

## **Written submission from the Equality and Human Rights Commission (OEU0040)**

### **Executive summary**

The Equality and Human Rights Commission (the Commission) has a statutory power to advise Government on the effectiveness of equalities and human rights law. Following the UK's decision to leave the EU it will carefully scrutinise and advise Government and Parliament on proposals which have implications for the protection or advancement of equality and human rights in the UK, and will seek opportunities to preserve and enhance protections.

The UK leaving the EU could have the following implications for equality:

- It would be possible for the UK to repeal domestic laws which protect or advance equality and human rights, which we are currently required to have in place by EU laws.
- The UK would not be bound to implement EU laws which come into force after the UK has left the EU, some of which may enhance protection against discrimination.
- The removal of certain constraints under EU law, for example, rules which regulate public procurement and prohibit more favourable treatment of a person because of a protected characteristic, may give rise to additional opportunities to promote equality.
- Some rights protected by the Charter of Fundamental Rights (the Charter) which advance equality will no longer be protected in our domestic legal order.
- The future status of the case law of the Court of Justice of the European Union (CJEU, formerly European Court of Justice or ECJ) in relation to domestic legal concepts, which are derived from or reflect concepts in EU law, will be uncertain.
- The European Convention on Human Rights (ECHR) does not provide an equivalent mechanism to EU law to enforce equality rights protection, either domestically, or at the international level.
- The importance of maintaining a focus on equality and human rights issues during the EU exit negotiations and their aftermath should not be understated. Government, Parliament, the courts, the Commission, and the other UK National Equality Body (NEB) and National Human Rights Institutions (NHRIs), will all have important roles to play, alongside civil society.

### **Recommendations**

The UK is currently a world leader in relation to the protection and promotion of equality and human rights and should continue to be so. In the Commission's view, at least the current level of equality and human rights protection should be

maintained now and in the future. To that end, we make the following key recommendations in relation to the legal framework on equality:

- Domestic rights-enhancing laws which are currently underpinned by EU law should not be diminished.
- EU rights-enhancing laws which currently have effect in the UK without domestic implementation should be given domestic effect.
- The UK Government should consider whether the removal of constraints imposed by EU laws provides the opportunity to introduce measures to further advance human rights or equality.
- The UK Government should implement those parts of the Equality Act 2010 that are not in force.
- The UK should make an explicit commitment to remaining amongst the best in the world in relation to the protection of equality and human rights. It should make a commitment to analyse future rights-enhancing laws emanating from the EU and elsewhere, with a view to considering whether similar measures are appropriate for implementation in the UK.
- The Government should ensure clarity in relation to the status of existing and future CJEU case law in the domestic legal order.
- The UK Government should conduct equality impact assessments and human rights impact assessments of all changes in the law that result from EU exit to ensure no regression.
- A very careful analysis by Government and Parliament will be required of the protections that will be lost when the Charter ceases to have effect.
- If existing levels of protection are to be preserved following EU exit, it is likely to be necessary to enhance the status of some international human rights obligations in domestic law. In particular, the proposed Bill of Rights may be an opportunity to fill some of the gaps left when the Charter no longer applies in the UK.
- Further entrenchment of equalities legislation (and other human rights) would be desirable, including by incorporating certain aspects of the UN human rights framework into domestic law.
- Consideration should be given either to ratifying Protocol 12 ECHR, or to enacting a freestanding principle of equal treatment or equality guarantee that is not dependent on the engagement of another right.

## **Introduction**

1. The Commission welcomes the opportunity to provide evidence in response to the Women and Equalities Committee's inquiry on Ensuring strong equalities legislation after EU exit.

2. As an NEB and NHRI, the Commission has an important role to play in advising on changes that may impact on the enjoyment of human rights and equality in Great Britain.
3. EU law is an important source of human rights and equality law. The implications of the UK's decision to leave the EU on UK equalities legislation will depend on the terms of our future relationship with the EU.

