

UK's decision to leave the EU:

Recommendations on the EU (Withdrawal) Bill, as introduced into the House of Lords

Briefing Paper

February 2018

Equality Commission

FOR NORTHERN IRELAND

Executive Summary

Introduction

- 1.1 This briefing sets out the Equality Commission for Northern Ireland's **recommendations** on the **European Union (Withdrawal) Bill**, as introduced into the House of Lords in January 2018.
- 1.2 Our recommendations take into account recent developments relevant to equality law in Northern Ireland, including the UK Government's commitments set out in the *Joint report from the negotiators of the EU and the UK Government on progress during phase 1 of the negotiations* (2017)¹ ('the Joint report').
- 1.3 They also take into account legislative changes made to the Withdrawal Bill, including those introduced following consideration by the House of Commons between July 2017 and January 2018.
- 1.4 Our recommendations reflect the particular context of Northern Ireland, including that equality law is a devolved matter in Northern Ireland, and the commitments to equality enshrined in the Good Friday/Belfast Agreement².
- 1.5 In summary, **we recommend** provisions in the Withdrawal Bill that ensure:
 - non-regression of equality rights and the implementation of future equality enhancing protections in Northern Ireland;
 - effective scrutiny of any proposed changes to equality in law in Northern Ireland; and
 - the incorporation of the EU Charter of Fundamental Rights into UK legislation.

¹ Negotiators of EU/UK Government (Dec, 2017), [Joint report of the negotiators of the EU and the UK Government on progress during phase 1 of the negotiations](#)

² The Belfast/ Good Friday [Agreement](#), 10 April 1998.

Our recommendations

Ensure non-regression of equality rights and implement future equality enhancing protections

Withdrawal Agreement

We **recommend** that the Withdrawal Bill ensures that the Withdrawal Agreement provides, as regards equality rights in Northern Ireland, for non-regression of rights, equivalent standards of protection with the Republic of Ireland, and that changes to EU law and interpretations by the Court of Justice of the EU (CJEU) continue to have effect in Northern Ireland.

International trade or investment agreements

We **recommend** a new clause in the Withdrawal Bill that will prohibit the UK Government from agreeing or ratifying an international trade or investment agreement that would require or permit the reduction of any protections for human rights and fundamental freedoms in Northern Ireland, including those relating to non-discrimination and equality, ensured under UK law.

The Good Friday/Belfast Agreement

We **recommend** the UK Government clarifies the legal status of the Good Friday/Belfast Agreement, and incorporates safeguards so as to ensure compliance with the Good Friday/Belfast Agreement, including in the Withdrawal Agreement and any future trade and investment agreements.

Supporting rationale

- 1.6 Equality and good relations are central to ensuring a prosperous and thriving Northern Ireland. It is essential that there is no regression from current levels of protection under Northern Ireland equality law and that future equality enhancing protections are implemented in Northern Ireland.
- 1.7 In the Joint report, the UK Government committed to ‘ensuring that no diminution of rights is caused by its departure from the EU, **including in the area of protection against forms of discrimination enshrined in EU law**’ (our emphasis)³.

³ Negotiators of EU/UK Government (Dec, 2017), [Joint report of the negotiators of the EU and the UK Government on progress during phase 1 of the negotiations](#), p8.

- 1.8 We consider it essential that this commitment to the non-regression of equality rights in Northern Ireland, is enshrined in the Withdrawal Agreement, and reflected in the Withdrawal Bill⁴.
- 1.9 In addition, both parties to the Joint report agreed that the Good Friday/Belfast Agreement ‘must be protected in all its parts’⁵, and confirmed ‘that the people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland’⁶.
- 1.10 Further, the European Commission, prior to the publication of the Joint report, highlighted that ‘the Good Friday/Belfast Agreement requires **equivalent standards of protection of rights in Ireland and Northern Ireland**’ (our emphasis)⁷.
- 1.11 After the UK’s exit from the EU, there is the potential for lower standards of equality protection to exist in Northern Ireland than in the Republic of Ireland. There is also the potential for people in Northern Ireland who choose to assert their right to Irish citizenship to be able to acquire *additional and enhanced* equality rights which come with EU citizenship, and which have emanated from the EU after the UK’s exit.
- 1.12 It is therefore essential that the Withdrawal Bill includes provisions, specifically as regards the Withdrawal Agreement and international trade or investment agreements, aimed at ensuring the non-regression of equality rights and the implementation of future equality enhancing protections in Northern Ireland. The UK Government should also clarify the legal status of, and incorporate safeguards so as to ensure compliance with the Good Friday/Belfast Agreement.
- 1.13 Finally, we note the requirements in the Withdrawal Bill⁸ placed on Ministers of the Crown when bringing forward statutory instruments made under the Bill which relate (solely) to equality law in Great

