Bar Council response to the Review of the Balance of Competences: Social and Employment consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Department of Business, Innovation and Skills consultation paper entitled Review of the Balance of Competences: Social and Employment.[1]

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

4. This response has been prepared with particular input from the Equality and Diversity Committee of the Bar Council and the Committee of the Employment Law Bar Association. Its focus is therefore on the impact of EU social and employment competence within the remits of those committees, in particular on (i) equality and diversity, and (ii) employment regulation (with less focus on health and safety at work). The representations set out below should be understood in that context.

5. Members of the Bar have a wide variety of different political opinions, including a range of different views about the EU and the overall balance of competencies. Accordingly, this response does not seek to promote a particular view of the correct overall balance in these areas. Nevertheless, the Bar Council and its members who practise in the fields covered by this consultation do have a common interest in:

[1] Department for Business, Innovation and Skills (October 2013) Review of the Balance of Competences: Social and Employment

a. ensuring and promoting a strong and effective rule of law with equality for all before the law; and

b. ensuring and promoting an effective, coherent and workable system of employment and discrimination rights.

6. Therefore, this response does suggest areas in which we consider that there is evidence that EU competence promotes those objectives, as well as identifying areas in which domestic legislation would in any event be required in order to ensure that those objectives continue to be met, even if the scope of EU competence in these fields were reduced.

Overview

7. This consultation covers three broad areas:

a. the argument for social and employment competence
b. the impact on the national interest, and
c. future options and challenges.

8. This response covers the broad areas and also highlights the impact of EU action on the UK and calls for EU anti-discrimination law to be further enhanced.

Question 1: To what extent is EU action in this area necessary for the operation of the single market?

9. The rule of law depends on strong anti-discrimination laws. They underpin equality before and under the law. There is a need for these rights to be consistent and strongly recognised across Europe. They are an essential complement to the operation of the single market. One of the basic foundations of the single market is free movement of persons. Individuals who are vulnerable to discrimination will be reluctant to exercise their free movement rights unless they are guaranteed a comparable standard of protection from discrimination in the Member State to which they are moving. In comparison to many other EU Member States, the UK has a longer tradition of anti-discrimination law and it has often been at the forefront of legal developments in this field (see also the response to Question 3 below). Setting common minimum EU standards benefits the UK because it helps to ensure (for example) that British citizens will not be deterred from exercising their free movement rights due to inadequate protection from discrimination elsewhere in the EU.

10. Moreover the Bar Council is committed to a Bar that is representative of all and for all and these rights are wholly consistent with that approach.

Question 2: To what extent are social and employment goals a desirable function of the EU in their own right?

11. Social and employment goals related to promoting equal treatment in employment and social policy are a desirable function of the EU. Given EU integration, it is not possible to contain social problems within a single Member State. For example, the well-documented discrimination and exclusion of Roma communities in some parts of Eastern Europe has a cross-border effect because it may cause increased levels of migration by those seeking to escape discrimination.

12. Furthermore, the EU seeks to promote equality through its international development policies, for example in relation to women. It can only do this convincingly if it has strong internal standards in this sphere.

13. Many barristers work across borders and particularly in Europe. It certainly helps them and their clients that they are protected from discrimination on the same basis across Europe.

Question 3: What domestic legislation would the UK need in the absence of EU legislation?

Equal treatment

14. There is no doubt that the UK would continue to need a comprehensive framework of anti-discrimination legislation even in the absence of EU legislation. The UK has a strong domestic tradition of promoting equality and diversity and has often been at the forefront of legal developments in that regard (as we outline further below). It would be contrary to that tradition, and to the essential principles of equality in a modern liberal democracy, for there to be any reduction in the present level of protection against discrimination.

15. Moreover, the UK would continue in any event to have obligations to combat discrimination under other international human rights instruments, such as the UN Conventions on the Elimination of Racial Discrimination, on the Elimination of Discrimination Against Women, and on the Rights of People with Disabilities. Furthermore, the UK would still be bound by the European Convention of Human Rights, which includes the right to non-discrimination in Article 14. Domestic legislation would be necessary to ensure adequate protection of the rights derived from Article 14, read together with other Convention rights.

