

Bringing human rights home?

What's at stake for rights in the incorporation of EU law after Brexit



LIBERTY

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Liberty is one of the UK's leading civil liberties and human rights organisations. We campaign for everyone in the UK to be treated fairly, with dignity and respect. Together with our members, Liberty has been standing up for people and holding the powerful to account since 1934. We work to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty is currently working on the implications of withdrawal from the European Union for human rights and equality law protections.

Liberty's policy papers are available here:

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Foreword

This report explores the implications of the process of incorporating European Union (EU) law into domestic law for the protection of human rights after the United Kingdom withdraws from the EU.

It is impossible to overstate the legal, political and constitutional significance of this process: the task of incorporating over four decades of EU law into domestic law is without precedent.

It has been universally accepted that the country's decision to leave the EU does not mean we should sacrifice rights and freedoms. But, if the Government is to keep its promise that Brexit will not lead to a loss of rights protections, its approach to the incorporation of EU law – reflected in the EU (Withdrawal) Bill, requires serious reform.

The Bill will not retain the Charter of Fundamental Rights of the European Union and will remove people's ability to bring legal claims based on the general principles of EU law.

This exceptional treatment of human rights laws is entirely at odds with the Bill's stated purpose – to enable the wholesale transfer of EU law onto the domestic statute book – and undermines Government assurances that the same rules will apply on the day before exit as on the day after.

The Bill also gives Ministers unprecedented powers to amend or repeal 'retained' EU law, without adequate parliamentary scrutiny or safeguards for human rights and equality laws. 'Retained' EU law under the Bill includes critical human rights legislation, such as the Equality Act 2010.

This report draws together leading NGOs, academics and practitioners who lay out the consequences of the incorporation process for human rights. Our aim is to alert those involved in the policy making process – including MPs and Peers, Ministers, civil servants and those who seek to influence them – to the significant dangers the Withdrawal Bill presents in its current form.

We have used concrete examples to cut through the complexity and legalistic jargon of the Bill, and illustrate its potential impact on our everyday lives.

The critical issues the report considers include the risk that our equality laws will be amended without proper parliamentary scrutiny, the danger that people with disabilities will lose protections and the complexities thrown up by the devolution settlement.

Irrespective of their area of focus, the contributors to this report are in unanimous agreement: Parliament must make major changes to the Withdrawal Bill if the people of the UK are to keep their human rights and equality protections intact after we leave the EU.

Even if those changes are made, we will need to vigilantly monitor the use of ministerial power under the final Act to make sure our rights are preserved and valued.

The Withdrawal Bill will not be enough, in isolation, to ensure the UK exits the EU without leaving human rights protections behind. As the contributions on data protection, disability rights and justice and home affairs illustrate, further legislation is required. The Government should publish detailed incorporation plans, outlining where it will legislate independently of the Withdrawal Bill.

Liberty is incredibly grateful to the contributors to this report for their time, effort and willingness to share their expertise. While the subject matter of their contributions is different, each is united by a desire to protect our hard-won rights and freedoms as we leave the EU.

Martha Spurrier
Director, Liberty
January 2018

Executive Summary

In July 2017, the Government introduced the EU (Withdrawal) Bill to the House of Commons. The Bill will incorporate EU law into domestic law at the point at which the UK leaves the EU. This process involves copying over four decades of EU law into UK law and aims to ensure “the same rules and laws... apply on the day after exit as on the day before”. These rules and laws cover everything from workers’ rights to protections for people with disabilities.

The Government has repeatedly stated that leaving the EU will not lead to a diminution in human rights and equality law protections, however, the Withdrawal Bill calls these statements into question. **In its current form, the Withdrawal Bill presents a significant threat to fundamental rights and the rule of law. Leaving the EU need not - and should not - result in ordinary people losing existing rights.**

The Bill significantly weakens human rights and equality law protections as it: (i) removes the Charter of Fundamental Rights of the European Union from domestic law; and (ii) removes the ability for domestic court action to be brought under the general principles of EU law. Moreover, the failure to include a clear prohibition on delegated powers being used to reduce rights leaves them at risk.

Ensuring adequate scrutiny of this Bill and protection for human rights and equality laws is not about opposing Brexit, it is about remaining true to the Bill’s stated purpose – ensuring legal continuity and a functioning statute book after we leave the EU.

The contributors to this joint report explore the potential implications of the Withdrawal Bill for the promotion and protection of human rights in a number of policy areas, including: immigration and asylum; privacy and digital rights; justice and home affairs; children’s rights; disability rights; employment; and devolution in Scotland, Wales and Northern Ireland. For each, recommendations are made for how the Bill can be amended to ensure that human rights and equality laws are adequately protected.

Government recommendations:

- Retain the Charter of Fundamental Rights and the ability for legal claims to be brought based upon the general principles of EU law
- Introduce safeguards to the Bill that would prevent Ministers from using delegated powers to amend or repeal fundamental rights protections
- Legislate to remedy gaps in human rights and equality law protections that exist as a consequence of improperly or partially transposed EU law (commitments to introduce draft EU human rights and equality laws should also be kept)
- Publish detailed incorporation plans outlining how all rights derived from the UK's EU membership will be protected (including under the Withdrawal Bill and via supplementary Brexit-related legislation)
- Ensure UK human rights and equality law keeps pace with future developments at EU-level
- Accommodate the legal and political differences that exist between Scotland, Wales and Northern Ireland in respect of their unique arrangements for the promotion and protection of fundamental rights

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1. THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION AND THE GENERAL PRINCIPLES OF EU LAW



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In its current form, the EU (Withdrawal) Bill will not retain the Charter of Fundamental Rights of the European Union and will remove the ability to bring legal claims based on the general principles of EU law.

This approach will have serious consequences for the promotion and protection of human rights after withdrawal. It runs counter to the Bill's stated purpose – to facilitate the wholesale transfer of EU law onto the domestic statute book – and contradicts Government assurances that the same rules will apply on the day before exit as on the day after.¹

The Charter

Clause 5(4) of the Repeal Bill makes clear the Charter will not be retained as part of domestic law after exit day. The Government has stated that its reason for not wanting to retain the Charter is that it contains rights replicated elsewhere – in the European Convention on Human Rights (ECHR), for example.

However this is not necessarily true. Although the rights contained in the Charter were drawn from a variety of sources, they have been interpreted to provide for protections that either are not – or have not yet been held to be – covered by other legal instruments.

The Charter, not the Convention, has proven a powerful tool for protecting individual rights in light of the challenges wrought by rapid technological change. In *Google Spain*² Article 8 (on the protection of personal data) served as the basis for the 'right to be forgotten'.

The Secretary of State for Exiting the European Union, David Davis, relied on Article 8 in his successful challenge to state powers to store communications metadata under the Data Protection and Investigatory Powers Act 2014. In Davis's case, the Court noted the Charter "clearly goes further, is more specific, and has no counterpart" in other privacy laws.³

During the Committee stage reading of the Repeal Bill, the Government resurrected the argument that Protocol 30 to the Lisbon Treaty, which applies to the UK and Poland, prevented the Charter from creating or extending rights that did not exist before its adoption (the Protocol did not preclude the application of the Charter to the UK or Poland).⁴

1 Department for Exiting the European Union, 'Repeal Bill Overview' (August 2017) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/627983/General_Factsheet.pdf> accessed 16 October 2017.

2 Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2014].

3 *David Davis and Others v Secretary of State for the Home Department* [2015] EWHC 2092 (Admin) [80].

4 HC Deb 21 November 2017, vol 631, cols 889 – 890.

The Protocol was agreed by the Union to assuage fears that the Charter would be used to interfere in national affairs in areas where it had not been granted competence to act. However, in practice, its impact has been limited – indeed it is considered by many not to be worth the paper it is written on.⁵

This is because the Protocol does not prevent the European Court of Justice (ECJ) from defining the scope of Charter rights. This has led to Charter rights being interpreted to provide for greater levels of protection than similar rights held under other instruments (which are discussed in detail below).

The Charter also includes rights that do not have domestic equivalents. The fundamental rights it protects are directly enforceable by individuals and can be used by courts to set aside incompatible domestic legislation (in areas within the scope of EU law). This stands in contrast to statutory rights protections, such as under the Equality Act 2010, which are not directly enforceable. Moreover, domestic legislation found to be incompatible with the ECHR cannot be set aside – only a weaker ‘declaration of incompatibility’ can be made.

Charter rights without domestic equivalents include:

- Article 3 (guarantees on bioethics): provides a right to physical and mental integrity, prohibiting eugenic practices, the use of the body and its parts for financial gain and the reproductive cloning of human beings. This right is separate and distinct from the prohibition of torture, inhumane and degrading treatment provided for under the ECHR.
- Article 14 (right to education): provides a right to vocational and continuing training. Unlike its analogue under the ECHR, Article 14 is framed as a positive right – rather than a right not to be denied an education (see Article 3, Protocol 1 of the ECHR).
- Article 25 (rights of the elderly): recognises the right of older people to lead a life of dignity and independence and participate in social and cultural life. This right is unique and has no equivalent under the ECHR or any justiciable international treaty or convention to which the UK is a party.
- Article 47 (right to a fair remedy and to a fair trial): has been applied to require EU Member States to provide legal aid in cases where not doing so would make it impossible to ensure an effective remedy was available. In comparison to its equivalent under the ECHR (Article 6), Article 47 is not limited to the determination of a criminal charge or civil rights.
- Article 10 (freedom of thought, conscience and religion): includes a right to conscientious objection not recognised in domestic law.

⁵ See Aiden O’Neil, ‘Is the UK’s ‘opt-out’ from the EU Charter of Fundamental Rights worth the paper it is written on? Part 1’ (eutopia law, 15 September 2011) <<https://eutopialaw.com/2011/09/15/is-the-uk%E2%80%99s-%E2%80%9Copt-out%E2%80%9D-from-the-eu-charter-of-fundamental-rights-worth-the-paper-it-is-written-on/>> accessed 1 December 2017; and Aiden O’Neil, ‘Is the UK’s ‘opt-out’ from the EU Charter of Fundamental Rights worth the paper it is written on? Part 2’ (eutopia law, 20 September 2011) < <https://eutopialaw.com/2011/09/20/is-the-uk%E2%80%99s-%E2%80%98opt-out%E2%80%99-from-the-eu-charter-of-fundamental-rights-worth-the-paper-it-is-written-on-part-2/>> accessed 1 December 2017.

Although many of these rights are yet to be adjudicated, it does not stand to reason that that they should be cast aside due to our vote to leave the EU.

This is because the Protocol does not prevent the European Court of Justice (ECJ) from defining the scope of Charter rights. This has led to Charter rights being interpreted to provide for greater levels of protection than similar rights held under other instruments (which are discussed in detail below).

The time for making such policy decisions is after withdrawal, in separate primary legislation, subject to full, informed, public debate. **This is what respect for our internationally renowned framework for protecting human rights demands.**

In a recent letter to the Joint Committee on Human Rights (JCHR), David Davis suggested that a technical distinction can be drawn between ‘rights’ and ‘principles’ covered by the Charter.⁶ He suggests the former are justiciable, while the latter “are not absolute entitlements for individuals” and “their inclusion in the Charter does not give them effect”.⁷

Although it is possible to make a distinction between rights and principles, it cannot be made as easily as David Davis suggests. The Charter does not systematically catalogue which provisions confer rights and which are principles. This is a task that has, with increasing frequency, fallen to the ECJ. Refusing in this way to recognise individual rights, based on a misunderstood technicality, suggests an attempt to purposefully diminish protections under the guise of EU withdrawal.

Retaining the Charter would be straightforward, requiring only minor amendment to the Repeal Bill (clarifying its retention as it applied while the UK was an EU member, when acting within the scope of (retained) EU law). This would protect important rights without extending the Charter’s field of application.⁸ After withdrawal, ECJ decisions would not have supremacy over those of our own courts. Once incorporated, Charter rights would be interpreted and enforced by domestic courts.⁹

This is a better proposal than the Bill’s approach, not only for human rights but also for legal certainty and clarity – objectives the Government has prioritised during the process of incorporating EU law.

