

Briefing Statement on Human Rights and the Welfare Reform Bill in Scotland

Scottish Human Rights Commission

December 2011

Introduction

The Scottish Human Rights Commission (the Commission) was established by The Scottish Commission for Human Rights Act 2006 and has a broad mandate to promote and protect human rights for everyone in Scotland.

The Commission sets out below a summary analysis of the potential human rights implications of the UK Welfare Reform Bill (the Bill) introduced in the House of Commons on 16 February 2011 and the subject of the Legislative Consent Memorandum of the Scottish Government dated 3 March 2011 and 31 October 2011.

The Health and Sport Committee report on the Legislative Consent Memorandum¹ draws on a wide range of written and oral evidence about the anticipated impacts of the new measures contained in the Bill in Scotland. The Commission seeks to provide Members of the Scottish Parliament, and other interested stakeholders, with the human rights framework which may inform this evidence and the forthcoming Parliamentary debate about the implications of this legislation in Scotland.

The Commission would like to draw Members attention to the House of Lords, House of Commons Joint Committee on Human Rights (JCHR) recent report on the legislative scrutiny of the Bill². The JCHR report comprehensively sets out the Committee's analysis of the potential human rights impacts of this legislation across the UK. This briefing summarises these potential human rights impacts and supplements additional considerations specific to the Scottish devolved context.

Executive Summary

In summary, the Commission is concerned by the following potential human rights impacts of the Bill:

1. Prohibition on inhuman or degrading treatment and the right to private, home and family life

Provisions in the Bill could amount to a breach of positive obligations to ensure that individuals are not left in circumstances of destitution or hardship which violate the right to respect for private, home and family life or amount to inhuman or degrading treatment.

Cumulative negative impacts through the operation of the Bill and the conditionality and sanctions imposed by the new regime may result in destitution for individuals who due to personal, social or environmental circumstances, require support without which may result in a violation of their rights.

¹ Health and Sport Committee, 4th Report, 2011 (Session 4), Report on the Legislative Consent Memorandum on the Welfare Reform Bill (UK Parliament Legislation- LCM (S4) 5.1

² House of Lord, House of Commons, Joint Committee on Human Rights, Legislative Scrutiny: Welfare Reform Bill, Twenty-first Report of Session 2010-12 - <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/233/233.pdf>

2. Discrimination against marginalised and vulnerable groups

The Commission is concerned that disproportionately negative outcomes on certain protected and more vulnerable groups such as disabled people, certain ethnic minorities, kinship carers, larger families or single parent families and women arising from the Bill may arise without proper objective justification.

3. Retrogression from international human rights standards

Many of the human rights obligations contained in international treaties to which the UK is signatory will be directly relevant to the legislation and should be observed and implemented appropriately. The Commission would refer MSPs to its submission to the Scotland Bill Committee on international obligations and the strengthening of the existing mechanisms for legislative scrutiny and effective implementation of the full range of human rights in Scotland.³

In particular, the right to an adequate standard of living and to social security are subject to the principle of progressive realisation within available resources and States must therefore take deliberate, concrete and targeted steps towards their realisation. There is a strong presumption against retrogressive measures and the Commission is concerned that scrutiny of the Bill has not as yet taken account of the requirements of international law in this regard.

Furthermore, the Bill appears to undermine the realisation of the rights contained in the UN Convention on the Rights of Persons with Disability, in particular the right to independent living as well as the rights of children to an adequate standard of living under the UN Convention on the Rights of the Child.⁴

Given these concerns the Commission strongly recommends that the Scottish Parliament give full consideration to the relevant human rights standards and international obligations both in relation to legislative consent as well as in ongoing scrutiny of the wider implications of the Bill and its impact on the most vulnerable individuals, families and communities in Scotland. The Commission recommends that careful monitoring of the post-legislative impact of this legislation is undertaken with particular attention to the human rights issues outlined.

European Convention on Human Rights standards

There are a range of human rights in the European Convention of Human Rights (ECHR) protected by the Human Rights Act 1998 and Scotland Act 1998 which are potentially engaged by the operation of the Bill. There are also standards in international human rights instruments, signed and ratified by the UK, which are relevant to the operation of the Bill as outlined further below.

The Commission would like to highlight the following human rights protections:

- **Article 1, protocol 1- the right to property**

³ Scottish Human Rights Commission Submission to the Scotland Bill Committee, September 2011- http://www.scottish.parliament.uk/S4_ScotlandBillCommittee/Inquiries/Scottish_Human_Rights_Commission.pdf

⁴ The UK ratified CRPD in 2009 and UNCRC in 1991.

