

UK's decision to leave the EU:

Update on Equality Law Considerations

June 2017

Equality Commission

FOR NORTHERN IRELAND

EQUALITY COMMISSION FOR NORTHERN IRELAND

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This briefing paper sets out an outline of the Equality Commission's policy recommendations regarding equality and good relations considerations in Northern Ireland as the UK exits the EU; provides an update on recent developments in Northern Ireland and Great Britain; and sets out a number of next steps.

Policy Recommendations

In October 2016 the Commission agreed a number of policy recommendations with the overall aim to ensure the maintenance and/or enhancement of equality and good relations provisions in Northern Ireland as the UK exits the EU.

In summary, the Commission recommends that 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 groups¹.

Since that date, the Commission has undertaken a range of steps to raise awareness and secure support for its recommendations. This has included highlighting the Commission's key recommendations through:

- its submission in November 2016 to the Women and Equalities Committee's Inquiry into *Ensuring strong equalities legislation after the EU exit*²;
- publication and dissemination of its recommendations, including a summary version, in March 2017 to a wide range of stakeholders

¹ For further information see www.equalityni.org/EUExit.

² ECNI (Nov 2016) [submission](#) to the UK Parliament, Women and Equalities Committee's Inquiry.

including NGOs, MLAs, etc. This included dissemination through a general ezine, MLA ezine and targeted social media;

- responses to key consultations, including on the draft Programme for Government³; draft Industrial Strategy⁴ ; and draft Belfast Agenda⁵;
- participation in a number of key conferences/seminars, including a conference on '*All Island Civic Dialogue on Human Rights under the Good Friday Agreement and UK exit from the EU*' (February 2017), which included participation from equality and human rights bodies across Northern Ireland and the Republic of Ireland ; and a NICRE Human Rights and Equality Conference in April 2017, attended by academics, and a range of representative organisations from across the equality groups, including minority ethnic groups;
- engagement with stakeholders, including the Department for Communities⁶ and NGOs, for example, representative organisations from the women's equality sector;
- agreed to speak at UK-wide conference on *The Impact of Brexit on Equality Rights* which had been scheduled to take place in June and will now take place in the Autumn 2017.
- ongoing engagement with Equality and Human Rights Commission on the potential impact of Brexit on equality law and the Northern Ireland Human Rights Commission.

Developments in NI and GB

Since October 2016 there have been a number of developments regarding the UK's decision to leave the EU. As outlined in more detail below, these developments include the outcome of a number of legal challenges, the triggering of Article 50, and the publication of the White Paper on the Great Repeal Bill.

Legal challenges

In Northern Ireland, in October 2016 the High Court ruled in favour of the UK Government in relation to Judicial Review cases brought by a victims campaigner and by a cross party group of MLAs and others ⁷.

In summary, the judge held that he was unable to identify any provisions within the Northern Ireland Act 1998, the Good Friday/Belfast Agreement and

³ ECNI (2016) [Response](#) to Executive's consultation on draft PfG

⁴ ECNI (2017) [Response](#) to DfEcon consultation on draft Industrial Strategy

⁵ ECNI (2017) [Response](#) to draft Belfast Agenda

⁶ For example, participation in the DfC stakeholder engagement event on 7 June 2017.

⁷ [McCord's \(Raymond\) Application \[2016\] NIQB 85](#) , 28 Oct 2016

other constitutional provisions that limited the exercise of the prerogative power of the executive to trigger Article 50.

The judge also considered whether, if an Act of Parliament was required to trigger Article 50, there was a requirement for a Legislative Consent Motion to be granted by the Assembly⁸ before this Act could be passed. The court held that such an Act to trigger Article 50 would not be legislation 'with regards to devolved matters' and so the Convention would not apply in those circumstances⁹.

Further, as regards the applicant's allegation that there had been a failure by the Northern Ireland Office to comply with Section 75 of the NI Act 1998 and the terms of its Equality Scheme, the court held that the notification of an intention on the part of the UK to exit the EU could not be regarded as carrying out a function relating to Northern Ireland (NI)¹⁰ and so Section 75 was not engaged¹¹.

Finally, the court rejected the claim that the Article 50 could not be triggered without the consent of the people of NI. It held that there was no provision in the Good Friday/Belfast Agreement or the Northern Ireland Act 1998 that created a legitimate expectation that there would be no change to the constitutional status of NI without the consent of the people of NI.

In Great Britain in January 2017, the Supreme Court rejected the UK Government's appeal¹² against the High Court ruling¹³ that Parliament must vote on whether Article 50 can be triggered, and stated that Ministers "*require the authority of primary legislation*" in order to give the Article 50 notice.

