

## Equality Commission for Northern Ireland

### Submission to Women and Equalities Committee: Inquiry on Ensuring strong equalities legislation after EU exit

November 2016

#### **1 Executive Summary**

- 1.1 The Commission is of the view that the NI Executive and the UK Government should ensure that the promotion of equality of opportunity and good relations in Northern Ireland are considered priority and core issues in the context of the UK's exit negotiations and final agreement with the EU.
- 1.2 EU law has benefited a number of equality groups in Northern Ireland as it has led progressively to the strengthening of protection against discrimination and harassment in Northern Ireland, as well as in Great Britain and in other EU Member States.
- 1.3 We consider that there should be no weakening or regression from current levels of protection under equality law in Northern Ireland that have emanated from EU law. Other rights, for example, employment rights, that help promote equality of opportunity for Section 75 groups, including for NI citizens working / living outside UK in EU Member States, should also not be diluted.
- 1.4 We recommend strongly that the NI Executive ensures that, following the UK's exit from the EU, further gaps in equality protections do not develop. We also recommend that NI citizens are able to benefit from any future EU law equality protections designed to strengthen rights for equality groups.
- 1.5 Further, we consider that there is a need to ensure that there is no negative impact on the promotion of equality and good relations in NI as a result of the UK's decision to leave the EU. This should include a consideration of the potential impact on the peace process in NI and work to promote social inclusion, including the potential impact of the loss of EU funding on programmes aimed at supporting peace and reconciliation, equality and good relations and social inclusion, as well as the impact on the voluntary and community sector. It should also include a consideration

of the likely impact on the institutions, guarantees and provisions of the Good Friday/Belfast Agreement; and the impact on race relations, including levels of race hate crime in NI.

## **2 Introduction**

2.1 The Equality Commission for Northern Ireland ('the Equality Commission') is an independent public body established under the Northern Ireland Act 1998. It is responsible for implementing the equality legislation on fair employment, sex discrimination and equal pay, race relations, sexual orientation, disability and age.

2.2 We have set out below a number of overarching points, together with our response to a number of the specific questions raised in the call for evidence by the Women and Equalities Committee (the Committee) in relation to its Inquiry on "Ensuring strong equalities legislation after EU exit".

## **3 Overarching points**

3.1 In general, the Commission is of the view that the NI Executive and the UK Government should ensure that the promotion of equality of opportunity and good relations in Northern Ireland are considered priority and core issues in the context of the UK's exit negotiations and final agreement with the EU.

3.2 Equality and good relations are central to ensuring a prosperous and thriving Northern Ireland. The principles of non-discrimination and equality should underpin the negotiations and final agreement between the UK and the EU. In addition, such negotiations and agreement should be founded on values that include respect for equality and human rights, and should aim to maximise opportunities to promote equality of opportunity and good relations in Northern Ireland.

3.3 It is important to not to lose the principles of non-discrimination and equality which are fundamental principles of EU law and its foundation on values that include respect for equality and human rights. These principles and the shared values across Member States have underpinned the actions of the EU institutions, including as regards the development of EU laws, and helped in the creation of more equal societies across the EU, including in NI.

## 4 Legislation

- 4.1 In terms of what aspects of equality legislation in Northern Ireland (NI) that could be affected<sup>1</sup> when the UK leaves the EU, EU law has benefited a number of equality groups in Northern Ireland as it has led progressively to the strengthening of protection against discrimination and harassment in Northern Ireland, as well as in Great Britain and in other EU Member States.
- 4.2 Whilst much of NI equality law has not been introduced as a direct result of EU law, EU law has resulted in some significant changes to NI equality law; including requiring the introduction of new forms of protection against discrimination and the strengthening of existing equality legislation in NI across a number of equality grounds.
- 4.3 In particular, people in NI have acquired additional protection against discrimination and harassment on the grounds of sex, racial or ethnic origin, religion or belief<sup>2</sup>, disability<sup>3</sup>, age and sexual orientation as a result of the implementation in Northern Ireland of EU law and case law, including Equality Directives such as the Race Directive<sup>4</sup>, Gender Directives<sup>5</sup> and Equal Treatment (Framework) Directive<sup>6</sup>, as well as Directives concerned with the equal treatment of men and women<sup>7</sup>.
- 4.4 For example, in NI, EU law and case law has directly resulted in:
- new protection against discrimination and harassment on the grounds of age and sexual orientation in employment and vocational training<sup>8</sup>. This has resulted in, for example, stronger protection against

