference to pregnancy.

²¹ Paragraph 5 in the Maternity and Parental Leave etc. Regulations (Northern Ireland) 1999 defines 'additional maternity leave' by reference to ordinary maternity leave.

²² 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.

²³ 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.*'

²⁴ 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.*'

operations of many service providers and employers, where terms like 'woman' are used without definition.

- 5.56 A good example is the Workplace (Health, Safety and Welfare) Regulations (Northern Ireland) 1993. Paragraph 20 requires '*suitable and sufficient sanitary conveniences*' which includes 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 '*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? This is an important issue which organisations are having to confront every day.
- 5.57 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.
- 5.58 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 provider 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 paragraph 108 in *FWS*²⁵, 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.
- 5.59 Moreover, some of the organisations providing services which are governed by the Relevant Allied Legislation will be subject to section 75 NIA 1998 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 pressing.

Human Rights Act 1998

- 5.60 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 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

²⁵ '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'.

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').

Jurisdiction of the Court to grant an advisory declaration

- 5.61 The relief sought is an advisory declaration. The justification for the Commission seeking such relief, from the perspective of the ECNI, is set out in the accompanying Affidavit. 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.
- 5.62 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). It is submitted that this 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.
- 5.63 The Court has power on an application for judicial review to grant an advisory declaration, pursuant to s 18(1)(a) 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.' (emphasis added)

- 5.64 Carswell LCJ, *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.'* This is precisely the situation here.
- 5.65 Although the Northern Ireland Court of Appeal noted in *Re Burns & McCreedy* [2022] NICA 20, at [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 [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 [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.'*
- 5.66 The importance of the *'public interest'* in resolving the legal issue is 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. As stated by the High Court for England and Wales in *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2759 (Admin) at [46]: *'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 here.
- 5.67 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.
- 5.68 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 NIA 1998, and an identification of the foundational principles that underpin the protection of people in relation to biological sex and transgender status.

- 5.69 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. The meaning of 'sex', etc. is highly contentious, and litigation is an inevitability. Without clarification from the Courts in the near future, 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. 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: *'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 the High Court to provide guidance now, with as many interested parties as possible involved, will likely create certainty more quickly.

Avoiding satellite litigation and focusing on the core substantive issues

- 5.70 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, several organisations are concerned, as is the Commission, to have the legal position clarified, but have taken a different route to achieving this, seeking judicial review of the Commission. There are already two cases that the Commission is aware of because it is the actual Respondent in one (taken by the Good Law Project: Application 2025 No. 058765/01) and the putative Respondent in the other (proposed by the Women's Rights Network Northern Ireland). 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.
- 5.71 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. At the same time as initiating those proceedings, it has indicated that it would wish to seek to intervene in any proceedings taken by the Commission. At a Review of the case on 7 October 2025, McAlinden J

decided, as suggested by the Commission, to stay the Good Law Project case, at least until the decision of the Supreme Court in *Dillon* is handed down.

5.72 The litigation proposed by Women's Rights Network Northern Ireland is at an earlier stage; the Commission sent a Pre Action Protocol response letter on 24 October 2025.

5.73 If both cases proceed, the applicants in those cases are 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 their resolution.

5.74 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 paragraph 5.60 above).

5.75 The ECNI sees its proposed action as 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.

5.76 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 can be predicted as likely to arise in the near future, in the interests of reducing costs for potential applicants and the Commission, and making the most efficient use of scarce judicial resources.

[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 at this time.

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

Not applicable.

[10] **Devolution issues**

The Court should give consideration to whether these proceedings raise a devolution issue within the terms of paragraph 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 paragraph 42(b) of Schedule 3 to that Act.

[11] **Service**

It is hereby certified that this Statement and all accompanying documents were served on:

- Good Law Project, via A & L Goodbody Solicitors, by process server at 42-46 Fountain Street Belfast BT1 5EF on the 3rd December 2025
- Women's Rights Network, via McIvor Farrell Solicitors, by process server at 129 Springfield Road, Belfast, BT12 7AE, on the 3rd December 2025
- The Rainbow Project LTD, via Phoenix Law Solicitors, by process server at 92 High Street, Belfast, BT1 2BG, on the 3rd December 2025
- Sex Matters, via Carson McDowell Solicitors, by process server at Murray House, Murray Street, Belfast, BT1 6DN, on the 3rd December 2025
- Northern Ireland Office, via the Crown Solicitors Office, by process server at the Royal Courts of Justice, Chichester Street, Belfast, BT1 3JE, on 3rd December 2025
- Northern Ireland Human Rights Commission, by process server at 4th Floor Alfred House, 19 – 21 Alfred Street, Belfast, BT2 8ED, on the 3rd December 2025
- Northern Ireland Commission for Children and Young People, by process server at Equality House, 7 -9 Shaftesbury Square, Belfast, BT2 7DP, on the 3rd December 2025

[12] **Legal Aid**

The Applicant is not a legally assisted person.

[13] **Protective Costs Order**

There is no application for a Protective Costs Order at this time.

[14] **PAP Requirements**

- 14.1 I, Eoin O'Neill, Solicitor, the solicitor whose signature appears at the end of this document, refer to paragraphs 39-42 of the Applicant's grounding affidavit, 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, Eoin O'Neill, 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**

The Applicant's proposed litigation timetable is as follows: not until after *Dillon* is handed down by the Supreme Court (oral submissions took place in the week commencing 13 October 2025).

[17] **Legal representation**

Name and address of Applicant's solicitor:

Eoin O'Neill, Solicitor
Equality Commission for Northern Ireland
Equality House
7 – 9 Shaftesbury Square
Belfast
BT2 7DP

Email: EONeill@equalityni.org
Tel: 028 90 500 859

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

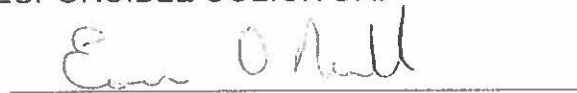
Name of other relevant legal representatives

Potential Interveners/Potential Interested Parties

Good Law Project - A & L Goodbody Solicitors
Women's Rights Network - Mclvor Farrell Solicitors
The Rainbow Project LTD - Phoenix Law Solicitors
Sex Matters - Carson McDowell Solicitors
Northern Ireland Office - Crown Solicitors Office
Northern Ireland Human Rights Commission (NIHRC) – Michael Black NIHRC
Northern Ireland Commission for Children and Young People (NICCY) – Joanne McGurk NICCY

SIGNATURE OF RESPONSIBLE SOLICITOR:

Signed:



Solicitor for the Applicant

Solicitor's email address: EONeill@equalityni.org

Dated this 3 day of December 2025.

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	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>'. 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.
	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, paragraph 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 ²⁶ 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 ²⁷ 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 'community background'.

²⁶ 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)).

²⁷ 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 5.51 to 5.54 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 (paragraph 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 (paragraph 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 paragraph 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 5.51 to 5.54 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.