On the devolution questions raised, the Court unanimously held that the UK Parliament was not legally required to seek consent from the devolved legislatures on the UK's decision to withdraw from the EU. It stated that the Sewel Convention operated as a political constraint on the activity of the UK Parliament, but the policing of its scope and operation was not within the constitutional remit of the courts.

⁸ Under the Sewel Convention the UK Government does not normally invite the UK Parliament to legislate on devolved matters or on the scope of devolved powers without gaining the consent from the relevant devolved administrations.

⁹ It will be noted that the judge held that if this view was incorrect the Court had difficulty in seeing how this Convention could be viewed as enforceable given its status as a convention.

¹⁰ The court held that it is not a function carried out by the Secretary of State for NI or by the NIO.

¹¹ It also held that if the Court was wrong and Section 75 was engaged, the claim being advanced that Section 75 had been breached was premature because at the point at which consultation, screening and impact assessment may be viewed as being required had yet to occur.

¹² [Supreme Court judgment](#) 24 Jan 2017: R (Gina Miller & Dos Santos) v Secretary of State for Exiting the European Union.

¹³ [High Court judgment](#) 3 Nov 2016: R (Gina Miller & Dos Santos) v Secretary of State for Exiting the European Union.

The court also held that the decision to withdraw from the EU was not a function carried out by the Secretary of State for Northern Ireland in relation to NI within the meaning of Section 75; and that the Northern Ireland Act 1998¹⁴ did not regulate any other change in the constitutional status of Northern Ireland.

Following this, the [European Union \(Notification of Withdrawal\) Act 2017](#) was passed on 16 March 2017 which gave the UK Government the legal power to notify the European Council of the UK's intention to leave the EU, formally beginning the process of the UK exiting the EU¹⁵.

It will be noted that a legal challenge lodged in the Irish High Court aimed at preventing the UK from leaving the EU has recently been discontinued¹⁶.

Triggering of Article 50

In October 2016, the Prime Minister announced plans to introduce a "Great Repeal Bill" in the next Queen's Speech, which will repeal the *European Communities Act 1972* (the ECA) and incorporate (convert or transpose) EU law into domestic law, wherever practical. The Government has indicated that these legal changes within the Bill would take effect on the day that the UK officially leaves the European Union. The Great Repeal Bill has not yet been published but is expected very soon after the Queen's Speech on 21 June 2017. In terms of future timelines, it is anticipated that the Great Repeal Bill will be passed by the UK Parliament in late 2017/early 2018.

On 29 March 2017, the UK Government triggered Article 50 of the Treaty on the European Union (TEU), beginning the formal two-year process of negotiating the UK's exit from the EU¹⁷. The UK is expected to leave the EU on 29 March 2019 and the UK Government has indicated that it will bring forward a motion on the final agreement to be voted on by both Houses of Parliament before it is concluded¹⁸.

Women and Equalities Committee Inquiry

In February 2017 the Women and Equalities Committee published its report on its Inquiry into [Ensuring strong equalities legislation after the EU exit](#)¹⁹. The Commission submitted evidence to this Inquiry in November 2016 highlighting the Commission's key recommendations on the UK exit from the

¹⁴ Section 1 gave the people of Northern Ireland the right to determine whether to remain part of the UK or to become part of a united Ireland,

¹⁵ [European Union \(Notification of Withdrawal\) Act 2017](#)

¹⁶ See [report in Financial Times](#) 29 May 2017

¹⁷ Prime Minister's [Letter](#) to President of EC triggering Art 50, 29 March 2017

¹⁸ See [Great Repeal Bill: White Paper: Legislating for the United Kingdom's withdrawal from the European Union](#) at para 1.18

¹⁹ Women and Equalities Committee (28 Feb 2017) report on [Ensuring strong equalities legislation after the EU exit](#).

EU, including the need to ensure no regression from existing equality protections²⁰.

The Women and Equalities Committee's report contained a number of recommendations for the UK Government. These included recommending the inclusion of a clause in the Great Repeal Bill to commit to maintain current levels of EU equalities protection. In addition, it recommended the inclusion of a clause in the Equality Act 2010 that would require Parliament to state, when passing any legislation, that the proposed legislation is compatible with the Equality Act 2010. The response of the UK Government to these recommendations is awaited.

White Paper on Great Repeal Bill

In March 2017, the UK Government published the *Great Repeal Bill: White Paper*²¹ (*the White Paper*). It indicated that the Great Repeal Bill will:

- repeal the European Communities Act;
- convert EU law into United Kingdom law;
- and create the necessary powers to make secondary legislation; so as to enable corrections to be made to laws that would otherwise not operate appropriately once the UK has left the EU and to enable domestic law to reflect the content of any withdrawal agreement²².

