



NORTHERN IRELAND
HUMAN RIGHTS
COMMISSION

Equality Commission

FOR NORTHERN IRELAND

NIHRC / ECNI Submission to the European Scrutiny Committee Inquiry on Retained EU law: the progress and mechanics of reform

9 February 2024

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Summary of Advice & Recommendations

- 3.7 The Commissions recommend that the UK Government and the Executive Office put in place effective structures to monitor areas of policy divergence of equality and human rights on the island of Ireland, post Brexit, as well as divergence of rights between NI and Great Britain, and make that information publicly available, as well as taking steps to address that divergence of rights in a manner aligned to the Commissions' recommendations in this area, including as set out below.
- 3.8 The Commissions recommend that North-South equivalence of rights and protections be ensured, by NI law keeping pace with changes to equality and human rights law, arising as a result of EU laws introduced on or after 1 January 2021, that enhance protections. This should include rights introduced as a result of EU laws that do not amend or replace the Annex 1 directives.
- 3.9 The Commissions recommend that the Irish Government, NI Executive, and UK Government work to enhance and harmonise equality and human rights protections on the island of Ireland, aligned to their respective remits, and make a clear commitment to working towards ensuring North-South equivalence of rights on the island of Ireland so as to strengthen protections.
- 3.11 The Commissions continue to recommend that both the NI Executive and UK Government ensure effective and regular engagement with civil society, including human rights and equality groups.
- 3.15 The Commissions recommend that compliance with Windsor Framework Article 2 be considered in advance of amendment, repeal or revocation of assimilated law and fully explained in associated Explanatory Memoranda / Notes or Human Rights Impact Assessments.
- 3.16 The Commissions recommend that when making any change to Retained EU / assimilated law, the relevant UK or NI Minister confirms that an assessment for compliance with the commitment in Article 2 has been undertaken and that there is no diminution of the rights, safeguards and

equality of opportunity as set out in the relevant part of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU.

- 3.20 The Commissions recommend that the Northern Ireland Office and Cabinet Office develop and roll out training and guidance on Windsor Framework Article 2 for relevant Westminster departments and act promptly to ensure that the Cabinet Office 'Guide to Making Legislation' and all other relevant UK government guidance on policy and legislative development is updated to include detailed advice on consideration of Article 2.
- 3.27 The Commissions recommend that the REUL Act be amended to include a Clause confirming that sections 2-4 are without prejudice to section 7A of the EU (Withdrawal) Act 2018.
- 3.28 The Commissions recommend that, consistent with principles of transparency and openness, government publishes guidance on the methodology, scope and approach to be taken by Departments in respect of the proposed codification of interpretative effects on a case-by-case basis, specifically in the context of meeting its Windsor Framework Article 2 commitments.
- 3.29 Also aligned to the principles of efficiency and effectiveness, and to provide assurances on the UK's compliance with Windsor Framework Article 2, the Commissions recommend government independently reviews and evaluates, within a reasonable timeframe, the proposed codification process in respect of EU interpretive effects in Northern Ireland, and publishes that evaluation.
- 3.30 In order to increase accessibility and clarity of the statute book, and increase accountability, transparency and openness, the Commissions recommend that government takes steps to ensure that any changes to the Retained EU / assimilated law in Northern Ireland relating to equality and human rights are made clear and easily accessible, including to those whose rights are affected.

- 4.5 The Commissions recommend that Ministers engage with stakeholders including the Commissions and human rights and equality organisations in Northern Ireland before using delegated powers to revoke or replace Retained EU / assimilated law relating to Northern Ireland.
- 4.8 The Commissions recommend that amendment or repeal of Retained EU/assimilated Law, affecting human rights and/or equality protections in Northern Ireland, should be progressed on the basis of continuing adherence to the UK constitutional convention of providing for policy change via the primary legislative process, with technical and operational detail addressed in subordinate legislation. This applies to legislation that emanates from either Westminster or from the NI Assembly.

