

## **European Union (Withdrawal) Bill**

### **House of Commons Committee stage**

**Tuesday 12 December 2017**

This briefing covers amendments to delegated powers aimed at ensuring non-regression of equality and human rights protections:

- i) Amendments 363, 364, 371, 372, 374, 266, 25, and 52 to Clauses 7
- ii) Amendments 365, 366, 367, 368, 369, 370, 373, 267, 268, 26, 27, to Clauses 8, 9, 17
- iii) Amendments 287, 288, 289, and 290 to Schedule 2

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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.

Britain has a long history of upholding people's rights, valuing diversity and challenging intolerance. 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. The Commission believes that vision must include retaining our fundamental rights and legal framework, and ensuring the UK remains a global leader on equality and human rights once we have left the EU. Respect for parliamentary sovereignty is the golden thread that runs through our advice to Government and Parliament.

## The Commission's approach to the EU (Withdrawal) Bill

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

*To ensure we retain the UK's equality and human rights legal framework as we leave the EU, the Bill must:*

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;
3. retain the protections in the EU Charter of Fundamental Rights (the Charter);

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

*To ensure the UK remains a global leader on equality and human rights after leaving the EU, the Bill must:*

1. introduce a domestic right to equality; and
2. 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 point 1 above.

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, worker's rights and immigration, are dealt with in ways that respect parliamentary sovereignty by guarding against excessive transfer of power from Parliament to the Executive.

### **Rule out the use of delegated powers to amend equality and human rights laws**

Commission's recommendations for support:

Clause / Schedule	Amendments
Clause 7	363, 364, 371, 372, 374, 266, 25, 52
Clauses 8, 9, 17	365, 366, 367, 368, 369, 370, 373, 267, 268, 26, 27
Schedule 2 (devolved authorities)	287, 288, 289, 290

### **What will they do?**

These Amendments rule out the use of delegated powers to make changes to equality and human rights laws, including those within the legislative competence of the devolved administrations.

## Why are they needed?

As the Bill currently stands, ministers will be able to amend laws, including rights contained in Acts of Parliament, by delegated legislation in order to facilitate the technical withdrawal from the EU.

The Government has said these powers will not be used to make significant policy changes and that current protections for equality rights and workers' rights will be maintained<sup>2</sup>. We welcome this commitment but consider it is essential that it is reflected in the powers in the Bill so that it is upheld in practice. This will guard against excessive transfer of power from Parliament to the Executive, and ensure the Government delivers on its promise of non-regression of our equality and human rights laws. Any changes to fundamental rights should be subject to full parliamentary scrutiny.

The House of Lords Delegated Powers and Regulatory Reform Committee expressed concern that:

*"...currently, the Bill allows regulations to make substantial policy changes that ought to be made only in primary legislation"*

And:

*"...the propriety of giving Ministers such unprecedented powers to override Acts of Parliament subject, in the great majority of cases, to no scrutiny whatsoever on the floor of either House."<sup>3</sup>*

The Committee illustrates this by noting that since 1950, even under the more rigorous affirmative scrutiny procedure, there have only been ten occasions when delegated legislation has not been approved by Parliament, equivalent to one every six or seven years.

To remedy this situation, the Commission recommends limiting the use of delegated powers. The Bill already recognises the importance of

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

<sup>3</sup> House of Lords Delegated Powers and Regulatory Reform Committee: 3<sup>rd</sup> report, European Union (Withdrawal) Bill, 28 September 2017.

protecting rights to some extent, as it prevents the use of delegated powers to amend the Human Rights Act 1998. But there is an inconsistency within the Bill with respect to the rest of the UK's equality and human rights legislative framework.

For this reason, other legislation which protects rights should also be excluded from the scope of delegated powers in the Bill. This should include the Equality Acts of 2006 and 2010, and other important rights contained in legislation such as the Employment Rights Act 1996 (which provides protection for pregnant/nursing mothers and maternity leave amongst other rights), and important secondary legislation made under powers in the European Communities Act 1972, such as the Working Time Regulations 1998.<sup>4</sup>

**Amendment 364** does this by ruling out the use of delegated powers under Clause 7 of the Bill to make any changes to our equality and human rights laws.<sup>5</sup>

We also support **Amendment 363** which strengthens the existing protection for the Human Rights Act 1998 to include preventing delegated powers being used to modify the effect of the Act.<sup>6</sup>

**Amendments 365, 366, 367, 368, 369, 370, 373** make equivalent changes to the delegated powers covered by Clauses 8, 9 and 17 of the Bill.

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<sup>4</sup> Rights under the Working Time Regulations 1998 include minimum daily rest periods, maximum weekly working time and minimum paid annual leave.

<sup>5</sup> Amendment 371 defines the rights protected to include those in the Human Rights Act 1998, the Equality Acts of 2006 and 2010, and other equality and human rights enactments. Amendment 372 provides the Secretary of State with a power to amend this definition and Amendment 374 requires the affirmative procedure to be used to do so. This power may be used to further specify the enactments that are protected under this provision and will enable the definition to keep pace with new legislation.

<sup>6</sup> This is necessary to prevent delegated powers being used to make changes to how the HRA works. The Bill as currently drafted prohibits amendment of the HRA, but permits changes to the effect of the HRA so long as it is done without textual amendment of the Act itself. For example delegated legislation could provide that certain retained EU law should be treated as primary legislation for the purposes of the HRA. This would change the remedy available under the HRA because the court cannot quash primary legislation. This Amendment prevents such changes being made by delegated powers so that a change to the effect of the HRA would require primary legislation ensuring Parliament has a full opportunity to scrutinise any such proposal.

For the same reasons, we also support **Amendments 287, 288, 289, and 290** to Schedule 2, which are equivalent provisions for devolved administrations. These amendments replicate the proposed restrictions on the use of delegated powers which apply to the UK as a whole.<sup>7</sup>

Finally we support **Amendments 266, 267, 268, 25, 26, 27, and 52**, which provide specific protection against the use of devolved powers to amend the Equality Act 2010, in Clauses 7, 8 and 9.

We also consider these Amendments could be improved by including equivalent protection for the Equality Act 2006, which provides for the powers of the Equality and Human Rights Commission. The Commission is the national equality and human rights body for Great Britain. It acts to protect human rights, and enforces the Equality Act 2010. The Commission's role will be even more important once we leave the EU and its accountability mechanisms behind. It is important that the Commission's independence and powers are not open to change by the use of delegated powers in the Bill.

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<sup>7</sup>There are existing limitations on devolved governments' legislative competence set out in the devolution statutes, and therefore the scope of these delegated powers to amend equality and human rights laws in the devolved administrations may in any event be limited; however as a matter of principle they should be limited in the same way as UK wide powers and for the same reasons.

## **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](http://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.