

European Union (Withdrawal) Bill
House of Commons
Consideration of Lords Amendments
12 June 2018

Summary

This briefing sets out the Equality and Human Rights Commission's recommendations for support to Lords amendments that are critical to protecting our human rights and equality framework after we leave the EU. The Commission recommends support to:

- **Lords Amendment 5** to ensure protections in the Charter are retained; and **Lords Amendment 53** that would continue to allow challenges to be brought to retained EU law on the grounds that it is in breach of general principles of EU law. These amendments are vital for preventing gaps in the protection of fundamental rights, and achieving legal certainty as we leave the EU.
- **Lords Amendment 4**, which introduces important safeguards on the use of delegated powers. This amendment reflects the constitutional principle that changes to fundamental rights should only be made by Parliament through primary legislation.
- **Lords amendments 6, 7 and 8**, which ensure that the Bill now makes clear that a court or tribunal may have regard to future EU law where it is relevant to any matter before the court. These amendments recognise the important impact that the case law of the Court of Justice of the European Union has had on equality and human rights in the UK.

Background

The Equality and Human Rights Commission (the Commission) has been given powers by Parliament to advise Government on the equality and human rights implications of laws and proposed laws and to publish information or provide advice, including to Parliament, on any matter related to equality, diversity and human rights.

Throughout the passage of the EU (Withdrawal) Bill we have worked with members across both Houses of Parliament to build a consensus and recommend steps that need to be taken to ensure the Bill delivers the Government's commitment to non-regression of equality and human rights protections, in a way that guards against excessive or inappropriate transfer of power from Parliament to the Executive.

Significant progress has been made – including amendments we have supported to:

- retain the EU Charter of Fundamental Rights and the right to bring a claim based on a breach of general principles of EU law;
- ensure our courts can properly consider future judgments of the Court of Justice of the European Union (CJEU) where it is relevant to any matter before the court; and
- introduce enhanced scrutiny over the use of delegated powers to amend equality rights.

It is critical that these important amendments are upheld when the Bill returns to the Commons.

Despite these positive developments, there are a number of areas where amendments have not been made and we remain concerned. In particular:

- constraints on the use of delegated powers under the Bill to amend equality legislation do not fully protect against regression of equality rights; and
- human rights protections in EU retained law, such as data privacy, should be given enhanced protection against changes being made by delegated powers (in the same way as certain other areas are protected by Lords Amendment 4).

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

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 the UK's four statutory human rights and equality bodies. We are united in our commitment to protect and enhance equality and human rights standards across the UK.

We have jointly identified three key priority areas that should be protected and advanced in the course of the UK's exit from the European Union.

These are:

- ensuring parliament gets a say in any proposed changes to the UK's equality and human rights legal framework;
- retaining at least equivalent equality and human rights legal protections as those we currently have in the UK. We need progression, not regression;
- ensuring the UK is a global leader in equality and human rights.

We also consider that the protection of equality and human rights should remain a priority in negotiations on the Withdrawal Agreement.

We are particularly concerned that loss of the Charter of Fundamental Rights of the EU will lead to gaps in protection and that removing the Charter as part of the Brexit process would create significant legal uncertainty; retained law would simply be incomplete without it. This is clearly demonstrated by the decision of the Irish Supreme Court on 1 February 2018 to refer a question to the European Court on whether it should refuse extradition to the UK under a European arrest warrant because of uncertainty whether the Appellant's rights, including under the Charter, will be capable of enforcement after Brexit.

The simplest and best way to comply with the government's political commitment that substantive rights remain unchanged after Brexit is to retain Charter rights in relation to EU law throughout the UK.

Retaining the protections in the EU Charter of Fundamental Rights

The Commission's recommendation

Support **Lords Amendment 5** to ensure protections in the Charter are retained; and **Lords Amendment 53** that would continue to allow challenges to be brought to retained EU law on the grounds that it is in breach of general principles of EU law.

The Commission's position

The Commission supported amendment 5, moved by Lord Pannick during Report.¹ It retains the Charter, except for parts that will be irrelevant after exit day (the Preamble and Chapter V) and ensures that the Charter has the same effect after exit day as it did before in relation to retained EU law. The amendment, agreed by 316 to 245 votes, received support from across the House of Lords.

The purpose of the Bill is to transfer the existing EU legal framework into UK law in order to achieve legal certainty as we leave the EU. The only exception to this approach in the original Bill was that the Charter would no longer apply after exit day. The Commission has identified a number of concerns as a result of this exception.

First, we are concerned that the loss of the Charter will lead to gaps in protection. The Commission obtained advice from Jason Coppel QC on the Government's approach.² His advice was that the loss of the Charter 'will lead to a significant weakening of the current system of human rights protection in the UK'. This would:

- create gaps in protection, for example, in relation to children's rights, data protection and non-discrimination;
- mean that many rights would no longer be directly enforceable; and

¹ Amendment 15, agreed on Report day two, 23 April 2018.

² This legal opinion is available on the Commission's website: <https://www.equalityhumanrights.com/en/our-brexite-work>.

- mean that many remaining rights could be removed by ministers exercising delegated powers.

The importance of fundamental rights, including respect for an individual's dignity, has been sadly demonstrated by recent events affecting the Windrush generation and their children. It is important as the UK leaves the EU that the rights of both UK and EU citizens are protected. In this context the Charter provides explicit protection of the right to dignity, and to a fair hearing, regardless of immigration status.

During the Committee debate, Lord Keen said that the Government would look at the analysis of the Joint Committee on Human Rights (JCHR) and that 'if rights are identified which are not in fact going to be incorporated into our domestic law in the absence of the Charter, we will look very carefully at ensuring that those are not lost.'³ The loss of specific rights has clearly been identified as a cross-party concern and it will be the responsibility of the Commons to uphold these amendments and retain the Charter through this Bill.