1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (NIHRC) is a national human rights institution accredited with 'A' status by the United Nations. Pursuant to section 69(1) of the Northern Ireland Act 1998, the Commission reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI).
- 1.2 The Equality Commission for Northern Ireland (ECNI) is an independent public body established under the Northern Ireland Act 1998. Its powers and duties derive from a number of equality statutes providing protection against discrimination on the grounds of age, disability, race, religion and political opinion, sex and sexual orientation. It also oversees the statutory duties on public authorities on the promotion of equality of opportunity and good relations under section 75 of the Northern Ireland Act 1998.
- 1.3 NIHRC and ECNI, pursuant to section 78A(1) and 78B(1) of the Northern Ireland Act 1998 respectively, monitor the implementation of Article 2(1) of the Windsor Framework ('Windsor Framework Article 2') to the EU Withdrawal Agreement. Windsor Framework Article 2 is a UK Government commitment to ensure no diminution of certain rights, safeguards and equality of opportunity protections, as a result of the UK's withdrawal from the EU. The Commissions offer the following advice in accordance with these functions.

2.0 Article 2 of the Windsor Framework

- 2.1 Windsor Framework Article 2 derives from recognition by the UK and EU that equality and human rights were central to the Belfast (Good Friday) Agreement and should be protected in the context of the UK's withdrawal from the EU. NI lags behind Great Britain and Ireland in terms of rights protection across a number of areas, including anti-

discrimination law, but Article 2 is an important safeguard providing a degree of certainty and stability in the context of wider change.¹

2.2 Windsor Framework Article 2 states:

“The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.”

2.2 The commitment means that the UK Government must ensure there is no diminution of rights, safeguards and equality of opportunity, as set out in the relevant chapter of the Belfast (Good Friday) Agreement 1998, resulting from the UK’s withdrawal from the EU.

2.3 In addition to the no diminution commitment, the law in NI must ‘keep pace’ with EU law developments relating to six EU Equality Directives listed in Annex 1 to the Windsor Framework.² That means that if the minimum standards in the Annex 1 Directives are amended or replaced, including via caselaw, the UK Government must ensure that domestic legislation in NI reflects enhancements in relevant protections.³

¹ In March 2022, the House of Commons NI Affairs Committee expressed concern that anti-discrimination legislation in NI “lags behind the rest of the UK” – see House of Commons NI Affairs Committee, ‘The Experiences of Minority Ethnic and Migrant People in NI: Second Report of Session 2021-2022’ (NIAC, 9 March 2022), page 3.

² Council Directive 2004/113/EC, ‘EU Council Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services’, 13 December 2004; Directive 2006/54/EC, ‘EU Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation’, 5 July 2006; Council Directive 2000/43/EC, ‘EU Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin’, 29 June 2000; Council Directive 2000/78/EC, ‘EU Council Directive establishing a general framework for equal treatment in employment and occupation’, 27 November 2000; Directive 2010/41/EU, ‘EU Directive on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC’, 7 July 2010; Council Directive 79/7/EEC, ‘EU Council Directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security’, 19 December 1978.

³ Article 13(3) of the Windsor Framework. See also Northern Ireland Office, ‘[UK Government Commitment to “no diminution of rights, safeguards and equality of opportunity” in Northern Ireland: What does it mean and how will it be implemented?](#)’, (NIO, 2020), at para 13.

- 2.4 In addition to the six Equality Directives, other relevant EU measures underpin rights set out in the relevant chapter of the Belfast (Good Friday) Agreement. The UK Government has acknowledged⁴ that these “include, but are not limited to, the Victims’ Directive;⁵ the Parental Leave Directive;⁶ and the Pregnant Workers’ Directive.”⁷ The UK Government has committed to ensuring that there will be no diminution of protections as were contained in relevant EU law on 31 December 2020.
- 2.5 Following extensive research and legal analysis, the Commissions published a working paper setting out their view as to which EU laws and obligations underpin the rights and safeguards in the relevant part of the Belfast (Good Friday) Agreement.⁸ The EU measures identified include protections for victims⁹ and employment protections for workers.¹⁰
- 2.6 The list includes a number of EU Regulations, previously classified as Retained Direct EU Law. These include, for example, Regulation (EC) No 1107/2006¹¹ 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. The UK Government has recognised that the rights of disabled people fall within the relevant chapter of the Belfast

⁴ Northern Ireland Office, [‘UK Government Commitment to “no diminution of rights, safeguards and equality of opportunity” in Northern Ireland: What does it mean and how will it be implemented?’](#), (NIO, 2020), at para. 13

⁵ [Directive 2012/29/EU](#), ‘Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

⁶ [Directive 2010/18/EU](#), ‘Council Directive implementing the revised Framework Agreement on parental leave’, 8 March 2010.

