

Cynulliad Cenedlaethol Cymru / National Assembly for Wales

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol a'r Pwyllgor Materion Allanol a Deddfwriaeth Ychwanegol / The Constitutional and Legislative Affairs Committee and the External Affairs and Additional Legislation Committee

Ymgynghoriad ar Fil yr Undeb Ewropeaidd (Ymadael) a'i oblygiadau i Gymru / The European Union (Withdrawal) Bill and its implications for Wales

EUWB 23

Ymateb gan y Comisiwn Cydraddoldeb a Hawliau Dynol / Evidence from the Equality and Human Rights Commission

Introduction

1. The Equality and Human Rights Commission has been given powers by Parliament to advise on the equality and human rights implications of laws and proposed laws. The Commission's independent advisory role is crucial in ensuring that the legislative changes that flow from the UK's decision to leave the European Union fully deliver the UK Government's commitment to non-regression on a range of social justice issues, including workers' rights and the protections in the Equality Acts 2006 and 2010 and equivalent legislation in Northern Ireland.

The position of the UK's four statutory bodies for human rights and equality

2. The Equality and Human Rights Commission (EHRC), the Equality Commission for Northern Ireland (ECNI), the Northern Ireland Human Rights Commission (NIHRC) and the Scottish Human Rights Commission (SHRC) are united in their commitment to the protection and enhancement of equality and human rights standards in all parts of the UK.
3. Whilst the four organisations each have specific priorities tailored to their individual mandates, they 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 European Union. 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 European Union 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 protections.
4. The UK's four statutory human rights and equality bodies recommend that the protection of equality and human rights should remain a priority in negotiations between the UK and the other EU member states.¹

The Commission's positive vision for equality and human rights in Britain

5. At this moment of significant constitutional change, it is important to set out a positive vision of the kind of country we want to be after we have left the EU. Britain has a long history of upholding people's rights, valuing diversity and challenging intolerance. The Commission's advice is intended to ensure the Bill realises the UK Government's intention to ensure certainty and continuity of the law, by dealing with changes to the law on equality and human rights, including matters such as maternity and parental rights, accessibility for disabled people, and immigration, in ways that respect parliamentary sovereignty and provide for proper democratic accountability.
6. These aims reflect the UK Government's stated intentions. However, the Commission believes that the Bill as drafted will not achieve them and, instead, risks eroding important existing legal protections that are fundamental to the UK's vision and reputation as a country that values equality and human rights and proper scrutiny of and accountability for changes to laws. We recommend that, to achieve these aims, five changes to the Bill are needed:
- rule out the use of delegated powers to amend equality and human rights laws
 - include a principle of non-dilution of equality and human rights law in the Bill

¹ EHRC's five point plan is available [here](#), ECNI full recommendations are available [here](#), the NIHR guidance is available [here](#), the SHRC position statement is available [here](#)

- retain the protections in the EU Charter of Fundamental Rights
 - introduce a constitutional right to equality
 - ensure the courts have regard to relevant EU case law where there is doubt in construing or applying law relating to equality and human rights.
7. The Commission also shares more general concerns expressed by others about the breadth of the delegated powers in the Bill and the level of scrutiny provided for their exercise. Where appropriate we will recommend supporting amendments to improve these aspects of the Bill.

Implications for Wales

8. It is important that devolution is fully considered with regards to the EU (Withdrawal) Bill, with the Welsh Government and Welsh Assembly having due opportunity to inform the Bill's development.
9. Equality and human rights are, with some exceptions, subjects that are not devolved to the National Assembly for Wales. The UK Government's EU (Withdrawal) Bill will therefore have a direct impact in Wales with regard to equality and human rights. The Bill appears to have few Wales-specific implications in relation to these areas of law.
10. This submission outlines the Commission's positions which relate to the UK-wide implications of the Bill, rather than focusing solely on Wales-specific matters.
11. The Commission's guiding principle are that any constitutional changes must:
- maintain, and where possible enhance, the protection and promotion of equality and human rights across the UK,
 - provide for coherent and workable frameworks of legal and administrative responsibilities and accountability for equality and human rights between bodies within the UK.

The Commission's 5 recommended changes to the Bill

Rule out the use of delegated powers to amend equality and human rights laws

Commission's recommendation

12. The Bill should explicitly rule out the use of delegated powers, including Henry VIII powers, to make changes to equality and human rights laws.