#### **A) Legislation**

4. Great Britain is currently a world leader in relation to the protection and promotion of equality and should continue to be so. Some areas of domestic equality law have been driven by EU law, but many areas of domestic equality law pre-dated their EU law equivalent and there remain areas in which domestic protection exceeds the requirements of EU law.
5. Much EU-derived discrimination law is fully incorporated into domestic law. Where this is the case there is no reason that any changes to these laws should automatically follow EU exit. Even in respect of those laws which are not currently incorporated into domestic law, but which have direct effect in the UK, the UK Government has indicated that existing protections will be maintained post-EU exit through a Great Repeal Bill, to be reviewed on a case by case basis by Parliament.<sup>1</sup> We welcome the Prime Minister's statement that existing workers' legal rights will continue to be guaranteed in law.<sup>2</sup>
6. In light of these Government commitments, and the fact that the future relationship between the UK and the EU is not known, it is difficult to fully assess the implications for equalities legislation of the UK leaving the EU. The primary difference is that whereas at present certain protections are required by EU law, after EU exit that guarantee will be removed making some protections potentially vulnerable to repeal in future.

#### **EU-based equality law**

7. Non-discrimination is a central principle at the heart of EU law reflected in the core EU treaties.<sup>3</sup>

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<sup>1</sup> 'As we repeal the European Communities Act, we will convert the 'acquis' - that is, the body of existing EU law - into British law. When the Great Repeal Bill is given Royal Assent, Parliament will be free - subject to international agreements and treaties with other countries, and the EU on matters such as trade - to amend, repeal and improve any law it chooses. By converting the acquis into British law, we will give businesses and workers maximum certainty as we leave the European Union. The same rules and laws will apply to them after Brexit as it did before. Any changes in the law will have to be subject to the full scrutiny and proper Parliamentary debate. Any let me be absolutely clear: existing workers' legal rights will continue to be guaranteed in law - and they will be guaranteed for as long as I am Prime Minister'. The Prime Minister, Theresa May, 2/10/16.

<sup>2</sup> The Prime Minister, Theresa May, 2/10/16

<sup>3</sup> The Treaty of the European Union makes provision in respect of equality, providing that the EU shall

8. One particularly important source of directly applicable rights is the Charter. The Charter reaffirms the rights, freedoms and principles already recognised in EU law. It is divided into sections: dignity, freedoms, equality, solidarity, citizens' rights and justice. The protections under the Charter are particularly relevant in relation to equality law as Article 21 prohibits discrimination on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, sexual orientation or nationality. It therefore protects against discrimination on grounds which are not protected characteristics under the Equality Act 2010 (EqA 2010). The Charter provides protection in cases arising in an area within the scope of EU law. Article 21 of the Charter provides broader protection than the equivalent right in the Human Rights Act 1998 (HRA), because Article 14 of the European Convention on Human Rights (ECHR) is not a free-standing right to non-discrimination but can only be relied on in relation to one of the other ECHR rights. The ECHR's equivalent to Article 21 of the Charter is Protocol 12, which the UK has not ratified.
9. The protection provided by the Charter is powerful in domestic law:
  - Domestic legislation that conflicts with a fundamental right protected by the Charter can be 'disapplied' by the domestic courts<sup>4</sup>.
  - Claiming for damages for a breach of EU rights can be easier than claiming compensation for a breach of the HRA.
10. The Charter is therefore a substantial source of equality protection in the UK which is unlikely to be preserved in our domestic legal order following EU exit. To ensure that there is no regression in equality protections, a very careful analysis will be required of the protections that will be lost when the Charter ceases to have effect. We suggest below that these gaps could be filled through any new Bill of Rights and by a systemic approach to compliance with the UK's obligations under the UN human rights Treaties.
11. As well as the provisions of the Treaties and the Charter, the EU has promulgated further fundamental rights in secondary legislation (in Regulations, which are directly applicable in the domestic legal order, and Directives, which have to be incorporated into domestic law). The Race Directive,<sup>5</sup> Recast

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"combat social exclusion and discrimination... equality between women and men... and protection of the rights of the child". Similarly, the Treaty on the Functioning of the European Union places obligations on EU institutions and Member States in respect of combatting discrimination and ensuring equal treatment.

<sup>4</sup> See further below (at B) for the distinction between this and the position under the HRA.

<sup>5</sup> Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin 2000/43/EC

Directive<sup>6</sup>, and Framework Directive<sup>7</sup> collectively provide protection against discrimination at work on the grounds of racial or ethnic origin, sex, religion or belief, age, disability and sexual orientation. The Race Directive and Gender Goods and Services Directive<sup>8</sup> collectively provide protection against discrimination on the grounds of race and sex in accessing goods and services. The Race Directive also extends to social protection and healthcare, social advantages and education. The requirements of these Directives are reflected in our EqA2010. Because of the importance of this Act to equality and non-discrimination, we have dealt with it specifically below.