⁷ [Directive 92/85/EEC](#), ‘Council Directive on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding’, 19 October 1992.

⁸ [Working Paper: the Scope of Article 2\(1\) of the Ireland/ Northern Ireland Protocol](#) (NIHRC and ECNI, 2022)

⁹ [Directive 2011/36/EU](#), ‘Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims’, 5 April 2011.

¹⁰ [Directive 97/81/EC](#), ‘Council Directive concerning the Framework Agreement on part-time workers’, 15 December 1997; [Directive 2008/104/EC](#), ‘Directive of the European Parliament and of the Council on temporary agency work’, 19 November 2008.

¹¹ [Regulation \(EC\) No 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air](#)

(Good Friday) Agreement¹² and therefore within the scope of Windsor Framework Article 2.¹³

- 2.7 The UK has incorporated the Withdrawal Agreement, including the Protocol, into domestic law through the EU (Withdrawal Agreement) Act 2020. Section 7A EU (Withdrawal) Act 2018 (EUWA) provides that all rights, obligations and remedies from the Withdrawal Agreement, including Windsor Framework Article 2, are recognised and available in domestic law.
- 2.8 The Commissions have been given additional powers to oversee the UK Government’s commitment under Windsor Framework Article 2.¹⁴ The Commissions are responsible for providing advice to government and monitoring, supervising, enforcing and reporting on the ongoing implementation of this commitment.

3.0 Question 3: How should the Government approach the ‘mechanics’ of reforming retained EU law?

- 3.1 The Commissions will address the following aspects of question 3:

What regard should be given to:

- Working with the Devolved Administrations and structures for managing policy divergence, such as UK Common Frameworks?
- Engagement with businesses and people affected by possible reforms?
- Parliamentary scrutiny?
- The accessibility and clarity of the statute book?

¹² The “right to equal opportunity in all social and economic activity regardless of class, creed, disability, gender or ethnicity” is affirmed in the Belfast (Good Friday) Agreement 1998, Rights, Safeguards and Equality of Opportunity chapter, paragraph 1.

¹³ NI Office, ‘[UK Government Commitment](#) to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at para 13.

¹⁴ Sections 78A-E, Northern Ireland Act 1998

What regard should be given to working with the Devolved Administrations and structures for managing policy divergence, such as UK Common Frameworks?

- 3.2 The Commissions advise that particular care should be taken by the NI Executive and UK Government when repealing or amending retained EU / assimilated law to ensure it does not result in a diminution of rights, safeguards or equality of opportunity protections, contrary to Article 2 of the Windsor Framework.
- 3.3 Engagement with devolved administrations and through common frameworks structures, would help ensure policy development and scrutiny is informed by relevant factors including the potential for divergence. Such engagement will be of particular importance in policy areas such as human trafficking, which include transferred and non-transferred aspects. Engagement with devolved administrations should be on matters not only relating to East-West divergence of equality and human rights, but also those relating to North-South divergence of rights.
- 3.4 In their working paper on the scope of Windsor Framework Article 2, the Commissions recognise the importance of long-term North-South equivalence of equality and human rights on the island of Ireland.¹⁵ In January 2023, the Equality Commission for NI, on behalf of the NIHRC and Irish Human Rights and Equality Commission, published a research report highlighting EU law, policy and best practice developments from 1 January 2021 that have the potential to result in divergence of rights on the island of Ireland due to Brexit.¹⁶ In April 2023, the three Commissions published key policy recommendations arising from this research.¹⁷ The Equality Commission for NI has commissioned an update to the research on behalf of the three Commissions, which is to be finalised in 2024.