Our analysis

13. The Bill will, with some important exceptions, convert the body of EU law, as it stands when we leave the EU, into domestic law. However, the means by which it does so is by delegating to Government Ministers wide-ranging powers to amend or repeal retained EU law and other domestic law, including primary legislation. Regulations made under this power will not be subject to the same degree of scrutiny by Parliament as would be required for primary legislation. While the purpose may be to facilitate the technical withdrawal from the EU, the implications for parliamentary sovereignty and democratic accountability for potential changes to laws covering a range of social justice issues are significant.
14. The Bill prohibits the use of these powers in relation to the Human Rights Act 1998, but not in relation to other legislation which protects equality and human rights.
15. This means that delegated powers could be used to amend the Equality Acts of 2006 and 2010, other primary legislation which protects individuals' rights such as the Employment Rights Act 1996 (providing protection for pregnant/nursing mothers and maternity leave amongst other rights), or important secondary legislation made under powers in the European Communities Act 1972, such as the Working Time Regulations 1998.
16. It is vital that Parliament – and, where relevant, the Welsh Assembly – retains the ability to fulfil its important constitutional role in fully scrutinising changes to the UK's equality and human rights legal framework. This means requiring changes to be made by primary legislation rather than through new delegated powers.
17. The Government's White Paper acknowledges that the purpose for which delegated powers in the Bill can be used should be limited. It states: "...Crucially, we will ensure that the power will not be available where Government wishes to make a policy change which is not designed to deal

with deficiencies in preserved EU derived law arising out of our exit from the EU.”²

18. We do not think the Bill contains sufficient safeguards over the exercise of delegated powers to achieve this policy intention.³ We therefore recommend that the Bill should explicitly rule out the use of delegated powers to make changes to equality and human rights laws. This would mean that any changes would have to be made by primary legislation and would be subject to the full scrutiny by Parliament that this entails.
19. The Commission recommends an equivalent provision should be made in relation to any changes to equality and human rights laws in devolved areas brought forward by the Welsh Government under delegated powers in the Bill.

Non-dilution of equality and human rights law

Commission’s recommendation

20. The Bill should set out a clear principle that Brexit should not result in a dilution of our fundamental rights.

Our analysis

21. We welcome the UK Government’s commitment to continue to protect and enhance the rights people have at work, and that all the protections covered in the Equality Act 2006, the Equality Act 2010 and equivalent legislation in Northern Ireland will continue to apply once the UK has left the EU.⁴
22. Limiting the power to “roll back” retained EU law rights without full parliamentary scrutiny by the use of delegated powers (as we have proposed above) is an important first step. However to ensure the Bill fully delivers the UK Government’s commitment, the Commission will recommend a New Clause to require the UK Government, when proposing new Brexit-related legislation, to explain to Parliament how it reflects the principle that Brexit should not result in a dilution of our fundamental rights. It will also ensure that the importance of retaining and protecting

² Legislating for the United Kingdom’s withdrawal from the European Union, March 2017 at 3.17

³ For example Clause 9 provides that a Minister may by regulations make such provision as the Minister considers appropriate for the purposes of implementing the withdrawal agreement.

⁴ Legislating for the United Kingdom’s withdrawal from the European Union, March 2017 at 2.17 (White Paper).

our equality and human rights laws is expressly considered when any public authority, including the Welsh Government, takes action under the Bill.

23. The principle will aim to secure that law relating to equality and human rights:
 - is retained and protected;
 - continues to reflect international standards; and
 - is scrutinised effectively by Parliament.
24. In the context of the great constitutional significance of this Bill, Parliament has an opportunity to make a clear commitment to retain our existing equality and human rights framework. While one Parliament cannot bind the next, Parliament can in this Bill give a clear message to the current and future Governments that legislative proposals and other action in connection with the United Kingdom's departure from the EU should protect our equality and human rights.

Ensure protections in the Charter are retained

Commission's recommendation

25. The EU Charter of Fundamental Rights (the Charter) should be retained.

Our analysis

26. The Bill removes the Charter from domestic law. The Charter currently provides important protections for rights that fall within the scope of EU law, such as non-discrimination rights in employment.⁵
27. The UK Government has stated its intention that 'the removal of the Charter from UK law will not affect the substantive rights from which individuals already benefit in the UK.'⁶ However, removal of the Charter will have this effect. This is because some Charter rights – for example, rights relating to children and the free standing right to non-discrimination – have no equivalent protection in UK law. Furthermore, the Charter provides remedies, including the right to an effective remedy and the ability to

⁵ For example by guaranteeing a right to an effective remedy under Article 47 of the Charter

⁶ White Paper at 2.25

challenge laws that breach fundamental rights, that will be lost if it no longer applies.

