

## **European Union (Withdrawal) Bill**

### **House of Lords Committee stage 5 March 2018**

This briefing covers amendments to:

- clarify the status of future decisions of the Court of Justice of the EU
- introduce a domestic Right to Equality in the Bill
- rule out the use of delegated powers to reduce equality and human rights protections

### **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 points 1, 4 and 5.

## **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* case<sup>1</sup>. It is also unlawful to discriminate against individuals because they care for disabled people as a result of the *Coleman* case<sup>2</sup>.

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.<sup>3</sup>

This is important to promote legal certainty. Businesses and individuals do not want to be subject to two different interpretations of the same law; however this is a risk if the UK courts and EU case law diverge on the meaning of the General Data Protection Regulation, for example.<sup>4</sup> 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.<sup>5</sup>

Therefore to promote legal certainty, and 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

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<sup>1</sup> Association Belge des Consommateurs Test-Achats ASBL v Council of Ministers (C-236/09).

<sup>2</sup> *Coleman v Attridge Law (A Firm)* (C-303/06) CJEU 17 July 2008).

<sup>3</sup> Interview with the BBC on 8/8/2017 accessible at <http://www.bbc.co.uk/news/uk-40855526>.

<sup>4</sup> 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.

<sup>5</sup> 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. See further the note [from deputy counsel to JCHR on the human rights implications of the Data Protection Bill](#), 6 December 2017.

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.

## **Introducing a domestic Right to Equality in the Bill**

### **Commission's recommendation**

**Support amendment 70A** which introduces a new clause to ensure that the rights to equality presently enjoyed in accordance with EU law are enshrined in domestic law after the UK leaves the EU.

### **Why is the amendment needed?**

At the moment, EU law provides a safety net of minimum standards for many of our equality rights. For example, the right to equal pay for work of equal value and protections for 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.

A UK right to equality would send a strong signal about the kind of country we want to be once we leave the EU. It would set the domestic equality standard against which new laws will be measured and make our courts the arbiter of equality compliance.

Amendment 70A achieves this by setting a standard that all individuals are equal before the law; and that all individuals have a right not to be discriminated against by a public authority.

These rights will have effect in the same way as those in the Human Rights Act 1998:

- 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.

This 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.*”<sup>6</sup>

In doing so, amendment 70A serves a distinctive and different purpose from the Equality Act 2010, which provides enforceable rights to individuals in specific situations. The domestic right to equality will provide a guarantee that our laws themselves must be non-discriminatory in their purpose and effect, and a mechanism to challenge them if they are. This cannot be done under the Equality Act 2010.<sup>7</sup> It will underpin and operate alongside the individual rights in the Equality Act 2010.

The new right to equality 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.

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

### **Commission’s recommendation**

#### **Support amendments 82, 161, 259, 242A and 245A**

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<sup>6</sup> 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.

<sup>7</sup> The Human Rights Act 1998 provides a mechanism for the court to review compliance of laws with fundamental rights and to make a declaration of incompatibility if appropriate (s3 and 4). These provisions would apply in the same way to the right to equality. The Equality Act 2010 does not provide an equivalent mechanism (see s29 and Schedules 3, 22, and 23).

As a matter of constitutional principle, changes to fundamental rights should be made by Parliament by primary legislation, not by ministers through secondary legislation. However, the Bill as it currently stands does 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, the right to human dignity, and to non-discrimination; as well as equality rights including protection for pregnant and nursing mothers and maternity leave rights.<sup>8</sup>

To prevent this, it is essential that the Bill is amended so as to guard against the excessive transfer of power from Parliament to the Executive and ensure any changes to fundamental rights are subject to full parliamentary scrutiny.

New scrutiny procedures introduced in the Commons, although welcome, do not address this concern. They provide a mechanism, in the form of a new 'sifting committee', to recommend the affirmative scrutiny procedure be used. However, this procedure does not allow Parliament to amend secondary legislation, and the lack of effective scrutiny it provides is demonstrated by the fact that there have only been ten occasions since 1950 when delegated legislation has not been approved by Parliament under the affirmative scrutiny procedure - equivalent to one every six or seven years.

Therefore stronger safeguards are required in the Bill to:

- exclude changes to equality and human rights from the scope of delegated powers; and
- require a ministerial statement that secondary legislation made under the Bill does not reduce rights under equality and human rights law.

To achieve this we support:

- Amendment 82, which would prevent the use of secondary legislation under Clause 7 to make changes to the Equality Act 2010 or subordinate legislation made under that Act; or to reduce

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<sup>8</sup> There is a prohibition on changes to the Human Rights Act 1998.

rights or remedies under EU retained law in comparison with the position before exit day.

- Amendments 161 and 259, which apply to Clauses 9 and 17 (as well as similar amendments to Clauses 7 and 8<sup>9</sup>), and prohibit the use of secondary legislation under these Clauses to change laws relating to equality or human rights. These Amendments would protect against changes, by secondary legislation, to equality and human rights beyond those in the Equality Act 2010, such as protection for pregnant/nursing mothers and maternity leave<sup>10</sup>, and laws which protect human rights such as privacy, and access to justice.
- Amendments 242A and 245A, which protect equality rights. These amendments give effect to the Government's commitment that current protections in the Equality Acts of 2006 and 2010 will be maintained after the UK leaves the EU<sup>11</sup>, by placing that commitment on the face of the Bill. The Government made an amendment on this point in the Commons, which is now at paragraph 22 of Schedule 7. However that amendment does not fulfil the Government's commitment to maintain current equality protections because:
  - 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.
  - The duty to have "due regard" is already a requirement under the Public Sector Equality Duty (PSED)<sup>12</sup> and the minister's statement will do no more than confirm s/he has partially complied with an existing statutory duty .

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<sup>9</sup> These further amendments were tabled on 2 March 2018 and have not yet been numbered at the date of issue of this briefing.

<sup>10</sup> Which are protected in the Employment Rights Act 1996.

<sup>11</sup> See the White Paper: Legislating for the United Kingdom's withdrawal from the European Union, March 2017 at 2.17. which states that "all the protections covered in the Equality Act 2006, the Equality Act 2010 and equivalent legislation in Northern Ireland will continue to apply once the UK has left the EU"  
<https://www.gov.uk/government/publications/the-repeal-bill-white-paper>.

<sup>12</sup> The PSED is set out at s149 of the Equality Act 2010.

- The requirement only focuses on the first duty in the PSED, to have regard to the need to eliminate discrimination, 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 PSED as opposed to this new, additional duty. This must be rectified to ensure clarity and compliance with existing statutory duties.
- The requirement only applies to certain enabling powers in the Bill, under Clauses 7(1), 8 or 9, so changes could be made, for example, under Clause 17<sup>13</sup> without the need for any explanatory statement under the Schedule.

Amendments 242A and 245A address these shortcomings by requiring a Minister when laying secondary legislation before Parliament under any enabling provision in the Act to make a statement that it does not remove or diminish any protection provided by equalities legislation.

## 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](http://www.equalityhumanrights.com)

For more information, please contact:

### Parliamentary leads

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

Katherine Perks (Tuesday, Wednesday, Thursday)

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<sup>13</sup> Clause 17 provides a very wide power that "a Minister of the Crown may by regulations make such provision as the Minister considers appropriate in consequence of this Act".

Katherine.Perks@equalityhumanrights.com  
Tel: 020 7832 7813

**Legal lead**

Stephen Lodge  
Stephen.Lodge@equalityhumanrights.com  
Tel: 020 7832 7851