In its current form, the Bill suggests references to the Charter in pre-Brexit case law should be read as though they are references to “corresponding fundamental rights or principles”

6 Letter from Rt Hon David Davis MP to Rt Hon Harriet Harman MP (20 November 2017) <http://www.parliament.uk/documents/joint-committees/human-rights/correspondence/2017-19/20171120_Letter_from_Secretary_of_State_to_Chair.pdf> accessed 1 December 2017.
7 *ibid.*
8 A ‘retained’ Charter would also require minor amendment to remove rights that would not make sense when the UK has withdrawn from the EU, for example, the right to stand and vote in European Parliament elections. This type of amendment is precisely what the delegated powers provided for under Clause 7 of the Repeal Bill should be used for.
9 Under Clause 6(2) of the Repeal Bill, domestic courts and tribunals would be free to consider CJEU jurisprudence on the Charter when making a determination concerning retained EU law.

retained in domestic law.¹⁰ However this approach will lead to serious uncertainty and confusion. From which sources should corresponding rights and principles be drawn, for example? Could incorporated international law sources serve as adequate substitutes or did the drafters of the Bill envisage a straight swap between Charter and Convention rights?

With regard to the latter question, taking the example of David Davis's case, Article 8 of the Charter has been developed in a far more expansive way by the ECJ than its Convention equivalent (the difference is such that the former is said to provide a so-called 'digital right to privacy'). The two are not equivalents and it would be foolish to assume that retained EU law could be disentangled from the Charter without issue (one commentator has suggested this would be akin 'separating an egg from an omelette').¹¹

David Davis's case also reveals how Clause 5(5) of the Bill cannot be considered an adequate substitute for the retention of the Charter. A like-for-like swap between the Charter and the Convention would lead to different results. Courts have already noted one divergence, on the protection of personal data, leaving the possibility of many others yet to be adjudicated.

However the aforementioned letter from David Davis to the JCHR suggests a different, narrower understanding, with corresponding rights and principles being 'read over' from the *acquis communautaire* (the constituent elements of EU law). This approach could exclude the Convention – as it has not been acceded to by the Union – in favour of directly applicable Treaty rights and secondary EU law retained by the Repeal Bill.¹²

Limiting the reading of references to the Charter in pre-Brexit case law to EU law Regulations, Directives and Decisions is conceptually incoherent: secondary legislation is not comparable to fundamental rights instruments – they are not of the same legal pedigree. Practically this is shown by the ease with which the former can be amended. Under the Repeal Bill this will be possible without any safeguards for human rights and equality laws¹³ – and it is open to question whether the *acquis* covers the full panoply of rights protected separately by the Charter (which the Government has not yet shown).¹⁴

The General Principles of EU Law

The 'general principles of EU law' are open-ended rules, drawn from a variety of sources, which can be applied by judges when considering EU law.

10 Clause 5(5).

11 Steve Peers, 'The White Paper on the Great Repeal Bill: Invasion of the Parliamentary Control Snatchers' (*EU Law Analysis*, 31 March 2017) <<http://eulawanalysis.blogspot.co.uk/2017/03/the-white-paper-on-great-repeal-bill.html>> accessed 17 November 2017.

12 An example of a directly applicable Treaty right is Article 157 TFEU (on equal pay for male and female workers for work of equal value). The government has not indicated which directly applicable Treaty rights will be retained by the Repeal Bill.

13 See Liberty, Amnesty International UK, Public Law Project and Justice, 'Committee Stage Brief on the Rights Implications of the EU (Withdrawal) Bill; Rights in need of protection' (October 2017) <<https://www.liberty-human-rights.org.uk/sites/default/files/Joint%20HR%20Threats%20Brief%20Committee%20-%20Repeal%20Bill.pdf>> accessed 30 November 2017.

14 It is unclear whether a memorandum the Government promised on the Charter, during the Committee stage debate on the Repeal Bill, will address this issue.

The Charter draws heavily on the general principles. However they do not find complete expression in any one particular document (rights arising from both are complementary and should not be viewed as replicating each other). General principles include:

- The principle of equality
- Legal certainty and the protection of legitimate expectations
- The principle of effective remedies in national courts
- Transparency and rights to documents

The Withdrawal Bill retains the general principles for interpretative purposes but removes the ability for claims to be brought where domestic legislation is incompatible.¹⁵ The ability for courts and tribunals to strike down conflicting law based upon the general principles will also be removed.¹⁶

The Bill's approach to the general principles robs them of their practical value. From a human rights perspective, the ability to strike down legislation based on a set of basic principles has proven incredibly valuable (examples are explored below). **Fundamental rights are only worth the paper they are written on if they are enforceable – something the Bill removes for the general principles.**

There has also been discussion about the origins of the general principles and suggestions they sit uncomfortably in our domestic legal system. However, rather than sitting apart from developments in the common law, there has been notable cross-pollination.¹⁷ **Put another way, the general principles are not 'European' constructs to be scrubbed from our legal system once we leave the EU – they are safeguards that find expression in all mature democracies based on the rule of law.** The method by which they were introduced into our legal system, via EU membership, should not be used as an excuse to change the way they operate.

In light of the Bill's twin aim of ensuring legal certainty and continuity, preventing individuals from bringing claims based on their infringement is contradictory. Such a right of action has been part of the legal status quo in the UK for decades. Not ensuring its availability in the future would be a significant change.

The benefit of the general principles to those whose rights have been infringed and their acceptance by the judiciary as part of our domestic human rights framework is illustrated by two recent high-profile cases decided in the Supreme Court:

15 Clause 3(1), Schedule 1.

16 Clause 3(2), Schedule 1; at the time of going to press, the Government had committed to introduce its own amendment on the general principles during the Report stage of the Repeal bill (the content of which is not known).

17 Indeed, in the context of the development of a common law principle of proportionality, in the recent Supreme Court case of *Pham v SSHD* (2015), the equivalent general principle of EU law was considered at length.

- In *Walker v Innospec*,¹⁸ the general principle of non-discrimination was used to find that an exemption in the Equalities Act was illegal as it allowed for pensions to be provided on a less favourable basis to same-sex couples.
- In *Unison v Lord Chancellor*,¹⁹ the legality of employment tribunal fees was considered with reference to the general principles. The general principles of effectiveness and effective judicial protection were cited in support of the argument that tribunal fees imposed a disproportionate limit on the right to justice.

The retention of the general principles, in a way that would ensure they are still actionable after withdrawal, could be achieved with minor amendment to the Bill. However as some general principles relate specifically to EU institutions, this should be done in a way that avoids causing incoherence in our legal system after withdrawal.²⁰ Separating these Union-focused general principles from those that are more generic could be accomplished by including a description in the Bill of those that should not be kept – for example by adding a line to Clause 3(1) of Schedule 1 so that it reads:

There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law... *that relate either to the functioning of the EU, its institutions, or relations between Member States...*

This would retain a right of action for all general principles apart from those that should not, for practical reasons, be made available to a non-EU member.

In its current form, the Withdrawal Bill poses a significant danger to the promotion and protection of human rights. As explored above, its failure to retain the Charter of Fundamental Rights and the actionability of the general principles of EU law will result in a serious reduction in human rights protections after withdrawal.

The Government must address these concerns and outline how – if it intends to proceed with the Repeal Bill un-amended – it will ensure we do not leave the EU with fewer rights than we had while we were members.

18 *Walker (Appellant) v Innospec Limited and others (Respondents)* [2017] UKSC 17.

19 *R (on the application of UNISON) (appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51.

20 Surprisingly, in its current form, the Bill appears to retain general principles such as subsidiarity and solidarity for interpretative purposes.

2. EQUAL TREATMENT AND NON-DISCRIMINATION RIGHTS



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EU law protects a number of equal treatment rights. The Repeal Bill will have some immediate consequences, including opting-out of future EU law; at the point of withdrawal, the UK will not be covered by future legislative measures or new Court of Justice of the EU rulings post-dating the UK's exit from the EU, including those that address equal treatment.

The second immediate effect will be that EU law in effect in the UK will be transmogrified into UK law. This might not seem like much of a change; as a result of the European Communities Act 1972 it is UK law already, but just happens to have an EU source at the moment. But it will mean that UK nationals will no longer be able to ask UK courts to seek the Court of Justice's interpretative guidance on equality measures that stem from EU law.

As UK law, provisions hitherto guaranteed by the EU will then be open to revision by the UK legislature. The much discussed provisions for Henry VIII powers means that the executive will be able to act in lieu of the legislature, allowing government, not parliament, to change, or repeal, newly domesticated laws.

Specific grounds of equal treatment and non-discrimination

Sex/ gender

A number of EU pieces of legislation are specifically directed at equal treatment on the ground of sex – Directive 2006/54 on equal treatment between men and women in matters of employment and occupation, Directive 2010/41 on gender equality and self-employment, Directive 2004/113 on the principle of equal treatment between men and women in the access to and supply of goods and services, and Directive 79/7 on equal treatment in matters of social security.

But there is also a host of measures contained in working condition rules, and health and safety rules that are either directly or indirectly related to sex equality, having a disproportionate impact upon women. These include equal treatment provisions for part time workers (Directive 97/81), protections for pregnant or breastfeeding workers (Directive 92/85), and measures relating to parental leave (Directive 2010/18). Several relevant provisions have been implemented into secondary law (for example the health and safety protections for new and expectant mothers in the Management of Health and Safety at Work (MHSW) Regulations 1999 (SI 1999/3242)) and so regardless of the Henry VIII provisions, when they no longer have the protection of EU law, will become susceptible to executive change, and subject to the vicissitudes of government, with no sunset clause.

Other rights contained in primary legislation, such as protections from pregnancy discrimination in the Equality Act 2010 and the right to paid time off for antenatal care in the Employment Rights Act 1996 will be potentially open to executive change during the lifetime of the delegated powers conferred in the Repeal Bill.

When assessing the dynamic between the UK and EU lawmakers on gender equality, it should be noted that while the UK did have sex equality legislation in place before the EU required it, UK courts have repeatedly interpreted it narrowly, and women have been reliant upon interventions of the Court of Justice. The original UK Equal Pay Act required a job evaluation study to have been completed before women could launch equal pay claims – and employers had control over whether such an evaluation was conducted. It was the Court of Justice that established that women could still claim equal pay for work of equal value without such an evaluation. Similarly, it was the Court of Justice that established that dismissal on the ground of pregnancy is a form of sex discrimination, and that protections from such discrimination should also cover fixed term workers.

Rights perceived to have resource and/or flexibility implications might be most susceptible to change – for example, EU law guarantees a right to paid time off for antenatal appointments. Other EU-derived rights might appear to reduce employer flexibility, such as annual leave and occupational pension rights of part time workers, and even potentially the protections from pregnancy discrimination afforded to fixed term workers. In the context of the UK's exit from the EU, if the government wishes to emphasise de-regulation, and to promote 'cost-saving' measures, a great deal will depend on who defines what counts as a cost or as a regulatory burden.

Race

Directive 2000/43 prohibits discrimination on the ground of racial or ethnic origin in employment and occupation, access to and the supply of goods and services, including housing, in social protection, including social security and healthcare, social advantages and education. UK law covered similar grounds in the Race Relations Act 1976, and continues to give effect to EU provisions in the Equality Act 2010, but EU case law has still had a modifying effect upon UK provisions. For example, it was a race discrimination case in the CJEU that established that discriminatory declarations by employers constituted a form of discrimination.

In *Feryn*,²⁰ an employer announced publicly that he would not employ Moroccan workers, because of his customers' preferences. On being asked whether this was evidence of discriminatory recruitment practices, the Court of Justice found that the announcement was not only evidence of discrimination in the process of recruitment, but that it was a discriminatory practice in itself, dissuading people from applying. Following this case, the explanatory notes accompanying the then Equality Bill, not the Bill itself, were adapted to include an example of prohibited discriminatory advertising.

This is an example of a type of protection that might be fairly readily modified – requiring a

21 Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008].

change in government policy expressed in different guidance. Any change would have wider ramifications than in the context of race discrimination, since the same definition of discrimination is adopted in the Equality Act for all protected characteristics.

Disability, age, religion and sexual orientation

EU law prohibits discrimination in the sphere of employment and occupation on the grounds of disability, age, religion and sexual orientation under Directive 2000/78. These grounds are now covered in UK law in the Equality Act 2010, which goes beyond the employment sphere covered in EU law, to also include goods, services, education, associations, occupational pensions and premises.

However, it is worth noting that the UK did not introduce legislative prohibition of discrimination on the grounds of age or sexual orientation until it was required to do so by the EU under Directive 2000/78, which led to UK equal treatment provisions on sexual orientation in 2003 and age in 2006. Religion was also not specifically a protected characteristic until 2003, though there had been prior attempts to address some forms of religious discrimination by treating it as a sub-set of race discrimination. These grounds stem directly from EU law.