⁴ The need for the joint commitments in the joint report to be reflected in the Withdrawal Agreement was also recognised by the parties to the Joint Report. Negotiators of EU/UK Government (Dec, 2017), [Joint report of the negotiators of the EU and the UK Government on progress during phase 1 of the negotiations](#). See paragraph 5 thereof.

⁵ Ibid p7

⁶ Ibid p8

⁷ European Commission (2017) [Guiding Principles transmitted to EU-27 for the Dialogue on Ireland/Northern Ireland](#), p4.

⁸ See Schedule 7, paragraph 22 of the [Bill](#) as introduced to the House of Lords in January 2018. The Bill requires Ministers of the Crown to make a statement alongside statutory instruments made under the Bill, setting out whether they amend, repeal or revoke any provision of equality law, and, if it does, to explain the effect that it has. It also requires Ministers to make a statement that they have, so far as required by equality legislation, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited by or under the Equality Act 2010.

Britain. As set out above, we **recommend**, as regards equality law in Northern Ireland, the inclusion of *stronger provisions* in the Withdrawal Bill, that reflect the particular context of Northern Ireland, including the commitments to equality enshrined in the Good Friday/Belfast Agreement, as well as the commitments in the Joint report as regards the non-regression of equality rights in Northern Ireland.

Ensure effective scrutiny of any proposed changes to equality law in Northern Ireland

We **recommend** that the Withdrawal Bill prohibits the use of delegated powers to amend equality laws in Northern Ireland.

Supporting rationale

- 1.14 Whilst the Withdrawal Bill prohibits the use of delegated powers in relation to provisions in the Human Rights Act 1998, there are no similar restrictions as regards equality law in Northern Ireland or in respect of equality law in other parts of the UK. It is essential that there are sufficient safeguards in the Bill so as to ensure the effective and full scrutiny of any proposed changes to equality law in Northern Ireland.

Ensure the incorporation of the EU Charter of Fundamental Rights into UK Legislation

We **recommend** that the Withdrawal Bill provides for the incorporation of the EU Charter of Fundamental Rights into UK legislation.

Supporting rationale

- 1.15 It is essential that the functions and fundamental principles of the Charter, including in relation to equality, are fully protected and preserved as the UK exits the EU. We are concerned that the removal of the Charter from UK law will affect the substantive rights that individuals in Northern Ireland, and in other parts of the UK, already benefit from.

Introduction

- 1.16 The Equality Commission for Northern Ireland ('the Commission') has set out below its **recommendations on the European Union (Withdrawal) Bill** ('the Withdrawal Bill'), as introduced into the House of Lords in January 2018.
- 1.17 Our recommendations on the Withdrawal Bill reflect our earlier overarching recommendations⁹ (March 2017) relating to the UK's exit from the EU, in which we recommended that the Government should:
- ensure the promotion of equality and good relations are priority issues in EU exit negotiations;
 - ensure no regression from existing equality protections and mechanisms;
 - adopt a best practice approach that includes implementing future relevant equality enhancing protections and best practice;
 - ensure there is no negative impact on equality and good relations for those living in Northern Ireland;
 - ensure effective engagement with key stakeholders, including Section 75 groups¹⁰.
- 1.18 Our recommendations on the Withdrawal Bill also reflect the particular context of Northern Ireland, including that equality law is a devolved matter in Northern Ireland, and the commitments to equality enshrined in the Good Friday/Belfast Agreement¹¹.
- 1.19 Further, the Commission, along with the Equality and Human Rights Commission (EHRC), the Northern Ireland Human Rights Commission (NIHRC) and the Scottish Human Rights Commission (SHRC) recommend that the protection of equality and human rights should remain a priority in negotiations between the UK and the other EU member states¹².

⁹ ECNI (2017) [UK's exit from the EU: ECNI Recommendations](#)

¹⁰ Section 75 of the Northern Ireland Act 1998.

¹¹ The Belfast/ Good Friday [Agreement](#), 10 April 1998.