Any interference with the right to property, which includes contributory benefits, must strike a fair balance between the right of the individual to peaceful enjoyment of their possessions and the public interest. While this does not guarantee that where a person does not meet the conditions of entitlement that this will be incompatible with the right, changes to existing benefits should not take away the very essence of the right. The European Court has also found that social welfare systems should be administered in a way that is not arbitrary or based on unjustified discrimination.⁵

- **Article 3 - freedom from inhuman or degrading treatment**

There are positive obligations on the State to ensure that individuals are not left in circumstances of destitution or hardship which could breach their right to respect for private, home and family life (Article 8 ECHR) or amount to inhuman or degrading treatment (Article 3 ECHR).

In establishing a potential Article 3 violation firstly an individual's situation must reach a high threshold of gravity, and secondly it must be established whether the State, through either act or omission, can be held responsible for the situation.

While the threshold for a breach of Article 3 is a high one it has nevertheless been found that this threshold can be reached where an individual "with no means and no alternative sources of support, unable to support himself, is by the deliberate action of the State, denied shelter, food or the most basic necessities of life."⁶ The test will also take into account all relevant factors such as an individual's vulnerability, for example if they are elderly or in ill health⁷ and the cumulative impacts of a situation.

While the UK Government considers that reduction in a universal credit award will not amount to "treatment" as claimants have responsibility to avoid the consequences of deprivation, this raises concerns about circumstances where an individual cannot undertake the necessary activities or employment because of personal circumstances or vulnerability.

The Commission shares the concerns of the JCHR around the conditionality and sanction provisions in the Bill. While these are not prohibited in human rights law they might in some circumstances lead to destitution amounting to inhuman or degrading treatment contrary to Article 3 of the ECHR.⁸ The risks of this must be properly assessed, and safeguards through hardship support, staff awareness and monitoring of the impacts will be required to ensure compliance.

The Commission also notes the devolution to Scotland of benefits such as the Council Tax Benefit (with 10% cut⁹) and elements of the Social Fund. In light of the above it will be all the more imperative that community care grants and crisis loans for living expenses are targeted to the most deprived households and areas in Scotland.

- **Article 8 - the right to private home and family life**

⁵ Stec v UK 67531/01 (2005) ECHR 724; Zeman v Austria Application No 23960/02

⁶ R (Limbuela) v secretary of State for the Home Department [2006] 1 AC 396

⁷ R (Limbuela) v secretary of State for the Home Department [2006] 1 AC 396

⁸ House of Lord, House of Commons, Joint Committee on Human Rights, Legislative Scrutiny: Welfare Reform Bill, Twenty-first Report of Session 2010-12, para 1.45

⁹ Scottish Government Supplementary Memorandum LCM (S4) 5.1 para 18

Article 8 of the Convention protects a private home and family life and is broad in its scope. It protects aspects of an individual's physical and psychological integrity as well as encompassing "aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world".¹⁰ Or even more broadly "to conduct one's life in the manner of one's choosing".¹¹ Interference with this right is permitted whether it is prescribed by law and is a proportionate response to achieving a legitimate aim.

The housing benefit component of universal credit, including the introduction of an under occupation penalty, direct payments, and a benefit cap with potential impacts on Scottish commitments towards tackling homelessness, would seem likely to engage Article 8 of the ECHR. This may particularly be the case where changes could result in eviction or moving home. The housing benefit changes also risk having a disproportionate impact on disabled people who require adapted housing and for whom a restriction on a one bedroom property or being forced to move property will have a knock-on effect to their care and support options.¹² This could risk breaching Article 8 and Article 14 (as below).

A further example of a potential Article 8 interference would be where the disability mobility component of the Personal Independence Payment (PIP) is removed for individuals in residential care, thereby potentially restricting their ability to live independently and participate effectively in the community (see also UN Convention on Rights of Persons with Disability protections below). The announcement on 1 December 2011 that the mobility component of PIP is to be continued for those in residential care is therefore welcome.

The loss of passported benefits, as eligibility for UK benefits acts as a gateway for other services, such as legal aid, free school lunches and "blue badge" mobility scheme to claimants under the new proposals may also contribute to cumulatively negative impacts which could result in a violation of Articles 8 or 3 as individuals and families are left without adequate levels of support.

- **Article 14- the right to non-discrimination**

As noted above it is considered that measures in the Bill will be within the ambit of Convention rights, such as the right to property, the right to private home and family life and the right not to be subject to inhuman or degrading treatment, and so the right to non-discrimination, which relates to these rights, may also be considered.