With regard to disability, the Court of Justice has been instrumental in shaping the protections available in the UK. While EU law only covers employment and occupation, and UK law has a broader material scope, Court of Justice rulings have broadened the personal scope of disability law. These include the *Coleman*²² judgment, which extended protection from disability discrimination beyond the disabled person, to their associates. As with discrimination by declaration, discrimination by association has not been explicitly included in the wording of the Equality Act 2010. Instead, as with discrimination by declaration, we are reliant upon the explanatory notes to include the concept. Again, this makes the construct rather more vulnerable to change than an express statutory provision.

The Court of Justice has also ruled the definition of a disabled person must be aligned with that adopted in the UN Convention on the Rights of Persons with Disabilities. This is more expansive than the medical definition hitherto adopted. It has had limited practical effect so far, as the Court of Justice construction is still focussed on impairments, but it seems to be an area of development, and the intention to place greater emphasis upon a more social model may mean that future rulings require impairments to be assessed differently. UK equality law still focuses on a medical model of disability. Should EU law move away from the medical model before the UK's exit, the UK may simply choose not to implement any new required measures or to apply any new case law.

Increased importance of the Human Rights Act

The Human Rights Act (HRA) offers some protection from discrimination, as it incorporates the European Convention of Human Rights (ECHR) into domestic law. Article 14 ECHR

²² C-303/06 S. *Coleman v. Attridge Law and Steve Law* [2008].

prohibits discrimination in the context of another Convention right being invoked. In the context of welfare cuts, the key rights may well be Article 14 in combination with Article 1 of Protocol 1, protecting the right to property. Welfare benefits have been found to be a form of property for the purposes of Article 1 of Protocol 1, and these provisions have proved a crucial vehicle for judicial review of welfare measures with disproportionate impacts – for example to review the cessation of disability benefits for children in hospital, or the withholding of benefits from refugees on the grounds of not meeting the ‘past presence’ test.

However, the HRA cannot function as a proxy for the Equality Act 2010 – not least because it has limited application in private law; it binds the courts in terms of how they must interpret the law, but does not create equality duties directly upon private bodies. The HRA is a protected piece of legislation – the secondary legislation adopted under the Repeal Bill may not be used to amend, repeal, or revoke the HRA or subordinate legislation made under it.

The HRA binds public authorities to not act in ways incompatible with the ECHR, though this does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament. A Minister proposing a Bill must make a statement of compatibility with Convention rights, but the same stipulation is not made for secondary legislation. So, if new legislation dealing with private law were introduced that undermined the equality rights protected in the ECHR, a great deal may rest on the interpretative duty in section 3 of the HRA – according to which the courts must, if possible, read the law in such a way as it is compatible with Convention rights.

To sum up – equal treatment and non-discrimination rights on all grounds explored here are insufficiently safeguarded under the current iteration of the European Union (Withdrawal) Bill; such rights may be open to modification by the executive, including fundamental rights contained in Court of Justice case law.

3. IMMIGRATION AND ASYLUM

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JCWI is concerned that the unprecedented executive powers offered by the Repeal Bill could have significant implications for foreign nationals whose rights currently derive from EU law and judgments of the Court of Justice of the EU. Although the Human Rights Act will be protected from amendment or removal, there are no other safeguards for individual rights in the Bill.

The executive powers proposed by the Repeal Bill also have particular implications for several groups of refugees and migrants with rights under EU law.

EEA Nationals currently residing in the UK

The rights of EEA citizens and their family members to enter and reside in the UK primarily derive from the EU Citizens Directive (2004/38/EC) and the Treaty on the Functioning of the European Union. The rights of this group from the date of Brexit are yet to be determined and are the subject of ongoing UK/EU withdrawal negotiations. It is likely that EU Treaty rights holders residing in the UK before a cut-off date yet to be agreed will be given an immigration status under domestic immigration law, as agreed during the negotiations.

However, Clauses 7 - 9 of the Bill would give ministers the power unilaterally to remove the residence rights of over 3 million EEA nationals currently residing in the UK, from the date of Brexit, if a UK/EU agreement is not reached. Explanatory notes appended to the Repeal Bill make explicit that ministers could “modify, limit or remove the rights which domestic law presently grants to EU nationals”.²³ This could have appalling consequences for the millions of families currently residing in the UK. Whether it materialises, the threat of this outcome has already created additional distress and insecurity for EEA nationals and their family members currently awaiting confirmation of their future status. Ministerial powers in the Bill must be curbed to protect the rights of EEA Treaty rights holders, regardless of the outcome of Brexit negotiations.

British citizens, EEA nationals and non-EEA nationals afforded residence rights by the Court of Justice

Currently, some EEA and non-EEA nationals have residence rights in the UK as a result of domestic regulations which give effect to rights under EU law, including those identified in judgments of the Court of Justice. These rights arise from their relationship with a British citizen, usually a close family member, partner or spouse.

²³ Department for Exiting the European Union. ‘European Union (Withdrawal) Bill Explanatory Note’ (July 2017) <<https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf>> accessed 17 October 2017.

Clauses 7 - 9 of the Repeal Bill would give ministers the power unilaterally to amend the regulations providing for derived residence rights in the UK, with no accountability or external oversight. Amendment of regulations could have significant implications for individual human rights, with direct impacts on long-term resident migrants, British citizen adults and children.

Relevant Court of Justice judgements include:

- *R (Secretary of State for the Home Department) v Immigration Appeal Tribunal and Surinder Singh* [1992], currently given effect in the UK through the Immigration (European Economic Area) Regulations 2016. The Surinder Singh judgement enables UK citizens who have exercised their free movement rights in another EEA member state to bring a non-EEA family member back to the UK with them. They must meet additional requirements including that the British citizen would be a qualified person if they were an EEA national, and that the British citizen and family member resided together genuinely in another state for a purpose other than to circumvent UK immigration law.
- *Zambrano v Office national de l'emploi (ONEm)*,²⁴ also given effect in the Immigration (European Economic Area) Regulations 2016. The Zambrano judgment was reaffirmed and expanded in May 2017 by *Chavez-Vilchez Others*.²⁵ These judgements grant a non-EEA carer (parent) of a British child residence rights here, in order that the child can fully exercise their EU citizenship rights.

Refugees and Asylum seekers

The Repeal Bill could result in a reduction in the UK's standards of treatment for asylum seekers from the date of Brexit.

The UK is currently part of the first phase Common European Asylum System and is bound by three EU directives relating to asylum seekers: the Qualification Directive (2004/83/EC), the Procedures Directive (2005/85/EC), and the Reception Directive (2003/9/EC). These Directives establish minimum standards for how asylum seekers are defined, treated and considered across signatory states, and limit the scope of restrictive domestic legislation in this area.

To sum up – equal treatment and non-discrimination rights on all grounds explored here are insufficiently safeguarded under the current iteration of the European Union (Withdrawal) Bill; such rights may be open to modification by the executive, including fundamental rights contained in Court of Justice case law.

In addition, the UK is a signatory to the Dublin III Regulation (Regulation (EU) No 604/2013). The Dublin III Regulation applies to all 28 EU Member States and four associated countries.

²⁴ Case C-34/0 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011].

²⁵ Case C-133/15 *Chavez-Vilchez Others v Raad van bestuur van de Sociale verzekeringsbank and Others* [2017].

Under 'take charge' provisions in the Regulation, asylum seekers processed in another Dublin country may be transferred to the UK where, for example, they have family members. For example, this has provided a safe and legal route for hundreds of children previously living in the Calais and Dunkirk refugee camps to be reunited with family members in the UK. Under 'take back' provisions, the UK may return asylum seekers to another EU Member State, for example, the first Member State entered, for processing. The UK also participates in the EURODAC database and Visa Information System, allowing it to collect and share fingerprint information from asylum seekers with other members of the EEA.

It is likely that the UK would wish to continue to participate in all or some of the provisions of the Dublin III Regulation – or a future version of it - as a non-EU Member State, if possible. The UK should continue at least to enact the Dublin III take charge provisions (if other Member States remain willing to send persons back to the UK) following Brexit.

Victims of trafficking

The UK is currently a signatory to Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims. The Trafficking Directive establishes EU-wide minimum standards in preventing and combating human trafficking, and protecting victims.

The Repeal Bill in its current form could enable ministers to repeal or substantially modify the provisions in the Directive without parliamentary scrutiny. This could, in theory, result in a lowering of standards for victims of trafficking. Anti-trafficking measures could also be impeded by a potential loss of cooperation with other EU Member States over data-sharing.

Migrant workers

Alongside British workers, The Repeal Bill could make some migrant workers in low-paid or insecure work more vulnerable to exploitation or abuse. The Government has pledged to transpose into domestic law the key EU workers' rights instruments to which the UK is currently bound. However, the Bill would enable ministers, if they wished to do so, unilaterally to modify or remove these individual rights without parliamentary scrutiny.

Relevant Directives include:

- Agency Workers Directive (2008/104/EC), given effect in the UK by the Agency Workers Regulations 2010, which protects the working and employment conditions of agency workers
- Working Time Directive (2003/88/EC), given effect in the UK by the Working Time Regulations 1998, which establishes maximum working hours and creates a criminal offence for those found to employ workers to work longer periods than is permitted.

- EU Equal Treatment Directive (2006/54/EC), bans discrimination on the grounds of age, religion or sexual orientation, and places the burden of proof in discrimination on alleged perpetrators rather than alleged victims. EU law also prevents any cap from being placed on compensation payments in discrimination cases.

4. PRIVACY AND DIGITAL RIGHTS

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Open Rights Group has serious concerns about the Repeal Bill and how the powers it confers could be used to change privacy and digital rights. This includes EU law rights that have been transposed by way of domestic legislation and those that are directly affective. There has also been notable silence on what will happen to future EU laws after exit, especially those that are close to publication (and which the UK has helped developed).

Areas to watch

Data protection

The General Data Protection Regulation (GDPR) is due to come into force in May 2018. It improves the control that individuals have over their personal data. People will be better able to control who can collect data about them and what they can use it for.

The GDPR will apply to all EU Member States including the UK. Although the UK does not need to put the GDPR into primary UK legislation for it to apply to the UK from May 2018, the UK Government has proposed a Data Protection Bill which will do just that. This will ensure that the GDPR is primary UK legislation before Brexit day and in effect gets ahead of what the Repeal Bill would do anyway.

We would expect the UK legal system to consider Court of Justice of the EU rulings on the GDPR when interpreting the Data Protection Bill, although this will depend to some extent on the instructions Parliament gives to judges in the Repeal Bill. Part of the reason for this is that any business, including UK businesses, which trade in the EU, will have to comply with the GDPR. The UK legal interpretation and practical application of GDPR would have to be roughly equivalent to the EU to keep the UK and EU markets broadly inter-operable.

To this end, the UK is expected to need the European Commission to give it an 'adequacy decision' saying that UK law and processes are at GDPR standards if UK businesses are to receive data from the EU. The access that the UK's security services has to data held by companies, as raised by the Snowden revelations, could prove a stumbling block to this adequacy decision. Previous CJEU judgments such as in *Schrems* have said that EU to USA data transfers are unlawful due to ensuing US National Security Agency (NSA) access to European citizens' personal data.²⁶

Electronic Commerce Directive

Article 15 of the E-Commerce Directive (2000/31/EC) says that states cannot force online

²⁶ Case C-362/14 *Schrems v Data Protection Commissioner* [2015].

service providers to a) monitor the information they transmit or store or b) to actively seek out illegal activity. Online service providers could include your Internet Service Provider, your phone provider, and the social media websites you use. Article 15 prevents government's imposing enormous restrictions on the free speech of internet users. It reduces the extent to which online service providers can control access to information. Also, online service providers are often poorly placed to decide what legal and illegal activity is.

The principles in Article 15 are under severe pressure at the moment. The UK Government wants social media companies to monitor for extremist content on its sites and Internet Service Providers have been forced to store the websites that their customers visit under the Investigatory Powers Act. Copyright lobby groups are also pushing for companies to monitor their networks and platforms for infringing content. One of the dangers of this is that companies are incentivised to be overly zealous in the content they remove. When in doubt, they are likely to block to avoid law suits. This could affect parodies, memes or music in the background of videos. Undermining the principles of Article 15 would harm online culture and freedom of expression.

Graham Smith has pointed out that the E-Commerce Directive has never been written into UK law.²⁷ In debates on the Repeal Bill, Parliament is likely to concentrate on converting EU Regulations (which do not have to be in Member States' statute books) into UK law. There is a significant risk that it will omit bringing in Directives which have so far not been made UK law. It is vital for freedom of expression that Article 15 of the E-Commerce Directive is transferred into UK law as the UK leaves the EU.