16. That the UK has a tradition of leading the way in this field is apparent from the following:

a. The UK Parliament enacted the Equal Pay Act 1970 before the UK joined the EEC (though it was brought into force after the UK's entry);

b. The UK Parliament enacted the Disability Discrimination Act 1995 before EU legislation in that area under the Discrimination Framework Directive 2000/78/EC;

c. Whilst it is undoubtedly correct that the jurisprudence of the ECJ/CJEU has helped to shape domestic courts' interpretation of anti-discrimination legislation (in generally uncontroversial and/or positive ways, as we suggest below), equally domestic UK courts have often led the way on important developments in discrimination jurisprudence: for example, in developing and applying the concept of indirect discrimination in the field of equal pay (see Jenkins v Kingsgate (Clothing Productions) Ltd [1980] 1 WLR 1485; Wilson v HSE [2010] IRLR 59, paras 65-67 *per* Arden LJ);

d. In other areas, domestic courts have recognised that UK discrimination legislation goes further than EU law (see for example North Cumbria Acute Hospitals NHS Trust v Potter [2009] IRLR 176, paras 80-87);

e. Even where domestic courts place reliance on jurisprudence of the ECJ/CJEU when construing or applying domestic equality legislation, more often than not it is to reinforce a conclusion that they would have reached in any event (see for example Akwiku & another v Onu [2013] ICR 1039);

f. Finally, the Equality Act 2010 already goes beyond EU minimum standards in certain respects: for example, discrimination on grounds of religion, age, disability and sexual orientation is prohibited in access to goods and services (which is not yet a requirement of EU law).

17. Moreover, in areas where EU law has undoubtedly shaped the development of domestic discrimination law, there is nothing to suggest that the UK might in principle wish to adopt a significantly divergent approach if the requirement to comply with EU discrimination law were to be removed. For example, a principle of discrimination law in which EU jurisprudence has undoubtedly been highly influential is in the development and application of the 'principle of proportionality' where a justification defence is available to employers or other alleged discriminators. That principle is at the heart of EU jurisprudence on the subject (see Bilka-Kaufhaus GmbH v Weber von Hartz [1987] ICR 110; Wilson, para 29 per Arden LJ) and has accordingly also become a 'well settled' element of domestic discrimination law (Homer v Chief Constable of West Yorkshire Police and West Yorkshire Police Authority [2012] IRLR 601). It is now enshrined in the statutory provisions of the Equality Act 2010 (see for example ss.13(2), 15(1)(b), 19(2)(d)).

18. Thus the central position of the 'principle of proportionality' is perhaps the most significant result of the influence of EU law in this field. Yet there is no evidence of any alternative test that might be regarded as more desirable for the purposes of domestic law. Indeed, in other areas where the concept of discrimination has received judicial attention, such as in relation to Article 14 of the ECHR, something very like the principle of proportionality has also evolved (see Stec v UK (2006) 43 EHRR 1017, para 51; R (Carson) v Secretary of State for Work and Pensions [2006] 1 AC 173, para 3 per Lord Nicholls; paras 57-58 per Lady Hale; R (Nicklinson) v MOJ & others [2013] EWCA Civ 961, para 110).

19. In summary, therefore, the jurisprudential evidence suggests that in the absence of equal treatment legislation:

a. The UK would still require a comprehensive framework of anti-discrimination legislation consistent with its domestic tradition and other international obligations;

b. There would be no reason to reduce the level of protection currently provided by the Equality Act 2010 or substantially to amend the essential structure or principles of that framework; and

c. The interpretation and application of such domestic anti-discrimination legislation by domestic courts would be unlikely to change in any substantial respect.

Employment regulation

20. In the absence of EU legislation (and domestic implementing legislation) regulating the treatment of fixed-term, part-time and agency workers, consideration would undoubtedly need to be given to the rights of such workers and how their treatment is to be regulated compared with permanent, full-time and direct employees. The forms of employment relationship within the modern UK labour market are diverse and include increasing numbers of workers in all three of these categories. Whilst such forms of employment relationship offer increased flexibility for both employers and workers, they also pose a question about the extent to which and circumstances in which employers should be permitted to exploit that flexibility in order to treat such workers differently (less favourably) than their core, permanent or full-time employees. There may be differences in the make up by gender, race/national origins and perhaps other characteristics of workers in these different groups, which mean that other equal treatment principles are likely to be engaged.