12. There are a number of areas of EU law which are not specifically about prohibiting discrimination, but which provide rights for groups of people who share a protected characteristic (such as disability, race or sex) or which provide protections which are likely to be relied upon disproportionately by particular groups. For example, EU Regulations have progressed the rights of disabled people regarding accessible transport by air,<sup>9</sup> by bus,<sup>10</sup> by rail,<sup>11</sup> and by ship.<sup>12</sup> In some areas these apply to a wider group than those protected by the definition of disability under the EqA2010.<sup>13</sup> There is also mutual recognition of preferential terms for blue badge parking in all EU countries. Secondary legislation has been made under section 2 of the European Communities Act 1972 which plays a vital role in ensuring accessible transport for disabled people. EU law has also resulted in progress towards improved accessibility and safety for disabled people in areas such as the use of braille in medicine labelling.<sup>14</sup>
13. The Pregnant Workers Directive<sup>15</sup> provides important health and safety and employment protections for pregnant women. “Family friendly”<sup>16</sup> policies cover rights such as non-transferable parental leave of four months for parents or

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<sup>6</sup> Council Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). 2006/54/EC

<sup>7</sup> Council Directive establishing a general framework for equal treatment in employment and occupation, 2000/78/EC

<sup>8</sup> Council Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services, 2004/113/EC

<sup>9</sup> Regulation 1107/2006

<sup>10</sup> Bus and Coach regulations 181/2011

<sup>11</sup> Regulation (EC) No 1371/2007 on rail passengers rights and obligations and Consolidated Railways Interoperability Directive 2008/57/EC

<sup>12</sup> Sea and Inland Waterways Regulation 1177/2010

<sup>13</sup> The definition under the air passengers’ regulations is wider than the Equality Act definition of disability. ‘Disabled person’ or ‘person with reduced mobility’ means any person whose mobility when using transport is reduced due to any physical disability (sensory or locomotor, permanent or temporary), intellectual disability or impairment, or any other cause of disability, or age, and whose situation needs appropriate attention and the adaptation to his or her particular needs of the service made available to all passengers.

<sup>14</sup> EU Medicinal Products for Human Use Directive 2004/27/EC

<sup>15</sup> 92/85

<sup>16</sup> Parental Leave Directive 2010/18/EU

adopters of a child, time off for urgent family reasons, and protection against detrimental treatment or dismissal for taking parental leave. The Working Time Directive<sup>17</sup> sets out minimum safety and health requirements for the organisation of working time, which can also impact on health and family life. These provisions are currently implemented through a combination of the EqA 2010 and other specific regulations.

14. EU laws provide specific protection for atypical workers. Women and people from ethnic minority groups, who are disproportionately represented in atypical work, may be particularly affected should regulations implementing the Part-time Workers Directive,<sup>18</sup> Fixed-term Work Directive<sup>19</sup> and Temporary Agency Work Directive<sup>20</sup> be repealed.
15. The primacy of EU law means that domestic laws implementing EU rights-enhancing Directives cannot be removed while the UK remains bound by EU law. The Government has indicated an intention not to repeal any of this body of law as an immediate response to EU exit. However, leaving the EU will mean that these rights could, as a matter of domestic law, be removed or diluted by a future Government.
16. We recommend that domestic rights-enhancing laws which are currently underpinned by EU law should not be diminished. We also recommend that EU rights-enhancing laws which currently have effect in the UK without domestic implementation should be given domestic effect and should not be diminished. Any proposal for repeal should be the subject of a rigorous equality and human rights impact assessment<sup>21</sup>.

### **Future EU equality law**

17. The UK will not be bound to implement EU laws which come into force after the UK has left the EU, some of which may enhance protection against discrimination.
18. The European Accessibility Act, which is expected to be enacted by the EU, will benefit disabled people by providing common rules on accessibility in relation to computers and operating systems, cash machines, ticketing and check-in machines, smartphones, television equipment related to digital television services, telephony services and related equipment, services related to air, bus, rail and waterborne passenger transport, banking services, e-books and e-

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<sup>17</sup> 2003/88/EC

<sup>18</sup> 97/81/EC

<sup>19</sup> 1999/70

<sup>20</sup> 2008/104/EC

<sup>21</sup> See further section C below in relation to possible measures to limit the impact of repeal of the Charter.

commerce. The proposed Act would require domestic provisions allowing consumers and interest groups to take action under national law. It would require authorities within Member States to have the power to restrict, prohibit or recall offending products and services. Manufacturers would be required to produce information relating to complaints, compliance and product recall.<sup>22</sup> The Act applies to persons with functional limitations, which protects a wider group than the definition of “disability” under the EqA 2010.