E-Privacy Regulation

The European Parliament is currently debating a new e-Privacy Regulation. As it is still under discussion, we are unable to say what the final outcome of the Regulation will be. One of the aims of the Regulation though is to guarantee the privacy of both the content and metadata of electronic communications. Metadata means data like who you communicate with, when, where, on what device and so on. It would apply to new 'over-the-top' services like Skype and WhatsApp.

There is still a long way to go before the Regulation delivers on those intentions but it should help fulfil rights to privacy and freedom of expression. The big question is whether it will be EU law in time for Brexit day. If it is ready then the UK is likely to bring it into UK law. If it isn't ready then it is unclear what will happen. The UK could bring in some or all of the legislation.

²⁷ Graham Smith, 'Time to speak up for Article 15' (*Cyberlegal*, 21 May 2017) <<http://www.cyberleagle.com/2017/05/time-to-speak-up-for-article-15.html>> accessed 18 October 2017.

5. JUSTICE AND HOME AFFAIRS

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The EU area of Freedom, Security and Justice is based on the principle that the imperatives of security and human rights in the European space are mutually reinforcing rather than contradictory. Cross-border cooperation within the EU is premised on the assumption that all EU Member States share similar standards of fundamental rights protection. The principle of mutual recognition based on mutual trust has allowed the development of greatly enhanced and operationally effective judicial cooperation mechanisms, like the European Arrest Warrant system, that have radically cut the time and cost of cross-border cooperation on fighting crime. Two key foundations of this mutual trust are:

- The possibility of recourse to the Court of Justice of the European Union (CJEU) to ensure a level playing field in the application of EU law; and
- The rights and principles contained in the Charter of Fundamental Rights of the European Union ('the Charter'), in particular, the right to protection of personal data.

The UK has had an ambivalent relationship with the EU in the area of justice and home affairs that has developed rapidly over the past twenty years. Following the agreement of the Lisbon Treaty in 2013, the UK obtained a block opt-out from all pre-Lisbon police and criminal justice measures but, importantly, chose to re-join 35 of these measures. At the time, Theresa May (then Home Secretary) said the measures the UK had opted into were 'vital' in order to:

[S]top foreign criminals from coming to Britain, deal with European fighters coming back from Syria, stop British criminals evading justice abroad, prevent foreign criminals evading justice by hiding here, and get foreign criminals out of our prisons.²⁸

In November 2014, May also said that failure to re-join the 35 identified measures "would risk harmful individuals walking free and escaping justice, and would seriously harm the capability of our law enforcement agencies to keep the public safe".²⁹ Among these measures was the European Arrest Warrant, which changed the face of extradition in Europe. More recently, the UK has taken a selective approach to opting-in to new measures. EU legislation that the UK has opted into in this area is likely to come under the umbrella of 'retained EU law' under the EU (Withdrawal) Bill ('the Repeal Bill').

28 Rt Hon Theresa May MP, 'Fight Europe by all means, but not over this Arrest Warrant' *The Daily Telegraph* <<http://www.telegraph.co.uk/news/politics/conservative/11216589/Theresa-May-Fight-Europe-by-all-means-but-not-over-this-Arrest-Warrant.html>>Telegraph (9 November 2014) accessed 6 December 2017.

29 HC Deb 10 November 2014, vol 587, cols 1224 and 1228 – 1229.

The Repeal Bill poses a number of problems for ongoing cooperation in the field of justice and home affairs. Firstly, legislation providing for international cooperation is meaningless if it is not reciprocated and based on international agreements. Secondly, the Bill explicitly excludes the Charter of Fundamental Rights of the EU, and therefore the right to protection of personal data under Article 8 from 'retained EU law'. Thirdly, the removal of the role of the CJEU following Brexit undermines the guarantee of a level playing field in terms of the interpretation and application of cooperation. If the UK is unable to cooperate with EU Member States in the field of security and criminal justice following Brexit, this will make it harder for the Government to protect the public from serious threats and to ensure that justice across borders is delivered effectively and in a timely manner respecting the rights of suspects, defendants and victims of crime. The following is a brief selection of the types of legislation that will be affected.

Mutual recognition instruments

Perhaps the best known mutual recognition instrument is Framework Decision 2002/584/JHA on the European Arrest Warrant (EAW) which was implemented in the UK through the Extradition Act 2003. It has transformed the way in which extradition takes place between the UK and EU Member States, in particular, it removed the barrier for some Member States to extradite their own nationals within the EU and speeded up the process significantly. The UK currently surrenders around 1000 people per year to the EU and receives back around 100 per year. In evidence to the House of Lords, the Director of Public Prosecutions, Alison Saunders, explained that EAW procedures are three times faster and four times less expensive than standard extradition procedures.³⁰

Although the Extradition Act may be treated as 'retained EU law' for the purposes of the Repeal Bill, in the absence of agreement, either bilateral or multi-lateral with the EU 27, it will be redundant in practice. Cooperation will not be able to continue in the same way without an international agreement. A similar agreement to the EAW has been made between the EU and Norway and Iceland. But it does not include surrender of own nationals, took 13 years to agree and is not yet in force (more than 3 years after agreement). Prior to the EAW, the UK extradited to EU Member States based on the Council of Europe Convention on Extradition (1957). Aside from the fact that this would mark a step backwards in extradition practice, the Convention on Extradition cannot serve as a fallback position without amendment to both UK legislation and, potentially, to individual EU Member State legislation.

Similar problems arise in other areas including the new Regulation on mutual recognition of freezing and confiscation orders;³¹ the European Investigation Order (EIO);³² the European Protection Order (EPO);³³ and the recognition of financial penalties,³⁴

30 Evidence of Alison Saunders DPP to HoL inquiry 'Mutual Recognition of Proceeds of Crime' Q55.

31 Home Office, Mutual Recognition of Freezing and Confiscation Orders (HCWS 101, 627); also see evidence of Alison Saunders DPP to HoL inquiry 'Mutual Recognition of Proceeds of Crime' Q58.

32 Directive 2014/41/EU.

33 Directive 2011/99/EU.

34 Council Framework Decision 2005/214/JHA.

custodial sentences,³⁵ supervision measures,³⁶ and confiscation orders.³⁷

This is a field where the Repeal Bill cannot guarantee the continued operation of retained EU law unless there are international agreements to support cooperation. The fundamental problems with the Bill i.e. the lack of legal certainty, the failure to carry over the rights and principles of the Charter and the lack of oversight of the CJEU, will make reaching such agreements at EU-level very difficult.

Data protection for law enforcement and security

The UK's approach to Article 8 of the Charter on protection of personal data and the lack of legal certainty in Repeal Bill pose significant risks to the UK's ability to cooperate with the EU in a number of other areas and calls into question the approach adopted under the Bill to the retention of EU law.

The Law Enforcement Directive

The Law Enforcement Directive (EU/2016/680) becomes effective in all EU Member States by the end of its transitional period in May 2018 (before the UK ceases to be a member of the EU).³⁸ This Directive introduces principles for domestic and cross-border data processing by law enforcement authorities for the prevention, investigation, detection or prosecution of criminal offences.³⁹ It also strengthens the right to privacy and personal data protection of individuals by providing rights for them such as rights to access, rectification, erasure, and restriction of processing.⁴⁰

The EU Member States are under an obligation to implement the Law Enforcement Directive by the end of the transitional period, but the UK is under no such obligation because of its opt-in arrangements in the area of justice and home affairs. Nevertheless, the Government has announced a Data Protection Bill which aims to transpose the provisions of the Law Enforcement Directive into UK law. The Bill was introduced to the House of Lords on 13 September 2017 and it is expected to come into force in May 2018. According to this expected timeline, the Bill will receive Royal Assent and become law before the UK leaves the EU, and will thus fall within the category of 'retained EU law' under the Repeal Bill.⁴¹ According to the Government, bringing the Law Enforcement Directive into UK law would help the UK to continue its co-operation with the EU in exchanging personal data for law enforcement purposes, which is a top priority for UK and EU in the field of police and security co-operation.⁴² However, the Repeal Bill in its current form imperils this aim.

35 Council Framework Decision 2008/909/JHA.

36 Council Framework Decision 2009/829/JHA.

37 Council Framework Decision 2006/783.

38 Directive 2016/690/EU.

39 Art 1, Law Enforcement Directive.

40 Art 12-18, Law Enforcement Directive.

41 Clause 3.

42 HM Government, 'The exchange and protection of personal data: A future partnership paper' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639853/The_exchange_and_protection_of_personal_data.pdf> accessed 6 December 2017.

As retained EU law, the Data Protection Bill can be subject to changes in accordance with the delegated Ministerial powers provided for under Clauses 7-9 of the Repeal Bill. Changes to the parts of the Data Protection Bill incorporating the provisions of the Law Enforcement Directive could pose significant risks to the continuity of the UK-EU co-operation on law enforcement after the UK's exit from the EU. The broad scope of such powers means that Ministers will be able to make substantial policy changes without parliamentary scrutiny or debate.⁴³ This creates uncertainty for the UK's commitment to protect the personal data of individuals after the UK's withdrawal from the EU which, in turn, might affect the EU's willingness to take part in cross-border data exchange schemes for law enforcement purposes.

Another reason why these sweeping powers might hamper UK-EU personal data exchanges after withdrawal is because they can be used to change the UK's implementation of the Law Enforcement Directive in the Data Protection Bill. As a result, the UK's data protection framework might be considered by the European Commission as falling foul of the level of data protection required for a third country – as a non-Member State – to receive personal data from the EU.⁴⁴ This will be at odds with the Government's position of maintaining data-driven law enforcement co-operation between the UK and the EU after withdrawal.⁴⁵

To sum up, it is clear that the Repeal Bill, in its current form, imperils the continuity of the UK-EU cross-border data transfers for law enforcement purposes. Therefore, it must be amended to ensure it contains adequate safeguards on the use of delegated powers.

EU Passenger Name Records (PNR) Directive

The EU PNR Directive obliges air carriers to transfer a wide array of information about their passengers (i.e. Passenger Name Records – PNR) for flights entering into or departing from the EU to specific entities in EU Member States (i.e. Passenger Information Units – PIUs) responsible for collecting and storing that information for the purpose of preventing, investigating, detecting, and prosecuting terrorist offences and serious transnational crimes.⁴⁶ To this end, it requires Member States to set up or designate PIUs.

The UK has been a key negotiator in the adoption of the PNR Directive. According to its opt-in arrangements in the field of justice and home affairs, the UK has already opted-in. Thus, like all EU Member States, it will have to implement the PNR Directive by May 2018. However, the UK Government has, to date, not pledged to transpose the PNR Directive into UK law.⁴⁷ If this Directive is not transposed before the UK ceases to be a member of the EU, it will not be covered by the Repeal Bill. It is, therefore, crucial that the Government deals with this matter before the Bill becomes law. If the PNR Directive is not transposed

43 Delegated Powers and Regulatory Reform Committee, European Union (Withdrawal) Bill (3rd report) (HL 2017-19, 22).

44 For a discussion on the UK data protection framework's fragile position for the continuity of the UK-EU cross-border personal data transfers after Brexit see Andrew Murray, 'Data Transfers Between the EU and UK post Brexit?' (2017) 7(3) International Data Privacy Law 149.

45 HM Government, 'Security, law enforcement, and criminal justice: A future partnership paper' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/645416/Security__law_enforcement_and_criminal_justice_-_a_future_partnership_paper.PDF>. accessed 6 December 2017.

46 Directive 2016/681/EU.

47 As of November 2017, only Belgium and Germany have communicated the transposition measures they intend to take to the EU; there is

correctly, the Government will be able to lower the data protection standards of individuals whose PNR data is processed. It is important to note that when determining the future of UK-EU PNR data exchanges, the crucial point is to establish a PNR scheme that is compatible with EU fundamental rights in order to ensure co-operation with EU Member States. As mentioned earlier, the Repeal Bill is a stumbling-block to a determination that the UK offers a level of personal data protection required to receive personal data from the EU.

EU law enforcement databases

The UK is currently a participant of the following EU law enforcement databases: the Schengen Information System (SIS II) (a database on people and objects of interest for law enforcement purposes and border control);⁴⁸ the European Criminal Records Information Systems (ECRIS) (facilitating the exchange of criminal records between EU Member States);⁴⁹ and the Prüm Decisions (facilitating the exchange of DNA profiles, fingerprints, and car license plates).⁵⁰ The House of Lords has mentioned remaining involved in these databases as top security priorities for the UK.⁵⁰ However, there are two reasons to suggest that maintaining the UK's access to these databases once it exits the EU will be hindered.

