The Equality and Human Rights Commission is the National Equality Body (NEB) for Scotland, England and Wales. We work to eliminate discrimination and promote equality across the nine protected characteristics set out in the Equality Act (EA) 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

We are an “A Status” National Human Rights Institution (NHRI) and share our mandate to promote and protect human rights in Scotland with the Scottish Human Rights Commission (SHRC). The Commission exists to protect and promote equality and human rights in Britain. Our core aim is to uphold our system of equality and human rights protections, ensuring strong equality and human rights laws protect people. It is in this context that we are responding to the call for views.

We previously published a joint statement with the Scottish Human Rights Commission, the Human Rights Consortium Scotland, the Scottish Council for Voluntary Organisations and Together, Scotland’s Alliance for Children’s Rights which welcomed elements of the previous UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, namely:

- The intention to retain the EU Charter of Fundamental Rights in Scots law following the UK’s exit from the European Union; and
- The principle that Scottish Ministers should be empowered to keep pace with progressive developments at an EU level following the UK departure from the EU.

However, we acknowledge that the UK Supreme Court’s decision made clear that following the passage of the EU (Withdrawal) Act 2018 at Westminster, the Scottish Parliament cannot legislate to retain the Charter in Scots law. This submission therefore focuses specifically on the ‘keeping pace’ power in the Bill.

Part 1, section 1 of the UK Withdrawal from the European Union (Continuity) (Scotland) Bill (‘the Bill’) creates a power that enables Scottish Ministers to make provision corresponding to European Union law by regulations. This is described in the Bill’s policy memorandum as the ‘keeping pace’ power. The remainder of our response focuses on the limits to, and statements regarding, this power.

Section 2 of the Bill introduces limitations on the keeping pace power. Subsection (1) (i) of section 2 states that regulations made under the keeping pace power may not:

“modify the Equality Act 2006 or the Equality Act 2010”.
We support this limitation.

However, section 2 (1) (i) is qualified by section 2 (2), which states that:

“Paragraphs (e) and (i) of subsection (1) do not prevent the removal of a protection or the making of a modification if alternative provision is made in the regulations that is equivalent to the protection being removed or the provision being modified.”

We support this qualification with respect to the EA 2010.

However, the Scotland Act 1998, as amended by the Scotland Act 2016, reserves modification of the EA 2006. Although there are some provisions in Part 1 of the EA 2006 which reference Scotland, these provisions relate to the functions of the Commission. Schedule 5, part III, section 3 (2) (d) of the Scotland Act 1998 (as amended) makes the Commission a reserved body. Section 3 (1) reserves the constitution, the conferring or removal of the functions of, and the conferring or removal of functions exercisable in relation to, such reserved bodies.

Therefore, the section 2 (2) qualification of the section 2 (1) (i) limitation cannot apply to the EA 2006.

Further, we believe that any regulations made in accordance with section 2 (2) – in relation to the EA 2010 – should be made using the affirmative procedure and that this should be specified on the face of the Bill. This could be achieved by adding a clause to subsection (2) of section 4, Scrutiny of regulations under section 1(1).

Section 5 of Part 1 of the Bill requires that when regulations made under the keeping pace power are laid before Parliament, a series of statements must be made by Scottish Ministers.

Section 6 (3) specifies that one such statement must explain:

“(a) as to whether the instrument or draft amends, repeals or revokes any provision of equalities legislation,¹ and
(b) if it does, explaining the effect of each such amendment, repeal or revocation.”

We would expect that statements of this type would help to demonstrate whether or not any new or amended provision is “equivalent to the protection being removed or the provision being modified” in relation to the qualification of the prohibition on modifying the EA 2010 in section 2 (2), described above.

¹ Section 6 (6) defines “equalities legislation” as “the Equality Act 2006, the Equality Act 2010 or any subordinate legislation made under either of those Acts.” This would include the Specific Duties, mentioned above.
A second statement relating to equalities legislation is required by section 6 (4). This statement requires Scottish Ministers to make clear that:

“in relation to the instrument or draft, the Scottish Ministers have, so far as required to do so by equalities legislation, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

Such a statement would be important, but would not in itself meet the Scottish Government’s PSED obligations which also require public authorities to:

- Advance equality of opportunity between people who share a relevant protected characteristic and those who do not
- Foster good relations between people who share a protected characteristic and those who do not.

Compliance with the PSED, including the requirements of the Specific Duties, will support Scottish Ministers’ evidence base for making such a statement.2

2 The PSED does not apply to legislation itself, but to the policy behind it.