

UK's decision to leave the EU:

Update on European Union (Withdrawal) Bill

August 2017

Equality Commission

FOR NORTHERN IRELAND

EQUALITY COMMISSION FOR NORTHERN IRELAND

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Purpose

This briefing paper provides an update on the European Union (Withdrawal) Bill, recent developments in Northern Ireland and Great Britain; and sets out a number of next steps.

Introduction

On 13 July 2017, the UK Government published the European Union (Withdrawal) Bill ('the Withdrawal Bill').

The Withdrawal Bill will:

- repeal the European Communities Act;
- convert EU law into United Kingdom law; and
- create the necessary powers to make secondary legislation so as to enable corrections to be made to laws that would otherwise not operate appropriately once the UK has left the EU and to enable domestic law to reflect the content of any withdrawal agreement.

In general, the provisions of the Bill reflect the approach set out in the UK Government's *Great Repeal Bill: White Paper*¹. The main provisions of this were outlined in the Commission's recent briefing paper *Update on equality law considerations relating to the UK's decision to leave the EU*². Some *additional points* of particular note are set out below.

Withdrawal Bill

Overview of provisions

Powers

The Bill will confer certain powers on the UK Government and the devolved administrations. It will be noted that the Bill will place restrictions on the

¹ UK Government (March 2017) [Great Repeal Bill: White Paper](#): Legislating for the United Kingdom's withdrawal from the European Union.

² ECNI, June 2017, [The UK's decision to leave the EU: Update on equality law considerations](#),

powers to be conferred on devolved administrations, and their use will be limited to domestic legislation within areas of devolved competence.

There is a power to make corrections to retained EU law to deal with deficiencies that arise due to the UK's exit. The powers allow for corrections to be made to both primary and secondary legislation (known as '*Henry VIII*' powers). Importantly, the power to correct deficiencies cannot be used by the UK Government or devolved authorities to, for example, amend parts of the Northern Ireland Act 1998 or the Human Rights Act 1998. This power is temporary and cannot be used more than two years after the UK's exit.

There are also powers to enable the UK Government and devolved administrations to comply with international obligations, and to implement the withdrawal agreement. The power to implement the withdrawal agreement can only be used up to exit day and it cannot amend/repeal the Human Rights Act 1998.

Interaction with devolved administrations

As regards the impact of the Withdrawal Bill on the devolved administrations, the UK Government has stated as follows:

“The Bill will replicate the common UK frameworks created by EU law in UK law, and maintain the scope of devolved decision making powers immediately after exit. This means that any decisions that the devolved authorities can take before exit, they can continue to take after exit.

This will be a transitional arrangement to provide certainty after exit and allow intensive discussion and consultation with devolved authorities on where lasting common frameworks are or are not needed.

Where it is determined that a common approach is not required, the Bill provides a power to lift the limit on devolved competence in that area”³.

It will be noted that concerns have been raised by the Welsh and Scottish First Ministers about the impact of the provisions of the Bill on the powers of the devolved administrations⁴.

The UK Government has denied that the Bill's provisions amount to a 'Westminster land grab' and has indicated that there is a need to ensure that decision making powers returning from the EU are allocated within the UK in a way that works⁵. It has indicated that this will be vital in order to protect the

³ Dept for Exiting the EU: [The Repeal Bill: Factsheet 5: Devolution](#) at page 1

⁴ For example, the First Minister for Wales, Carwyn Jones and the First Minister for Scotland, Nicola Sturgeon issued a joint-statement on the Bill indicating their belief that the Bill was 'a naked powers grab' and 'an attack on the founding principles of devolution and could destabilise our economies' See [Joint Statement](#) of First Minister for Wales and First Minister for Scotland 13 July 2017

⁵ Dept for Exiting the EU: [The Repeal Bill: Factsheet 5: Devolution](#)

UK internal market, strike trade deals, protect common resources and fulfill international obligations.

The UK Government has also confirmed in July 2017 that senior officials have written to the interim Head of the Northern Ireland Civil Service to instigate discussions on where future common approaches are needed⁶.

Finally, it will be noted that the UK Government has published its *Northern Ireland and Ireland: Position Paper*⁷ that outlines its position on how to address the unique circumstances of Northern Ireland and Ireland in light of the UK's exit from the EU.

The UK Government has, for example, proposed that both the UK and the EU should:

- affirm the ongoing support of the UK Government and Irish Government, and the European Union, for the peace process;
- formally recognise that the citizenship rights set out in the Belfast ('Good Friday') Agreement will continue to be upheld; and
- agree to the continuation of PEACE funding to Northern Ireland and border counties of Ireland.