Firstly, there is no precedent for access by non-EU (ECRIS) and non-Schengen (SIS II) countries, which might limit the options available for the UK to continue its participation in these systems after withdrawal. Secondly, the UK's compliance with EU data protection standards is a prerequisite for participation. The implementation of the Law Enforcement Directive through the introduction of the Data Protection Bill is not sufficient to satisfy current compliance requirement because, as mentioned earlier, the Repeal Bill, as it stands, imperils the UK's status of offering a level of personal data protection required to receive personal data from the EU.

Conclusion

In its current form, the EU (Withdrawal) Bill grants sweeping powers to Ministers to change laws without the adequate parliament oversight. This will have serious implications for the continuity of the UK's co-operation with the EU on justice and home affairs after withdrawal from the EU. The explicit removal of the rights and principles contained in the Charter, in particular, the right to protection of personal data, undermines the proposition that the UK's history within the EU should give other Member States the confidence that the UK has similar standards. The removal of the jurisdiction of the CJEU and the lack of certainty over the way CJEU case law will be interpreted removes the level playing field underpinning the principle of mutual recognition based on mutual trust. Without international agreements, whether

a hint in the Government's position paper on the future of security, law enforcement, and criminal justice cooperation that the UK is in the process of implementing the PNR Directive, but there is no information on any specific steps it has taken.

48 Council Decision 2007/533/JHA.

49 Council Framework Decision 2009/ 315/ JHA.

50 Council Decision 2008/615/JHA.

51 EU Committee, *Brexit: future UK-EU security and police cooperation (7th report)* (HL 2016-2017, 77).

bilateral or multi-lateral, in this area, the carrying over of 'retained EU law' on cooperation in the fields of criminal justice and security is meaningless in practice. Therefore, the Repeal Bill, as it currently stands, contradicts the Government's assurances that the UK and the EU will work alongside each other in the field of security, law enforcement, and criminal justice despite the UK's withdrawal from the EU.⁵²

52 HM Government (n 42) 4.

6. CHILDREN'S RIGHTS

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Children were unable to vote in the referendum, but they are likely to be impacted in both the long-term future and the immediate future. The EU has enacted over 80 legal instruments that confer direct entitlement for children covering issues such as migration, asylum, child protection, health and safety, paediatric medicine, access to social and economic rights and cross-border family breakdown. The work of the Coalition on Children's Brexit, on the EU (Withdrawal) Bill has focussed on: child safeguarding, poverty, immigration and children's rights and the inclusion of the voices of children and young people. This Chapter brings together work from members of the coalition on children's rights post-Brexit.⁵³

The Government's early white paper on withdrawal mentions children only once. It urges 'us all' to work towards a "stronger, fairer, more Global Britain" for the country's 'children and grandchildren'.⁵⁴ Despite this, in debates so far there has been relatively little discussion of the needs of, and issues concerning, children. In contrast, the European Union has as an objective the promotion and protection of children's rights, as set out in Article 3(3) of the Treaty of the Functioning of the European Union (TFEU).

Safeguarding

Child safeguarding and security is a global issue, in which we rely on international co-operation. The EU provides not only a legal framework, but also coordination through EU agencies including Eurojust, Europol, the European Arrest Warrant, and the European Criminal Records Information System (ECRIS). These allow cross-border co-operation between judges, the police and includes a fast track extradition procedure, as well as checking criminal records for crimes committed in another Member State. This helps to protect children at risk of exploitation, trafficking, or abuse. This cooperation is underpinned by the TFEU which provides the legal framework.

The EU has developed policies and supported research and data gathering, information exchange and training across a range of child protection areas, including: online child abuse, missing children, and violence against women and children. For example, the European Commission is working towards an early warning system for missing children that is operational across the EU; it has proposed children specific provisions for the Common European Asylum System; and it has proposed principles for an integrated child protection system.

⁵³ For a more in depth briefing, please see Coram Children's Legal Centre, 'Making Brexit work for children', (November 2017) <http://www.childrenslegalcentre.com/wp-content/uploads/2017/08/Brexit_Discussion_Paper_FINAL.pdf> accessed 10 January 2018.

⁵⁴ Department for Exiting the European Union, 'Legislating for the United Kingdom's Exit from the European Union' (May 2017) <<https://www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union>> accessed 18 October 2017.

Although the UK Government has signalled its intention to develop a close ongoing relationship with these EU institutions following withdrawal, leaving the EU means renegotiating each agreement, and finding alternative models for cooperation.⁵⁵ This requires the agreement of the other Member States to allow the UK to adopt a model similar to other non-EU countries, including Norway and the US.

Recommendations

- That on-going membership of the EU-level child protection mechanisms features prominently in the negotiations. We need to maintain access to EU data, intelligence, training, research, and security infrastructure with a view to protecting children.
- That a comprehensive audit of EU funding for child protection is undertaken so that funding gaps left by Brexit are identified and filled.
- Negotiations relating to the border between Northern Ireland and the Republic of Ireland need to take into account the implications of cross-border mobility for child protection and safeguarding.

Immigration

Immigration is a reserved power and therefore applies across the UK. However, many children in Northern Ireland identify as either Irish or British, and are entitled to both nationalities. Children's independent free movement rights have largely been ignored in negotiations on citizens' rights. However, children are rights holders and can exercise free movement rights independently. There are children and young people in the UK separated from their parents or EU family members. Children may have a right of residence that their family members do not have, or they may not be in contact with EU family members in the UK. Given that children can be exercising their Treaty rights while being in education, for example, they must have an independent right to the Home Office's proposed 'settled' status where appropriate.

Recommendations

It is critical that any new rules governing the rights of European nationals in the UK after Brexit must be workable, fair and take into account the rights of children and young people who have grown up in this country. A child-friendly settlement for European nationals currently residing in the UK should:

- Allow European nationals in the UK with permanent residence or who are able to show five years' residence, including all EEA family members and those with derived rights, indefinite leave to remain through a simple process that is easy to administer with no application fee.

⁵⁵ HM Government, 'Security, law enforcement and criminal justice: A future partnership paper' (September 2017) <<https://www.gov.>

- Ensure that all children and young people who have been in the UK are able to apply for settled status in their own right.
- Ensure that children and families are able to protect their rights through a right of appeal in domestic courts and access to an independent adjudication mechanism (through the Court of Justice).
- Provide and promote clearer guidance on European national children whose future is in the UK who may be registered as British citizens through the Secretary of State's discretion.

Children's Rights

As referred to above, the EU has set an agenda on children's rights through legislation and policy. Article 24 of the Charter of Fundamental Rights of the EU distils the UN Convention on the Rights of the Child (UNCRC) to 4 core principles: children must be safeguarded, able to express their views, maintain a relationship with their parents and all actions taken by public and private authorities in relation to children must consider their best interests.

There is no similar statutory provision in national legislation. Wales, Scotland, and Northern Ireland have strengthened their laws on children's rights and protection. Since 2012, public authorities in Wales have had a duty to give due regard to the UNCRC and routinely undertake Children's Rights Impact Assessments in proposing legal and policy change.⁵⁶ In Scotland, Ministers must consider steps to secure further or better implementation of the UNCRC;⁵⁷ and in Northern Ireland, the best interests of children must be determined in accordance with the UNCRC.⁵⁸ In England, there is a duty on certain public authorities to safeguard and promote the welfare of the child,⁵⁹ and a duty on the Home Office to consider the need to safeguard and promote the welfare of the child in discharging their immigration functions.⁶⁰

The broad powers within the Repeal Bill enable Ministers to make changes to legislation without Parliamentary scrutiny, this limits consideration of the impact on children to amendments to EU legislation brought into national law, and limits the functioning of the devolved nations child rights' protections.

As an example, in the area of child trafficking, the 2011 EU Anti Trafficking Directive (2011/36/EU) has been partially transposed into domestic law through the Modern Slavery Act 2015, the 2015 Human Trafficking and Exploitation (Scotland) Act, and the Human Trafficking and

[uk/government/uploads/system/uploads/attachment_data/file/645416/Security_law_enforcement_and_criminal_justice_-_a_future_partnership_paper.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/645416/Security_law_enforcement_and_criminal_justice_-_a_future_partnership_paper.PDF)> accessed 18 October 2017.

56 The Rights of Children and Young Persons (Wales) Measure 2011.

57 Children and Young People (Scotland) Act 2014.

58 Children's Services Co-operation Act 2015.

59 Section 11, Children Act 2004.

60 Section 55, Borders, Citizenship and Immigration Act 2009.

Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.

The Modern Slavery Act did not transpose the full scope of provisions in the Directive which includes important safeguards for victims of trafficking, including explicit reference to unaccompanied minors in preamble 23 (particular assistance, support, guardianship, durable solutions) and Article 16 (Member States should take necessary measures to ensure specific, durable, actions to assist and support child victims of trafficking taking into account special circumstances of the child victim). Where national law is silent on the implementation of specific, positive obligations, then the provisions of the Directive may become directly applicable.

There remain no guardians available for child victims of trafficking in some nations, which highlights the half-hearted nature of victim protection in legislation. However, when considering whether the Directive should be moved into national legislation, it is likely that ministers will consider that this has been completed under the Modern Slavery Act. This means that child victims of trafficking will be left with a lacuna where they can no longer rely on the Directive.

Recommendations

- The Government should ensure that all existing EU law protections for children's rights are incorporated into UK law following Brexit.
- Children's rights contained in provisions of the Charter of Fundamental Rights of the EU should be brought fully into the domestic law of all UK nations, to ensure adequate protection for issues of centralised and devolved concern.
- The Government must expressly in primary legislation protect children's rights in the context of Brexit. This could be achieved through requiring all regulations that are introduced as a result of Brexit to be compliant with the UNCRC. The Government should also consider the introduction of a child rights impact assessments being undertaken prior to the approval of a statutory instrument.

Where it is not possible to directly incorporate existing EU Regulations that rely on multi-lateral agreements, such as the Dublin III Regulation and EU family justice measures, the Government must endeavour to replicate the agreements and guarantee that negotiations to do so will protect existing children's rights.

7. DISABILITY RIGHTS

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People with disabilities make up one in five of the UK's population and have an enormous stake in important legal and policy debates concerning Brexit.

The implications of the UK's vote to leave the EU could have far-reaching consequences for the promotion and protection of disability rights – not least because the majority of domestic legislation relating to disability rights originates from the EU. Recent legislative developments include:

- The Air Passenger Rights Regulation (2006), which requires assistance for people with disabilities when travelling by plane.
- The Public Procurement Directive (2014), which requires public bodies to include accessibility criteria in technical specifications for the award of business tenders; and
- The Medicinal Products Directive (2004), which requires the packaging of medicinal products to include labelling in braille.

It must be stressed that because of the diversity of people with disabilities in terms of factors such as employment status, age, gender, where they live and experience of impairment, they are also protected by more general EU legislation with a wider field of application – for example, the Employment Equality Directive (2000) prohibits discrimination on the grounds of disability in the workplace.

The rights of people with disabilities are also protected by the Charter of Fundamental Rights of the European Union and the general principles of EU law. However, as discussed in Chapter 1 of this report, the Withdrawal Bill will not retain the Charter in domestic law and will remove the ability for claims to be brought based upon the general principles.

Importantly, membership of the EU has benefitted people with disabilities by providing funding for disability rights organisations. It has also made the grant of development funds for regional infrastructure projects conditional upon meeting the needs of people with disabilities. Under the European Structural Funds (ESFs), accessibility criteria are considered for awards covering transport developments, such as the creation of new bus and rail services. During 2015-17, the EU will provide €4.5 million to support and strengthen the operational and advocacy capacity of organisations working on disability-related issues.

Withdrawal from the EU will, in all likelihood, lead to the end of most of these programmes. It is not clear whether the Government will commit to match any funding that stands to be lost or whether it will develop domestic programmes to mainstream the rights of people with disabilities in economic development plans, as the EU has (including rights held under the UN Convention on the Rights of Persons with Disabilities).

Turning to the focus of this contribution, the EU law-derived rights of people with disabilities will be at serious risk of regression if the Withdrawal Bill is not amended. Alongside the process of incorporating EU law, the Government must take complementary action to ensure that commitments to update EU laws are kept and that proposals for new legislation, which have been consulted on, are implemented when they are finalised.

Withdrawal from the EU should not deprive people of rights they reasonably expected to benefit from before the result of the referendum.

