

Setting the Scene: Legislative Context and Implementation - UK and Devolution

Colm O’Cinneide

Professor of Law, University College London

Key Points

- Equality law and policy was historically centralised at Westminster/Whitehall level. Devolution has changed this dynamic in fundamental ways, with s. 120 GWA 1998 being a highly significant marker of this.
- Distinct equality strategies have emerged in Wales, Scotland and NI, best reflected in the varying design of the specific positive equality duties in place in each of the devolved nations.
- However, ‘employment law’ – which includes anti-discrimination law – remains a reserved function. This constrains the freedom of action of the devolved legislatures and governments, especially in relation to the private sector.
- Wider constraints on the legislative capacity of the devolved legislatures need also be noted, especially as they relate to human rights treaty incorporation and Westminster legislation. *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill [2021] UKSC 42.*

Consequences

- ‘Stasis’ in Westminster limits to some degree what is possible at devolved level, as does the wider structure of the devolved constitutional framework. The UK-wide ‘baseline’/Internal Market focus of current UK government also a factor.
- More specifically, the reserved status of employment law limits the ability of devolved legislatures and governments to promote equal pay and other equality objectives, particularly in the private sector.
- ‘Promotion’ is possible, including auditing requirements; direct regulation of the employment relationship is not. This impacts on e.g. positive action measures; positive duty measures insofar as they fall outside the existing freedom of action conferred on the devolved governments; the enforcement mechanism for future human rights incorporation mechanisms.
- Note the ongoing constitutional discussion about the place of Wales within the UK’s constitutional structure. Time for new thinking?