19. On 3rd December 2012 the European Commission adopted a proposal for a Directive on the accessibility of public sector bodies' websites, in recognition of their importance in imparting essential information for citizens.<sup>23</sup> The European Commission is also currently consulting on strengthening provisions relating to parental leave: introducing special leave for fathers, carers' leave, more flexibility in working arrangements for parents and carers and improving the implementation and enforcement of equal treatment.<sup>24</sup>
20. We recommend that the UK should make an explicit commitment to remaining amongst the best in the world in relation to the protection of equality and human rights. It should make a commitment to analyse future rights-enhancing laws emanating from the EU and elsewhere, with a view to considering whether similar measures are appropriate for implementation in the UK.

## **Equality Act 2010**

21. The EqA 2010 is the domestic legislation which prohibits discrimination and makes provision intended to advance equality. Domestic legislation will not be immediately affected by EU exit. However, whereas currently the UK is required to retain parts of the EqA2010, following EU exit the Government could, in theory, repeal some or all of its provisions. In the Commission's strong view there should be no regression from the current protections. Equality is valued, well-embedded and well-accepted in British culture and society. Much of the protection afforded by the EqA2010 originated in domestic legislation prior to the introduction of EU provisions and the EqA2010 exceeds the requirements of EU law as a matter of domestic policy. For example the Public Sector Equality Duty has no EU equivalent and it was the UK Government that decided to introduce protection against disability, sexual orientation, religion or belief and age discrimination outside the employment sphere - this is not a requirement of EU law.

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<sup>22</sup> From the European Accessibility Act brochure <http://ec.europa.eu/social/BlobServlet?docId=14869&langId=en> and web page <http://ec.europa.eu/social/main.jsp?catId=1202>

<sup>23</sup> Proposed Public Sector Website Accessibility Directive

<sup>24</sup> See Micheal Ford's Advice to TUC; European Commission Roadmap (August 2015) and EC Consultation Document on addressing the challenges faced by working parents and care givers (11.11.2015) C (2015) 7754 final

22. Some domestic protection however has been driven by developments at EU level. Some of these protections, particularly those which are perceived as financially costly or as burdensome to business, might be more vulnerable to repeal under a future Government. The following are some examples of the many EU-derived protections currently contained in the EqA 2010:
- Protection from direct or indirect discrimination on the grounds of religion or belief, age or sexual orientation in relation to work<sup>25</sup>.
  - Specific protection from pregnancy and maternity discrimination<sup>26</sup>.
  - Equal pay for men and women for work of equal value.<sup>27</sup>
  - Discrimination by association.<sup>28</sup>
  - Harassment was recognised as a specific form of prohibited conduct at EU level, which led to amendments to our domestic equality laws.

### **Areas of opportunity for future development of the Equality Act 2010**

23. The removal of certain constraints under EU law, for example rules which regulate public procurement or which prohibit more favourable treatment of a person because of a protected characteristic, may give rise to additional opportunities to promote equality.
24. We recommend that the UK Government should consider whether the removal of constraints imposed by EU laws provides the opportunity to introduce measures to further advance human rights or equality.
25. For example, section 158 EqA 2010 sets out the criteria for positive action and section 159 covers positive action in recruitment and promotion at work in a tie-break scenario. EU law acknowledges the value of positive action as a means of achieving the Treaty aims of promoting equality of opportunity and this is reflected in the positive action provisions of the equality Directives. However there is extensive CJEU case law which sets limits on permissible positive

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<sup>25</sup> As a result of the Framework Directive 2000/78/EC

<sup>26</sup> Following a ruling that since pregnancy is a condition unique to women, sex discrimination could arise without the need for comparison with a sick man. *Webb v Emo* [1995] 1 W.L.R. 1454. Pregnancy and maternity discrimination in work and non-work cases is now embedded in sections 17 and 18 of the Equality Act.

<sup>27</sup> The Equal Pay Act 1970 was enacted in preparation for UK's accession to the European Economic Community to give effect to TFEU Article 119 (now Article 157) requiring that men and women receive equal pay for equal work. Equal pay law has been heavily influenced by EU case law developments, in particular in relation to work of equal value.