21. Therefore, any coherent system of employment rights in the modern UK will necessarily need to grapple with the comparative treatment of these different groups and make clear provision for the extent to which the employment rights and treatment of workers in the different groups should be the same and/or the extent to which differential treatment should be permitted. At present that question is regulated by EU legislation, implemented through the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 and the Agency Workers Regulations 2010. No doubt, in the absence of EU legislation on the subject, there would be ample scope for the UK to regulate the treatment of these workers differently, but it is overwhelmingly likely that some statutory regulation would be considered necessary.

22. A related consideration in the absence of EU legislation/competence would be the treatment of posted workers from other EU countries. At present, aside from the basic minimum statutory rights stipulated by UK law, which are required to apply to all posted

workers pursuant to Directive 96/71/EC, the position under EU law is that it is unlawful even for private UK organisations such as trade unions to take measures (such as industrial action) designed to ensure that low-paid posted workers from other EU countries are not used in a manner that under-cuts and puts a general downward pressure on UK terms and conditions of employment (see Laval v Byggnads Case C-341/05 [2007] ECR I-11767; [2008] 2 CMLR 9). Given the substantial number of posted workers in the UK[2] and their potential impact on employment terms and conditions in the UK, particularly in sectors such as the construction industry, it would therefore be desirable, in the absence of EU legislation/competence in this field, for domestic legislation to regulate the treatment of posted workers and their use in sectors where they potentially have the effect of under-cutting normal UK terms and conditions, which in turn risks stimulating hostility to foreign workers.

23. Similarly, the regulation of transfers of undertakings is likely to be a matter that would require alternative domestic legislation in the absence of EU legislation (in its present form of the Acquired Rights Directive 2001/23 ('ARD') as implemented by the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE')). Such transfers are commonplace and, in the absence of legislation, the default position at common law is that every time a business or part of a business is transferred from one company to another, all employees' contracts of employment would terminate and they would be required to commence fresh employment with the transferee, with no automatic right to such employment. Even if successful in obtaining employment with the transferee, they would lose their continuity of employment and associated employment rights. Given the frequency of business transfers, that 'default' position would inevitably create significant instability in the labour market and/or lead to employees in otherwise long-standing, stable employment losing established rights. Therefore, in the absence of EU legislation, whilst no particular form of regulation of such transfers would be mandated, it is very likely that some form of regulation would be considered necessary. Even at present, TUPE goes beyond the strict scope of the ARD by including the concept of a 'service provision change' within the definition of a 'relevant transfer' (reg. 3(1)(b)). That is a wholly domestic concept designed to achieve greater clarity than has been achieved by the complex and often opaque jurisprudence of the ECJ/CJEU on what constitutes a relevant transfer for the purposes of the ARD. Therefore, in the absence of EU legislation, the UK could choose to retain its current domestic concept of a service provision change and the domestic protection for employees which currently applies under TUPE in those circumstances.

24. As to the regulation of information and consultation, including in the specific context of collective redundancies, any coherent, effective and workable system of industrial relations requires legislation to support and facilitate appropriate consultation and bargaining at a collective level. Moreover, the UK has a positive obligation pursuant to Article 11 of the ECHR to facilitate a system of meaningful collective bargaining as an essential element of trade union rights under that Article (see Demir and Baykara v Turkey ECHR Case No. 34503/97, 12 November 2008). Therefore, those matters would require domestic legislation even in the absence of EU legislation. They are presently regulated by primary legislation in the form of the Trade Union and Labour Relations (Consolidation) Act

[2] See http://www.eurofound.europa.eu/eiro/studies/tn0908038s/uk0908039q.htm

1992, which contains a large number of purely domestic provisions as well as those which implement underlying EU legislation in this field and is intended to form a coherent overall domestic industrial relations code. It is, therefore, unlikely that any substantial revision of the 1992 Act would be appropriate even in the absence of EU legislation.

25. Finally, in respect of EU legislation dealing with employment regulation related to health and safety, such as legislation on working time, pregnant workers and young workers, it is unlikely that Parliament would wish to leave such matters entirely unregulated. Therefore, again whilst the particular form and content of any purely domestic legislation may differ from the present EU legislation, it is very likely that some domestic legislation on these subjects would be required in its stead.