¹² See EHRC [Briefing](#), European Union (Withdrawal) Bill, Second Reading, House of Commons, 7 September 2017

1.20 In addition, whilst each of these organisations have specific priorities tailored to their individual mandates, we have jointly identified a number of key priority areas which should be protected and advanced in the course of the UK's exit from the EU.

1.21 These are:

- ensuring parliamentary scrutiny of any changes to the UK's equality and human rights legal framework;
- retaining the UK's equality and human rights legal framework as we leave the EU and ensuring progression, not regression, from existing mechanisms;
- ensuring the UK is a global leader in equality and human rights and adopts best practice that enhances protections¹³.

1.22 Our recommendations also take into account recent developments relevant to equality law in Northern Ireland, including the UK Government's commitments set out in the *Joint report from the negotiators of the EU and the UK Government on progress during phase 1 of the negotiations (2017)*¹⁴ ('the Joint report').

1.23 They also take into account legislative changes to the Withdrawal Bill, including those introduced following consideration by the House of Commons between July 2017 and January 2018.

Our Recommendations

Ensure non-regression of equality rights and implement future equality enhancing protections

Withdrawal Agreement

We **recommend** that the Withdrawal Bill ensures that the Withdrawal Agreement provides, as regards equality rights in Northern Ireland, for non-regression of rights, equivalent standards of protection with the Republic of Ireland, and that changes to EU law and interpretations by the Court of Justice of the EU (CJEU) continue to have effect in Northern Ireland.

¹³ ECNI recommendations are available [here](#), the EHRC's five point plan is available [here](#), the NIHRC guidance is available [here](#), and the SHRC position statement is available [here](#).

¹⁴ [Joint report of the negotiators of the EU and the UK Government on progress during phase 1 of the negotiations](#) (Dec, 2017)

Specifically, we **recommend** a new clause in the Withdrawal Bill that will ensure that the Withdrawal Agreement provides that, following the UK's exit from the EU:

- there must be no diminution of non-discrimination and equality rights in Northern Ireland;
- there must be equivalent standards of protection as regards non-discrimination and equality rights in the Republic of Ireland and Northern Ireland;
- amendments to EU law protections against discrimination will continue to be brought into force in Northern Ireland;
- any interpretations by the CJEU as regards EU equality law protections, will continue to be given effect in Northern Ireland; and
- any interpretations by the CJEU as regards the general principles of EU law will continue to be given effect in Northern Ireland, in the same way as before the UK's exit from the EU.

International trade or investment agreements

We **recommend** a new clause in the Withdrawal Bill that will prohibit the UK Government from agreeing or ratifying an international trade or investment agreement that would require or permit the reduction of any protections for human rights and fundamental freedoms in Northern Ireland, including those relating to non-discrimination and equality, ensured under UK law.

The Good Friday/Belfast Agreement

We **recommend** the UK Government clarifies the legal status of the Good Friday/Belfast Agreement, and incorporates safeguards so as to ensure compliance with the Good Friday/Belfast Agreement, including in the Withdrawal Agreement and any future trade and investment agreements.

Supporting rationale

- 1.24 The Commission has recommended that the Government should commit to ensuring that there is no regression from current levels of protection under equality law in Northern Ireland and no weakening of supporting equality mechanisms¹⁵.

¹⁵ See ECNI (2017) [Brexit recommendations](#). For further information see www.equalityni.org/EUExit.

- 1.25 We have also recommended that the Government should commit to the implementation in Northern Ireland of key future equality enhancing protections and best practice emanating from the EU and elsewhere. This includes future protections advocated by the EU or others aimed at strengthening rights for equality groups.
- 1.26 We consider that equality and good relations are central to ensuring a prosperous and thriving Northern Ireland. The right to equality of opportunity, including in all social and economic activity, was a core issue in the Good Friday/Belfast Agreement¹⁶.
- 1.27 The Agreement is explicitly founded upon a set of foundational general principles including a commitment to “partnership, equality and mutual respect as the basis of relationships within Northern Ireland, between North and South, and between these islands”¹⁷.
- 1.28 The UK Government has also confirmed that ‘the British-Irish Agreement is binding on the UK Government and Irish Government, and **gives the commitments on equality, parity of esteem and citizenship legal force in international law**’ (our emphasis)¹⁸.
- 1.29 We have recommended that Government should consider and fully mitigate any potential negative impact on work to promote equality and good relations in Northern Ireland and that this should include a consideration of the likely impact on the institutions, guarantees and provisions of the Good Friday/Belfast Agreement.
- 1.30 We welcome the fact that the UK Government has indicated its commitment that the protections covered in the Equality Act 2006, the Equality Act 2010 **and equivalent legislation in Northern Ireland** (our emphasis) will continue to apply once the UK has left the EU¹⁹; as well as its commitment to protect workers’ rights that are enjoyed under EU law and to ensure that they keep pace with the changing labour market.
- 1.31 Further, we note that the UK Government has indicated that it has some of the strongest equalities legislation in the world, and we welcome its commitment to continue to make sure these rights are protected²⁰.

