



European Union (Withdrawal) Bill

House of Commons Committee stage

Tuesday 21 November 2017

This briefing supports: New Clause 78, Amendment 8 to Clause 5 and Amendment 10 to Schedule 1.

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Introduction

The Equality and Human Rights Commission (the Commission) has been given powers by Parliament to advise on the equality and human rights implications of laws and proposed laws. The Commission's independent advisory role is crucial in ensuring the legislative changes that flow from the UK's decision to leave the European Union fully deliver the Government's commitment to non-regression on a range of social justice issues, including workers' rights and the protections in the Equality Acts 2006 and 2010. Our analysis indicates that the Bill, as presently drafted, will not achieve this objective.

The Commission set out its full position on the EU (Withdrawal) Bill in our Second Reading Briefing.¹ We have adopted a five-point approach to achieve the Government's aim of non-regression:

1. rule out the use of delegated powers to amend equality and human rights laws;
2. include a principle of non-regression of equality and human rights law in the Bill;
3. retain the protections in the EU Charter of Fundamental Rights (the Charter);
4. introduce a domestic right to equality; and
5. ensure the UK keeps pace with developments in equality and human rights law by ensuring the courts have regard to relevant EU case law after exit day.

For the Bill's Committee stage, we will provide a series of briefings on specific areas of concern. This briefing covers amendments relating to points 3 and 4 above.

The Commission's positive vision for equality and human rights in Britain

At this moment of significant constitutional change, it is important to set out a positive vision of the kind of country we want to be after we have left the EU. Britain has a long history of upholding people's rights, valuing diversity and challenging intolerance. The Commission believes

¹ European Union (Withdrawal) Bill, House of Commons Second Reading, 7 September, 2017, available at: <https://www.equalityhumanrights.com/en/legal-responses/parliamentary-briefings>

that respect for equality and human rights must remain at the heart of our national identity. The amendments to the Bill we are supporting will realise the Government's commitment to non-regression on fundamental rights by ensuring any changes to the law on equality and human rights, including matters such as maternity and parental rights, accessibility for disabled people, and immigration, are dealt with in ways that respect parliamentary sovereignty and guard against excessive transfer of power from Parliament to the Executive.

Include a domestic Right to Equality in the Bill

Commission's recommendation

Support New Clause 78: A domestic Right to Equality to ensure the UK remains a global leader in equality rights.

What will it do?

The New Clause replaces the EU underpinning of equality rights with the UK's own guarantee of fair and equal treatment. In doing so it makes our courts, rather than the European Court, the arbiter of equality compliance and ensures that Parliament ultimately decides UK laws.

It does this in two ways:

- by requiring a ministerial statement of compatibility with the right to equality when legislation is introduced to Parliament; and
- by allowing laws and state actions to be tested against the right to equality in the UK courts.

The Clause provides that all individuals are equal before the law and have the right to the equal protection and benefit of the law; and that all individuals have a right not to be discriminated against by a public authority.

It will be enforceable in the same way as rights under the Human Rights Act 1998, and will give the right to fair and equal treatment the same status as the rights protected by that Act.

Why is it needed?

The Government has clearly stated it will maintain current equality laws and protections as we leave the EU,² and that Parliament and our courts should decide UK laws in the future.

For the Government to deliver on this promise, the UK needs to replace the underpinning of equality protections currently provided by EU law, with our own domestic right to equality. At the moment, many of our equality rights are underpinned by EU law. For example, the right to equal pay for work of equal value, protection of pregnant workers, and many other matters, cannot be removed while the UK remains part of the EU. Exiting the EU means losing the fundamental structural underpinning of equality rights and opens up the risk that such rights could be eroded in the future.

We welcome the Government's commitment on the first day of Committee Stage that it will table an amendment to require ministers to make a statement to guard against non-regression of equality law when presenting Brexit-related primary or secondary legislation. We await further details of this amendment.

However, New Clause 78 serves a different, and equally important, purpose. Specifically it provides an overarching domestic guarantee of non-discrimination by the state – a home-grown replacement for the safety net for equality rights currently provided by EU law. This right to equality builds on our common law principle of equal treatment without discrimination. It is an important signifier of the kind of country we want to be after we leave the EU, ensuring that Britain remains a world leader in protection of the right to fair and equal treatment. Its application will not be confined to Brexit-related legislation, but will be an enduring new right in UK law. Importantly, it will strengthen protection for children, who currently have limited protection from unjustifiable discrimination under domestic law.³

The requirement in this Clause for a ministerial statement of compatibility will support effective parliamentary scrutiny of new laws, as

² Legislating for the United Kingdom's withdrawal from the European Union, March 2017 at 2.17.

³ S28 Equality Act 2010.

parliamentarians will be able to consider the Government's explicit policy justification for any potentially regressive measure.

The right to challenge discriminatory laws in the courts provides an essential mechanism to ensure that the new right is enforceable by those affected. It will not impact on justifiable different treatment⁴, so ensuring that the courts can take account of the policy justification for the measure in question, and providing the flexibility necessary to deal with new and unforeseen circumstances.

The effect of New Clause 78 is in line with the recommendation of the Women and Equalities Committee that the Bill should include an amendment "*to empower Parliament and the courts to declare whether legislation is compatible with UK principles of equality.*"⁵

The new right will operate alongside and underpin existing rights in the Equality Act 2010, but not replace them. Where the Equality Act 2010 provides an exception because Parliament has determined specific conduct should not be unlawful⁶, this should be justifiable under the new right.

The new right is intended to apply across the UK. However, its application in Scotland, Wales and Northern Ireland would require discussion with the devolved administrations and agreement as to how the right would be incorporated into the devolution statutes.