The *White Paper* makes it clear that the UK Government's overall approach is to convert the body of existing EU law into domestic law, after which Parliament and, where appropriate, the devolved legislature, will be able to decide which elements of that law to keep, amend, or repeal once the UK has left the EU. This approach will ensure that there are no significant gaps in the UK's statute book once the UK leaves the EU.

However, the Government stresses that this is not enough as a significant amount of EU-derived law, even when converted into domestic law, will not achieve its desired legal effect in the UK once it has left the EU²³. The Government's initial assessment has shown that a "*very significant proportion of EU-derived law*" will require adjustment to ensure it works after the UK exits the EU²⁴. The Great Repeal Bill will therefore include delegated powers

²⁰ ECNI [submission](#) to Women and Equalities Committee Inquiry, Nov 2016.

²¹ UK Government (March 2017) [Great Repeal Bill: White Paper](#): Legislating for the United Kingdom's withdrawal from the European Union.

²² See White Paper, p12 and [Statement](#) to UK Parliament by Secretary of State David Davis on the White Paper, 30 March 2017

²³ For example, legislation may refer to an EU institution.

²⁴ White paper para 3.5

to enable such changes to be made by Ministers pre- and post-the UK exit from the EU ²⁵ by secondary legislation.

Conversion of EU laws

In terms of what EU laws will be converted by the Great Repeal Bill, the *White Paper* states as follows:

- **Directly applicable EU law:** The Bill will convert directly applicable EU law (EU Regulations) into UK law²⁶. This includes a number of EU Regulations that impact on the rights of Section 75 equality groups, for example, disabled people²⁷.
- **Domestic laws made to implement EU law:** The Bill will preserve all the laws passed in UK to implement our EU obligations. It will be noted that certain types of EU law, such as EU Directives²⁸, have to be given effect in the UK through national law; including through secondary legislation passed by the devolved administrations.

Significantly there are a number of equality-related EU Directives that have been transposed into NI law by NI specific regulations, for example, the Race Directive²⁹, Gender Directives³⁰ and Equal Treatment (Framework) Directive³¹, as well as Directives concerned with the equal treatment of men and women³². The *White Paper* states that this domestic legislation will be preserved.

It is important to note that the *White Paper* expressly states that “*all the protections covered in the Equality Act 2006, the Equality Act 2010 and equivalent legislation in NI will continue to apply once the UK has left the EU*”³³. It also confirms that workers’ rights that are

²⁵ See House of Commons Briefing Paper (May 2017) [Legislating for Brexit: The Great Repeal Bill](#).

²⁶ Directly applicable means that they have effect in UK without the need to pass specific UK implementing legislation.

²⁷ For example, [Regulation \(EC\) No 1107/2006](#) of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air.

²⁸ According to the EU’s Eur-lex database, in December 2016 there were around 900 Directives in force, almost all of which apply to the UK.

²⁹ [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. OFMDFM, for example, in 2003, under powers under the EC Act 1972, passed the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003 in order to implement the Directive.

³⁰ 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.

³¹ [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. OFMDFM, for example, in 2003, under powers under the EC Act 1972, passed the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 in order to implement the Directive.

³² The *Recast Directive* of 2006 consolidates sex discrimination law, repealing Directives from before 2000 and also the *Equal Treatment Directive* of 2002,

³³ UK Government (March 2017) [Great Repeal Bill: White Paper](#):p16

enjoyed under EU law will continue to be available in UK law after the UK exits the EU.

- **Rights in EU Treaties:** The *White Paper* states that rights in EU treaties are the primary source of EU law and the rights in these treaties that can be relied on directly in court by an individual will continue to be available in UK law. It states, for example, that the right to rely on Art 157 of the TFEU (equal pay) directly in court will be preserved.

However, it is important to note that the *White Paper* indicates that the Charter of Fundamental Rights will *not* be converted into UK law. It states that the Charter only applies to Member States when acting within the scope of EU law, so that its relevance is removed by the UK's withdrawal from the EU. It also confirms that there are no plans for the UK to withdraw from the European Convention on Human Rights (ECHR)³⁴.