Disparate outcomes where certain groups may be disproportionately affected by the measures in the Bill may violate Article 14 without proper justification demonstrating that such discrimination is the minimum necessary interference to achieve an overarching and legitimate aim.¹³ There is a duty on the State to avoid discrimination - failure to attempt to correct inequality may in itself give rise to a breach.

While the full impact of the Bill may not be easily assessed at this stage it appears likely that there may be a disproportionate impact on certain protected and more

¹⁰ Evans v UK, Grand Chamber (2007) citing Pretty v UK (2002)

¹¹ Pretty v UK (2002)

¹² E.g. R v Enfield LBC (ex parte Bernard) [2002] E.W.H.C. 2282

¹³ DH v Czech Republic (2008) 47 EHRR 3

vulnerable groups such as disabled people, certain ethnic minorities, kinship carers, larger families or single parent families and women.

For example, Citizens Advice Scotland in its written evidence to the Health and Sport Committee outlined how conditionality requirements and a benefits cap may disproportionately affect kinship carers who are not assessed as foster carers in Scotland, unlike in England and Wales.

Similarly large families with children, who are often from ethnic minority groups, may also be disproportionately affected by the household benefits cap. The justification put forward by the UK Government here is that this will promote fairness with similar sized households who are outside the benefit entitlement and is proportionate taking into account the amount of the cap, notification, and the few numbers of households affected. The JCHR puts forward alternative approaches of calculating the level of cap based on the earnings of families with children rather than all households as a more proportionate response and calls for monitoring of this change.

Reductions in contributory Employment Support Allowance (ESA) to 12 months could particularly affect disabled people because it is aimed at people with health conditions which affect their ability to work. Inclusion Scotland has estimated that, on the basis on DWP statistics, 22,000 disabled people in Scotland could lose ESA in April 2012 already prior to these changes as a result of a one year limit effective from next April.¹⁴ It has also been predicted that changes to ESA will particularly affect women and older people who may find it more difficult to get back into work, even with increased support for these groups. There is a requirement for objective justification for these disparate impacts to guard against violations of the right to non discrimination.

International human rights standards

International human rights standards are also of relevance in consideration of the Bill both to ensure compliance with the UK's treaty obligations and in the interpretation and application the Convention rights as set out above. The Commission's submission to the Scotland Bill Committee in September 2011¹⁵ and recommendations to the United Nations Human Rights Council on the human rights record of the UK as part of the Universal Periodic Review (UPR)¹⁶ process, sets out safeguards which could be put in place to ensure better observance and implementation of international obligations by Scottish Minister and the Scottish Parliament, through effective pre and post legislative scrutiny and human rights impact assessment.

The UK Government's stated objective for the Bill is to support people into work while protecting those in greatest need which taken at face value is an objective consistent with the right to work and the right to an adequate standard of living. The measures to be brought into effect by the Bill to achieve the objective raise concerns however about human rights compatibility with the standards set out below. In particular the

¹⁴ Scottish Parliament Health and Sport Committee, Official Report, 22 November 2011, Col 606

¹⁵ Scottish Human Rights Commission Submission to the Scotland Bill Committee, September 2011 - http://www.scottish.parliament.uk/S4_ScotlandBillCommittee/Inquiries/Scottish_Human_Rights_Commission.pdf

¹⁶ Submission by the Scottish Human Rights Commission to the Universal Periodic Review of the UK - May 2012- <http://www.scottishhumanrights.com/application/resources/documents/UPRsubmissionshrc15nov2011.doc>

Commission is concerned that the Bill amounts to retrogression from international human rights standards which cannot be duly justified.

- **The right to social security and to an adequate standard of living**

The Universal Declaration of Human Rights and many subsequent human rights treaties¹⁷, recognise the right to social security “in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

The International Covenant on Economic, Social and Cultural Rights (ICESCR) also guarantees a right to an adequate standard of which includes “adequate food, clothing and housing ...and the continuous improvement of living conditions.”¹⁸

These rights to an adequate standard of living and to social security, recognised in the treaties are subject to the principle of progressive realisation and so States must take deliberate, concrete and targeted steps towards their realisation“ to the maximum extent of their available resources.”

The UN Committee on Economic, Social and Cultural Rights (the Committee) has elaborated in General Comment 19¹⁹ that in order to demonstrate compliance “State parties must show that they have taken necessary steps towards the realisation of the right to social security within their maximum available resources, and have guaranteed that the right is enjoyed without discrimination and equally by men and women, different ethnic groups both in respect of adults and children.”

