



**Equality and
Human Rights
Commission**

European Union (Withdrawal) Bill

House of Lords Second Reading

30 January 2018

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 UK, 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.

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

As the Bill currently stands, ministers will be able to amend laws, including rights contained in Acts of Parliament, using delegated powers. 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 maintained¹. It is 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 by ensuring 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 does not address the concern that delegated powers should not be used to change fundamental rights. Parliament cannot amend secondary legislation under this procedure, 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.

¹ Legislating for the United Kingdom's withdrawal from the European Union, March 2017 at 2.17.

Our recommendation

The Commission recommends limiting the use of delegated powers to change equality and human rights law by:

- excluding changes to such laws from the scope of delegated powers; and
- requiring a ministerial statement, when exercising the delegated powers under the Bill, that any changes do not reduce rights under equality and human rights law.

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

The political commitment given by the Government to protect equality rights after we leave the EU must be included in the Bill in order to avoid the risk that equality rights could be undermined in the future.

The Government's amendment in response to the Women and Equalities Committee's recommendation on this issue, which is now paragraph 22 of Schedule 7 to the Bill, fails to deliver on this commitment. It requires ministers to make explanatory statements in relation to equality issues, when laying secondary legislation made under certain sections of this Bill. However:

- It does not apply at all to other Brexit-related primary and secondary legislation, which could potentially be used to reduce existing protections.
- It does not require that current levels of protection will be maintained.

Our recommendation

We recommend the Bill be amended to give effect to the Government's commitment to maintain equality protections through the Brexit process.

Retaining the EU Charter of Fundamental Rights

Clause 5(4) of the Bill removes the Charter from UK domestic law. In doing so it departs from the scheme and purpose of the Bill, which is to transfer the existing EU legal framework into UK law in order to achieve legal certainty as we leave the EU.

The Government's explanation is that retaining the Charter is not necessary because its removal will "not remove any substantive rights that UK citizens currently enjoy."² However 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 loss of the Charter will lead to a significant weakening of human rights protection in the UK.³ This is because some Charter rights, for example those relating to children, 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.

The Government's argument is that the rights set out in the Charter are found elsewhere in EU case law and domestic law. As explained above this is not the case. However even if it was, 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.

Our recommendation

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 UK law.

Introducing a domestic Right to Equality in the Bill

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

² See the Government's "Right by Right Analysis" of the Charter dated 5 December 2017.

³ This legal opinion is available on the Commission's website: <https://www.equalityhumanrights.com/en/our-brexite-work>

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.

Our recommendation

We recommend the Bill should include a new domestic right to equality. This 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.

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

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* case⁴. It is also unlawful to discriminate against individuals because they care for disabled people as a result of the *Coleman* case⁵.

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.⁶

Our recommendation

To ensure the UK remains at the forefront of equality and human rights law, we recommend that UK courts should take account of future developments in EU case law, without being bound to follow them; our courts would have the final say on the meaning of our laws.

⁴ Association Belge des Consommateurs Test-Achats ASBL v Council of Ministers (C-236/09).

⁵ Coleman v Attridge Law (A Firm) (C-303/06) CJEU 17 July 2008).

⁶ Interview with the BBC on 8/8/2017 accessible at <http://www.bbc.co.uk/news/uk-40855526>.

To achieve this we recommend the Bill should provide that if there is doubt as to the construction or application of any law relating to equality or human rights, UK courts and tribunals should have regard to any relevant future EU 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 on this briefing, please contact:

Parliamentary leads:

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

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