¹⁵ NI Human Rights Commission and Equality Commission for NI, '[Working Paper: Scope of Article 2\(1\) of the Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement 2020](#)' (NIHRC and ECNI, 2022)

¹⁶ Sarah Craig et al, '[European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#)' (ECNI, NIHRC, IHREC, 2022).

¹⁷ Equality Commission for NI, NI Human Rights Commission and Irish Human Rights and Equality Commission, '[Policy Recommendations: European Union Developments in Equality and Human Rights – The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#)' (ECNI, NIHRC and IHREC, 2023).

- 3.5 Key areas of actual/ potential North-South divergence of rights, as a result of EU law developments post Brexit, include rights relating to work life balance, equal pay and gender pay gap reporting, and laws relating to improving the accessibility of products and services, that will benefit people with disabilities and older people.
- 3.6 The Commissions consider there is value in the UK Government and the Executive Office centrally logging areas of regulatory divergence post Brexit relating to equality and human rights in Northern Ireland, and making this information public in an accessible and transparent way. This should include in the context of divergence of rights on the island of Ireland and divergence of rights between NI and Great Britain.
- 3.7 The Commissions recommend that the UK Government and the Executive Office put in place effective structures to monitor areas of policy divergence of equality and human rights on the island of Ireland, post Brexit, as well as divergence of rights between NI and Great Britain, and make that information publicly available, as well as taking steps to address that divergence of rights in a manner aligned to the Commissions' recommendations in this area, including as set out below.
- 3.8 The Commissions recommend that North-South equivalence of rights and protections be ensured, by NI law keeping pace with changes to equality and human rights law, arising as a result of EU laws introduced on or after 1 January 2021, that enhance protections. This should include rights introduced as a result of EU laws that do not amend or replace the Annex 1 directives.
- 3.9 The Commissions recommend that the Irish Government, NI Executive, and UK Government work to enhance and harmonise equality and human rights protections on the island of Ireland, aligned to their respective remits, and make a clear commitment to working towards ensuring North-South equivalence of rights on the island of Ireland so as to strengthen protections.

What regard should be given to engagement with businesses and people affected by possible reforms?

- 3.10 Policy and legislative change may have a different impact in NI due to the particular constitutional, economic, social and equality / human rights context. Engagement by departments with the Commissions and civil society can ensure appropriate early consideration is given to the particular circumstances and potential impacts of legislation and policy in NI.
- 3.11 The Commissions continue to recommend that both the NI Executive and UK Government ensure effective and regular engagement with civil society, including human rights and equality groups.¹⁸

What regard should be given to Parliamentary scrutiny?

- 3.12 As detailed above, Windsor Framework Article 2 is an international treaty obligation binding on the UK Government, incorporated into domestic law and requiring no diminution of certain human rights and equality protections.
- 3.13 Effective parliamentary scrutiny of changes to Retained EU / assimilated law requires that consideration of Windsor Framework Article 2 is incorporated into guidance, training, policy development and engagement and then reflected in bill documentation. While some progress has been made, there is limited evidence that early consideration of Article 2 has been fully embedded in policy and legislative development and processes.
- 3.14 The Explanatory Notes to the Retained EU Law (Revocation and Reform) Bill (REUL) did not refer to any consideration of compliance with Windsor Framework Article 2. This is a persistent concern for the Commissions.¹⁹ The Commissions have previously recommended that this should be the

¹⁸ See also section 4 in relation to delegated powers.