Question 4: What evidence is there that EU action in social policy advantages the UK?

26. As has already been indicated above, where EU law has had a clear impact on domestic anti-discrimination law, that impact has generally had the effect of improving the quality of UK anti-discrimination legislation, in particular through the impact of pioneering judgments of the ECJ/CJEU. For example, in 1996, in *P v S and Cornwall County Council*, the ECJ held that the dismissal of a woman following gender reassignment was unlawful discrimination on grounds of sex. This led to amendment of the Sex Discrimination Act 1975. Although the decision was novel at the time, few would argue today that the law should not protect people from dismissal following gender reassignment. Likewise, it is possible to point to other aspects of anti-discrimination law where the ECJ/CJEU helped to develop the law and these principles have since become widely accepted. For example, in *Webb v EMO Air Cargo*, the CJEU clarified the need for the Sex Discrimination Act 1975 to prohibit pregnancy discrimination, another proposition which would no longer be controversial.

Question 5: What evidence is there that EU action in social policy disadvantages the UK?

27. There is generally little or no evidence, from the specific point of view of the Bar's commitment to Equality and Diversity and/or its interest in an effective, coherent and workable system of employment and discrimination rights, that EU action in social policy disadvantages the UK.

28. The only point that might be highlighted from the jurisprudential evidence is the effect, mentioned above, of the CJEU's judgment in Laval v Byggnads Case C-341/05 [2007] ECR I-11767; [2008] 2 CMLR 9:

a. Firstly, there is a serious question as to whether that judgment is consistent with the UK's obligations under Article 11 of the ECHR, since it appears to give primacy to the principle of free movement of services over the trade union rights guaranteed by Article 11. Therefore, the UK is potentially disadvantaged by the current position in EU law on posted workers by being placed in breach of its obligations under the ECHR.

b. Secondly, the effect of the current position in EU law on posted workers is that employers are free to use low-paid posted workers from other EU countries to under-cut normal UK employment terms and conditions (subject of course to the requirement to pay the national minimum wage) and thereby (i) apply a downward pressure to those terms and (ii) undermine equality within the UK workforce by permitting the development a lower-paid, predominantly non-resident segment of the workforce.

c. Thirdly, there is some evidence that permitting the use of posted EU workers in this way in turn encourages hostility towards them based on their national origins[3] and so may have an adverse effect on equality and diversity within the UK more generally.

29. Therefore, in that limited context, there is some evidence that the current position in binding EU law as to the treatment of posted workers has an adverse effect both in relation to equality within the UK workforce and in relation to general standards of employment terms and conditions.

30. Outside that limited area, however, there is no evidence that EU action has a deleterious effect in relation to equality/diversity and/or the coherence of the UK's system of employment and discrimination rights.

Question 6: Are there any other impacts of EU action in social policy that should be noted?

31. Tackling discrimination across the EU also provides common benefits because of the potential to learn from the experience of other jurisdictions in relation to making law more effective. The development of EU anti-discrimination law has led to much greater exchange of information and experience between NGOs, legal practitioners and government bodies with an interest in this field. This favours the improvement of law and policy over time as there is an opportunity to borrow successful techniques developed elsewhere, as well as avoiding the adoption of measures that have proven to be problematic outside the UK. For example, the experience in Germany with positive action in recruitment and promotion (and the resulting CJEU case-law) clearly shaped the drafting of section 159 of the Equality Act 2010.

Question 7: What evidence is there about the impact of EU action on the UK economy? How far can this be separated from any domestic legislation you would need in the absence of EU action?

32. We believe that anti-discrimination legislation is beneficial to the UK economy. Within the workplace, it ensures that the best use of all available talent is made and it seeks to avoid the economic marginalisation of certain groups. The latter imposes costs on the state and society, such as increased rates of unemployment. For example, age discrimination

[3] See http://library.fes.de/pdf-files/gurn/00379.pdf, p102

forces older people to leave the workforce earlier than necessary with consequent impacts on reduced contribution to taxation and increased reliance on social welfare. Moreover, anti-discrimination law seeks to ensure that services are accessible to all people. This is beneficial to business as it widens the pool of customers; for example, inaccessible buildings exclude disabled consumers. Alternatively, if people face discrimination in access to credit and finance, then this can hinder the growth of business and expansion of the economy. We believe that the UK would need domestic anti-discrimination legislation in the absence of EU action, but the EU has been a constructive force in enhancing domestic law. For example, its extension to include age discrimination in 2006.

