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Dear Christina,

Thank you for your letter of 22 January in which you sought further information in connection with the Committee's work on the implications of Brexit for equality and human rights in Scotland.

In particular, you asked about the Scottish Government's understanding of the reference to *Equal Treatment Legislation* in the list which I provided to the Finance and Constitution Committee in September last year.

As I indicated in my September letter, the list represents an initial assessment by the UK Government of areas in which EU competences can be expected to intersect with devolution. The length of the list (which runs to 111 entries in total) illustrates the extent to which Brexit could potentially result in the UK Government acquiring control over matters of devolved policy.

For our part, the Scottish Government has made very clear that there must be no erosion of devolved competence. We are certainly not opposed to the idea of common frameworks which support future, post-Brexit collaboration and co-ordination across the different UK jurisdictions, in areas of mutual benefit. But it is essential that any such frameworks are based firmly on respect for devolution, including existing, well-established arrangements for co-operation.

As matters currently stand, the EU (Withdrawal) Bill remains unacceptable as a basis for the negotiation of common frameworks, whether in relation to equality or other matters. We do, however, remain in discussion with the UK Government and the other devolved administrations with a view to agreeing how such arrangements might be taken forward.

As far as the particular meaning of *Equal Treatment Legislation* is concerned, I can enlarge to some extent on the the evidence you have already heard.

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Our view is that *Equal Treatment Legislation* is best understood by reference to EU law dealing primarily with matters of equal treatment. These relate in particular to matters of employment, but extend also to encompass aspects of discrimination in the provision of goods and services and in social protection. The Annex to this letter lists Directives and relevant Treaty articles which, taken together, can be regarded as constituting EU equal treatment legislation.

More specifically, existing EU equal treatment legislation in the area of employment covers discrimination on 6 grounds, namely gender, sexual orientation, disability, age, religion and race or ethnic origin. Some areas outside of employment are also covered by EU equal treatment legislation, but to a more limited extent . For example, EU law covers discrimination on grounds of gender and race or ethnic origin in the provision of goods and services and in social protection.

The European Commission introduced a proposal in 2008 for an Equal Treatment Directive which would have the further effect of prohibiting discrimination in the provision of goods and services and in social protection on grounds of sexual orientation, disability, age and religion.¹ Although that proposal continues to be one of the Commission's priorities and remains on the agenda, little progress has to date been made in Council.

A proposal for a European Accessibility Act was introduced in 2015 and aims to improve the functioning of the internal market for accessible products and services by removing barriers created by divergent legislation. So, for example, a manufacturer of disabled-accessible buses would require to satisfy common standards which apply across all Member States. This proposal has had more success and a "general approach" was agreed by the Member States at the Employment, Social Policy, Health and Consumers Council on 7 December 2017. The Council can now begin the process of negotiation with the European Parliament.²

The concept of *Equal Treatment Legislation* in the EU context can therefore be compared with the separate domestic legislative framework which deals with equality and non-discrimination in the broader sense exemplified by the Equality Act 2010. Amongst other things, the 2010 Act gives effect in Great Britain to EU equal treatment legislation. In addition, the overall reach of the 2010 Act encompasses 9 protected characteristics, rather than the 6 which feature in EU equal treatment legislation relating to employment, or the 2 which are currently covered by EU legislation relating to the provision of goods and services.

As the Committee is aware, the general subject matter of equal opportunities is reserved under Section L2 of Schedule 5 to the Scotland Act 1998. There are however exceptions to this general reservation of equal opportunities, and these were further extended by the Scotland Act 2016. Amongst the practical consequences of these changes has, for example, been the extension of devolved competence to include provision for the inclusion of persons with protected characteristics in non-executive posts on public boards. Devolved competence also extends *inter alia* to "the encouragement (other than by prohibition or regulation) of equal opportunities" and "equal opportunities in relation to the Scottish functions of any Scottish public authority ...[including] provision that supplements or is otherwise additional to provision made by [the 2010] Act".

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008PC0426&from=en>

² http://europa.eu/rapid/press-release_STATEMENT-17-5143_en.htm

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These aspects of existing devolved competence intersect most obviously with EU equal treatment legislation in relation to the role of government in taking action designed to encourage equal opportunities.

In addressing the challenges presented by Brexit in this area, our starting position is that the existing statutory framework provided by the 2010 Act (and related legislation) is fundamentally sound. It should, as a minimum, be retained in its current form (subject to minor consequential changes and necessary updates). These existing arrangements already give effect to important aspects of EU law and constitute a tried and tested *de facto* “common framework”. There is absolutely no case to be made for reducing or diminishing existing equality protections.

That position is consistent with our more general view, that responsibility for all policy areas within devolved competence, where powers are currently exercised at EU level, must be retained by the Scottish Parliament when the UK leaves the EU. The same principle applies to all areas of competence which are not reserved under the existing terms of the constitutional settlement.

In order to ensure that these goals are achieved, the Scottish Government remains committed to constructive engagement and dialogue with our UK counterparts. It is, of course, welcome that the Scotland Office has reiterated, in its own evidence to the Committee, that the UK Government also wishes to ensure that “existing EU derived domestic legislation and relevant EU direct legislation continues to have effect in domestic law”. That provides a positive basis on which to take forward our further discussions.

We are, however, also clear that a co-ordinated and mutually beneficial response to Brexit should be paralleled by further progress in achieving the full devolution of competence for equality in Scotland. Responsibility for human rights already falls firmly within the competence of the Scottish Parliament and the same arrangement should apply in relation to equal opportunities. Competence for equality is already devolved in Northern Ireland. The case for the devolution of further powers to Scotland pre-dates, and is separate from, the challenges presented by Brexit. But in taking forward any dialogue concerned with creating or retaining common frameworks, it is appropriate also to explore the ways in which each component part of the UK can be empowered to further extend or enhance existing legislative provision in the field of equality, in line with the wishes of their democratically-elected institutions.

I trust this explanation is of assistance to the Committee. I can assure members that these are matters on which we remain committed to engaging with UK counterparts, once broader agreement on framework issues is reached.

Yours Sincerely



MICHAEL RUSSELL

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ANNEX

EU Equal Treatment Legislation – Relevant Treaty Articles

- Articles 8, 10, 19 and 157 of the Treaty on the Functioning of the European Union
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>

EU Equal Treatment Legislation – Relevant Directives

- Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32010L0041>
- Council Directive 2010/18/EU on parental leave
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32010L0018>
- Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32006L0054>
- Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services
<http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32004L0113>
- Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0078>
- Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0043>
- Council Directive 92/85/EEC on pregnant workers
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31992L0085>
- Council Directive 79/7/EEC on equal treatment for men and women in matters of social security
<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31979L0007>

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