<sup>28</sup> Case C-303/06 *Coleman v. Attridge Law* [2008] CMLR 777. The ECJ held that the protection against discrimination "on grounds of disability" in the Framework Directive must be interpreted purposively so as to include discrimination by reason of the claimant's association with a disabled person. Section 13 of the Equality Act, provides that a "person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others." This broad "because of" formulation interpreted in light of *Coleman* means that section 13 includes associative discrimination.



action.<sup>29</sup> When the UK leaves the EU, this might be an area for potential development.

## **B) Courts, case law and appeals**

### **Appeals and the future role of the CJEU**

26. There are a number of obligations on domestic courts when applying laws (including equality laws) within the scope of EU law. The most important is that domestic legislation which gives effect to EU law must be construed purposively, so as to give it a meaning consistent with EU law in so far as is possible.<sup>30</sup> It is also a principle of EU law that domestic law must provide effective remedies for a breach of EU law.<sup>31</sup> Where the position is not clear, national courts can refer questions on the interpretation of EU law to the CJEU. Domestic legislation, including primary legislation, can in some cases be dis-applied if it conflicts with EU law.<sup>32</sup>
27. EU case law has had an important impact on equality rights in the UK. The CJEU's interpretation of the Equality Directives has extended protection domestically, including when relying on the Charter. For instance, it is no longer lawful to charge men and women different premiums for insurance because of the *Test-Achats* case.<sup>33</sup> Other examples are given above.
28. The loss of these principles and enforcement mechanisms could impact on the protection and promotion of equality rights currently within the scope of EU law in the following ways:
  - Parties to litigation will no longer be able to seek an interpretation from the CJEU, removing an additional forum in which litigants can currently seek justice.
  - Individuals will no longer be able to rely directly on EU law rights, including fundamental rights, in domestic courts.
  - Future decisions of the CJEU will no longer be binding on domestic courts. Over time this may lead to a weaker level of protection of equality rights compared to equivalent EU rights, given that historically decisions of the CJEU/ECJ have tended to provide a higher level of protection compared to domestic decisions.

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<sup>29</sup> See *Kalanke v Freie Hansestadt Bremen* Case C-450/93 and *Badeck v Hessische Ministerpräsident* Case C-158/97

<sup>30</sup> *Litster v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546 and *Marleasing SA v La Comercial Internacional de Alimentacion* Case C-106/89.

<sup>31</sup> Article 19 TEU and article 47 of the EU Charter.

<sup>32</sup> *Google v Vidal-Hall* [2015] EWCA Civ 311.

<sup>33</sup> Case C-236/09 *Association belge des Consommateurs Test-Achats ABL v Conseil des ministres* (1 March 2011)

- The re-litigation of settled principles. Although normal principles of precedent will apply to existing decisions of domestic courts, it may be argued that cases following CJEU precedent should be distinguished, and not followed when interpreting legislation after EU exit.
  - The courts will be unlikely to continue to apply EU rules of statutory interpretation so that in future, if issues arise about the scope of rights previously protected under EU law, they may be interpreted more or less restrictively.
29. If existing rights are diluted or removed by a future Government, individuals will not be able to seek to dis-apply such measures as contrary to EU law in the courts. In Theresa May's statement on 2 October 2016 setting out plans for the Great Repeal Bill, she proposed that the jurisdiction of the CJEU will be removed. It is unclear what the impact of existing ECJ/CJEU case law will be on the interpretation of domestic legal concepts which were derived from or reflect equivalent concepts in EU law.
30. The statement indicated the Government's intention to preserve for the time being all of the EU law 'acquis', but it is not clear how the Government intends to do this since that includes a significant amount of case law.
31. The Government should ensure clarity in relation to the status of existing and future CJEU case law in the domestic legal order, for example, by issuing statutory guidance on the status of existing case law and future CJEU decisions for domestic legal concepts which are derived from, or reflect, similar concepts in, EU law.

### **Role of the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR)**

32. EU exit will have no direct impact on UK membership of the Council of Europe, nor on the role of the ECHR or the Strasbourg court.
33. The UK will of course continue to be bound in international law by human rights conventions and other international instruments to which it is a signatory, including the ECHR. Rights under the ECHR are incorporated into domestic law by the HRA which can also, in appropriate cases, be interpreted in light of unincorporated Treaties such as the UN Convention on the Rights of the Child (CRC).<sup>34</sup>

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<sup>34</sup> *R (on the application of SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16.

