

Written submission from the Oxford Human Rights Hub (OEU0045)

Introduction

1. We have been asked by the Women and Equalities Committee to suggest possible clauses which might be included in the proposed Great Repeal Bill to protect equality rights after Brexit. We begin by setting out the problems which such a clause would address, and show how these problems affect equality legislation. In the third section, we propose several possible clauses which could address the problems we have identified.

Two problems

2. There are two problems which will arise in relation to the protection of equality rights after the UK leaves the UK:

- A. When the UK repeals the European Communities Act 1972, a swathe of legislation which depends on that statute will automatically disappear. The government's proposed solution to this problem is to enact a 'Great Repeal Bill' prior to leaving the EU, which will come into force on exiting the EU. The aim of the Bill will be to preserve the status quo until Parliament or the Government has the time and opportunity to determine which provisions of EU law it wishes to repeal. Anything else will retain legislative force, unless the Great Repeal Bill specifically provides for its repeal. It is at present unclear exactly how the Great Repeal Bill will achieve these aims. However, there have been strong suggestions that it will contain what are known as Henry VIII clauses. These clauses empower the government to modify, amend or repeal primary legislation without full Parliamentary scrutiny. This goes against the principle of Parliamentary sovereignty, according to which only Parliament can make and unmake primary legislation. Hence the name 'Henry VIII' clauses, which refers back to the era when the monarch claimed to have the power to

override the wishes of the democratically elected Parliament. The House of Lords Constitution Committee has been critical of the use of such clauses because of their risk to parliamentary supremacy and democratic scrutiny, in addition to the added layers of complexity added to the statute book.¹ Nevertheless, they are increasingly prevalent.²

B. Currently, under the European Communities Act 1972, the judiciary are required to interpret legislation implementing EU law, or areas regulated by EU law, consistently with the principle of equality, which is a fundamental principle in EU law. Following the withdrawal from the EU, equality protections found in EU law will no longer be required to be used by the judiciary when interpreting legislation implementing EU law, or regulating an area regulated by EU law. In addition, EU law currently has primacy over UK legislation. This means that, when primary legislation gives lesser protection than EU law, UK courts will not apply that legislation and instead follow EU law. This protection for equality provisions, because they are underpinned by EU law, will be lost following our withdrawal from the EU. This is not fully remedied by the Human Rights Act 1998. Although the Human Rights Act 1998 protects rights found in the European Convention of Human Rights, including those which protect equality rights, the Act does not allow courts to disapply legislation which contravenes these rights. Instead, the remedy under the HRA is a much

¹ Constitution Committee of the House of Lords, 'Report on the Legislative and Regulatory Reform Bill' Sixth Report of Session 2005-6. See also Delegated Powers and Regulatory Reform Committee of the House of Lords, 'Special Report on Henry VIII Powers to Make Incidental, Consequential and Similar Provision, 3rd Report of Session 2002-2003, HL Paper 21.

² As noted by Lord Judge in his lecture, 'Ceding Power to the Executive; the Resurrection of Henry VIII' delivered at King's College London, 12 April 2016; <<https://www.kcl.ac.uk/law/newsevents/newsrecords/2015-16/Ceding-Power-to-the-Executive---Lord-Judge---130416.pdf>>

weaker one: the Court can only declare such legislation to be incompatible with Convention rights. Following such a declaration of incompatibility, it is for Parliament to decide whether or not to change legislation in order to ensure that it protects rights and the legislation remains in force in the meanwhile.

Relevance to the Equality Law 2010 and other EU equality and non-discrimination law

3. Although the Equality Act 2010 is primary legislation, it derives much of its content from EU law and the Court of Justice of the EU has played a central role in the interpretation of its provisions. The two problems set out above might arise in the following ways:

- A. The Great Repeal Bill might include a Henry VIII clause, which would empower government to amend, modify or repeal parts of the Act once it is no longer underpinned by EU law. It is likely that the Henry VIII clause will only give a highly truncated opportunity for Parliamentary scrutiny by using the negative resolution procedure. Under this procedure, delegated legislation will pass by default once it has been before Parliament for a period, usually 21 days, unless a resolution has been taken to reject the measure by either or both of the Houses. The negative procedure generally leads to such legislation passing by default, since a resolution to reject the measure can be hard to achieve as it can be difficult to secure a time to debate the measure. Furthermore, political parties may not draw attention to the measure, so that MPs and committees may not be aware of the implications of the piece of delegated legislation. Given the bulk of measures which will be need to be changed after Brexit, the risk of repeal with almost no Parliamentary scrutiny is worryingly exacerbated.

B. Following the withdrawal of the UK from the EU, there is the risk that future legislation could inadvertently override legislation designed to protect equality rights. Courts will not be able to interpret such legislation consistently with the fundamental principle of equality, which until now has been derived from EU law, and will not be able to disapply provisions which are less favourable than EU law.

Possible Clauses in the Great Repeal Bill

4. The Committee has asked us to advise on how a clause might be drafted to protect equality rights in this context. We give some suggestions to address each of the problems identified above.

Problem 1. Henry VIII clauses in the Great Repeal Bill:

5. One possibility is to propose an amendment to limit the scope of the Henry VIII clause to amend equality rights. This could be formulated as follows:

‘Any clause in the Act which permits ministers to modify, amend or repeal primary legislation by order, does not include a power to amend, repeal or otherwise modify the right to equality.’

6. A second approach would not limit the scope of the Henry VIII clause as such, but restrict the power to make delegated legislation which arises under such a clause. This approach has been used in Section 8 of the Legislative and Regulatory Reform Act 2006, which specifically restricts a broad power to make delegated legislation, such as a Henry VIII clause. Following this model, such a clause might be formulated as follows:

'No provision enacted under statutory power herein granted to repeal, amend or otherwise modify primary legislation by order, may make provision amending or repealing any provision of the Equality Act 2010.'

7. This would mean that the Equality Act 2010 can only be amended with full Parliamentary process and scrutiny. This would include first reading, scrutiny by the Parliamentary committees, second and third reading in both Houses.

8. A different approach would be to put preconditions on the enactment of the Henry VIII clause, following the model of Section 3 of the Legislative and Regulatory Reform Act 2006.

9. A suggested format could be as follows:

10. 'Ministerial powers to amend, modify or repeal primary legislation can only be used if:

- (i) the provision does not prevent any person from continuing to exercise any right or freedom which that person has by virtue of the Equality Act 2010 or other provisions previously derived from EU law which protect equality rights; or
- (ii) the provision is not of constitutional significance.'

Problem 2: Preserving judicial interpretive powers in case equality rights are overridden incidentally in the future:

11. In order to protect equality rights from future incidental erosion by legislation and to preserve the interpretation given by the EU Court of Justice of the equality rights given expression in the Equality Act 2010, a clause could be inserted as follows:

‘Any enactment passed or to be passed shall be construed and have effect subject to equality rights [and other fundamental human rights].’

12. A weaker version would read:

‘So far as is it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with EU equality rights.’

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