



**Equality and
Human Rights
Commission**

European Union (Withdrawal) Bill

**House of Lords
Committee stage
26 February 2018**

This briefing covers amendments relating to the Charter of Fundamental Rights; and EU case law

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. This briefing sets out our analysis of the steps that need to be taken to ensure the EU (Withdrawal) Bill fully delivers the Government's commitment to non-regression of equality and human rights protections, in a way that guards against the excessive transfer of power from Parliament to the Executive.

At this moment of significant constitutional change, it is important for this Bill 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 a vision of a fair and inclusive Britain that supports individuals to achieve their potential involves delivering on two key objectives:

- **Ensuring we retain the UK's equality and human rights legal framework as we leave the EU by:**

- 1) ruling out the use of delegated powers to reduce equality and human rights protections;
 - 2) including a principle of non-regression of equality and human rights law; and,
 - 3) retaining the protections in the EU Charter of Fundamental Rights (the Charter).
- **Ensuring the UK remains a global leader on equality and human rights after leaving the EU by:**
 - 4) introducing a domestic right to equality; and,
 - 5) ensuring the UK keeps pace with developments in equality and human rights law and that UK courts have regard to relevant EU case law after exit day.

For the Bill's Committee stage in the House of Lords, we will provide a series of briefings on specific areas of concern. This briefing covers amendments relating to point 3 on protections in the Charter, and point 5 to ensure the UK keeps pace with developments in equality and human rights law.

This briefing updates our briefing for 21 February and now also includes advice on amendment 63A that relates to how the Charter will work after we leave the EU. The Commission has also published a ['Supplementary legal note on how the EU Charter of Fundamental Rights works, and would work after Brexit'](#) to accompany this briefing.

Retaining the EU Charter of Fundamental Rights

Commission's recommendation

Support amendments 34, 14, 20, 25, 41 and 63A to ensure protections in the Charter are retained.

Why are the amendments needed?

The scheme and 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. Changes can then be made in later domestic legislation, subject to

appropriate debate and scrutiny by Parliament. The exception to this approach is Clause 5(4) of the Bill, which provides that the EU Charter of Fundamental Rights will no longer apply in UK domestic law after exit day. This will create legal uncertainty and raises complex issues concerning loss of fundamental rights. Put simply, this Bill is not the place to make changes to human rights.

As the Constitution Committee has said:

“If, [however], the Charter does add value, then legal continuity suggests that the Bill should not make substantive changes to the law which applies immediately after exit day.”¹

It is clear the Charter does add value. The Commission has obtained the opinion of senior counsel, Jason Coppel QC, on the Government’s analysis of the Charter, and his advice is that the loss of the Charter will lead to a significant weakening of human rights protection in the UK.²

This is because:

- There will be gaps in protection, for example in relation to children’s rights, data protection and non-discrimination.³
- Many rights will no longer be directly enforceable, leading to further gaps in protection.⁴
- Many remaining rights could be removed by ministers exercising delegated powers. This is unacceptable. Human rights should not be changed without full Parliamentary scrutiny.⁵

As stated above, it is also clear that removing the Charter will create significant legal uncertainty. This is because retained EU law is

¹ House of Lords Select Committee on the Constitution 9th Report of Session 2017–19, 29 January 2018.

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

³ The Government’s argument is that the rights set out in the Charter are merely a collection of rights found in other sources of EU law. However some of the original sources of Charter rights are not enforceable. This includes the Explanatory Notes to the Charter, which the Government acknowledges are an authoritative source. These make clear that the rights of the child in the Charter are based on the United Nations Convention on the Rights of the Child, which is not enforceable in UK law.

⁴ Rights which are retained by General Principles of EU law, such as rights to non-discrimination and to an effective remedy, will no longer provide an enforceable right of action after exit day (see Schedule 1 of the Bill).

⁵ We have separately recommended delegated powers in the Bill should be limited to prevent changes to human rights by secondary legislation.

incomplete without the Charter, which is frequently referred to in EU law and provides the framework within which it operates.⁶

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.⁷

In another example, failure to retain Article 8 of the Charter, which protects personal data, could lead to uncertainty regarding whether the UK will be able to obtain an adequacy decision⁸ for data transfers to the EU⁹, with potentially serious consequences for UK businesses and individuals¹⁰.

The legal uncertainty caused by removing the Charter, or altering the way it operates, will inevitably give rise to extensive litigation to establish whether, and to what extent, particular Charter rights continue to have effect in domestic law.