Second, it is also clear that removing the Charter would create significant legal uncertainty. This is because retained EU law is incomplete without the Charter, which is frequently referred to in EU law and provides the framework within which it operates.⁴

This is clearly demonstrated by the decision of the Irish Supreme Court on 1 February 2018 to refer a question to the European Court on whether it should refuse extradition to the UK under a European arrest warrant because of uncertainty whether the Appellant's rights, including under the Charter, will be capable of enforcement after Brexit.⁵

Third, concerns have been raised about how the Charter would work after the UK has left the EU. The Commission has previously produced a 'Supplementary legal note on how the EU Charter of Fundamental Rights works, and would work after Brexit',⁶ to address such concerns.

³ HL deb (2018)789 col.570; 26 February 2018 (day 2).

⁴ For example the General Data Protection Regulation (EU) 2016/679 contains multiple references to the Charter.

⁵ Minister for Justice -v- O'Connor [2018] IESC 3.

⁶ EHRC, Supplementary Legal Note on how the EU Charter of Fundamental Rights Works, and would work after Brexit, 26 February 2018, online:

https://www.equalityhumanrights.com/sites/default/files/legal_note_-_how_the_eu_charter_of_fundamental_rights_works.pdf.

This note explains how courts would be able to continue to apply the rights in the Charter to retained EU law once we leave the EU, in the same way as they do at present. While there would have to be some adjustments to the wording of some Charter rights to reflect the changed legal environment, this is no different to the position with many other provisions of retained EU law.

Finally, the failure to retain the Charter in UK law could result in a patchwork of protections across the UK. Scotland's legal continuity bill - the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – incorporates the Charter as it applies to devolved matters.⁷ This matter is ever more pressing following the Scottish Parliament's refusal to give consent to the EU (Withdrawal) Bill in May. In addition, the Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission has expressed concern 'that failure to retain the EU Charter of Fundamental Rights and EU equality legislation within UK law will result in a diminution of rights within Northern Ireland and potentially cause divergence in rights protections on a North-South basis, contrary to the Belfast /Good Friday Agreement 1998.'⁸The Commission also recommends the retention of amendment 53, which would continue to allow challenges to be brought to retained EU law on the grounds that it is in breach of general principles of EU law. The importance of general principles as part of the framework of fundamental rights in EU law was demonstrated recently in a case in which the Supreme Court relied on the general principle of non-discrimination on grounds of sexual orientation in a judgment which ended pension inequality for same-sex couples.⁹

⁷ Section 5, UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill.

⁸ Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission, Policy statement on the United Kingdom withdrawal from the European Union, March 2018, online: https://www.ihrec.ie/app/uploads/2018/03/Joint-Committee-IHREC-NIHRC-Brexit-Policy-Statement_March-2018.pdf.

⁹ Walker v Innospec Ltd, Supreme Court, 12 July 2017, [2017] UKSC 47.

Ruling out the use of delegated powers to reduce equality and human rights protections

The Commission's recommendation

Support **Lords Amendment 4**.

The Commission's position

The Commission supported Lords amendment 4 moved by Baroness Hayter of Kentish Town, which introduced important safeguards on the use of delegated powers, and was agreed on Report.¹⁰ This amendment introduced a requirement for an enhanced scrutiny procedure where delegated powers are used to make changes to a number of areas of retained EU law, including 'equality rights and protections'. We also supported an amendment tabled by Lord Low of Dalston¹¹ that would have strengthened this provision by adding human rights protection to the list of areas subject to enhanced protection. This additional amendment was not put to a vote. However, Baroness Hayter supported it and noted in the debate that her own amendment 'should, of course, have included the words "human rights"'.¹²

As a matter of constitutional principle, changes to fundamental rights should be made by Parliament through primary legislation, not by ministers through secondary legislation. However, the original Bill did not prohibit such changes being made by delegated powers. These powers could be used to change fundamental rights currently protected by EU law, such as rights to protection of personal data, children's rights, and the general rights in EU law to non-discrimination, as well as other equality rights such as protection for pregnant and nursing mothers and maternity leave rights.¹²

We therefore consider it important that Lords amendment 4 is retained, and would urge the addition of human rights to the list of protected areas.

¹⁰ Amendment 11 at Report, agreed on Report day 1, 18 April 2018.

¹¹ Amendment 11A at Report, also considered on Report Day 1, 18 April 2018.

¹² There is a prohibition on changes to the Human Rights Act 1998.

Ensuring the UK keeps pace with developments in equality and human rights law by making it clear that UK courts can have regard to relevant EU law after exit day

The Commission's recommendation

Support **Lords amendments 6, 7 and 8.**

The Commission's position

Following discussions between peers and Ministers on this matter, the Government introduced amendments 6, 7 and 8, which were supported by the Commission.¹³ These ensure the Bill now makes clear that a court or tribunal may have regard to future EU law where it is relevant to any matter before the court.

The case law of the Court of Justice of the European Union (the CJEU) has had an important impact on equality and human rights in the UK. Although the original Bill provided discretion for courts to have regard to future EU law, there was no indication of when Parliament thought it may be appropriate to do so. The Commission supports retention of these amendments to make clear that a court or tribunal may have regard to future decisions of the CJEU where relevant to any matter before the court, whilst also making clear that the UK courts are not bound to follow such case law.

¹³ Government Amendments 23, 24, and 25, agreed on Lords' Report day two, 23 April 2018.

Further information

The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. Find out more about the Commission's work at: www.equalityhumanrights.com

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