¹⁶ The Good Friday/ Belfast [Agreement](#).

¹⁷ Ibid

¹⁸ UK Government (2017) [Northern Ireland and Ireland: Position Paper](#), para 13.

¹⁹ UK Government (March 2017) [Great Repeal Bill: White Paper](#): Legislating for the United Kingdom’s withdrawal from the European Union.

²⁰ Ibid

- 1.32 We welcome that in the Joint report, the UK Government also committed to ‘ensuring that no diminution of rights is caused by its departure from the EU, **including in the area of protection against forms of discrimination enshrined in EU law**’ (our emphasis)²¹.
- 1.33 We consider it essential that this commitment to the non-regression of equality rights in Northern Ireland, is enshrined in the Withdrawal Agreement²², and reflected in the Withdrawal Bill.
- 1.34 In addition, we welcome the UK Government’s commitment set out in the Joint report to facilitate the related work of the institutions and bodies, established by the Good Friday/Belfast Agreement, which includes the Commission, in upholding human rights and equality standards²³.
- 1.35 Further, we welcome that both parties agreed that the Good Friday /Belfast Agreement ‘must be protected in all its parts’²⁴. The parties also confirmed ‘that the people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland’, and agreed that ‘the Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with EU citizenship for such people’²⁵.
- 1.36 We note that, prior to the publication of the Joint report, the European Commission, in its *Guiding Principles Transmitted to EU-27 for the Dialogue on Ireland/Northern Ireland*²⁶ (2017) set out a number of principles and indicated that agreement on these principles will form the basis for the subsequent negotiation of solutions.
- 1.37 Significantly, it highlighted that ‘the Good Friday Agreement requires **equivalent standards of protection of rights** in Ireland and Northern Ireland’ and that the UK ‘should **ensure that no diminution of rights** is caused by the UK’s departure from the European Union, **including in the area of protection against**

²¹ Negotiators of EU/UK Government (Dec, 2017), [Joint report of the negotiators of the EU and the UK Government on progress during phase 1 of the negotiations](#), p8.

²² The need for the joint commitments in the joint report to be reflected in the Withdrawal Agreement was also recognised by the parties to the Joint Report. Ibid, see paragraph 5 thereof.

²³ Ibid p8.

²⁴ Ibid p7

²⁵ Ibid p8

²⁶ European Commission (2017) [Guiding Principles transmitted to EU-27 for the Dialogue on Ireland/Northern Ireland](#), at page 4.

forms of discrimination currently enshrined in Union law' (our emphasis)²⁷.

- 1.38 Currently both the Republic of Ireland and the UK are required to implement the minimum standards of EU law. After the UK's exit from the EU, there is the potential for policy and legislative divergence in the area of equality law between the Republic of Ireland and Northern Ireland, as well as within different parts of the UK, as the UK will no longer be required to implement the minimum requirements of EU law, including EU equality directives.
- 1.39 There are, at present, a number of proposed EU laws relevant to equality which have the potential to enhance protection against discrimination and strengthen rights for equality groups. These include the draft EU Horizontal Directive²⁸, the European Accessibility Act²⁹, and the draft EU Directive on improving the gender balance of non-executive members of companies³⁰.
- 1.40 If these EU laws are brought into force and are required to be implemented in the Republic of Ireland, as well as in other EU Member States, there is the potential, if equivalent standards of protections are not similarly introduced in Northern Ireland, for lower standards of equality protection to exist in Northern Ireland than in the Republic of Ireland.
- 1.41 There is also the potential that people in Northern Ireland, who choose to assert their right to Irish citizenship, will be able to acquire *additional and enhanced* equality rights which come with EU citizenship, and which have emanated from the EU after the UK's exit.
- 1.42 We have recommended that the UK Government should commit to the implementation in Northern Ireland of key future equality enhancing protections and best practice emanating from the EU and elsewhere. This includes ensuring that equivalent standards of protection of equality rights exist in Northern Ireland as in the Republic of Ireland, after the UK exits the EU.