Importantly the Committee states that “*Violations include, for example, the adoption of deliberately retrogressive measures incompatible with the core obligations.*” The measures contained in the Welfare Reform Bill could be viewed as largely retrogressive in nature and therefore prohibited where they do not meet the following tests, as set out by the Committee:

“If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party. The Committee will look carefully at whether:
*(a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level.”*²⁰

¹⁷ UDHR, (Article 22), International Covenant on Economic, Social and Cultural Rights (Article 9), International Convention on the Elimination of All Forms of Racial Discrimination (Article 5(e)); Convention on the Elimination of All Forms of Discrimination against Women (Articles 11 and 14) and the Convention on the Rights of the Child (Article 26).

¹⁸ International Covenant on Economic, Social and Cultural Rights (Article 11)

¹⁹ UN Committee on Economic and Social Rights, General Comment 19, The Right to Social Security, 4 February 2008, E/C. 12/GC/19, 64-65

²⁰ UN Committee on Economic and Social Rights, General Comment 19, The Right to Social Security, 4 February 2008, E/C. 12/GC/19, 64-65

The Commission expresses its concern that the Bill may be retrogressive in relation to the right to social security and the right to an adequate standard of living and that the above safeguards and justifications have not been given adequate consideration.

- **The rights of disabled people**

The UN Convention on the Rights of Persons with Disabilities requires State parties to “prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds” and to “take all appropriate steps to ensure that reasonable accommodation is provided” (Article 5).

The Convention requires, inter alia, States to “take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures...include the identification and elimination of obstacles and barriers to accessibility” (Article 9). The Convention also guarantees personal mobility (Article 20); respect for privacy, home and the family (Article 22-23); education (Article 24); health (Article 25); work and employment (Article 27); an adequate standard of living and social protection (Article 28) and the right to live independently in the community (Article 19). All of these measures are subject to the principle of progressive realisation as set out above (Article 4).

While the economic impact of the welfare reform is estimated at taking nearly £2 billion²¹ - £2.5 billion²² from Scottish households by 2014-15, Inclusion Scotland has estimated nearly £1 billion of this will be from disabled people and their households²³, illustrating a disproportionately negative impact on disabled persons.

The Commission has concerns that the introduction of the Personal Independence Payment (PIP) will have a negative impact on disabled peoples right to independent living under Article 19 of the Convention which includes elements all of the rights as set out above. For example, if the qualifying period for the care component of Disability Living Allowance, or PIP, is to be changed from three to six months, resulting in concerns that people will be left without critical levels of support. The 20% reduction in the budget for PIPs means that funding is not only being targeted at those most in need but that overall levels of support are being reduced. It is anticipated that reductions in benefit rates and tighter eligibility criteria will be needed to achieve the 20% reduction, which raises concerns about retrogression and non compliance with Article 19 of the CRPD which does not meet the tests as set out above.

The Commission welcomes the proposal of the JCHR for the assessment of PIPs to take account of the social, practical and environmental barriers experienced by claimants in line with the social model of disability in the Convention and lessening the likelihood of incompatibility.

There are further concerns about how the housing component of universal credit may disproportionately negatively impact disabled people with adapted housing and

²¹ The Fraser of Allander Institute, Economic commentary Vol 34 No 2 November 2010

²² Scottish Parliament Health and Sport Committee, Official Report, 22 November 2011, Col 651

²³ Inclusion Scotland, Written evidence to the Health and Sport Committee, 2011.

space requirements for carers or equipment. If disabled tenants are forced to move into properties unsuited to their needs this will risk breaching their Article 8 rights as set out above as well as rights contained in the Convention.

- **The rights of children**

The Convention on the Rights of the Child (CRC) includes (Article 26) “the right [of every child] to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.” Article 27 provides the right of every child to an adequate standard of living for the child’s physical, mental, spiritual, moral and social development.

Further, Article 2(1) provides that States Parties have a duty to respect and ensure the rights in the Convention to each child within their jurisdiction “without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”. In addition, Article 2(2) provides that States Parties shall take all appropriate measures to ensure that children are protected “against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.”