34. The ECHR and the ECtHR will continue to have an impact on enforcing equality rights. For example, in *Eweida v United Kingdom*<sup>35</sup> where the Claimant was not permitted to wear a visible Christian cross at work, the domestic courts had not upheld a claim for discrimination. The ECtHR held the domestic courts failed sufficiently to protect Ms Eweida's right to manifest her religion, in breach of the positive obligation under Article 9 ECHR.
35. There are, however, a number of limitations on the role that ECHR rights can play in protecting equality rights, particularly as compared to the role of EU law:
- Article 14 of the ECHR prohibits discrimination. However it is not a free-standing right, but can only be relied on in relation to one of the other ECHR rights. It may be possible to argue that one of the other ECHR rights is engaged in an equalities case, for example, the right to respect for family life under Article 8 ECHR, or to manifest one's religion under Article 9 ECHR, but in many cases this will not be possible.<sup>36</sup>
  - ECHR rights are primarily rights against the state and are therefore of only limited utility in seeking to enforce equality rights against private bodies such as an employer.
  - Under the HRA, the courts cannot dis-apply incompatible legislation – they can only interpret domestic law so as to comply with the Convention to the extent possible or declare it incompatible with the ECHR rights.<sup>37</sup>
  - Similarly, although decisions of the ECtHR are binding on the UK in international law<sup>38</sup> they are not as a matter of domestic law.
  - In many cases the ECtHR will allow the Government a degree of discretion referred to as the “margin of appreciation” in how it interprets and gives effect to the rights in the ECHR. This contrasts with EU law which must be construed purposively, so as to give it a meaning consistent with EU law in so far as is possible. It is unlikely that many of the positive developments in equalities law referred to above and found to be required by EU law would be found to be required by Convention rights.
  - Claiming damages for a breach of the HRA is not as straightforward as for a breach of EU equality rights (or indeed alternative domestic remedies).<sup>39</sup>

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<sup>35</sup> *Eweida v United Kingdom* (2013) 57 E.H.R.R. 8.

<sup>36</sup> Protocol 12 to the ECHR does provide a free standing prohibition on discrimination, however the UK has not ratified it. By contrast Article 21 of the EU Charter prohibits any discrimination on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, sexual orientation or nationality.

<sup>37</sup> This contrasts with the position under EU law where domestic legislation that conflicts with a fundamental right protected by EU Law can be ‘disapplied’ by the domestic courts. See further *Benkharbouche v Embassy of the Republic of Sudan and Janah v Libya* [2015] EWCA Civ 33 below.

<sup>38</sup> Article 46 ECHR.

<sup>39</sup> Under s8 HRA no award of damages is to be made unless the court is satisfied that it is necessary to do so to “afford just satisfaction”.

36. The different impact of the ECHR and EU law rights in domestic law is demonstrated by the case of *Benkharbouche v Embassy of the Republic of Sudan and Janah v Libya*. In that case the State Immunity Act 1978 prevented the Claimants from bringing claims including for unfair dismissal and discrimination. The Court of Appeal found that the restriction on the Claimants' right to bring claims was incompatible with fair trial rights under both Article 6 ECHR and Article 47 of the EU Charter. However in respect of rights outside the scope of EU law, such as unfair dismissal, the Court was only able to make a declaration of incompatibility under the HRA, which does not in itself provide the Claimants with a remedy. In contrast, in respect of rights protected by EU law, including discrimination, the Court was able to dis-apply the restriction in the State Immunity Act so that the Claimants could pursue a remedy for these claims.
37. For these reasons the ECHR does not provide an equivalent mechanism to EU law to enforce equality rights protection either domestically or at the international level.

### **Infrastructure supporting equality law and policy**

38. The importance of maintaining a focus on equality and human rights issues during the EU exit negotiations and their aftermath should not be understated. Government, Parliament, the courts, the Commission in its roles both as an NHRI and a NEB, and the other UK NEB and NHRIs, will all have important roles to play, alongside civil society.
39. The Commission was established under the Equality Act 2006, which sets out its structure, powers and duties.
40. The Commission must have a central role in advising on any changes to laws or policies related to EU exit which would impact upon equality or human rights. This will include securing continuing equality standards during negotiations and following EU exit, working with Government, civil society and others. We will advise on the equality and human rights impact of any proposals to change equality legislation or other laws that have a disproportionate impact on one or more groups, in line not only with our duties under the 2006 Act, but also the Paris Principles and the Belgrade Principles. The 2006 Act provides that the Commission must “monitor the effectiveness of the equality and human rights enactments” and that we may: “advise central or devolved government about the likely effect of a proposed change of law”.<sup>40</sup> The Paris Principles, which are

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<sup>40</sup> Section 11.

the international standards for NHRIs, provide that “the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights”.