²⁷ Ibid

²⁸ 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.

²⁹ 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. In December 2015, the European Commission commenced a consultation on the [European Accessibility Act](#).

³⁰ 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

- 1.43 This will ensure that *all* citizens of Northern Ireland, regardless of whether or not they choose to assert their right to Irish citizenship, can benefit from any enhanced standards of protection of equality rights that emanate from the EU or elsewhere.
- 1.44 We recognise that the UK Government, the NI Executive, and the Irish Government, have in some areas already gone beyond the required minimum standards of EU law and proactively enhanced and strengthened domestic equality rights and protections.
- 1.45 We also consider that ensuring equivalent standards of protection of equality rights may mean that different forms are used to achieve that aim, and that the particular circumstances of Northern Ireland or the Republic of Ireland may dictate that a different approach is required. For example, the introduction of fair employment legislation in Northern Ireland was introduced to address particular issues in Northern Ireland, including the need for strong and effective legislative to ensure equality of opportunity on the grounds of religious belief and/or political opinion at that time.
- 1.46 We note that the Withdrawal Bill contains a provision that requires Ministers of the Crown to make a statement alongside statutory instruments made under the Bill, setting out whether they amend, repeal or revoke any provision of equality law, and, if it does, to explain the effect that it has. The provision also requires Ministers to make a statement that they have, so far as required by equality legislation, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited by or under the Equality Act 2010³¹.
- 1.47 First, it is important to note that these requirements do not apply to statutory instruments made by Ministers in the Northern Ireland devolved administration or relate to equality law in Northern Ireland³². Secondly, as set out below, we **recommend**, as regards equality law in Northern Ireland, the inclusion of *stronger provisions* in the Withdrawal Bill, that reflect the particular context of Northern Ireland, including the commitments to equality enshrined in the Good Friday/Belfast Agreement, as well as the commitments in the

³¹ See Schedule 7, paragraph 22 of the [Bill](#), as introduced to the House of Lords in January 2018.

³² The requirements apply only to statutory instruments made solely by Ministers of the Crown and only relate to equality legislation in Great Britain. The UK Government has indicated that it is for the devolved authorities to decide what explanatory information they wish to publish alongside any instruments they make. Dept for Exiting the EU (2018), [EUROPEAN UNION \(WITHDRAWAL\) BILL: Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), p28.

Joint report, as regards the non-regression of equality rights in Northern Ireland.

- 1.48 As set out above, equality law in Northern Ireland is currently a devolved matter. We are aware that the UK Government is considering policy areas where EU law intersects with devolved competence and where a UK wide common legislative framework is required.
- 1.49 In the event that Ministers of the Crown are responsible for bringing forward statutory instruments made under the Bill relating to Northern Ireland, we **recommend**, as regards equality law in Northern Ireland, the inclusion of *stronger provisions* in the Withdrawal Bill. These provisions should reflect the particular context of Northern Ireland, including the commitments to equality in the Good Friday/Belfast Agreement, as well as the commitments in the Joint report as regards the non-regression of equality rights in Northern Ireland.
- 1.50 In addition, aligned to our recommendations that the UK Government ensures the non-regression of equality rights and the implementation of future equality enhancing protections in Northern Ireland, and in light of the commitments to equality enshrined in the Good Friday/Belfast Agreement, we **recommend** the inclusion in the Withdrawal Bill of the following clauses relating to provisions in the Withdrawal Agreement and international trade or investments agreements.

Withdrawal Agreement

- 1.51 We **recommend** that the Withdrawal Bill ensures that the Withdrawal Agreement provides, as regards equality rights in Northern Ireland, for non-regression of rights, equivalent standards of protection with the Republic of Ireland, and that changes to EU law and interpretations by the CJEU continue to have effect in Northern Ireland.
- 1.52 Specifically, we **recommend** a new clause in the Withdrawal Bill that will ensure that the Withdrawal Agreement provides that, following the UK's exit from the EU:
- there must be no diminution of non-discrimination and equality rights in Northern Ireland;
 - there must be equivalent standards of protection as regards non-discrimination and equality rights in the Republic of Ireland and Northern Ireland;

- amendments to EU law protections against discrimination will continue to be brought into force in Northern Ireland;
- any interpretations by the CJEU as regards EU equality law protections, will continue to be given effect in Northern Ireland; and
- any interpretations by the CJEU as regards the general principles of EU law will continue to be given effect in Northern Ireland, in the same way as before the UK's exit from the EU.