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<sup>1</sup> An expert briefing paper (March 2016), commissioned by the Equality Commission prior to the UK's decision to leave the EU sets out a number of potential issues from a legal perspective that require consideration in the context of the impact of a decision by the UK to leave the EU on NI equality law. It also gives further detail on the interrelation of British and NI equality law with EU equality law. See Prof D. Schiek (2016) [UK referendum on EU and \(NI\) Equality Law- Outline paper](#).

<sup>2</sup> For example, changes were made to the Fair Employment & Treatment Order (NI) 1998 as a result of the implementation of the Framework Directive 2000/78.

<sup>3</sup> For example, changes were made to the Disability Discrimination Act 1995 as a result of the implementation of the Framework Directive 2000/78.

<sup>4</sup> Directive 2000/43/EC This prohibits discrimination based on racial or ethnic origin and defines direct and indirect discrimination and harassment, covering the fields of employment, training, social protection, education and access to goods and services

<sup>5</sup> The first *Gender Directive* prohibits discrimination in employment on the grounds of sex and defines direct and indirect discrimination, harassment and sexual harassment and the second *Gender Directive* prohibits discrimination in access to goods and services

<sup>6</sup> Directive 2000/78/EC This prohibits discrimination on the grounds of religion or belief, disability, age or sexual orientation in employment and defines direct and indirect discrimination and harassment

<sup>7</sup> The *Recast Directive* of 2006 consolidates sex discrimination law, repealing Directives from before 2000 and also the *Equal Treatment Directive* of 2002.

<sup>8</sup> The Employment Equality (Age) Regulations (NI) 2006 and the Employment Equality (Sexual Orientation) Regulations (NI) 2003 were introduced in Northern Ireland in order to implement the Framework Directive 2000.

discrimination for older and younger workers, as well as for LGB employees, in the workplace;

- stronger protection against sex discrimination and equal pay<sup>9</sup>, including against discrimination on the grounds of gender reassignment.<sup>10</sup> This has resulted in, for example, stronger protection against discrimination for women including in employment and vocational training,<sup>11</sup> as well as for transgender people when accessing goods, facilities and services;
- increased protection against racial discrimination. Changes include, for example, improved protection against racial harassment and indirect racial discrimination<sup>12</sup> for minority ethnic communities.<sup>13</sup>

4.5 Further, a body of case law from the Court of Justice of the EU (CJEU), including cases from NI<sup>14</sup>, has helped to promote greater equality across the EU, including in NI.<sup>15</sup> It is also of note that EU law, including case law, has made clear that the UK and other Member States must ensure that sanctions for breach of EU law, including EU equality law, must be effective, proportionate and dissuasive. Further, decisions of the European Court of Justice (now CJEU) have also made it clear that compensation in respect of damages for breach of discrimination and other rights protected under EU law cannot be subject to an upper limit.<sup>16</sup>

4.6 Beyond equality law, EU law has also resulted in stronger employment rights in NI, that have particularly benefited certain Section 75<sup>17</sup> equality groups, for example, women. These include enhanced rights for pregnant workers, agency workers and part-time workers and in employment areas such as parental leave and working time.

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9 It will be noted that the Equal Pay Act (NI) 1970 was enacted before the UK joined the EEC. It implements Art 119 of the EEC Treaty which requires equal pay for equal work.

<sup>10</sup> For example, as a result of the *Gender Directive* 2004/113/EC, changes were made to NI sex equality law to extend protection against direct discrimination and harassment to transsexual people in the provision of goods, facilities and services.

<sup>11</sup> For example, as a result of the implementation of the Gender Directive 2004/113/EC

<sup>12</sup> It will be noted that improved protection against racial harassment and indirect racial discrimination relates to the grounds of race, ethnic and national origin only.