41. The requirement to have an NEB comes from EU equal treatment Directives. EU law requires EU countries to designate an equality body to promote equal treatment in respect of sex and race. They are often legally required to promote equality and combat discrimination in relation to some or all of the other grounds protected in EU law: age, sexual orientation, religion or belief and disability. The Commission is a member of Equinet, the European Network of Equality Bodies, which promotes equality in Europe through supporting and enabling the work of NEBs. We consider it desirable to remain a member of Equinet following EU exit<sup>41</sup>, since it enables collaborative working on issues of common interest across the region.
42. In addition to the role the Commission itself can play, it is important that other actors are fully involved in ensuring that legislation is not repealed or amended if that will result in lowering protection. The Women and Equalities Committee will have an important role in scrutinising the impact of EU exit on equalities. The UK and national governments, across all departments, should conduct equality impact assessments and human rights impact assessments of all proposed changes in the law that result from EU exit to ensure no regression. Where appropriate, advice should be available to other departments from the Government Equalities Office as well as the Commission.

### **C) Embedding equality principles**

43. The Commission’s strong view is that the UK Government should ensure that there is no regression in equality or human rights protection as a consequence of EU exit. Equality is a fundamental human right, which we are obliged by our obligations under international human rights law to protect.
44. It is the Commission’s view that further entrenchment of the right to equal treatment (and other human rights) would be desirable, as this would help embed the principle of equality in other provisions and prevent the development of law or policy that might have discriminatory impact.
45. There is no freestanding equality principle, or equality guarantee, within UK constitutional norms. Article 21 of the Charter prohibits discrimination on any

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<sup>41</sup> There are other members of Equinet from non-EU countries, e.g. Norway, but the rules currently require members to be based in an EU Member State, accession state or EEA state.

ground. Article 14 of the ECHR, which is incorporated into domestic law by the HRA, is not a free-standing right, but can only be relied on in relation to one of the other ECHR rights. The ECHR's equivalent to Article 21 of the Charter is Protocol 12, which the UK has not ratified. Consideration should be given either to ratifying Protocol 12, or to enacting a freestanding principle of equal treatment or an equality guarantee that is not dependent on the engagement of another right. This could also have the benefit of safeguarding a minimum level of protection across the UK, in relation to devolved legislative competence, in relation to equality matters.<sup>42</sup>

46. We have previously called for certain aspects of the UN human rights framework<sup>43</sup> to be further incorporated into domestic law, and we consider this a good starting point. The proposed Bill of Rights may be an opportunity to do this, and to fill some of the gaps left when the Charter no longer applies in the UK.
47. If equality or human rights protections that originate in EU law, including those set out in the Charter, and the supervisory role of the EU institutions are to be lost or reduced, the role of other international Conventions in providing protection for fundamental human rights will be even more crucial. The UK Government should show its commitment to taking its obligations under these human rights Treaties seriously, for example, by developing Action Plans for the implementation of the Concluding Observations of the UN Treaty Bodies.
48. Some examples of the way in which rights could further be advanced in the domestic legal order include:
49. The Scottish and Welsh Governments have enhanced the status of the Convention on the Rights of the Child (CRC) in national law.<sup>44</sup> The Commission considers that they have engendered a more systematic consideration of

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<sup>42</sup> An alternative approach would be to introduce in any further devolution in relation to equality legislation a provision equivalent to that which exists in relation to the HRA ie. to exclude competence to legislate in a way that reduces equality protections, and to give a power to the courts to strike down any measure which does so.