International Trade/ Investment Agreements

- 1.53 Further, we **recommend** a new clause in the Withdrawal Bill that will prohibit the UK Government from agreeing or ratifying an international trade or investment agreement that would require or permit the reduction of any protections for human rights and fundamental freedoms in Northern Ireland, including those relating to non-discrimination and equality, ensured under UK law.
- 1.54 We note that the UK Parliament's Joint Committee on Human Rights in its report on *The human rights implications of Brexit*³³ (2016) highlighted that 'the EU has included human rights clauses in trade agreements for many years'. It also indicates that 'in circumstances where the UK exits the EU, if it has to negotiate and enter into trade agreements with other states, the Government should, at the very least, ensure that the standards included in current agreements are maintained'.
- 1.55 It further states that 'any dilution of standards would give rise to a potential imbalance between UK standards and EU standards which would be extremely undesirable', and that 'there is, in principle, an argument to be made that if the UK enters into any new agreements, this is an opportunity to raise standards'.
- 1.56 In addition, as highlighted above, the UK Government has committed to 'ensuring that no diminution of rights is caused by its departure from the EU, including in the area of protection against forms of discrimination enshrined in EU law'³⁴.

³³ Joint Committee on Human Rights (2016) [The human rights implications of Brexit](#), paragraph 105.

³⁴ Negotiators of EU/UK Government (Dec, 2017), [Joint report of the negotiators of the EU and the UK Government on progress during phase 1 of the negotiations](#), at p8.

The Good Friday/ Belfast Agreement

- 1.57 In addition, we **recommend** that the UK Government clarifies the legal status of Good Friday/Belfast Agreement and incorporates safeguards so as to ensure compliance with the Good Friday/Belfast Agreement, including in the Withdrawal Agreement and any future trade and investment agreements.
- 1.58 As set out above, the UK Government has confirmed that ‘the British-Irish Agreement is binding on the UK Government and Irish Government, and gives the commitments on equality, parity of esteem and citizenship legal force in international law’³⁵. Further, both parties to the *Joint report* agreed that the Good Friday/ Belfast Agreement ‘must be protected in all its parts’³⁶.
- 1.59 However, given that the UK Supreme Court, in its decision in *Miller*³⁷ did not recognise that the Good Friday/Belfast Agreement was legally enforceable in UK law, we recommend that the legal status of the Good Friday/Belfast Agreement is clarified.
- 1.60 We also consider that there is a need to incorporate safeguards so as to ensure compliance with the Good Friday/Belfast Agreement, including in the Withdrawal Agreement and any future trade and investment agreements.

Ensure effective scrutiny of any proposed changes to equality law in Northern Ireland

We **recommend** the Withdrawal Bill should prohibit the use of delegated powers to amend equality laws in Northern Ireland.

Supporting rationale

- 1.61 The Withdrawal Bill will confer wide ranging powers on the UK Government and the devolved administrations in relation to domestic legislation within areas of devolved competence, to make secondary legislation to correct retained EU law. These powers will allow for corrections to be made to both primary and secondary legislation (known as ‘*Henry VIII*’ powers). The powers will also enable the UK Government and devolved administrations to

³⁵ UK Government (2017) [Northern Ireland and Ireland: Position Paper](#), para 13.

³⁶ Negotiators of EU/UK Government (Dec, 2017), [Joint report of the negotiators of the EU and the UK Government on progress during phase 1 of the negotiations](#), p7.

³⁷ [Supreme Court judgment](#) 24 Jan 2017: R (Gina Miller & Dos Santos) v Secretary of State for Exiting the European Union.

comply with international obligations, and to implement the Withdrawal Agreement.