The simplest and best way of achieving the Government's intention that substantive rights should remain unchanged and ensuring legal certainty is to retain the Charter rights in relation to EU retained law.¹¹ We therefore support amendment 34 which does this.

We also support amendments 14, 20, 25, 41 and 63A, relating to the interpretation and application of the Charter after exit day.

⁶ For example the General Data Protection Regulation (EU) 2016/679 contains multiple references to the Charter.

⁷ Minister for Justice -v- O'Connor [2018] IESC 3.

⁸ Data adequacy is a status granted by the European Commission to non-EEA countries that provide a level of personal data protection "essentially equivalent" to that provided in European law. Personal data can be transferred freely between EEA member states, which include all EU countries. But personal data is allowed to leave the EEA only if the Commission judges there to be sufficient protection for this data in the destination country. When a country has been awarded data adequacy status, information can pass freely between it and the EEA.

⁹ See note [from deputy counsel to JCHR on the human rights implications of the Data Protection Bill](#), 6 December 2017.

¹⁰ The Commission has produced a [briefing on the practical impact of the loss of the Charter](#), which includes further examples, February 2018.

¹¹ The Commission has produced a [supplementary legal note on how the EU Charter of Fundamental Rights works, and would work after Brexit](#), February 2018.

Amendments 14 (to Clause 2), 20 (to Clause 3) and 25 (to Clause 4) taken together have a very similar effect to amendment 63A (relating to Clause 6). Amendment 63A has a wider effect because it applies not only to Clauses 2, 3 and 4, but also sub-clauses 3 and 6 of Clause 6. This encompasses retained EU case law and retained General Principles. Amendment 41, (relating to Schedule 1), concerns the continuing application of, and a right of action based on, EU General Principles in domestic law after exit.

Ensuring the UK remains at the forefront of equality and human rights law

Commission's recommendation

Support amendment 56 which requires a court or tribunal to have regard to future decisions of the European Court where relevant to the proper interpretation of retained EU law.

Why is the amendment needed?

EU case law has had an important impact on equality and human rights in the UK. For instance, it is no longer lawful to charge men and women different insurance premiums because of the *Test-Achats* case¹². It is also unlawful to discriminate against individuals because they care for disabled people as a result of the *Coleman* case¹³.

Although the Bill provides discretion for courts to have regard to future EU law, it provides no indication of when Parliament thinks it may be appropriate to do so. Lord Neuberger, retiring President of the Supreme Court, has said he would hope and expect Parliament to spell out in a statute what judges should do about decisions of the European Court after Brexit.¹⁴

This is important to promote legal certainty. Businesses and individuals do not want to be subject to two different interpretations of the same law;

¹² Association Belge des Consommateurs Test-Achats ASBL v Council of Ministers (C-236/09).

¹³ *Coleman v Attridge Law (A Firm)* (C-303/06) CJEU 17 July 2008).

¹⁴ Interview with the BBC on 8/8/2017 accessible at <http://www.bbc.co.uk/news/uk-40855526>.

this is a risk if the UK courts and EU case law diverge on the meaning of the General Data Protection Regulation, for example.¹⁵ This could lead to a situation where different interpretations of the same law, and therefore different standards, apply depending on whether data is being processed in the UK or transferred to the EU. This would create confusion and potentially bring into question whether the UK will obtain a data adequacy decision enabling data transfers with the EU.

To ensure the UK remains at the forefront of equality and human rights law, we recommend that UK courts should, where relevant, take account of future developments in EU case law.

We support amendment 56, which requires a court or tribunal to have regard to future decisions of the European Court where relevant to the proper interpretation of retained EU law. It also makes clear that the UK courts are not bound to follow, or indeed give any weight to, such case law. Parliament will of course have the final say on our domestic legal framework.

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

For more information, please contact:

Parliamentary leads

Denise Morrisroe (Monday, Tuesday, Friday)
Denise.Morrisroe@equalityhumanrights.com
Tel: 0161 829 8109

¹⁵ The General Data Protection Regulation (EU) 2016/679 came into force on 24 May 2016 and will apply in the UK from 25 May 2018. The Data Protection Bill currently before Parliament provides that domestic data protection law will be governed by the GDPR post-exit. See also the footnote above regarding the significance of the UK obtaining a "data adequacy" decision after exit.

Katherine Perks (Tuesday, Wednesday, Thursday)

Katherine.Perks@equalityhumanrights.com

Tel: 020 7832 7813

Legal lead

Stephen Lodge

Stephen.Lodge@equalityhumanrights.com

Tel: 020 7832 7851