



**Equality and
Human Rights
Commission**

European Union (Withdrawal) Bill

House of Commons Committee stage

Tuesday 14 November 2017

This briefing supports: Amendments 137 and 306 to Clause 6, Amendment 8 to Clause 5 and Amendment 10 to Schedule 1, and New Clause 76.

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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 constitutional 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 first briefing covers amendments relating to points 2, 3 and 5 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 Bill provides the opportunity to 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 provide for proper democratic accountability.

Clause 6

Commission's Recommendation

Support Amendments 137 and 306 to 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.

What will they do?

Amendment 137 provides clear guidance and a consistent framework for UK courts by requiring them to consider any relevant decision of the European Court of Justice.

Amendment 306 means a court or tribunal must take account of the European Court in relation to— (a) employment entitlement, rights and protections; (b) equality entitlements, rights and protections; (c) health and safety entitlement, rights and protections. It helps to keep Britain in harmony with social standards across the EU.

Why are they needed?

“If [the Government] doesn't express clearly what the judges should do about decisions of the European Court of Justice after Brexit, or indeed any other topic after Brexit, then the judges will simply have to do their best...But to blame the judges for making the law when parliament has failed to do so would be unfair...”

“[judges] would hope and expect parliament to spell out how the judges would approach that sort of issue after Brexit, and to spell it out in a statute.”

Lord Neuberger (retired President of the Supreme Court)

EU case law has had an important impact on equality rights in the UK. The European Court's interpretation of Equality Directives has extended protection domestically. For example, in the case of *Coleman*,² protection against discrimination on the grounds of disability was held to include those who cared for disabled people as well as disabled people themselves. It is important UK courts can take account of such developments in the future, ensuring the UK remains a global leader in equality and human rights.

As it stands, the Bill provides the option for courts to consider future EU law, but offers no indication as to when it may be appropriate to do so. This uncertainty has prompted Lord Neuberger, recently retired President of the Supreme Court, to call on parliament to spell out, in statute, what judges should do about decisions of the European Court after the UK leaves the EU.

To address these concerns, our Second Reading briefing recommended an amendment to provide clarity. Simply put; if there is doubt as to the construction or application of any law relating to equality or human rights, the courts and tribunals should have regard to relevant EU case law. While not precisely in those terms, the Commission supports Amendment 137 which provides that the courts should take account of relevant decisions of the European Court when interpreting retained EU law after exit day. We also support Amendment 306 which provides a specific duty to take account of European Court decisions in relation to social standards, including equality and employment rights.

These amendments do not mean that ECJ will have any jurisdiction over our laws. Rather, they ensure that UK law can keep pace with developments in EU law, including equality and human rights law. The amendments reflect parliamentary sovereignty and protect judicial independence.

² *Coleman v Attridge Law (A Firm)* (C-303/06) European Court of Justice, 17 July 2008.

Clause 5 and Schedule 1

Commission's recommendation

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

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 employment³. 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.

³ 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).

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 business; and the free standing right to non-discrimination – which have no equivalent⁴ 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 mitigation of concerns on 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.⁵ However, the UK has not incorporated UN human rights treaties into domestic law. This means that – with only a few exceptions⁶ – 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 follow the Government's own stated intention 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.

⁴ That is not to say these matters are not covered at all in domestic law but there is no equivalent general codified right.

⁵ 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.

⁶ 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).

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.⁷ This makes it a useful ‘one stop shop’ for practical, legal remedy.

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.

Include a principle of non-regression of equality rights in the Bill

Commission’s recommendation

Support New Clause 76

What will it do?

This New Clause gives effect to the Government’s commitment to protect our equality laws after we leave the EU.

⁷ See: Equality Analysis: European Union (Withdrawal) Bill July 2017.

It requires any legislation relating to EU withdrawal to be accompanied by a statement by a minister certifying that it does not remove or reduce protections in the Equality Acts 2006 and 2010.

Why is it needed?

The Government has committed to continue to protect and enhance the rights people have at work, and that all the protections covered in the Equality Acts of 2006 and 2010 will continue to apply once the UK has left the EU.⁸ We welcome this commitment and believe it is essential that it is included in the Bill to ensure it is fulfilled in a sustainable way.

Furthermore, the Women and Equalities Select Committee recommended that the Bill should “explicitly commit to maintaining the current levels of equality protection”.⁹

The Government responded to this recommendation by stating that the Bill will preserve the rights that already exist in the UK under EU law.¹⁰ Yet, there is nothing in the Bill which gives legislative effect to the Government’s commitment to maintain current levels of protection. Meanwhile, the Bill gives ministers wide powers to amend preserved rights by delegated legislation.

Consequently there is a risk that, without embedding the principle of non-regression within the Bill, equality rights could be undermined in the future. This risk is particularly acute because many of those rights are currently protected by EU law.

⁸ Legislating for the United Kingdom’s withdrawal from the European Union, March 2017 at 2.17.

⁹ House of Commons Women and Equalities Committee: Ensuring strong equalities legislation after the EU exit 22 February 2017 Seventh Report of Session 2016–17.

¹⁰ Ensuring strong equalities legislation after the EU exit: Government Response, 13 September 2017.

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.