



**Equality and
Human Rights
Commission**

European Union (Withdrawal) Bill

House of Commons Report stage

Tuesday 16 January 2018

This briefing supports: New Clause 15 – non regression of equality law;
New Clause 16 – right to equality; Amendments 4 and 7 to ensure
protections in the EU Charter of Fundamental Rights are retained; and
Amendments 2, 9 and NS1 to protect changes to rights being made by
delegated powers

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Executive Summary

This briefing sets out the Commission's advice for MPs to support amendments to the EU (Withdrawal) Bill for House of Commons Report stage that contribute to the two key aims of ensuring that:

1. we retain the UK's equality and human rights legal framework as we leave the EU; and
2. the UK remains a global leader on equality and human rights after leaving the EU.

Recommendation: Support New Clause 15 (Non-regression)

This New Clause introduces a principle of non-regression of equality rights in the Bill and gives effect to the Government's commitment to protect our equality laws after we leave the EU. It requires any legislation relating to EU withdrawal to be accompanied by a ministerial statement certifying that it does not remove or reduce protections in the Equality Acts 2006 and 2010.

The New Clause addresses deficiencies in Government Amendment 391 passed in Committee, which is now Schedule 7, paragraph 21 of the Bill, namely:

- It applies only to secondary legislation under the Bill.
- It does not require a statement that current levels of protection will be maintained.
- It does nothing to stop the minister, having had due regard to the need to eliminate conduct prohibited by the Equality Act 2010, deciding to reduce protections.

Recommendation: Support New Clause 16 (right to equality)

This New Clause provides a domestic guarantee of non-discrimination by the state, which will replace the safety net for equality rights currently provided by EU law. This home-grown right is an important signal of the kind of country we want to be after we leave the EU, ensuring that Britain remains a world leader on equality. It will:

- Require a ministerial statement of compatibility with the right to equality when legislation is introduced to Parliament.
- Allow laws and state actions to be tested against the right to equality in UK courts.
- Operate alongside and underpin existing rights in the Equality Act 2010, but not replace them.

Recommendation: Support Amendments 4 and 7 to ensure protections in the EU Charter of Fundamental Rights are retained

The Bill currently removes the EU Charter of Fundamental Rights from UK domestic law. The Government's position is that this "...will not affect the substantive rights from which individuals already benefit in the UK..." The Commission disagrees because some Charter rights, for example the right for a child's best interests to be a primary consideration in all actions taken by a public or private institution have no equivalent protection in UK law. Furthermore, the Charter provides remedies, such as the ability for an individual to challenge laws that breach their fundamental rights, which are not otherwise available in UK law. At present, Charter rights cannot be repealed or overridden, which reflects their status as fundamental rights. Under the Bill, many of these rights could potentially be repealed by secondary legislation with very limited scrutiny by Parliament. In addition, the Charter can currently be used to strike down any EU law that undermines our fundamental rights, so this protection will be lost.

Recommendation: Support Amendments 2, 9 and NS1 to protect changes to rights being made by delegated powers

As the Bill currently stands, ministers will be able to amend laws 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. We think this commitment should be reflected in the Bill so that it is upheld in practice.

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 (EU) fully deliver the Government's commitment to non-regression, and in a way that respects parliamentary sovereignty by guarding against the excessive transfer of power from Parliament to the Executive. Our analysis indicates that the EU (Withdrawal) 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 achieve two key objectives:

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 (Amendments 2, 9 and NS1);
2. include a principle of non-regression of equality and human rights law (NC 15);
3. retain the protections in the EU Charter of Fundamental Rights (the Charter) (Amendments 4 and 7);

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

4. introduce a domestic right to equality (NC 16); and
5. ensure the UK keeps pace with developments in equality and human rights law by ensuring UK courts have regard to relevant EU case law after exit day.

This briefing covers amendments that have been laid at Report stage relating to points 1 to 4 above.

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

Commission's recommendation

Support New Clause 15

What will it do?

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

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?

It is needed to fulfil the Government's commitment to protect equality rights after we leave the EU.¹ The Government Amendment introduced at Committee fails to do so for the reasons explained below.

Despite the Government's political commitment, 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 equality rights are currently protected by EU law. The Women and Equalities Select Committee recognised this risk and recommended that the Bill should "explicitly commit to maintaining the current levels of equality protection".²

On the first day of committee debate the minister, Dominic Raab, committed the Government to table an amendment which:

¹ Legislating for the United Kingdom's withdrawal from the European Union, March 2017 at 2.17. In its White Paper the Government gave a commitment 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.

² House of Commons Women and Equalities Committee: Ensuring strong equalities legislation after the EU exit 22 February 2017 Seventh Report of Session 2016–17.

“will require ministers to make a statement before the House in the presentation of any Brexit-related primary or secondary legislation on whether and how it is consistent with the Equalities Act.”