¹⁹ See, for example, [Joint NIHRC ECNI Submission on the Protocol Bill](#), [NIHRC Submission on the Illegal Migration Bill](#) (NIHRC, 2024), [ECNI Submission on the Illegal Migration Bill](#) (ECNI, 2023).

case regarding all relevant legislation.²⁰

- 3.15 The Commissions recommend that compliance with Windsor Framework Article 2 be considered in advance of amendment, repeal or revocation of assimilated law and fully explained in associated Explanatory Memoranda / Notes or Human Rights Impact Assessments.
- 3.16 The Commissions recommend that when making any change to Retained EU / assimilated law, the relevant UK or NI Minister confirms that an assessment for compliance with the commitment in Article 2 has been undertaken and that there is no diminution of the rights, safeguards and equality of opportunity as set out in the relevant part of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU.
- 3.17 In June 2022, the Chairs of the NI Affairs Committee, the Women and Equalities Select Committee, the House of Lords Sub-Committee on the Protocol and the Joint Committee on Human Rights jointly wrote to the UK Government, on the issue of parliamentary scrutiny of Windsor Framework Article 2.⁷⁰ The four committees requested that the UK Government consider changes to the ‘Cabinet Office Guide to Making Legislation’ and to ‘Statutory Instrument Practice’ to ensure effective consideration of Article 2, specifically requesting that Explanatory Notes for Bills and Explanatory Memoranda for Statutory Instruments include details on the consideration given to Article 2 issues.
- 3.18 In March 2023, the Leader of the House of Commons, Rt. Hon. Penny Mordaunt MP, advised that updated Explanatory Memorandum guidance for statutory instruments had been circulated to departments to ensure consideration of compliance with Windsor Framework Article 2 and that the next update of the Guide to Making Legislation will reference the importance of compliance with Article 2.
- 3.19 The Cabinet Office published the latest ‘Guide to Preparing Explanatory Memoranda (EMs) to Statutory Instruments’ on 2 January 2024, which

²⁰ See also recommendations in [‘Legislative Scrutiny and the Dedicated Mechanism for Monitoring Article 2 of the Ireland/Northern Ireland Protocol’](#), Paul Evans, Alexander Horne and Tasneem Ghazi (ECNI, 2021).

briefly advises officials to contact the Windsor Framework Taskforce if the instrument ‘may have interactions with Article 2 of the Windsor Framework’. The current ‘Guide to Making Legislation’ is dated 2022 and does not refer to Article 2 of the then Protocol on Ireland/ Northern Ireland. The Executive Office NI has developed guidance for NI civil service staff in relation to Windsor Framework Article 2.

- 3.20 The Commissions recommend that the Northern Ireland Office and Cabinet Office develop and roll out training and guidance on Windsor Framework Article 2 for relevant Westminster departments and act promptly to ensure that the Cabinet Office ‘Guide to Making Legislation’ and all other relevant UK government guidance on policy and legislative development is updated to include detailed advice on consideration of Article 2.

What regard should be given to the accessibility and clarity of the statute book?

- 3.21 The Commissions are concerned about the accessibility and clarity of the statute book as a consequence of the REUL Act.
- 3.22 The UK-EU withdrawal Agreement is given effect in UK law through Section 7A of the EU (Withdrawal Agreement) Act. Article 4 of the UK-EU Withdrawal Agreement sets out the methods and principles relating to the effect, implementation and application of that Agreement, including Windsor Framework Article 2. Article 4(1) provides that the provisions in the Agreement and any EU law made applicable by it “shall produce in respect of and in the UK the same legal effects as those which they produce within the [EU] and its Member States”. In accordance with Article 4(3), provisions of the Withdrawal Agreement referring to EU law or to concepts or provisions thereof must be interpreted and applied in accordance with the methods and general principles of EU law.
- 3.23 Section 2 of the REUL Act repealed section 4 of the EUWA (saving for rights etc under s.2(1) ECA) without acknowledging that this repeal is ‘subject to’ the obligations arising under the UK EU Withdrawal

Agreement, incorporated into domestic law by section 7A of the EUWA. Section 7A EUWA provides for its own primacy over “every enactment” but in failing to acknowledge that, section 2 REUL Act has nevertheless created a risk of confusion in this regard. The primacy of section 7A EUWA has recently been affirmed by the High Court of Justice in NI which found that it limited the effect of section 5(4) EUWA.²¹