- 1.62 Whilst the Withdrawal Bill prohibits the use of these delegated powers in relation to provisions in the Human Rights Act 1998, there are no similar restrictions in the Bill on the use of delegated powers as regards equality law in Northern Ireland, or in respect of equality law in other parts of the UK.
- 1.63 We are concerned that the wide ranging delegated powers proposed under the Withdrawal Bill, including as regards the devolved administration in Northern Ireland³⁸, do not have sufficient safeguards and levels of scrutiny.
- 1.64 We note that, whilst it is proposed in the Bill that Parliament or the devolved administrations will be able to scrutinise statutory instruments made under these delegated powers, most statutory instruments will be subject to the ‘negative procedure’. This means that in only very limited circumstances will the ‘affirmative procedure’ apply and the express consent of Parliament or the devolved administrations be required.
- 1.65 We note that the UK Parliament’s Joint Committee on Human Rights (2016) has indicated that ‘...the Government must resist the temptation to allow laws relating to fundamental rights to be repealed by secondary legislation for reasons of expediency. If rights are to be changed there should be an opportunity for both Houses to seek both to amend and to vote on such changes’³⁹.
- 1.66 We also note that the Withdrawal Bill makes provision for a *sifting committee*, with a power to make a recommendation as regards the correct procedure (affirmative/ negative) to be followed for statutory instruments laid by a Minister of Crown⁴⁰.
- 1.67 It is important to note that this sifting procedure applies only to statutory instruments laid before the House of Commons by Ministers of Crown, and therefore would not apply to statutory instruments being brought forward by Ministers in the Northern Ireland devolved administration. Further, such a sifting procedure⁴¹,

³⁸ The Commission recognises that the devolved administration in Northern Ireland is currently suspended.

³⁹ Joint Committee on Human Rights (2016) [The human rights implications of Brexit](#), paragraph 92.

⁴⁰ The Bill requires that Ministers of the Crown lay statutory instruments that they are proposing to make under the negative procedure, pursuant to the powers in the Bill, before the House of Commons. These instruments are laid so that they may be considered by a sifting committee. Dept for Exiting the EU (2018), [EUROPEAN UNION \(WITHDRAWAL\) BILL: Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#) p27

⁴¹ Or a procedure of a similar nature, had it applied in the specific context of the devolved administration in Northern Ireland.

does not address our recommendation that the Withdrawal Bill prohibits the use of delegated powers to amend equality laws in Northern Ireland.

- 1.68 As regards equality law in Northern Ireland, the implementation of this sifting procedure, rather than the inclusion of provisions in the Bill that prohibit the use of delegated powers to amend equality laws in Northern Ireland, becomes particularly relevant in the event that Ministers of the Crown are responsible for bringing forward statutory instruments⁴² made under the Bill *relating to Northern Ireland*⁴³.
- 1.69 We therefore **recommend** that the Withdrawal Bill is amended so as to prohibit the use of delegated powers by Ministers, including by Ministers in the Northern Ireland devolved administration, to amend equality laws in Northern Ireland. Delegated powers, including *Henry VIII* powers, should not be used to make any significant policy changes to equality law in Northern Ireland.
- 1.70 There should be sufficient safeguards in the Bill so as to ensure the effective and full scrutiny of any proposed changes to equality law in Northern Ireland. Any proposed changes to equality law in Northern Ireland by the devolved administration should be made through the affirmative procedure so as to allow for effective scrutiny of any proposed changes. In the event that equality law in Northern Ireland is not devolved, we recommend that any changes to equality law in Northern Ireland are made by primary legislation, rather than through delegated powers, and subject to the full scrutiny of Parliament.

Ensure the incorporation of the EU Charter of Fundamental Rights into UK legislation

We **recommend** that the Withdrawal Bill provides for the incorporation of the EU Charter of Fundamental Rights into UK legislation.

Supporting rationale

- 1.71 The Withdrawal Bill will remove the EU Charter of Fundamental Rights ('the Charter') from UK law. The Charter contains the fundamental rights and principles protected in EU law. These

⁴² Statutory instruments to be laid before the House of Commons.

⁴³ For example, although equality law in Northern Ireland is currently a devolved matter, we are aware that the UK Government is considering policy areas where EU law intersects with devolved competence and where a UK wide common legislative framework is required.

include equality before the law, non-discrimination and equality between men and women.