<sup>43</sup> The UK has ratified seven of the nine 'core' UN human rights conventions but not directly incorporated them into domestic law. The two Conventions not yet ratified by the UK are the Convention on the Rights of Migrant Workers and their Families, and the Convention on Enforced Disappearances (CED). No apparent progress has been made on ratifying the CED despite the UK Government having accepted UPR recommendations on this in 2012. See Annex 1, UPR Recommendations to the UK. September 2012. Available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/GBSession13.aspx> [accessed: 24 August 2016]

<sup>44</sup> The Rights of Children and Young Persons (Wales) Measure 2011. Available at: <http://www.legislation.gov.uk/mwa/2011/2/contents> [accessed: 23 August 2016]. For information on the measure, see <http://gov.wales/topics/people-and-communities/people/children-and-young-people/rights/uncrc/?lang=en> [accessed: 23 August 2016]. The Children and Young People (Scotland) Act 2014 Sections 1 and 2. Available at: <http://www.legislation.gov.uk/asp/2014/8/contents/enacted> [accessed: 22 August 2016]

children's rights in the development of policy and legislation, ensuring that relevant considerations, evidence and expertise are taken into account.<sup>45</sup>

50. Section 1 of the EqA2010 sets out the duty of certain public authorities to have due regard to the desirability of reducing socio-economic disadvantage when taking strategic decisions about how to exercise their functions. This section has not been brought into force, but could go some way towards promoting compliance with the International Covenant on Economic, Social and Cultural Rights in domestic law.<sup>46</sup> Bringing this provision into force would help increase protection for socio-economic rights currently protected in the Charter, and would be in line with the recommendation of the UN Committee on Economic, Social and Cultural Rights that the UK "bring into force the relevant provisions of the Equality Act that refer to the public authorities' duty on socio-economic disadvantage".<sup>47</sup>
51. In addition, all other provisions of the EqA 2010 that have not yet been brought into force should be implemented<sup>48</sup>. This includes section 9(5) to ensure that caste discrimination is explicitly prohibited under law, and section 14 on dual discrimination, as recommended by the UN Committee on the Elimination of Racial Discrimination (CERD).<sup>49</sup> Implementation of the other unimplemented sections of the EqA2010 would go some way towards implementing the

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<sup>45</sup> EHRC, Briefing on the impact of statutory duties to have due regard to the Convention on the Rights of the Child in Scotland and Wales, October 2016.

<sup>46</sup> EHRC, Socio-economic rights in the UK, Updated submission of the EHRC to the UN Committee on Economic, Social and Cultural Rights in advance of the public examination of the UK's implementation of the International Covenant on Economic, Social and Cultural Rights – April 2016, available at: <https://www.equalityhumanrights.com/en/file/18741/download?token=E1vJk4F>

<sup>47</sup> Committee on Economic, Social and Cultural Rights, Concluding Observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGBR%2fCO%2f6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGBR%2fCO%2f6&Lang=en)

<sup>48</sup> The full list of provisions in the Equality Act 2010 that have not yet been commenced or have been repealed are:

- the socio-economic duty – sections 1 to 3;
- caste discrimination – section 9 (5);
- dual discrimination – section 14;
- ships and hovercraft – section 30;
- reasonable adjustments to common parts of rented residential properties – section 36 and Schedule 4 (England and Wales only);
- taxi transport accessibility – sections 160 to 165 (Chapters 1 of Part 12). Note the recent announcement on this point, outlined below.
- the majority of bus and coach accessibility provisions (Chapter 2 of Part 12) exempted until 28 February 2017 with the possibility of further exemption;
- the requirement for political parties to report on diversity of candidates – section 106
- the employment tribunal power to make wider recommendations (repealed)

third party harassment provisions (repealed).

<sup>49</sup> UN International Convention on the Elimination of All Forms of Racial Discrimination, Committee on the Elimination of Racial Discrimination, Concluding Observations on the twenty-first to twenty-third periodic reports of United Kingdom, August 2016. Available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fGBR%2fCO%2f21-23&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fGBR%2fCO%2f21-23&Lang=en) [Accessed 17 October 2016].

provisions of those international human rights Treaties which require the prohibition of discrimination and promotion of equality, such as the Convention on the Elimination of Discrimination against Women as well as CERD.

52. Further consideration of these options, and others, will be required over the coming months.

### **About the Equality and Human Rights Commission**

The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. It operates independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights. It contributes to making and keeping Britain a fair society in which everyone, regardless of background, has an equal opportunity to fulfil their potential. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It encourages compliance with the Human Rights Act 1998 and is accredited by the UN as an 'A status' National Human Rights Institution. Find out more about the Commission's work at: [www.equalityhumanrights.com](http://www.equalityhumanrights.com)

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