Concerns about the impacts of Bill on child poverty were highlighted in evidence to the Health and Sport Committee²⁴ and backed by work carried out by the Institute of Fiscal Studies which suggests that between 50,000 and 100,000 children in Scotland may be put into poverty. In particular concerns were raised about the impact of the legislation on lone parent families who are estimated to suffer an 8.5% cut in their income over the next 5 years.²⁵

There is a danger that the “conditionality” framework around the Bill effectively penalises the dependent children of vulnerable claimants who may not, for a variety of reasons, including availability of flexible working hours and affordable childcare, meet the conditions and will therefore face a reduction in payments. The Commission is also concerned about any reduction in the amount of support available for new claimants of universal credit who care for disabled children. These potential impacts may be incompatible with the UN CRC rights as set out above. The impact, particularly on lone parents and the loss of benefit to them and their children must , therefore be further assessed.

Furthermore, it would appear that proposals should increase and not reduce ministerial accountability for the eradication of child poverty and it would be helpful to require the Secretary of State to make a statement to the UK Parliament in response to the Social Mobility and Child Poverty Commission in order to increase accountability for the eradication of child poverty and the progressive realisation of children’s rights.

All of the above international human rights standards, ratified by the UK, and binding in international law must be subject to careful consideration by the Parliament. Furthermore, the above international standards may be used to guide interpretation and application of the justiciable ECHR standards outlined above.

²⁴ Scottish Parliament Health and Sport Committee, Official Report, 15 November 2011

²⁵ Scottish Parliament Health and Sport Committee, Official Report, 15 November 2011, Col 573

European Union Charter on Fundamental Rights

EU law also provides protection for fundamental rights including through the EU Charter on Fundamental Rights (the Charter) , which Courts of Member States are obliged to give effect to, within the scope of EU law²⁶, the Charter having the same legal value as Treaties.²⁷ Article 1 of the Charter protects human dignity and Article 3 protects physical and mental integrity and all rights must be applied in a non discriminatory way.²⁸ All of the provisions must be applied in a way that furthers the overriding objectives of the Treaty “founded in values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.”²⁹

Recommendations

The Commission recommends that the Parliament give full consideration to the above human rights standards and obligations both in relation to legislative consent as well as in on going scrutiny of the wider implications of the Bill and its impact on the most vulnerable individuals, families and communities in Scotland. The Commission recommends that careful monitoring of the post-legislative impact of this legislation is undertaken with particular attention to the human rights issues outlined above.

The Commission reiterates the regret stated by the JCHR that the Bill was not accompanied by a full human rights memorandum which would have assisted both the Scottish Parliament and the UK Parliament scrutiny of the Bill to ensure its compliance with human rights obligations, both arising from the HRA and ECHR and international instruments. Additionally it is of concern that the Equality Impact Assessments relating to distinct aspects of the Bill do not take account of cumulative impacts of multiple provisions. The development of human rights impact assessment (HRIA) as a means of systematically identifying the human rights impacts of the legislation throughout the legislative cycle and post enactment would be a helpful mechanism for future development.³⁰

It is recommended that related subordinate legislation is also fully assessed by both the UK and Scottish Parliaments for their human rights impacts. It is understood that it is intended that safeguards on compatibility with human rights may be contained in secondary legislation which highlights the need for proper scrutiny. Again, the Commission would endorse the JCHR recommendation that, at a minimum, draft Regulations should be published with the Bill in order for full legislative scrutiny by both Parliaments.

²⁶ Article 51, The Charter of Fundamental Rights of the European Union. Regarding the Protocol No.

³⁰ “opt out” of UK see Opinion of AG Trstenjak in Case C-411/10

²⁷ Article 6(1) Treaty on European Union (TEU)

²⁸ Article 20 and 21 of the EU Charter, Articles 2 and 393) TEU, Articles 8, 10 and 19 FTEU , Article 14 ECHR under Article 6(3) TEU

²⁹ Articles and 3(5) TEU

³⁰ Scottish Human Rights Commission Submission to the Scotland Bill Committee, September 2011-
http://www.scottish.parliament.uk/S4_ScotlandBillCommittee/Inquiries/Scottish_Human_Rights_Commission.pdf; and Human Rights Impact Assessment:

Review of Practice and Guidance for Future Assessments by James Harrison and Mary-Ann Stephenson, 1 June 2010-

<http://www.scottishhumanrights.com/application/resources/documents/HRIAFeb2011.doc>

Finally, it is recommended that the human rights implications of withholding legislative consent for the more contentious aspects of the Bill must be considered in light of these human rights implications. We note the concern expressed by some organisations that withholding consent may result in delays to universal credit and passported benefits in Scotland which could result in further hardship for vulnerable individuals and families. If the Scottish Parliament votes to withhold consent in order to further the protection of the human rights of the most in need families in Scotland, it is essential that negative impacts are fully assessed and mitigated against.

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