28. The Government has noted that many of the rights protected in the Charter are also found in UN and other international treaties, which the UK has ratified. However, although Government is bound to uphold such rights in international law, the UK has not incorporated UN human rights treaties. This means that they do not have direct effect in domestic law and do not provide protection equivalent to that provided by the Charter. As a consequence, the Bill does not give full effect to the Government's intention to protect existing rights currently protected by the Charter.
29. We recommend these rights should remain protected in domestic law, by retaining the Charter in UK law. The UK courts have not had difficulty in applying the Charter to domestic cases that fall within the scope of EU law. Our recommendation is that they should be able to continue to do so in the same way, having regard to the limits of EU competence immediately before "exit day".

Ensuring the UK remains a global leader in equality and human rights: a constitutional right to equality

Commission's recommendation

30. Introduce a constitutional right to equality, applicable across the UK, on the face of the Bill.⁷

Our analysis

31. A constitutional right to equality would help protect and promote domestic equality rights on leaving the EU and ensure that Britain remains a world leader in protection of the right to fair and equal treatment.
32. Much of our domestic equality legislation is currently underpinned by EU law. This means that rights guaranteed by EU law, for example the right to equal pay for work of equal value, protection of pregnant workers, and

⁷ The Women and Equality Committee has made a similar recommendation: House of Commons, Women and Equalities Committee, Ensuring strong equalities legislation after the EU exit, 22 February 2017 at para 43.

many other matters, cannot be removed while the UK remains part of the EU. Exiting the EU will result in the loss of this underpinning of equality rights.

33. EU law also currently provides a free standing right to non-discrimination under Article 21 of the Charter.
34. The Bill presents an opportunity for Parliament to replace this EU law with the UK's own guarantee of equal treatment, and ensure that a free standing right to non-discrimination is enshrined in domestic law after we leave the EU.
35. We will recommend a New Clause to introduce a constitutional right to equality, which would have the same constitutional status as rights protected under the Human Rights Act and would be enforceable in the same way. The key aims of the right are to:
 - enable laws and state actions to be tested against our right to equality and non-discrimination.⁸
 - facilitate proper parliamentary scrutiny of new laws by requiring any Minister introducing a new Bill to state whether or not the Bill is compatible with the constitutional right to equality. This would provide an important tool in ensuring parliamentarians have Government's explicit policy justifications to inform debates and would also provide a standard for scrutiny of legislation by parliamentary committees.
36. Under the constitutional right to equality, it is proposed governments in the UK, Scotland and Wales would have to provide a statement to their parliaments that legislation is "right to equality" compliant as well as human rights compliant. This would require amendments to the devolution statutes.
37. Following the UK's decision to exit the EU, the Welsh Government could take further opportunities to take forward equality and human rights, securing certain protections. For example, the Welsh Government is able to

⁸ The Human Rights Act 1998 provides a mechanism for the court to review compliance of laws with fundamental rights and to make a declaration of incompatibility if appropriate (s3 and 4). These provisions would apply in the same way to the constitutional right to equality. The Equality Act 2010 does not provide an equivalent mechanism (see s29 and Schedules 3, 22, and 23). For this reason claims are often brought relying on Article 14 of the European Convention of Human Rights however this only applies to discrimination in the enjoyment of Convention rights.

build UN human rights treaties into Welsh legislation and policy. It has done this to some degree, most notably with regard to the UN Convention on the Rights of the Child. The Welsh Government could consider explicitly incorporating human rights principles into the service delivery of devolved functions, including health & social care, education and local government.

Ensure the UK keeps pace with developments in equality and human rights law

Commission's recommendation

38. If there is doubt as to the construction or application of any law relating to equality or human rights, the courts and tribunals should have regard to any relevant EU case law.

Our analysis

39. EU case law has had an important impact on equality rights in the UK. The European Court's interpretation of the Equality Directives has extended protection domestically, including when relying on the Charter. For instance, it is no longer lawful to charge men and women different insurance premiums because of the *Test-Achats* case.⁹
40. Although the Bill provides discretion for courts to have regard to future EU law, it provides no indication as to when it may be appropriate to do so. Lord Neuberger, retiring President of the Supreme Court, has said he would hope and expect Parliament to spell out in a statute what judges should do about decisions of the European Court after Brexit.
41. We will recommend an amendment to help ensure that, where appropriate, UK law keeps pace with developments in equality and human rights law in the EU. It would do so by providing that, if there is doubt as to the construction or application of any law relating to equality or human rights, the courts and tribunals should have regard to any relevant EU case law, while not of course being required to follow it.

About the Equality and Human Rights Commission

The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. It operates independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights. It contributes to making and keeping Britain a fair

⁹ *Association Belge des Consommateurs Test-Achats ASBL v Council of Ministers (C-236/09)*.

society in which everyone, regardless of background, has an equal opportunity to fulfil their potential. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It encourages compliance with the Human Rights Act 1998 and is accredited by the UN as an 'A status' National Human Rights Institution. Find out more about the Commission's work at:
www.equalityhumanrights.com