- 3.24 Sections 3 and 4 REUL Act amended EUWA section 5 (Exceptions to savings and incorporation) to include statements that “(A1) The principle of the supremacy of EU law is not part of domestic law” and that “(A4) No general principle of EU law is part of domestic law after the end of 2023.” Section 7A of the EUWA, read with Article 4 of the Withdrawal Agreement means the treaty provisions and EU law made applicable have primacy over incompatible domestic provisions. Equally, the EU Charter and general principles continue to inform the interpretation of the treaty and relevant EU measures.²² While it is clear from reading section 5 EUWA, as amended, that these inserted provisions are subject to ‘relevant separation agreement law’, defined in section 7C as including section 7A, this could be more accessible.
- 3.25 Due to the analysis above, the Commissions consider that section 7A EUWA requires that relevant EU measures, be read in keeping with EU interpretive requirements and that related domestic provisions should be interpreted in a manner that ensures no diminution of standards, contrary to Windsor Framework Article 2. Parliamentary correspondence suggests the government may have a different view of the interaction between these provisions and Windsor Framework Article 2. In June 2023, the Secretary of State for Business and Trade, in a letter to the House of Lords Sub-Committee on the Ireland/NI Protocol, stated that Windsor Framework Article 2 “does not itself apply EU law, and so domestic law giving effect to Article 2 rights may be affected by the abolition of retained EU interpretive effects”.²³ The Secretary of State

²¹ *Angesom’s Application* [2023] NIKB 102 at para. 94

²² *Angesom’s Application* [2023] NIKB 102

²³ [Letter from Rt Hon. Kemi Badenoch, Secretary of State for Business and Trade to House of Lords European Affairs Sub-Committee on the Protocol, 16 June 2023](#)

continued that it may therefore be necessary to restate a number of instruments within scope of Windsor Framework Article 2 “to codify any required effects.” The House of Lords European Affairs Sub-Committee on the Protocol has raised some concerns about the risks inherent in this approach.²⁴ These include the risk of incomplete codification, particularly due to the as yet uncertain scope of EU law relevant to Windsor Framework Article 2.²⁵

- 3.26 Further, concerns have been raised with the ECNI by a number of organisations representing equality groups, for example, women’s organisations, that they find that the complex nature of Brexit has made it difficult for organisations to keep up with and understand, the impact of Brexit, including on their equality and human rights. This highlights the importance of people having access to timely, accurate, accessible, and comprehensive information as regards their equality and human rights and entitlements post Brexit, as well as any changes to their rights, including by the UK Government and the NI Executive.
- 3.27 The Commissions recommend that the REUL Act be amended to include a Clause confirming that sections 2-4 are without prejudice to section 7A of the EU (Withdrawal) Act 2018.
- 3.28 The Commissions recommend that, consistent with principles of transparency and openness, government publishes guidance on the methodology, scope and approach to be taken by Departments in respect of the proposed codification of interpretative effects on a case-by-case basis, specifically in the context of meeting its Windsor Framework Article 2 commitments.
- 3.29 Also aligned to the principles of efficiency and effectiveness, and to provide assurances on the UK’s compliance with Windsor Framework Article 2, the Commissions recommend government independently

²⁴ [Letter from House of Lords European Affairs Sub-Committee on the Protocol to Nusrat Ghani MP, Minister of State for Industry & Economic Security at Department for Business and Trade and Minister of State at the Cabinet Office, 19 October 2023](#)

²⁵ The NIHRC/ECNI Working Paper on the scope of Protocol Article 2 identified some 70 measures but the Commissions acknowledge that court rulings will be required to confirm relevant EU law.

reviews and evaluates, within a reasonable timeframe, the proposed codification process in respect of EU interpretive effects in Northern Ireland, and publishes that evaluation.

- 3.30 In order to increase accessibility and clarity of the statute book, and increase accountability, transparency and openness, the Commissions recommend that government takes steps to ensure that any changes to the Retained EU / assimilated law in Northern Ireland relating to equality and human rights are made clear and easily accessible, including to those whose rights are affected.

4.0 Question 4: What broader principles of good governance and administration should the Government bear in mind when reforming retained EU law, including the Office for the Internal Market as outlined in section 46 of the UK Internal Market Act 2020?