Partially transposed EU law

There has been a tendency in debates on the Withdraw Bill to describe its purpose as allowing for the 'transfer' EU law into UK law. This process of 'incorporation' is presented as straightforward and – given its reliance on delegated powers – no different to the usual tasks undertaken by the Executive on a daily basis (such as Ministers making regulations pursuant to powers provide for by primary legislation).

For EU legislation like Regulation 1177/2010 on maritime passenger rights, this is an accurate description. The Regulation is directly applicable and, as a consequence, does not require transposition into the domestic law of Member States in order to be relied upon by individuals. If action were not taken before withdrawal to retain the Regulation, it would cease to have effect in the UK. This situation has been foreseen in the Withdrawal Bill and Clause 3(1) (on the incorporation of direct EU legislation) ensures directly applicable EU law will form part of domestic law after exit day.

However, the Government has so far remained silent on its approach towards incorporating partially transposed 'direct' EU legislation.

Partial transposition occurs where individual provisions of direct EU legislation, although not requiring transposition, have been transposed. For example, some aspects of the Passenger Rights Regulation⁶¹ – concerning passengers' rights when travelling by bus and coach, find expression in the Equality Act 2010 – such as the right to transport (reservations and tickets should be offered to disabled people and people with reduced mobility at no additional cost). Other aspects of the Passenger Rights Regulation, however, such as Article 9 on access to tickets and transport without disability discrimination, have no domestic equivalent.

At face value, incorporation should not prove problematic, as rights such as those provided for by Article 9 will be saved by virtue of Clause 3(1) of the Withdrawal Bill. However in practice another outcome is possible.

⁶¹ Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 (Text with EEA relevance).

Under Clause 7(1)(b), a Minister can make provision to prevent, remedy or mitigate any deficiency of retained EU law arising from withdrawal.⁶² The Bill defines ‘deficiency’ broadly, including when retained EU law is considered “redundant or substantially redundant”.⁶³ The Bill provides no guidance on what constitutes a ‘redundancy’.

It is not difficult to envisage a scenario where a Minister justifies the repeal of an EU law Regulation on the basis that the subject matter it addresses is covered elsewhere in UK law and is thus deemed superfluous (without full consideration of whether or not it affords exactly the same protections). For the Passenger Rights Regulation, a Minister might consider a new implementing statutory instrument unnecessary, as parts of the Equality Act address the rights of passengers with disabilities. However this would lead to the loss of an important protection without a clear domestic equivalent.

To prevent rights being lost after withdrawal, the Government has been urged to undertake a comprehensive audit of all EU-derived human rights law, outlining how individual instruments are given effect in UK law and the steps it intends to take to ensure they are protected during the process of incorporation. To date, it has declined to do so.

The Government has also resisted calls to restrict the scope of Clause 7 of the Withdrawal Bill or prevent Ministers from using delegated powers to weaken substantive rights protections.⁶⁴

EU law requiring revision

Given the complexities of legislating for 28 states, the Union often adopts a flexible approach towards the implementation of legislation. In the case of Regulations, where Member States would struggle to comply with certain provisions, they may be granted a time-limited exemption (for example to allow preparations to be made for future compliance).

The UK is currently exempt from all provisions under Regulation 1371/2007, for example, except those provided for by Article 2(3).⁶⁵ These exemptions cover important protections for disabled passengers that are not provided for in domestic legislation. Parts of the Regulation that are exempted in the UK include those requiring train operators to ensure travel information is accessible for people with auditory and/or visual impairments,⁶⁶ and that the

62 Read alongside Clause 7(4), this includes the power to repeal retained EU law. This is as Clause 7(4) provides “Regulations made under this section may make any provision that could be made by Act of Parliament” (which includes repeal). One argument against the above reading is that the title of Clause 7, ‘Dealing with deficiencies arising from withdrawal’, implies that changes can only be made to retained EU law when they are directly related to the UK no longer being a member of the EU e.g. where domestic law gives effect to the decisions of an EU regulatory body that the UK is no longer bound by. This interpretation is supported by the examples of deficiencies listed under Clause 7 (2) (b). However, this list is not exhaustive, adding to the already considerable uncertainty surrounding how the power conferred by Clause 7 may be exercised.

63 Clause 7(2)(b).

64 See Liberty, Amnesty International UK, Public Law Project and Justice, ‘Committee Stage Brief on the Rights Implications of the EU (Withdrawal) Bill; Rights in need of protection’ (October 2017) <<https://www.liberty-human-rights.org.uk/sites/default/files/Joint%20HR%20Threats%20Brief%20Committee%20-%20Repeal%20Bill.pdf>> accessed 30 November 2017.

65 Article 9, 11, 12, 19, 20(1) and 26.

66 Article 8.

needs of people with disabilities and people with reduced mobility are met when train arrivals or departures are delayed.⁶⁷

The UK's exemption from these provisions is supposed to expire at the end of 2019, after we are expected to have left the EU. However in 2015 the Department for Transport consulted on the Regulation and whether the current exemptions to its operation should be removed or maintained.⁶⁸

With regard to the exemptions outlined above, of the stakeholders who responded, almost all were in favour of their removal. Of 15 responses to the question of whether Article 18 of the Regulation should remain exempt (on delays and ensuring the needs of disabled people are met), 100 per cent of respondents said it should not (including three out of three rail industry groups).⁶⁹

However Brexit raises the question of whether, without the legal expectation that the UK's exemptions will expire, the Government will either update the Regulation or legislate to cover gaps that exist in domestic legislation.⁷⁰

Current EU legislative proposals

Withdrawal from the EU also draws into question the future of EU legislation that is yet to be adopted but which, importantly, the UK has played an active role in helping develop – and to which people with disabilities in the UK have devoted a great deal of effort and energy in order to vindicate their rights.

With regard to current EU legislative proposals, the so-called 'European Accessibility Act' has generated a significant amount of interest. The Act aims to harmonise existing laws and regulations across Member States in order to improve the accessibility of a range of goods and services for disabled people. Goods and services covered by the Act include:

- General purpose computer hardware and computer operating systems
- Self-service terminals e.g. cash, ticketing and check-in machines
- 'Consumer terminal equipment' e.g. televisions
- Air, bus, rail and waterborne passage transport services
- Banking services
- e-Books
- e-Commerce

67 Article 18.

68 See Department for Transport, 'Consultation on Regulation (EC) No 1371/2007 (Summary of responses); Moving Britain Ahead' (November 2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480630/passengers_rights_responsibilities_summary_responses.pdf> accessed 30 November 2017.

69 *ibid* 21.

70 See European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on rail passengers' rights and obligations (recast)' COM(2017) 548 final.

While there are some potential overlaps between the Accessibility Act and UK domestic law, there are a number of areas where the Act would provide for new or enhanced protections.

For example, unlike the Accessibility Act, the Equality Act 2010 does not cover accessibility standards for manufactured goods. Arguably the greatest changes wrought by the Act would be for those offering financial goods and services. Banking is not covered by any domestic accessibility legislation and, as a consequence of the Act, providers would have to make significant changes to their operations. This would likely include amending the format in which information is presented to customers, including for financial services products, online and over-the-counter banking and cash machines.

These changes would address some of the challenges people with accessibility requirements face in their day-to-day lives, which stand in the way of full equality. Prior to the referendum, a number of disability rights organisations welcomed the Act as a long overdue development of UK disabilities law. The UK Government itself had been actively involved in its development and had taken preliminary steps towards preparing for its implementation.⁷¹

In light of this, failure to implement the Act – or to amend existing legislation to take account of the deficiencies it highlights – would represent a serious betrayal of a significant number of people who the Government had committed to protect.

The Accessibility Act also has implications for the future trading relationship between the UK and the EU 27. Article 114 of the Treaty on the Functioning of the European Union has been proposed as the legal basis for the Act, which allows the Union to adopt measures aimed at the establishment and functioning of the internal market.

Although its aim is to create a floor for accessibility standards across Europe, the Act would also, as a consequence, reduce regulatory divergence between Member States. For example, (accessible) cash machines could be manufactured in one Member State and sold to another without having to be altered to comply with local legislation.

Without adopting similar standards – whether by implementing the Act or amending existing laws – the cross-border provision of goods and services from the UK to the EU 27 could be restricted, adding potentially serious economic costs to the human cost of not adopting the Act.

As the area of disability rights illustrates, the process of incorporating EU law under the Withdrawal Bill will be far from straightforward. The relationship between EU law and domestic law is such that untangling the two will be fraught with difficulties.

⁷¹ See Department for Business, Innovation and Skills, 'Explanatory Memorandum on European Union Legislation (the European Accessibility Act)' (December 2015) < [https://www.parliament.uk/documents/lords-committees/eu-internal-market-subcommittee/european-accessibility-act/14799-15-accessibility-requirements-products-services-\(COM2015\)615-221215.pdf](https://www.parliament.uk/documents/lords-committees/eu-internal-market-subcommittee/european-accessibility-act/14799-15-accessibility-requirements-products-services-(COM2015)615-221215.pdf) > accessed 30 November 2017.

Alongside the need for safeguards to be added to the broad delegated powers conferred by the Withdrawal Bill, more information is required on how they will be exercised. The Government should publish detailed incorporation plans, outlining how these powers will be used and where it will legislate independently of the Withdrawal Bill.

In order to avoid the loss and reduction of rights and ensure the constitutional propriety of withdrawal, Government must develop a more sophisticated understanding of incorporation.

The Withdrawal Bill is only one part of this process – it is not, as the Government is suggesting, the silver bullet. Falling into this way of thinking will put at risk our hard won rights and freedoms.

8. FAITH SCHOOL EMPLOYMENT DISCRIMINATION



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The European Employment Equality Directive (2004/78/EC) is incorrectly transposed into UK law with respect to employment in religious schools in England, Scotland, and Wales. This is because the Equality Act 2010 has an exception written into it permitting much wider discrimination in these settings than just where a genuine occupational requirement can be demonstrated, which is all the Directive allows. Previous correspondence with the UK Government about this has indicated that its approach is that if the matter comes before an Employment Tribunal, then it expects that the EU Directive will trump the UK Act. However, this might well not be true after Brexit. Therefore, unless addressed, the Repeal Bill may result in making legal the widespread discrimination practiced by religious schools in their employment policies.

Legal situation

Article 4 of the Employment Equality Directive prohibits employers from discriminating against employees on the basis of their religion or belief, except where:

[B]y reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate (author's own emphasis)

This exception for genuine occupational requirements (GORs) is transposed into the UK's domestic legislation by the Equality Act 2010. However, unlike the Directive, the Equality Act sets out a further exception, allowing religious schools to discriminate in their employment policies even when a GOR does not exist.

More specifically, the Act allows religiously designated voluntary aided schools, academies, free schools, and private schools in England and Wales to give:

[P]reference... in connection with the appointment, remuneration or promotion of teachers at the school, to persons— (i) whose religious opinions are in accordance with the tenets of the religion or religious denomination specified in relation to the school... or (ii) who attend religious worship in accordance with those tenets, or (iii) who give, or are willing to give, religious education at the school in accordance with those tenets.⁷²

⁷² Section 60(5)(a), School Standards and Framework Act 1998. Sections 124A(2) and 124AA(6) extend the same provisions to all religiously

The same applies to the termination of the employment of any teacher,⁷³ and similarly, voluntary controlled and foundation schools (and academies that were VC or foundation schools prior to conversion) are allowed to so discriminate for up to a fifth of teaching staff, regardless of whether or not a GOR applies.

In Scotland, the law actively mandates religious schools to discriminate:

A teacher appointed to any post on the staff of any... [religious] school by the education authority... shall be required to be approved as regards his religious belief and character by representatives of the church or denominational body in whose interest the school has been conducted.⁷⁴

In other words, the exception in the Equality Act from GOR rules means that in domestic legislation, religious schools are able to discriminate much more broadly than where there can be said to be a GOR. The Directive has not been transposed properly.

Employment discrimination in practice

It clearly isn't the case that religiously designated schools can claim there is a genuine requirement for every teacher to be of a particular faith. Such a school certainly would be able to say this is true for a head of RE, and possibly also some senior teaching posts (in the name of securing the ethos of the school). But it could not say this for, for example, a PE teacher, or a maths teacher, or a science teacher, and so on.

However, this is exactly what religious schools are currently doing. Such examples are easy to find, just through a quick search of recruitment websites. And the Catholic Education Service, for instance, which is responsible for running nearly 10% of state schools in England, maintains in its pro forma staff recruitment forms that "Schools/colleges of a Religious character are permitted, where recruiting for teaching posts, to give preference to applicants who are practising Catholics".⁷⁵

European Commission investigation

In 2010 Humanists UK submitted a formal complaint to the European Commission (EC) about the disparity between the Directive and the Equality Act, triggering a formal investigation by the EC.