The Government’s subsequent amendment 391 was passed on day 7 of committee debate and is now Schedule 7, paragraph 21 of the Bill. It requires ministers to make explanatory statements, including in relation to equality issues, when laying secondary legislation made under sections 7, 8 or 9 of the Bill. However:

- Contrary to the minister’s commitment to Parliament, it only applies to secondary legislation under the Bill. It does not apply at all to other Brexit related primary and secondary legislation that could potentially be used to reduce existing protections without the requirement for a statement.
- It does not require a statement that current levels of protection will be maintained. It merely requires the minister to explain whether and how equality legislation has been changed, and that “due regard” has been had to the need to eliminate conduct prohibited by the Equality Act 2010. There is nothing to stop the minister, having had due regard to this need, deciding to reduce protections.
- Furthermore, this duty to have “due regard” is already a requirement under the Public Sector Equality Duty (PSED) and the minister’s statement will do no more than confirm s/he has partially complied with an existing statutory duty³.
- The amendment focuses on the first duty in the PSED, to have regard to the need to eliminate discrimination, presumably because of the emphasis on non-regression in the committee stage debate. However, the PSED also includes more progressive duties: to have regard to the need to advance equality of opportunity and to foster good relations. The focus on just one aspect of the PSED, rather than the whole, risks confusion about whether ministers are obliged to fully comply with the whole of the

³The PSED is set out at s149 of the Equality Act 2010. In speaking to the Government Amendment on day 7 of the committee debate the minister said that the “same formula will be applied to all Brexit-related primary legislation”. Such a statement is, of course, not the same as including a requirement in the Bill and with respect appears to be meaningless because the PSED does not apply to the introduction of Bills in Parliament.

PSED as opposed to this new, additional duty. This must be rectified to ensure clarity and compliance with existing statutory duties.

New Clause 15 addresses the defects in the Government's amendment by covering all Brexit related primary and secondary legislation and requiring a statement that any changes to equality legislation does not remove or reduce existing protections.

Include a domestic Right to Equality in the Bill

Commission's recommendation

Support New Clause 16

What will it do?

This New Clause replaces the EU's equality safety net with the UK's own home-grown right to equality. In doing so, it makes our own courts the arbiter of equality compliance and ensures our 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 sends a strong signal about the kind of country we want to be once we leave the EU by providing 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, which UK courts are familiar with, and will give the right to fair and equal treatment the same status as the rights protected by that Act.

Why is it needed?

At the moment, EU law provides a safety net for many of our equality rights. For example, the right to equal pay for work of equal value or protection of pregnant workers cannot be removed while the UK remains part of the EU. Exiting the EU removes that safety net and opens up the risk that equality rights could be eroded in the future. For the Government to deliver on its commitment to non-regression, the UK needs to replace the EU's equality safety net with our own domestic right to equality.

This New Clause provides a domestic guarantee of non-discrimination by the state, which builds on our common law principle of equal treatment without discrimination. It is an important signal of the kind of country we want to be after we leave the EU, ensuring that Britain remains a world leader on equality. This new right will not just be confined to Brexit-related legislation, but will be an enduring right in UK law. Importantly, it will strengthen protection for children, who currently have limited protection from unjustifiable discrimination under domestic law.⁴

The requirement in this Clause for a ministerial statement of compatibility will support effective parliamentary scrutiny of new laws, as 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 that is provided by this Clause will ensure the new right to equality is enforceable by those affected. However, this right will not impact on justifiable different treatment⁵ thereby ensuring courts can take account of policy justifications for legislation that is subject to a challenge. This will provide the flexibility necessary to deal with new and unforeseen circumstances.

⁴ S28 Equality Act 2010.

⁵ The principle of justification is incorporated in the Clause, through the case law of the European Court of Human Rights, by sub clause 6.

The effect of New Clause 16 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.*”⁶

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 to the protection from discrimination because Parliament has determined specific conduct should not be unlawful,⁷ this will 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.

Retain the EU Charter of Fundamental Rights

Clause 5

Commission’s recommendation

Support Amendments 4 and 7 to ensure protections in the Charter are retained.

What will they do?

Clause 5(4) of the Bill removes the Charter from UK domestic law. The Government’s position is that this “...will not affect the substantive rights from which individuals already benefit in the UK...” The Commission disagrees because some Charter rights, for example those relating to children, have no equivalent protection in UK law. Furthermore, the

⁶ 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.

⁷ 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.

Charter provides remedies, such as the ability for an individual to challenge laws that breach their fundamental rights, which are not otherwise available in UK law.

Amendment 7 preserves the Charter as part of retained EU law by removing Clause 5(4) and the related Clause 5(5) from the Bill.

Amendment 4 retains relevant Charter rights in UK law and gives them the same level of protection as the rights in the Human Rights Act 1998.

Why are they needed?

The Charter currently provides important protections for rights that fall within the scope of EU law, such as non-discrimination rights in employment⁸, privacy rights, and many other areas.

The Government has stated its intention (1) that there should be no loss of rights, and (2) to ensure legal certainty and consistency as we leave the EU. Neither of these aims will be achieved by removing the Charter from UK law. On the contrary, the best way to achieve them is to retain the Charter.