<sup>13</sup> For example, as a result of the implementation of the Race Directive in NI.

<sup>14</sup> NI cases include cases such as *Johnston v RUC* and *Gillespie & Others v NI HSSB & Others* Case C-342/93 [1996].

<sup>15</sup> For example, the decision of the European Court of Justice (now CJEU) in the case of *P v S* and *Cornwall County Council* (1996) led to changes in domestic legislation to provide for protection against discrimination on the grounds of gender reassignment. The ECJ concluded that the concept of 'sex' in the Directives concerning sex equality was broad enough to include people who had undergone gender reassignment.

<sup>16</sup> See for example, ECJ decision in *Marshall (No.2)* [1993] ICR 893 where the ECJ ruled in case against the UK that compensation for victims of sex discrimination at work could not be subject to an upper limit.

<sup>17</sup> Section 75 of the Northern Ireland Act 1998.

## 5 Embedding equality principles

- 5.1 In terms of on whether it is necessary to further embed equalities legislation into the UK law on leaving the EU, we are of the view that there should be no weakening or regression from current levels of protection under equality law in Northern Ireland, including those which have emanated from EU law. Other rights, for example, employment rights, that help promote equality of opportunity for Section 75 groups, including for NI citizens working / living outside UK in EU Member States, should also not be diluted.
- 5.2 As highlighted above, EU law has benefited a number of equality groups in Northern Ireland as it has led progressively to the strengthening of protection against discrimination and harassment in Northern Ireland, as well as in Great Britain and in other EU Member States. Further, EU law has also ensured that people from Northern Ireland who live in, or travel to, other parts of the EU can enjoy broadly the same levels of protection against discrimination in the areas covered by European equality law as they do in NI.
- 5.3 The Committee will be aware that concerns have been raised that if there is no longer the requirement for the UK to meet the EU minimum levels of protection, that certain areas of equality law, such as those that are perceived to be a burden to businesses, may be vulnerable to being changed.<sup>18</sup>
- 5.4 The Committee will also be aware that there is the potential that there could be further policy and legislative divergence within different parts of the UK in the area of equality law, as the UK will no longer be required to implement the minimum requirements of equality EU Directives. It is therefore possible, following a UK exit from the EU, for an increasing unevenness in equality law protection (beyond existing gaps) to exist in different parts of the United Kingdom, as well as the potential for a reduction in levels of protection.
- 5.5 We draw the Committee's attention to the fact that in some equality areas not currently covered by EU law, there are already significant gaps in equality protection between Northern Ireland and Great Britain – gaps which the Commission has consistently called for to be addressed. This

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<sup>18</sup> See, for example, evidence by Professor McColgan to Women and Equalities Select Committee on *Inquiry on Impact of Brexit on the Equalities Agenda* (14 Sept 2016). EU law requires the introduction of the minimum levels of protection against discrimination, which means that there can be no regression from these levels of protection by the UK or other Member States.

includes protection against age discrimination in respect of the provision of goods, facilities and services.<sup>19</sup>

- 5.6 We recommend strongly that the NI Executive ensures that, following the UK's exit from the EU, further gaps in equality protections do not develop.
- 5.7 Further, we recommend that NI citizens are able to benefit from any future EU law equality protections<sup>20</sup> designed to strengthen rights for equality groups. The Committee will be aware that current proposed EU law relevant to equality includes the draft EU Horizontal Directive<sup>21</sup>, European Accessibility Act<sup>22</sup>, and the draft EU Directive on improving the gender balance of non-executive members of companies.<sup>2324</sup>
- 5.8 Whilst the UK Government, depending on the final agreement, may not be required to implement future EU equality protections into UK law, we recommend that steps are taken to ensure that NI citizens are able to enjoy the same minimum levels of protection under equality law as EU citizens.
- 5.9 In terms of policy and/or legislation changes that should be made to ensure that the UK is well placed to support strong equalities legislation and processes outside the EU, we are of the view that there is a need to ensure that there is no negative impact on the promotion of equality and good relations in NI as a result of the UK's decision to leave the EU, and that the negotiations should seek to maximise opportunities to promote equality of opportunity and good relations.
- 5.10 This should include a consideration of the potential impact on the peace process in NI and work to promote social inclusion, including the potential impact of the loss of EU funding on programmes aimed at supporting