The Government has always maintained – publicly and in official guidance⁷⁶ – that faith

designated schools.

73 Section 60(5)(b), School Standards and Framework Act 1998. Sections 124A(3) and 124AA(7) extend the same provisions to all religiously designated schools.

74 Section 21(2A), Education (Scotland) Act 1980.

75 Catholic Education Service for England and Wales, 'Application forms' <<http://www.catholiceducation.org.uk/employment-documents/application-forms>> accessed 18 October 2017.

76 For example, see Department for Education, 'The Equality Act 2010 and schools: Departmental advice for school leaders, school staff, governing bodies and local authorities' (May 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/

schools can legally require all teachers to share its faith, but in the course of the investigation it adopted a different position. It stated that if a teacher was to bring a claim against a school on grounds of discrimination, UK law “would, if necessary, be construed and applied by a court or tribunal as permitting preferential decisions on grounds of religious belief, only to the extent that such decisions were consistent with genuine, legitimate and justified occupational requirements”.⁷⁷

This is at odds with the official guidance, is contrary to the situation understood by the CES and most religious schools, and ignores the view of the Court of Justice of the EU that it is not considered acceptable for a national government to inadequately implement a Directive, instead relying on domestic courts to resolve the difference.⁷⁸ Despite this, the EC decided to close the case without resolving the issue, shortly before the Brexit vote was scheduled to take place.

Implications of Brexit

Whether the Directive will remain in force in the UK after Brexit is to be determined, and there are therefore a number of possibilities. If the Directive ceases to apply, and it has not been correctly transposed when this happens, then schools will legally be able to discriminate far more widely than the law today should (or arguably does) permit. If the Directive continues to apply, however, but the UK pulls out of the Court of Justice, the case law requiring correct transposition of Directives may not apply.

In any case, the Government’s position to date suggests it has little appetite to resolve this issue. The Brexit process is likely to provide cover for such inaction, and allow the most significant form of illegal discrimination in employment based on a protected characteristic to endure.

Recommendations

The straightforward thing to do would be for schedule 22, paragraph 4 of the Equality Act 2010 to be repealed to bring the Act in line with the European Employment Equality Directive. Relevant English and Welsh and Scottish education law should also be amended, and the relevant guidance on the Equality Act updated. An alternative that would at least maintain the status quo would be to re-transpose the Directive, or otherwise make it clear it still has force over and above that of domestic legislation. Kerry McCarthy MP’s amendment 95 at the Committee Stage of the European Union (Withdrawal) Bill sought to compel ministers to correct incorrectly or incompletely transposed EU law, where this is found to be the case.

file/315587/Equality_Act_Advice_Final.pdf> accessed 18 October 2017. In particular, see paras 8.17 and 8.19.

77 HM Government, Conformity of various UK laws with Article 4 of Directive 2000/78/EC: The observations of the United Kingdom Government, June 2013 as quoted in Conformity of various UK laws with Article 4 of Directive 2000/78/EC: Response from the British Humanist Association to the observations of the United Kingdom Government, Para 11.

78 As per Vladimir Spidla, European Commission, ‘Reasoned Opinion: Infringement No 2006/2450’ (2009) <www.secularism.org.uk/uploads/ec-reasoned-opinion.pdf> accessed 19 October 2017.

The Government should update any relevant guidance to make it clear that religious schools can only discriminate against staff where there is a GOR.⁷⁹

79 For example, Department for Education, "The Equality Act 2010 and schools: Departmental advice for school leaders, school staff, governing bodies and local authorities" (2014) > https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/315587/Equality_Act_Advice_Final.pdf> accessed 18 October 2017.

9. IMPLICATIONS FOR EQUALITY, EMPLOYMENT AND HUMAN RIGHTS IN SCOTLAND



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The European Union Withdrawal Bill (EUW Bill) was published on 13 July 2017. It repeals the European Communities Act 1972 (ECA) on 'exit day' (clause 1). The main provisions of the Bill, which has been described as 'a complex mixture of constitutional change and legal continuity',⁸⁰ provide for the creation of a new distinct body of law ('retained EU law') and broadly-framed delegated powers for Government to amend this body of law; new instructions to the courts on how to interpret retained EU law; and amendments to the legislation that underpin devolution. This note provides a summary of the main implications of the Bill for Scotland with particular focus on employment and equality laws, and human rights protections.

The Repeal Bill and Scotland

The Scottish Government's main concern centres on Clause 11 of the Repeal Bill, which amends the provision of the Scotland Act 1998 that prohibits the Scottish Parliament from legislating contrary to EU law. Clause 11 amends Section 29 of the Act so that the prohibition applies to retained EU law. Although this does not appear to alter the scope of devolved competence, it means that any 'repatriation' of powers from the EU in devolved areas will not be to the devolved legislatures but will lie with the Westminster Parliament notwithstanding that any administrative arrangements for the implementation of devolved matters will continue to be the preserve of the devolved administrations.

Describing the Repeal Bill as a 'blatant power grab', the Scottish Government has indicated that it will withhold legislative consent unless amendments are made. This could result in a major constitutional crisis. It will be possible, by Order in Council, for the UK Government to specify that certain areas do not fall within the prohibition in Clause 11 and the Explanatory Notes to the Bill indicate that the Government is willing to do so in areas where no UK-wide approach is necessary. Although decisions over which areas to repatriate to the devolved legislatures as well as whether to modify retained EU law in devolved areas (where no repatriation has taken place) will lie with the UK Parliament, the Scottish Government may have some political sway here for reasons set out in the conclusions below.

⁸⁰ Jack Simson Caird, 'The European Union (Withdrawal) Bill: Constitutional Change and Legal Continuity' (*UK Constitutional Law Association Blog*, 18 July 2017) <<https://ukconstitutionallaw.org/2017/07/18/jack-simson-caird-the-european-union-withdrawal-bill-constitutional-change-and-legal-continuity/>> accessed 18 October 2017.

Employment and equality law and human rights in Scotland

Employment and industrial relations, health and safety, and ‘equal opportunities’⁸¹ (and thus equality law) are reserved matters under Schedule 5(H) and (L2) of the Scotland Act 1998. In the case of employment, there are some minor differences between the laws that apply in Scotland and in England but these are not in areas impacted by EU law. In the equality context, the key EU rights are implemented almost exclusively through UK legal sources, and in particular the Equality Act 2010. There is some limited Scottish provision, specifically where there is interplay with devolved legislation in, for example, education and housing, where legislative consent motions have been required. The concerns that arise in relation to the Repeal Bill’s impact on employment and equality law in the Scottish context are, for the most part, UK-wide and fall into two main areas.

First, the Repeal Bill raises concerns over the future interpretation of EU-derived employment and equality laws by UK courts. Clause 5(2) retains the principle of supremacy of EU law but only as it applies to the interpretation of retained EU law. A post-Brexit Act of Parliament which conflicts with or overturns EU-derived laws would therefore take precedence. It is also not clear which would prevail in the event of a clash between the common law and retained EU law post-Brexit. Clause 6(3) provides that all relevant case law of the Court of Justice of the EU decided before exit day should be used by British courts to determine the ‘validity, meaning and effect’ of retained EU law. However, Clause 6(1) clarifies that British courts will not be bound by post-Brexit judgments of the Court of Justice. This is particularly relevant in the employment and equality fields as the progressive jurisprudence of the Court of Justice has significantly widened the scope of associated protections and rights in the UK.

Second, the so-called Henry VIII clauses contained in clauses 7-9 of the Repeal Bill raise particular concerns in relation to some EU-derived employment and equality laws to which previous Westminster administrations have been particularly opposed. Examples include information and consultation on collective redundancies; working time; some health and safety regulations; protections for agency workers and some areas of equality law such as equal pay where the business lobby has been particularly vocal. Safeguards for the current range of EU-derived employment and equality rights can only be put in place if the scope of the Henry VIII clauses is clearly defined.

Turning specifically to the potential threats posed by Brexit to human rights, the main area of concern for Scotland, as elsewhere, relates to the position of the Charter of Fundamental Rights of the EU after Brexit. Despite the political assurances contained in the White Paper preceding the Bill that all current protections arising from EU law will be preserved at the date of exit,⁸² clause 5(4) of the Bill provides that ‘The Charter of Fundamental Rights is not part of domestic law on or after exit day’. The Charter contains rights which go beyond those of the European Convention on Human Rights and includes important protections in evolving

81 Although with some limited exceptions (see Schedule 5 L2 Scotland Act 1998).

82 See Department for Exiting the European Union, ‘Legislating for the United Kingdom’s Exit from the European Union’ (May 2017) <<https://www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union>> accessed 18 October 2017.

areas concerning social and workers' rights. Its exclusion could give rise to a diminution in existing rights as well as heightened uncertainty regarding the future protection of equality and human rights standards in the UK particularly with the potential removal of European jurisprudential influence on British legal institutions.

Conclusion

Although the reserved nature of employment and equality laws may appear to rule out the Repeal Bill having any particular Scottish-specific impact, it is important to remember the inter-relationship between the devolution settlement and the means and nature of the UK's departure from the EU. Against the backdrop of a 62% Scottish vote in favour of 'remain' in the Brexit referendum, a weakened (post-election) Westminster Government may find itself unable to resist completely any appeasement that might be requested by the Scottish Government in order to acquire its support in the ongoing Brexit negotiations. With the pending devolution of the management and operation of employment tribunals to the Scottish Parliament coupled with the concerns outlined above, it seems at least likely that the Scottish Government will seek greater powers over substantive employment and equality rights and duties in a post-Brexit UK.

10. BREXIT, DEVOLUTION AND HUMAN RIGHTS IN WALES

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Overview

This short note outlines the way human rights are currently protected and promoted in Wales, highlighting the emerging differences between Wales and England. It explains the imminent move from the conferred to reserved model of devolution, and presents the human rights and equality considerations arising from the UK's withdrawal from the EU.

Devolution background

The model of devolution seen in Wales has been through a series of changes since the Government of Wales Act 1998 (GOWA). By 2006, a formal institutional division between legislature (Assembly) and executive (Welsh ministers in Welsh Assembly Government) was in place. In turn, the Assembly subsequently gained primary legislative powers, supplementing the ministerial and secondary legislative powers under the original GOWA.

The Welsh model of devolution operates on the basis of a conferred powers model, though this will move to a reserved powers model, familiar in Scotland and Northern Ireland, in April 2018. This will see the changes brought about by the Wales Act 2017 coming into effect. Under the reserved powers model, the default position is that powers lie at the devolved level, unless they have been explicitly reserved. This reverses the approach of the conferred model, under which Welsh competence lies over those things that have been explicitly conferred under GOWA.

It was hoped that this shift would bring a degree of clarity and certainty to the distribution of powers. A robust reading of devolved conferred powers has seen Wales legislate in areas that the existing GOWA is silent on, where individual measures 'fairly and realistically' relate to a conferred power. In this way, separate Wales only laws governing employment rights have been passed on Agricultural Wages (through the conferred powers over agriculture, Agricultural Sector (Wales) Act 2014) and on Trade Union Rights (through powers over the public sector, Trade Union (Wales) Act 2017).

Unlike primary legislation from the UK Parliament, Welsh Assembly legislation is susceptible to review, which takes place before the Supreme Court. This may be brought either before or after Royal Assent. Grounds which could see legislation struck down include the Assembly acting outside competence, and where Welsh law, and ministerial acts, fail to respect EU law or the European Convention on Human Rights (ECHR).⁸³

⁸³ Section 108 (6)(c), GOWA 2006.

Human rights in the Welsh legal context

Respect for the ECHR is firmly embedded in the devolution settlement, and applies to actions of the Welsh ministers (Section 81 GOWA), and to legislative acts of Assembly (Section 108(6) GOWA). Legislation may be struck down for lack of compliance with the ECHR, as happened with the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill. The Bill, making insurers liable for the costs to the NHS of asbestosis disease was deemed by the Supreme Court to be both outside competence (it had been introduced under powers relating to the organisation and funding of the NHS) as well as incompatible with the insurance companies' right to peaceful enjoyment of possessions (Article 1, Protocol 1 ECHR).⁸⁴

In addition to this status afforded to ECHR under the devolution settlement, there is, more generally, said to be a distinctive Welsh approach being taken to human rights and equality, which is leading to an increasing divergence in practice between England and Wales.⁸⁵ Hoffmann reports that 'significant to the development of a distinctively Welsh human rights law is the willingness of successive Welsh administrations to articulate policy in terms which reflect notions inherent in human rights: dignity, humanity, equality and social justice'.⁸⁶

Some commonality is of course to be expected. England and Wales share common institutions (the Equality and Human Rights Commission in Wales is part of the GB EHRC) and legislative frameworks (the Equality Act 2010 and the general Public Sector Equality Duty). However, under powers granted in the Equality Act, the Welsh ministers have adopted Welsh Specific Equality Duties (Equality Act Specific Duties (Wales) Regulations 2011).