The Commission has recommended that the Government should ensure that the UK's exit from the EU does not negatively impact on initiatives that support equality, good relations and the peace process⁸. We have also highlighted that the right to equality of opportunity, including in all social and economic activity, was a core issue in the Good Friday/ Belfast Agreement and that equality and good relations should be treated as priority issues in EU exit negotiations.

Equality Analysis

The UK Government, in addition to producing detailed explanatory notes⁹ and a series of factsheets¹⁰, including one on devolution¹¹, has published an equality analysis¹² on the Withdrawal Bill. Key points to note in relation to the equality analysis are summarised below.

- Overall, the UK Government concluded that 'there may potentially be impacts, both adverse and positive, on those with protected characteristics as defined by the Equality Act 2010 when the UK leaves

⁶ [Reply](#) to written question by Chris Skidmore, Minister for the Cabinet Office, 25 July 2017

⁷ UK Government: [Northern Ireland and Ireland: Position Paper](#), 16 Aug 2017

⁸ For further information see www.equalityni.org/EUExit.

⁹ Dept for Exiting the EU: The Repeal Bill: Explanatory Notes

¹⁰ Dept for Exiting the EU: [The Repeal Bill: Factsheets](#)

¹¹ Dept for Exiting the EU: [The Repeal Bill: Factsheet 5: Devolution](#)

¹² Dept for Exiting the EU: [The Repeal Bill: Equality Analysis](#)

the EU¹³. It was of the view that where potential equalities impacts were identified ‘these are likely to be limited’¹⁴.

- The UK Government reiterated its commitment to ensuring that the protections in the Equality Act 2010 will continue to apply once the UK has left the EU. It is important to note that the *White Paper* had expressly stated that “*all the protections covered in the Equality Act 2006, the Equality Act 2010 and equivalent legislation in NI will continue to apply once the UK has left the EU*”¹⁵. The UK Government also reiterated its commitment, in its equality analysis, to protect workers’ rights that are enjoyed under EU law and to ensure that they keep pace with the changing labour market. It has indicated that ‘the UK has some of the strongest equalities legislation in the world and the Government will continue to make sure these rights are protected’¹⁶.
- The UK Government confirmed its commitment to maintaining the continued role of the Equality and Human Rights Commission (EHRC), NIHRC and ECNI and recognised their important roles in enforcing and monitoring equality and human rights law in the UK.
- The UK Government confirmed that in exercising powers in the Bill, it and the devolved administrations would continue to be subject to the public sector duties and that public authorities would need to give due regard to the potential equality implications of any changes that are being introduced as a result of the UK’s exit from the EU.
- As regards the Bill’s provisions that will remove the **Charter of Fundamental Rights** (‘the Charter’) from UK law, the UK Government indicated that it does not consider that there will be an impact on individuals protected under the Equality Act 2010. It will be noted that the Charter contains the fundamental rights and principles protected in EU law. These include equality before the law, non-discrimination and equality between men and women.

The UK Government’s *Fact Sheet* on the Charter also indicates that the Charter did not create any new rights and that it only applies to Member States when acting within the scope of EU law and, as such, will cease to have any real relevance when the UK exits the EU¹⁷. It also considers that its removal from UK law would not affect substantive rights that individuals already benefit from in the UK¹⁸.

¹³ Ibid at p13

¹⁴ Ibid p3

¹⁵ UK Government (March 2017) [Great Repeal Bill: White Paper](#): Legislating for the United Kingdom’s withdrawal from the European Union.

¹⁶ Dept for Exiting the EU: [The Repeal Bill: Equality Analysis](#), p13

¹⁷ Dept for Exiting the EU: [Factsheet 6: Charter of Fundamental Rights](#)

¹⁸ Ibid

It has also indicated that the Bill will make no changes to the UK's substantive obligations under the European Convention on Human Rights (ECHR), nor the Human Rights Act 1998¹⁹.

Further, it has confirmed that where Article 14 of the ECHR (prohibition of discrimination) is engaged, individuals will still be able to challenge domestic legislation or the actions of public authorities which they consider to be in breach of equality and non-discrimination rights²⁰.

- As regards the Bill's provisions on changes to the way in which **general principles of EU law** operate in UK law after the UK exits, the UK Government has indicated that there may be a limited impact on individuals protected under the Equality Act 2010.