- **Case law of the CJEU:** The Bill will provide that historic Court of Justice of the EU (CJEU) case law be given the same binding, or precedent, status in our courts as decisions of the UK Supreme Court. Once the UK leaves the EU, the jurisdiction of the CJEU will end. The Bill will not provide any role for the CJEU in the interpretation of new laws passed after the UK leaves the EU and it will not require the domestic courts to consider the CJEU's jurisprudence. However, the Bill will provide that any question as to the meaning of EU-derived law will be determined in the UK courts by reference to the CJEU's case law as it exists on the day the UK leaves the EU³⁵.

Interaction with the Devolved Institutions

The *White Paper* provides some indication on how the UK Government will approach devolution related matters in legislating for the UK's exit from the EU.

For example, it states that the UK Government intends to replicate the current *frameworks* provided by EU law through UK legislation. It highlights that in areas where the devolved administrations have competence, such as agriculture, environment and some transport issues, these administrations

³⁴ Though more recently the Prime Minister Teresa May has indicated that provisions in the EHRC that limit the UK's ability to tackle terrorism may be subject to review. See for example, report in [The Guardian](#) 6 June 2017.

³⁵ The *White Paper* states that protections are strengthened by the Bill's incorporation of CJEU case law and that this means that where workers rights have been extended by CJEU judgments, those rights will continue to be protected in the UK once it leaves the EU.

are responsible for implementing the common policy frameworks set by the EU.

It states that examples of where common UK frameworks may be required include where they are necessary to protect the freedom of businesses to operate across the UK single market. This will occur “*in parallel*” with “*intensive discussions with the devolved administrations*” on where common frameworks need to be retained, and what these should be³⁶.

The Government expects that the outcome of this process will lead to “*a significant increase in the decision- making power of each devolved administration*”³⁷.

Further, in relation to the delegated powers in the Bill, the *White Paper* states that the devolved ministers will be given a power to ‘*amend devolved legislation to correct law that will no longer operate appropriately*’, in line with the power it is proposed should be held by UK ministers³⁸.

A recent House of Commons *Briefing Paper* (May 2017) indicates that it is clear that there is some uncertainty in relation to how the Great Repeal Bill, and subsequent UK legislation on the UK’s exit from the EU will engage with the UK’s devolution framework³⁹.

It highlights that ‘*once the constraint of EU law is removed there would be the potential for the laws applying in different parts of the UK to diverge to a greater extent than at present*’⁴⁰.

The *Briefing Paper* states that the White Paper ‘*leaves open some questions on the Great Repeal Bill’s engagement with devolution*’. These include the following:

- whether the Bill will make provision on devolved subjects and whether legislative consent from the devolved administrations will be sought in relation to the Great Repeal Bill⁴¹;
- what limitations and scrutiny procedures will apply to the delegated powers granted to the Ministers in devolved administrations in order to correct EU law;
- how the legal common ‘frameworks’ referred to in the *White Paper* will operate⁴².

³⁶ White Paper p27

³⁷ White Paper para 4.5.

³⁸ See para 4.6 of White Paper.

³⁹ See House of Commons Briefing Paper (May 2017) [Legislating for Brexit: The Great Repeal Bill](#).

⁴⁰ Ibid p71

⁴¹ It notes that the White Paper does not give a clear commitment on the possible use of the Sewel Convention.

⁴² For example, will the replication of current frameworks be done through the Bill itself or through separate subject- specific legislation; and whether steps are needed to ensure the durability of such frameworks. It

It will also be noted that the European Commission has produced draft position papers on Art 50 negotiations⁴³. Detailed negotiations between the UK Government and the EU commenced on 19 June 2017.

Next steps

The Commission will continue to raise awareness, and to secure support for its recommendations.

This will include:

- further targeted engagement with key stakeholders, including officials from the Executive Office, the Departmental Solicitors Office, the Department for Communities, the European Commission Office in Northern Ireland, NGOs, as well as MLAs, Westminster MPs and relevant Assembly and Westminster Committees;
- securing legal advice on equality legislation and devolution related matters and legislating to embed and further protect equality legislation during and after the UK exit from the EU;
- participation in range of key conferences/seminars, including a UK-wide conference organised by Oxford Human Rights Hub on '*The Impact of Brexit on Equality Rights*' in the Autumn, and a conference organised by QUB in September 2017 on the impact of the UK exiting the EU;
- highlighting its recommendations in responses to key consultations, for example, on the draft Social Strategy;
- further ongoing engagement with the EHRC and NIHRC.

June 2017

notes, for example, if the subject matter remains devolved, then a framework could be altered by any of the devolved legislatures, notwithstanding its having been embodied in a UK statute. It states it would be necessary to reserve the framework itself, or to make the statute that implements it a protected enactment.

⁴³ European Commission draft [position papers](#) on Art 50 negotiations.

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