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<sup>19</sup> See ECNI [Key point briefing](#): Gaps in Equality Law between Great Britain and NI, 2014

<sup>20</sup> It will be noted that the UK Government stated prior to the EU Referendum that in order to maintain the rights of UK citizens living, working and travelling in other EU countries, it would almost certainly have to accept reciprocal arrangements for their citizens in the UK. See UK report on *Alternatives to Membership: possible models for the UK outside the EU*, Feb 2016, <https://www.gov.uk/government/publications/alternatives-to-membership-possible-models-for-the-united-kingdom-outside-the-european-union>

<sup>21</sup> This draft Directive, for example, will, if implemented in its current form, result in additional protection against discrimination and harassment outside the workplace on a range of equality grounds-in particular, age, religion and belief, disability, and sexual orientation.

<sup>22</sup> The European Accessibility Act, which will, if implemented in its current form, sets common accessibility requirements for certain key products and services that will help people with disabilities at EU level to participate fully in society. December 2015, the EC commenced a consultation on the [European Accessibility Act](#).

<sup>23</sup> For example, under current proposals the implementation of the Horizontal Directive will result in the strengthening of Northern Ireland equality law on the grounds of age, religion and belief, disability, and sexual orientation outside the workplace.

<sup>24</sup> This draft Directive is aimed at redressing the gender balance among non-executive directors of companies listed on stock exchanges. 14.11.2012 COM (2012) 614 FINAL.

peace and reconciliation, equality and good relations and social inclusion, as well as the impact on the voluntary and community sector. It should also include a consideration of the likely impact on the institutions, guarantees and provisions of the Good Friday/Belfast Agreement; and the impact on race relations, including levels of race hate crime in NI.

- 5.11 Policy initiatives taken forward by the European institutions have, for example, helped to promote equality of opportunity and social inclusion in NI, as well as in other parts of the UK and across Member States
- 5.12 For example, it has received funding through the PEACE programme aimed at supporting peace and reconciliation and promoting economic and social progress in Northern Ireland and the Border Region of Ireland. It has also received funding through the INTERREG VA programme.
- 5.13 In addition, the NI European Social Fund (ESF) Programme 2014-2020 has helped to combat poverty and enhance social inclusion by reducing economic inactivity and increasing the skills base of those currently in work and future potential participants in the workforce (including supporting people with disabilities).
- 5.14 EU funding through the Rights, Equality and Citizenship Programme 2014-2020 has also helped to promote equality in NI<sup>25</sup>. Other EU funded initiatives have also helped to promote gender equality in NI; including under the EU's PEACE III Programme that funded cross-border projects that aim to encourage and support women's participation in peace building<sup>26</sup>.
- 5.15 EU funding has enabled the community and voluntary sector in Northern Ireland to play an important role in addressing social and economic deprivation, training and employment, social enterprise, health and well-being, 'peace building' and building cross-community and cross-border relationships<sup>27</sup>. This has included work carried out by voluntary and community sector representatives in the area of gender equality and racial equality.
- 5.16 Finally, we consider that there is a need to effectively tackle prejudicial attitudes and hate crime in NI, including on the grounds of race, that may arise as a direct result of the negotiations or in the aftermath of any

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<sup>25</sup> [EU Rights, Equality and Citizenship programme 2014-2020](#).

<sup>26</sup> See, for example, TWN cross border, cross-community project- [The Extending Positive Relations Project](#).

<sup>27</sup> The annual income of the Northern Ireland community and voluntary sector is reported to be around £741.9 million, of which approximately £70.1 million is estimated to derive from various EU funding programmes. See *Lords Select Committee (EU Committee) 9th report- EU Referendum and EU Reform*, 30 March 2016.

agreement. This includes tackling prejudicial attitudes/hate crime towards migrant workers and asylum seekers, and their families. It also includes highlighting and valuing the important contribution that migrant workers make to the NI economy, across all sectors, as well as to wider society.

Equality Commission

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