These changes will mean that, after the UK's exit, it will no longer be possible for individuals to bring a claim or for courts to quash an administrative action or to disapply law on the grounds that it breaches the general principles of EU law. The general principles include equality before the law, non-discrimination and equality between men and women. It is important to note that there have been cases where national courts have been required to disapply national law on the grounds that it was in breach of the non-discrimination principle²¹.

- The UK Government concluded that the Bill's provisions relating to a change in the **direct effect of directives**²² was likely to have a limited impact on individuals protected under the Equality Act 2010. The Bill provides that, after exit, individuals will no longer be able to rely on the principle of direct effect in respect of *unimplemented* provisions of a directive; unless it has been recognised by the CJEU, a domestic court or tribunal prior to EU exit. It will be noted that whilst the Government has indicated that it has a 'good record on transposing directives'²³, there have been delays in Northern Ireland as regards the transposition of equality directives²⁴.
- The UK Government indicated, as regards the Bill's provisions on the **pre-exit case law of the CJEU**, that it recognised that '*the proposed provision might create both beneficial and/or adverse impacts*' on those

¹⁹ Ibid

²⁰ Dept for Exiting the EU: [The Repeal Bill: Equality Analysis](#), p7

²¹ For example, *Mangold v Helm (2005)*, as cited in [The Repeal Bill: Equality Analysis](#) p 6

²² This principle means that where EU law provisions are sufficiently clear, precise and unconditional, individuals can rely on them 'directly' as against the state if the member state has not properly implemented a directive.

²³ See Dept for Exiting the EU: [The Repeal Bill: Equality Analysis](#) p9

²⁴ For example, it will be noted that in 2016, OFMDFM, introduced changes to the sex discrimination legislation in NI in order to address some of the concerns raised by the EU Commission in relation to transposition of the Recast Directive (Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment between men and women (recast) consolidated a number of existing EU Directives on gender equality).

individuals protected under the Equality Act 2010 where a court departs from retained CJEU case law²⁵.

The Bill's provisions will end the jurisdiction of the CJEU in the UK. It will mean that UK courts and tribunals will not be bound by the CJEU decisions made after exit day, and domestic courts will not be able to refer cases to the CJEU.

Further, whilst UK courts will be able to take CJEU judgments into account when making decisions, they will no longer be required to do so. Any question as to the meaning of EU –derived law will be determined by UK courts by reference to the CJEU's case law as it exists on the day the UK leaves the EU. After exit, the Supreme Court and the High Court of Justiciary will be able to depart from the case law inherited from the CJEU.

- The UK Government has indicated, as regards the Bill's provisions on the removal of the ability to claim **Francovich damages**²⁶, that they are likely to have a limited impact on individuals protected under the Equality Act 2010.

Progress of Bill through Parliament

In terms of the progress of the Bill through Parliament, the Bill has received its First Reading and is due to receive its Second Reading on 7-9 September 2017.

It is understood that the House of Commons' Committee stages²⁷ will be in early October and the House of Lords' stages will be in December 2017. It is also anticipated that the UK Government will seek to achieve Royal Assent of the Bill in March 2018. The UK is expected to leave the EU on 29 March 2019 and the UK Government has indicated that it will bring forward a motion on the final agreement to be voted on by both Houses of Parliament before it is concluded²⁸.

EHRC recommendations on Withdrawal Bill

Following publication of the Withdrawal Bill, the Equality and Human Rights Commission published a [briefing](#) on the Bill.²⁹

Next steps

The Commission will continue to raise awareness and secure support for its policy recommendations including engaging with key stakeholders including

²⁵ See Dept for Exiting the EU: [The Repeal Bill: Equality Analysis](#) p12

²⁶ In the *Francovich* case, the CJEU indicated that in some circumstances states have to compensate individuals for damage that they suffer as a result of a state's breach of EU law.

²⁷ Committee Stage, Report Stage and Third Reading.

²⁸ See [Great Repeal Bill: White Paper: Legislating for the United Kingdom's withdrawal from the European Union](#) at para 1.18

²⁹ EHRC, [Briefing on The European Union \(Withdrawal\) Bill](#), July 2017

the Executive Office, elected representatives and partner bodies such as the NI Human Rights Commission and EHRC.

We will also be participating in range of key conferences/seminars, including a UK-wide conference organised by Oxford Human Rights Hub on '*The Impact of Brexit on Equality Rights*' in the Autumn.

The Commission will maximise opportunities to influence the passage of the Withdrawal Bill through Parliament, including at the House of Commons' Committee stages likely to take place in October 2017.

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