- 1.72 We note that the UK Government's position is that the removal of the Charter will not affect the substantive rights from which individuals already benefit in the UK. We also note the Government's commitment to 'look again at some of the technical detail about how the Bill deals with the general principles of EU law'⁴⁴.
- 1.73 We consider that it is essential that the functions and fundamental principles of the Charter, including in relation to equality, are fully protected and preserved as the UK exits the EU.
- 1.74 We are concerned that the removal of the Charter from UK law will affect the substantive rights that individuals in Northern Ireland, and in other parts of the UK, already benefit from. We note that a recent House of Commons Library briefing paper has identified that the Charter has some substantive and procedural advantages over the European Convention on Human Rights (ECHR)⁴⁵. It has noted that although the Charter applies to the UK only within the scope of EU law, there are stronger remedies available for incompatibility with the Charter, compared to claims under the Human Rights Act 1998.
- 1.75 The paper also highlights some potential impacts on human rights protections if the Charter is not retained in UK law. These include, for example, that rights might be lost when EU law is amended by delegated powers proposed under the Bill, as these delegated powers have only limited human rights safeguards.
- 1.76 In addition, the briefing paper highlights that the retention of *general principles of EU law* would have only a limited effect, because failure to comply with general principles of EU law could no longer be used as the basis for a right of action in domestic law in the UK or to disapply or quash legislation.
- 1.77 We note that the UK Government, as regards the Bill's provisions on changes to the way in which general principles of EU law operate in UK law after the UK exits, has acknowledged that there may be 'a limited impact on individuals protected under the Equality Act 2010'⁴⁶. The general principles include equality before the law, non-discrimination and equality between men and women. It is

⁴⁴ UK Government (2017), [EU Charter: Right by Right Analysis . p5](#)

⁴⁵ House of Commons Library (2017) [Briefing Paper: EU \(Withdrawal Bill\)](#)

⁴⁶ Dept for Exiting the EU (2017) [The Repeal Bill: Equality Analysis](#), page 7

important to note that there have been cases where national courts have been required to disapply national law on the grounds that it was in breach of the non-discrimination principle⁴⁷.

- 1.78 Further, the briefing paper indicates that Charter provisions corresponding to a human rights treaty provision that the UK has not ratified, or has ratified but not made enforceable under domestic law, 'would no longer have even the limited enforceability provided indirectly by the Charter'⁴⁸.
- 1.79 Further, we note that the Joint Committee on Human Rights in its recent report on the Withdrawal Bill⁴⁹ (2018), in which it outlines its response to the UK Government's 'right by right' analysis of the Charter⁵⁰, has highlighted a number of reasons why 'rights may be diminished owing to the exclusion of the Charter'. It also concluded that the exclusion of the Charter from domestic law results in a complex human rights landscape which is uncertain and that legal uncertainty was likely to undermine the protection of rights⁵¹.
- 1.80 We also note that a legal opinion commissioned by the Equality and Human Rights Commission (EHRC) has concluded that a failure to preserve relevant parts of the Charter in domestic law after Brexit will lead to a significant weakening of the current system of human rights protection in the UK⁵².
- 1.81 We therefore **recommend** that the Withdrawal Bill includes a new clause that provides for the incorporation of the Charter into UK legislation, in a similar way to which the European Convention on Human Rights was incorporated into UK law in the Human Rights Act.

Further Information

- 1.82 The Commission is an independent public body established under the Northern Ireland Act 1998. Our powers and duties derive from a number of statutes providing protection against discrimination on the grounds of age, disability, race, religion and political opinion, sex and sexual orientation in Northern Ireland. We also have responsibilities arising from the Northern Ireland Act 1998 in

⁴⁷ For example, *Mangold v Helm* (2005), as cited in [The Repeal Bill: Equality Analysis](#) page 6

⁴⁸ House of Commons Library (2017) [Briefing Paper: EU \(Withdrawal Bill\)](#) page 43

⁴⁹ Joint Committee on Human Rights (2018), *Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis*

⁵⁰ UK Government (2017), [EU Charter: Right by Right Analysis](#)

⁵¹ Joint Committee on Human Rights (2018), *Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis*, p24.

⁵² [Legal opinion](#) by Jason Coppel QC (2018), commissioned by EHRC.

respect of the statutory equality and good relations duties which apply to public authorities.

- 1.83 The Commission, jointly with the Northern Ireland Human Rights Commission, is designated as the independent mechanism for Northern Ireland of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).
- 1.84 Further information on the Commission's recommendations relating to the UK's exit from the EU, as well as briefing paper updates can be accessed at: www.equalityni.org/EUExit

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