Question 8: How might the UK benefit from the EU taking more action in social policy?

33. As mentioned earlier, domestic legislation on anti-discrimination goes beyond the minimum requirements set by the EU (e.g. in respect of material scope). This means that UK citizens who exercise their free movement rights may not enjoy the same level of legal protection elsewhere in the EU that they currently find in the UK. This may be a barrier to free movement or hinder British businesses operating in other EU Member States. It would be in the interests of the UK to see the quality of EU anti-discrimination law enhanced further, in particular through the adoption of the 2008 proposal to extend the prohibition of discrimination on grounds of religion or belief, age, disability and sexual orientation into all areas of EU competence.

Question 9: How might the UK benefit from the EU taking less action in social policy, or from more action being taken at the national rather than EU level?

34. The Bar does not believe that it is in the interests of the UK for the EU to take less action in social policy so far as it relates to equality/discrimination. In the limited area where some adverse effect has been noted above, the appropriate course would be to rectify the problem by seeking to change the current position in EU law, rather than by reducing the EU's competence in this sphere.

35. As noted in the introductory section to this response, members of the Bar inevitably have diverse views about EU competencies in the sphere of employment and social policy more generally. Accordingly, outside the sphere of equality/discrimination law, where it is our view that the EU has had and continues to have a generally positive impact, the Bar Council does not seek to promote a particular position with regard to the appropriate balance of competencies.

Question 10: How could action in social policy be undertaken differently? For example, are there ways of improving how EU legislation is made e.g. through greater adherence to the principles of subsidiarity and proportionality or the ways social partners are engaged?

36. EU legislation in the field of anti-discrimination already provides sufficient guarantees with regard to subsidiarity and proportionality. For example, the Directives leave Member States great flexibility with regard to what type of institutional support is provided to individuals (such as equality bodies). These vary across the Member States, often reflecting local traditions and context. Likewise there is considerable flexibility

regarding the enforcement infrastructure. While the UK has retained its emphasis on Employment Tribunals, other states have relied on local legal traditions, such as Ombudsmen. There is also flexibility with regard to the exceptions permitted within anti-discrimination law. For example, some states have chosen to retain mandatory retirement ages. Arguably, the main concern is that excessive flexibility risks undermining minimum standards.

37. Again outside the field of equality/discrimination law, the Bar Council does not seek to promote any particular position as to the appropriate level for action on employment or social policy matters.

Question 11: How else could the UK implement its current obligations in this area?

38. Both the current and previous governments have been committed, in principle, to the implementation of the Equality Act 2010. This comprehensive legislation was adopted after extensive public and political debate over many years. While it implements Britain's obligations in relation to EU anti-discrimination law, it goes further and includes domestic legal initiatives (e.g. the public sector equality duty). In principle, the UK could return to the earlier piecemeal implementation of EU Directives via ground-specific legislation, but this would be a retrograde step. By advancing coherence across the protected characteristics, the Equality Act 2010 offers many benefits for individuals and businesses in comparison to the opaque and fragmented legislation that existed previously.

39. In relation to wider social policy and employment obligations deriving from EU law, there is no realistic alternative to legislating either through primary or secondary legislation so as to ensure compliance.

Question 12: What future challenge/opportunities might the UK face in this area and what impact might these have on the national interest?

40. The UK needs to be in the vanguard of promoting high standards on equality across the EU. This requires a strong legal foundation of comprehensive anti-discrimination legislation, which is still lacking at EU level. Failure to make progress in advancing equality within the EU is likely to exacerbate push factors around migration by compelling the most marginalised groups to consider relocating to avoid discrimination. Likewise those arriving in the EU as new migrants can be expected to avoid Member States where there is widespread discrimination and exclusion of minority communities. A balanced and constructive migration policy within Europe demands a strong internal commitment to combating discrimination across the EU.

41. A first step in promoting a more coherent EU anti-discrimination legal framework would be for the UK to advocate in favour of adoption of the 2008 proposed Directive on extending anti-discrimination law.