- 4.1 The Commissions are concerned by the breadth of delegated powers provided under the REUL Act and the potential for inadvertent breach of Windsor Framework Article 2 or wider diminution of human rights and equality in the absence of detailed parliamentary scrutiny.
- 4.2 The Commissions are mindful of concerns expressed about increasing reliance on delegated powers given the limited scrutiny of such legislation, deriving from the speed with which it is considered, the volume of instruments and the absence of detailed debate or amending stages. A recent expression of this is seen in the House of Lords Sub-Committee on the Constitution which reported in 2018:

As part of our scrutiny of bills, and from the work of the DPRRC [Delegated Powers and Regulatory Reform Committee], we have identified a number of recurring problems with delegated powers. We have observed an increasing and constitutionally objectionable trend for the Government to seek wide delegated powers, that

would permit the determination as well as the implementation of policy.²⁶

- 4.3 Retained EU / Assimilated law gives effect to a significant body of policy relating to human rights and equality, including employment legislation, as well as EU Regulations providing for the rights of disabled people. Under section 14(1), Ministers may revoke secondary REUL without replacing it, creating potential policy change with limited scrutiny. In addition to powers in subsection (2) to replace secondary REUL with provisions with ‘the same or similar objectives’, Ministers are given significant additional powers to replace REUL with ‘alternative provision’, in subsection (3), which is of particular concern.
- 4.4 When exercising these powers, Ministers are not under a duty, under the Act, to consult with respect to the piece of REUL that is being replaced. Even though the powers granted are time-limited, the Commissions believe those powers are too widely drawn and will provide insufficient scrutiny, potentially leading to conflict with obligations under Windsor Framework Article 2. Ensuring that relevant stakeholders have a voice in decision making, and that their views are taken into account, aligns with the principle of participation, which is a principle of good administration and governance.
- 4.5 **The Commissions recommend that Ministers engage with stakeholders including the Commissions and human rights and equality organisations in Northern Ireland before using delegated powers to revoke or replace Retained EU / assimilated law relating to Northern Ireland.**
- 4.6 It is acknowledged that, during the UK’s membership of the EU, significant change was introduced via subordinate legislation, but it is worth noting that this was in the context of the policy having been decided by Member States, including the UK, at EU level and set out in EU legislation.

²⁶ [The Legislative Process: The Delegation of Powers](#), 16th Report of Session 2017-19, HL Paper 225, House of Lords Select Committee on the Constitution, at paragraphs 50 and 110.

- 4.7 The Commissions' view is that procedures for the amendment, repeal or restatement of retained EU law should be considered in light of UK constitutional conventions as to the appropriate use of primary and subordinate legislation, to ensure robust democratic scrutiny of policy change. For the Commissions, this is particularly important in respect of policy change impacting human rights and equality.
- 4.8 **The Commissions recommend that amendment or repeal of Retained EU/assimilated Law, affecting human rights and/or equality protections in Northern Ireland, should be progressed on the basis of continuing adherence to the UK constitutional convention of providing for policy change via the primary legislative process, with technical and operational detail addressed in subordinate legislation. This applies to legislation that emanates from either Westminster²⁷ or from the NI Assembly.**
- 4.9 In addition, it should be noted that, in taking forward any legislative policy changes, NI Departments, and other relevant designated public bodies, must comply with their public sector equality duties under Section 75 of the Northern Ireland Act 1998 and their public sector Disability Duties and requirements set out in their respective equality schemes.²⁸ This includes requirements relating to conducting equality screenings and equality impact assessments (EQIAs).
- 4.10 Finally, we also refer the Committee to our recommendations raised in reply to the question above, which also relate to furthering the principles of good governance and administration, for example, openness, transparency, efficiency and effectiveness.

²⁷ As regards laws that impact on rights relating to human rights and equality in Northern Ireland.

²⁸ Duties under Section 75 of the NI Act 1998. For further information on the disability duties see [ECNI - Disability Duties for Public Authorities - Equality Commission NI \(equalityni.org\)](https://equalityni.org). The Disability Discrimination Act 1995 Section 49A requires designated public authorities to have due regard to the need to promote positive attitudes towards disabled persons, and to the need to encourage participation by disabled persons in public life.

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