

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

Summary

This briefing sets out the Equality and Human Rights Commission's support for the following amendments, which are critical to protecting our human rights and equality framework after we leave the EU:

- **Lords Amendment 5: Support Amendment 5B in lieu**, to ensure the EU Charter of Fundamental Rights can provide a guide to interpretation of retained EU law. This amendment would help to prevent gaps in the protection of fundamental rights, and support legal certainty as we leave the EU.
- **Lords Amendment 4: Support amendment 4F in lieu**, 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.

The Commission's continued concern to prevent regression of equality and human rights protections, and to ensure Parliament can properly scrutinise any proposed changes to these fundamental protections, is shared with the three other statutory equality and human rights bodies in the UK, as set out in the joint statement at the end of this briefing.

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 throughout the passage of the Bill, with wide support for key amendments to:

- retain the EU Charter of Fundamental Rights;
- 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.

However, critical amendments to retain the Charter and introduce enhanced scrutiny to amend equality rights were rejected in the Commons by a very narrow majority. The Commission remains very concerned about the loss of Charter protections and the use of delegated powers to amend rights. We are therefore recommending support for the following amendments in lieu.

Retaining the protections in the EU Charter of Fundamental Rights

The Commission's recommendation

Lords amendment 5: Support Amendment 5B to ensure protections in the Charter are retained for the purpose of providing a guide to interpretation of retained EU law.

The Commission's position

The Commission supported Lords amendment 5, moved by Lord Pannick during Lords 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. However, it was rejected in the Commons by a very narrow majority of 20 votes, on the basis of concerns that it could frustrate parliamentary sovereignty.

Since the Commons vote, Lord Pannick has tabled amendment 5B in lieu to ensure protections in the Charter are retained for the purpose of providing a guide to interpretation of retained EU law. Although this does not fully retain the protections in the Charter, the Commission supports this amendment as it goes some way to addressing some of our concerns.

First, we are concerned that the complete 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;

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 rights would no longer be directly enforceable; and
- 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 Lords 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.

Second, it is also clear that entirely 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 was 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

Finally, the failure to retain the Charter in any form 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

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.

matters.⁶ 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.'⁷

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

The Commission's recommendation

Lords Amendment 4: Support amendment 4F which introduces important safeguards on the use of delegated powers.

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.⁸ 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 Dalston⁹ 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

⁶ Section 5, UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill.

⁷ 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.

⁸ Amendment 11 at Report, agreed on Report day 1, 18 April 2018.

⁹ Amendment 11A at Report, also considered on Report Day 1, 18 April 2018.

it and noted in the debate that her own amendment ‘should, of course, have included the words “human rights”’.

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.¹⁰

The Commission was disappointed that Lords amendment 4 was narrowly lost in the Commons by 17 votes. We recommend support for amendment 4F which requires enhanced scrutiny of changes to equality rights. We do, however, consider that the amendment would be strengthened by the addition of human rights to the list of protected areas.

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:

¹⁰ There is a prohibition on changes to the Human Rights Act 1998.

- 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.

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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