The devolution legislation also recognises a range of potentially significant powers for the Welsh ministers, including the promotion of well-being under Article 60 GOWA which provides that ministers may do anything they consider appropriate to promote economic, social or environmental well-being of Wales; and the equality of opportunity obligation, which requires ministers to make appropriate arrangements with a view to exercising their functions with due regard to principle of equality of opportunity for all people (Article 77 GOWA).

The Welsh Government every four years introduces its Strategic Equality Plan and Equality Objectives, the current 2016-2020 iteration has as the first of the objectives to "put the needs, rights and contributions of people with protected characteristics at the heart of the design and delivery of all public services".⁸⁷

Primary legislative competence on equality and human rights matters is at present, though, limited, and includes powers to legislate in respect to equal opportunities in relation to public authorities (the Assembly, Welsh Assembly Government, and anyone exercising functions

⁸⁴ *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill - Reference by the Counsel General for Wales* [2015] UKSC 3.

⁸⁵ See National Assembly for Wales, Communities, Equality and Local Government Committee, 'The Future of Equality and Human Rights in Wales' (August 2013) <<http://senedd.assembly.wales/mglIssueHistoryHome.aspx?IId=6256>> accessed 18 October 2019.

⁸⁶ *ibid.*

⁸⁷ Welsh Government, 'Strategic Equality Plan and Equality Objectives 2016 – 2020: Working towards a fairer Wales' (November 2016) <<http://gov.wales/docs/dsjlg/publications/equality/161214-strategic-equality-plan-en.pdf>> accessed 18 October 2018.

of a public nature over whom Welsh ministers exercise functions or fund directly or indirectly (Section 14, Schedule 7).

Competence also exists in allied areas e.g. in respect to social welfare and the well-being of children. Within this framework of powers, Wales has taken a number of distinctive initiatives, including building in to domestic law respect for the UN Convention on the Rights of the Child, with a duty for public authorities to pay due regard to the rights of the child, reinforced through a requirement for Child Rights Impact Assessments to be undertaken (Rights of Children and Young People (Wales) Measure 2011). The duty to pay due regard to the principles of UNCRC is supplemented by a duty in respect to UN Principles for Older Persons in the exercise of functions covered by the Social Services and Well Being (Wales) Act 2014. The Wellbeing of Future Generations (Wales) Act 2015 meanwhile sets out the seven well-being goals (including a healthier Wales, a more resilient Wales, and a more equal Wales) which public bodies in Wales must work to achieve. A Future Generations Commissioner is entrusted under the legislation with the role of promoting sustainable development across Welsh public bodies.

Additional Wales-specific legislation bearing on rights and equality include the Education (Wales) Act 2014; Housing (Wales) Act 2014; and Violence Against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015.

The shift to the reserved powers model of devolution under the Wales Act 2017 confirms the role for the devolved authorities in observing and implementing international agreements, including the ECHR (Section 10, Schedule 7A), whilst reserving the matter of equal opportunities (Section N1, 187, Schedule 7A) with the exception of a series of carve outs – including ‘imposing duties on any devolved Welsh Authority’ to carry out its functions ‘with due regard to the need to meet the equal opportunity requirements’. A power to introduce the public sector socio-economic inequalities duty, never commenced for England, is included within the legislation (Section 45, Wales Act 2017).

Brexit: Points of concern for rights protection in wales

Unless agreement is made to the contrary, on withdrawal from the EU, the jurisdiction of the Court of Justice will end and the underpinning legal enforceability of EU derived rights brought about by the doctrines of supremacy, direct effect and state liability will fall away.

The ability of the Welsh Assembly to legislate to resist any roll back at UK level of social rights currently underpinned by EU law will depend on the competences that will be operative under the new Wales Act 2017. The Act reserves all employment law (apart from the Agricultural Sector (Wales) Act) and will close down any opportunities for legislation which may exist under the conferred model. More generally, the UK Government has indicated that even in devolved areas, it will consider the introduction of UK wide frameworks to replace those currently drawn from EU law. The list of areas released by the Scottish Government includes Equality.

Wales, unlike the UK overall, is a current net beneficiary of EU funds, and the end of support from the European Social Fund etc. may have particularly severe consequences for Wales-based third sector organisations with equality objectives, unless replacement sources of funding are made available. Wales may also find itself cut off from the softer collaborative networks and governance structures operating across the EU which have provided policy learning opportunities.

11. IMPLICATIONS FOR HUMAN RIGHTS AND EQUALITY IN NORTHERN IRELAND



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Context

Northern Ireland voted to remain in the EU and that fact continues to be significant. As predicted, Brexit is destabilising the peace process. Common membership of the EU has been a basic assumption of that process and the 'special relationship' between the UK and Ireland has also been a factor. There is extensive debate, at all levels, on the unique circumstances of Ireland/Northern Ireland and how these will be effectively reflected in the discussions ahead. These constitutional conversations are now travelling well beyond the Westminster Parliament, given the emphasis that the EU has placed on, for example, the Good Friday Agreement in the negotiations (including a commitment to 'no diminution' in the protection of human rights and equality).

At the time of writing, the Northern Ireland Assembly and Executive are still not functioning and difficult negotiations on their restoration are continuing. Brexit was one of the reasons listed in the resignation letter of the then deputy First Minister (the late Martin McGuinness) in January 2017. That means that Brexit contributed directly to the current crisis and the process is therefore progressing without an Executive and Assembly; consent cannot be given (and would be highly unlikely). Even if that was not the case, and the institutions were there, it is not apparent that there would be consensus or agreement on a specifically Northern Irish approach to Brexit. The two major parties of government took opposite sides in the Brexit debate (DUP – Leave; Sinn Féin – Remain). The DUP has, following the Westminster elections in June, concluded a 'Confidence and Supply Agreement' with the Conservative Government. The party has continued to express its established view on Brexit; this includes its rejection of the idea of 'special status' and the party, for example, has voted with the Government on the Repeal Bill. A notable point, however, is that things changed in Northern Ireland as a result of the Assembly elections in March, with unionist political parties losing their overall majority. If the Assembly is eventually restored then this may well have significant implications, including for human rights and equality in Northern Ireland.

The human rights and equality context in Northern Ireland is distinctive and advances in an environment shaped by principles of unionist/nationalist power-sharing and constitutional thinking that embraces relationships across these islands. The EU's contribution in the field of equality is widely acknowledged as valuable. Northern Ireland remains a place that is emerging from violent conflict, and governmental structures flow from a political process and peace agreement with domestic and international legal implications. The centrality of human rights and equality to the Good Friday Agreement is much commented upon; even if many of

the promises of peace have not been realised.

Northern Ireland has had its own Bill of Rights process. This led to proposals to the British Government in 2008 from the NI Human Rights Commission, and there are ongoing discussions about a Charter of Rights for the island of Ireland. There have been calls for the enactment of a Single Equality Act, and serious gaps have opened up between equality guarantees here and in Britain. As with the rest of the UK, the Human Rights Act 1998 applies in Northern Ireland, and 'Convention rights' are woven into the Northern Ireland Act 1998, as well as being key to reform in areas such as policing. There is a sense that Brexit feeds into a wider culture of hostility to rights and equality; therefore reassurance is urgently required that there will be no regression in relation to existing guarantees.

The Repeal Bill and human rights and equality

The general constitutional, human rights and equality concerns with the Repeal Bill are well known and extensively documented in this report. So, for example, the position taken on the EU Charter of Fundamental Rights is of considerable concern in Northern Ireland too. This will lead to a loss of rights, in addition to the departure of the more muscular remedies that are available through EU law. It is a backward and unwelcome step that raises serious questions about the UK's commitment to 'no diminution'.

The Repeal Bill will amend the Northern Ireland Act 1998. The competence of the Northern Irish administration is currently constrained with reference to compliance with EU law (and other matters such as 'Convention rights'). The Bill will remove this and essentially replace it with 'retained EU law'. Ministers at Westminster will have the 'transitional' power of 'correction', and a carefully circumscribed 'correction' power for devolved ministers is also present.

The approach of the Bill, at first glance, might appear to hold to the current position but in reality raises many challenging questions of constitutional principle, and will promote considerable uncertainty on the precise boundaries of devolved competence. Serious issues arise for Northern Ireland in the Bill as currently drafted (this remains the case even though the Bill does indicate that the regulations on 'dealing with deficiencies' and 'operational effectiveness' should not be used to amend or repeal the Northern Ireland Act 1998 or the Human Rights Act 1998). Keep in mind that this significant legislative change will be taken forward without the participation or agreement of the political institutions in Northern Ireland, and therefore without the power-sharing safeguards that they provide. All in a political context where the Westminster Government has made a deal with one of the major parties.

In Northern Ireland, matters such as equality and employment law and observing and implementing international obligations (including EU law obligations) are, for example, devolved (although Section 75 – the 'constitutional' equality provision in the Northern Ireland Act – is a reserved matter, and note the point above about amendment or repeal of the Northern Ireland Act). Equality and employment are areas where EU law and case law have

much to say, and have impacted positively on laws, policies and practices in Northern Ireland.

The Repeal Bill will mean increased uncertainty, tension and potential confusion. Powers that would have come to Northern Ireland will be diverted for now to Westminster, in the context of a limited range of safeguards and exceptions. While it may be agreed that these powers can eventually be conferred on Northern Ireland (although how that process will in fact function in practice remains to be seen) the current position does merit the 'power-grab' label it has been given. This situation is exacerbated by the Conservative Party – DUP deal; there are power-sharing protections wrapped around the Northern Ireland arrangements (including on Executive-level agreement and cross-community consent) that simply do not exist at Westminster. There is a strong feeling in Northern Ireland (particularly evident in the reaction of the nationalist/republican community) that it is being taken out of the EU against its will. Little thought is being given to the long-term damage this is all doing to the prospects for peace and reconciliation on this island and between these islands.

Putting aside for a moment worries about UK Government 'impartiality', the DUP record on matters of human rights and equality is not impressive (in the Northern Ireland Executive, Assembly or at the Westminster Parliament). Taken together this picture is causing much anxiety; it underlines the pressing need for safeguards on the face of the legislation that respect and protect human rights and equality in unequivocal terms. For Northern Ireland at least, this is arguably now essential if the UK is going to respect its commitment in the negotiations to 'no diminution' on rights and equality.

Conclusions

The Repeal Bill plainly lacks sufficient safeguards on human rights and equality. Given the scale of what is being proposed, and the level of uncertainty it promotes, there is a strong case for amendment. Many of the implications are already well-documented and have been discussed, in relation to constitutional principle, the rule of law and ministerial 'power-grabs'. There are additional reasons why this is of particular concern for Northern Ireland. Human rights and equality are intended to be central to the peace process. Although the Human Rights Act 1998 appears safe for now the volatility of UK politics means that it is not secure while the promise to 'repeal and replace' remains intact. The design of the structures in Northern Ireland were carefully crafted over decades, and this Bill injects unhelpful levels of uncertainty, including in areas where there is sharp disagreement. It suggests that in the rush to address the practical mess created by Brexit, the UK Government is prepared to sacrifice established constitutional values, harm relationships across these islands, and even risk the future of the 'union state' itself.

There is good reason to insist that the Repeal Bill should include an explicit non-regression provision that clearly protects human rights and equality guarantees. But thought also must be given to the future progressive development of the law in line with EU developments (on equality, for example), as well as the need for explicit Northern Irish safeguards. Here care is required on how respect for the Good Friday Agreement (in all its parts) is to be demonstrated under this and related legislation (something that is of great concern to the EU too). It is also

time to begin thinking again about the human rights and equality promises of peace that have not been delivered, including the proposed Bill of Rights for Northern Ireland. Surely this Bill of Rights project (and discussions of a Charter of Rights for the island of Ireland) should be revisited in the light of Brexit?

Finally, it must be stressed that this process is advancing without a functioning Executive and Assembly in Northern Ireland, against the wishes of the electorate and with one section of the community effectively silenced. There is a need for imaginative thinking to ensure that some of the concerns outlined above are reflected fully in the debates to come, and that an inclusive range of voices from Northern Ireland are heard in this constitutional conversation.

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