No loss of rights

On 5 December 2017, the Government published a “Right by Right Analysis” of the Charter. This repeats the Government’s assurance that the rights provided by the Charter will not be weakened following Brexit. The Commission has obtained the opinion of senior counsel, Jason Coppel QC, on the Government’s analysis. His advice is that assurance is not correct and a failure to preserve relevant parts of the Charter in domestic law after Brexit will lead to a significant weakening of the current system of human rights protection in the UK.⁹

The loss of the Charter will result in a loss of rights in a number of ways:

⁸ 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).

⁹This Legal opinion will be published on 14 January 2018, and available on the Commission’s website: <https://www.equalityhumanrights.com/en/our-brex-it-work>

- The Government's analysis only identifies where aspects of a Charter right will continue to be protected in the UK, for example because of a specific domestic law or EU case law, but does not identify the gaps in protection that will result from this partial approach.¹⁰ There are some important 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; and the free standing right to non-discrimination – which have no equivalent protection in UK law.
- Remedies currently available in UK law for breach of Charter rights will no longer be available. This will directly affect Claimants who in some cases will no longer be able to obtain justice for a breach of their rights.¹¹
- At present, Charter rights cannot be repealed or overridden, which reflects their status as fundamental rights. Under the Bill, many of the rights which the Government claims will stand in place of Charter rights could potentially be repealed by secondary legislation with very limited scrutiny by Parliament. This would significantly weaken current human rights protections in a way that has limited democratic accountability and is not consistent with the kind of country we want to be.
- This Charter can currently be used to strike down any EU law that undermines our fundamental rights. This protection will be lost, resulting in a lower level of protection for human rights in EU retained law than under EU law.

¹⁰ For example the rights of the child protected by Article 24 of the Charter will not be fully reflected in domestic law after Brexit. Specific aspects of children's rights have been recognised as general principles of EU law but litigants relying upon the primacy of the child's best interests, reflected in Article 24, very often have to do so with reference to Article 3 of the UN Convention on the Rights of the Child, which is unincorporated international law and not directly enforceable.

¹¹ For example if the Benkharbouche case (referred to in the footnote above) had been decided in the absence of the Charter the Claimants' claims would have been struck out. See further counsel's advice at paragraph 20. (Benkharbouche v Embassy of Sudan [2015] EWCA Civ 33).

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.¹² This provides legal certainty and makes it an effective ‘one stop shop’ for practical, legal remedy.

The Government’s argument is that the rights set out in the Charter are found elsewhere in EU case law, however, removing it or altering the way it operates will create unnecessary uncertainty. It will inevitably give rise to extensive litigation to establish whether and to what extent particular Charter rights continue to have effect in domestic law.

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 in UK law.

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

Clause 7

Commission’s recommendation

Support Amendments 2, 9 and NS1 to ensure our rights are protected from changes by secondary legislation

What will they do?

These Amendments protect against changes to rights being made by secondary legislation:

- Amendment 2 prohibits the use of delegated powers under Clause 7 of the Bill to reduce rights or protections; or to change the Equality Act 2010.
- Amendment 9 and NS1 prohibit the use of delegated powers to change retained EU law that implements worker’s rights, including equality rights.

¹² As the Government acknowledges. See: Equality Analysis: European Union (Withdrawal) Bill July 2017.

Below we set out our views on these Amendments, insofar as they relate to matters within our remit, namely the protection of equality and human rights.

Why are they needed?

As the Bill currently stands, ministers will be able to amend laws, including rights contained in Acts of Parliament, using delegated powers 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 maintained¹³. We consider it essential that this commitment to non-regression 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 any changes to fundamental rights are subject to full parliamentary scrutiny and democratic accountability.

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."¹⁴

The Committee illustrates this by noting that since 1950, even under the more rigorous affirmative scrutiny procedure, there have only been ten

¹³ Legislating for the United Kingdom's withdrawal from the European Union, March 2017 at 2.17.

¹⁴ House of Lords Delegated Powers and Regulatory Reform Committee: 3rd report, European Union (Withdrawal) Bill, 28 September 2017.

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 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 in relation to the rest of the UK's equality and human rights legislative framework.

Other legislation that 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;
- rights contained in primary legislation such as the Employment Rights Act 1996 (which provides protection for pregnant/nursing mothers and maternity leave amongst other rights); and
- rights contained in secondary legislation made under powers in the European Communities Act 1972, such as the Working Time Regulations 1998.¹⁵

We support Amendments 2, 9 and NS1 which offer this protection in different ways.

Amendment 2 prohibits use of delegated powers to reduce rights or protections and also provides specific protection for the Equality Act 2010. This Amendment could be improved by also including the Equality Act 2006, which provides for the powers of the Equality and Human Rights Commission. As the national equality and human rights body for Great Britain, the Commission protects 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.

¹⁵ Rights under the Working Time Regulations 1998 include minimum daily rest periods, maximum weekly working time and minimum paid annual leave.

Amendment 9 and NS1 prohibit use of delegated powers to change retained EU law that implements worker's rights, including equality rights. This Amendment would ensure that changes can only be made to these rights by primary legislation, following full Parliamentary scrutiny.

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