Clause 5 and Schedule 1

Commission's recommendation

Support Amendments 8 and 10 to ensure protections in the Charter are retained.

⁴ The principle of justification is read across from the case law of the European Court of Human Rights by the Clause.

⁵ The Women and Equalities Committee recommended this should be by amendment to the Equality Act 2010 however this New Clause achieves similar aims. See Women and Equalities Committee: Ensuring strong equalities legislation after the EU exit, 22 February 2017, Seventh Report of Session 2016–17.

⁶ For example Schedule 3 paragraph 26 of the Equality Act 2010 provides that it is not unlawful sex discrimination for a public authority to provide separate services for each sex if a joint service for persons of both sexes would be less effective and the limited provision is a proportionate means of achieving a legitimate aim.

What will they do?

The Government's position is that removing the Charter from UK law "...will not affect the substantive rights from which individuals already benefit in the UK..." The Commission does not agree with this view as some Charter rights, for example those relating to children, have no equivalency in UK law. Furthermore, the Charter provides remedies, such as the ability for an individual to challenge laws which breach their fundamental rights, which are not otherwise available in UK law.

Clause 5(4) of the Bill removes the Charter of Fundamental Rights from UK domestic law. Amendment 8 removes this Clause and the related Clause 5(5) from the Bill, preserving the Charter as part of retained EU law (in so far as the Charter is covered by clause 4(1)) and ensuring people living in the UK continue to enjoy its protections.

Amendment 10 edits Schedule 1 of the Bill regarding important remedies currently available in UK law, undoing the effect of paragraphs 2 and 3 of Schedule 1 ensuring these remedies remain available to people in the UK.

Why are they needed?

The Charter of Fundamental Rights currently provides important protections for rights that fall within the scope of EU law, such as non-discrimination rights in employment⁷. The Charter should continue to apply to retained EU law which would be in line with the Government's stated intention (1) that there should be no loss of rights, and (2) to ensure legal certainty and consistency as we leave the EU.

No loss of rights

There are some Charter rights - for example the right to human dignity; the right for a child's best interests to be a primary consideration in all actions taken by a public or private institution; freedom to conduct a

⁷ For example by guaranteeing a right to an effective remedy under Article 47 of the Charter (see *Benkharbouche v Embassy of Sudan* [2015] EWCA Civ 33).

business; and the free standing right to non-discrimination – which have no equivalent⁸ protection in UK law.

In addition, there will be no right of action in domestic law based on a failure to comply with any of the general principles of EU law, which include the fundamental rights set out in the Charter; and the courts will not be able to dis-apply or quash any law because it is incompatible with any of the general principles of EU law, including fundamental rights.

In an attempt to mitigate concerns about the loss of the Charter, the Government has stated that many of the rights protected in the Charter are also found in UN and other international treaties, which the UK has ratified.⁹ However, the UK has not incorporated UN human rights treaties into domestic law. This means that – with only a few exceptions¹⁰ – they do not have direct effect in domestic law and do not provide the equivalent protections provided by the Charter. As a consequence, the Bill, as it stands, does not deliver on the Government's promise to protect the substantive rights that people currently enjoy in the UK.

Retaining the Charter in UK law will ensure that these rights remain protected. It is also worth noting that the UK courts have not had difficulty in applying the Charter to domestic cases that fall within the scope of EU law.

Ensure legal certainty and consistency as we leave the EU

The Charter collects in a single document the fundamental rights and principles protected in EU law.¹¹ This makes it a useful 'one stop shop' for practical, legal remedy.

⁸ That is not to say these matters are not covered at all in domestic law but there is no equivalent general codified right.

⁹ For example the UK has ratified the UN Convention on the Rights of the Child, Article 3 of which provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

¹⁰ For example in Wales, the 'Rights of Children and Young Persons (Wales) Measure' 2011, places a duty on Welsh Ministers to have due regard to the rights and obligations in the United Nations Convention on the Rights of the Child (UNCRC).

¹¹ See: Equality Analysis: European Union (Withdrawal) Bill July 2017.

As the Government's own Equality Analysis acknowledges, respect for fundamental rights is a general principle of EU law and one of the key legal principles governing the way EU law operates. Transposing the wide and complex body of EU law, while dis-applying the general principles set out in the Charter that underpin them, leaves the risk of significant unforeseen gaps in protection both during the process of amending EU legislation under the EU (Withdrawal) Bill and afterwards.

The Government's argument is that the rights set out in the Charter are found elsewhere in EU case law. However, the Charter acts as a 'lodestone' for this case law and hence removing it or altering the way it operates will create unnecessary uncertainty. Given the Government's intention that substantive rights should remain unchanged, we consider the simplest and best way of achieving this and ensuring legal certainty is to retain the Charter with its current enforcement mechanisms.

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

The position of the UK's four statutory bodies for human rights and equality

The Equality and Human Rights Commission (EHRC), the Equality Commission for Northern Ireland (ECNI), the Northern Ireland Human Rights Commission (NIHRC) and the Scottish Human Rights Commission (SHRC) are united in their commitment to the protection and enhancement of equality and human rights standards in all parts of the UK.

Whilst the four organisations each have specific priorities tailored to their individual mandates, they have jointly identified a number of key priority areas which should be protected and advanced in the course of the UK's exit from the European Union.

These are:

- ensuring parliamentary scrutiny of any changes to the UK's equality and human rights legal framework;
- retaining the UK's equality and human rights legal framework as we leave the European Union and ensuring progression, not regression, from existing mechanisms;
- ensuring the UK is a global leader in equality and human rights and adopts best practice that enhances protections.

The UK's four statutory human rights and equality bodies recommend that the protection of equality and human rights should remain a priority in negotiations between the UK and the other EU member states.