

European Union (Withdrawal) Bill

House of Lords

Report stage

18 April 2018

This briefing covers amendments to:

- rule out the use of delegated powers to reduce equality rights and human rights protections
- retain the EU Charter of Fundamental Rights

Introduction

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.

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) retaining the protections in the EU Charter of Fundamental Rights (the Charter).
 - 2) ensuring non-regression of equality rights; and,
 - 3) ruling out the use of delegated powers to reduce equality and human rights protections;

- **Ensuring the UK remains a global leader on equality and human rights after leaving the EU by:**
 - 4) 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 Report 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 and 3 above.

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

Commission's recommendation

Support Amendment 11, and the Amendment to Amendment 11 (tabled by Lord Low) to add human rights protection

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 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.¹

To prevent this, it is essential that the Bill is amended to 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.

In order to strengthen scrutiny, we support proposals for an enhanced scrutiny procedure if delegated powers are used to make changes in a number of areas including equality and human rights protections. Together, Amendments 11 and the Amendment to Amendment 11 (tabled by Lord Low) would achieve this.

Amendment 11 also provides important safeguards for the use of delegated powers by requiring a minister to certify that secondary legislation does no more than make technical changes to retained EU law in order for it to work following exit, and to make an explanatory statement under paragraph 22 of Schedule 7 of the Bill.

This first of these requirements is in line with the Government's commitment that "*the Bill does not aim to make major changes to policy*"², and the recommendation of the House of Lords Select Committee on the Constitution that this commitment should be on the face of the Bill:

¹ There is a prohibition on changes to the Human Rights Act 1998.

² Explanatory notes to the Bill paragraph 14.

“Ministerial assurances that the powers will not be used to make “major” or “substantive” policy changes are insufficient. The powers must be more tightly circumscribed on the face of the Bill ...[We] recommend that explanatory memoranda should include a certification from the minister that the regulation does no more than make technical changes to retained EU law in order for it to work post-exit, and that no policy decisions are being made.”³

The House of Lords Delegated Powers and Regulatory Reform Committee has also expressed concern that:

“...currently, the Bill allows regulations to make substantial policy changes that ought to be made only in primary legislation”⁴

The second requirement, to make an explanatory statement under paragraph 22 of Schedule 7, is intended to provide greater transparency about the reason for bringing forward delegated legislation under the Bill, and its effect, if any, on equality legislation. We welcome its inclusion in the Bill, and in this amendment, but recommend that it should be strengthened to require a statement that delegated legislation does not reduce any protection provided by equalities legislation. Such a statement would be in line with the political commitment given by the Government that current protections in the Equality Acts of 2006 and 2010 will be maintained after the UK leaves the EU.⁵

The importance of providing additional safeguards for equality laws in the Bill, rather than being merely a political commitment, is highlighted by the results of the *‘red tape challenge’ (RTC)*, undertaken by the coalition Government of 2010-2015, which removed important equality protections.

³ House of Lords Select Committee on the Constitution, 9th Report of Session 2017–19 European Union (Withdrawal) Bill 24 January 2018.

⁴ House of Lords Delegated Powers and Regulatory Reform Committee: 3rd report, European Union (Withdrawal) Bill, 28 September 2017.

⁵ 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>.

Changes made following the RTC included removing workers' protection against harassment, including sexual harassment, by customers, and repealing the power of employment tribunals to make recommendations to benefit an employer's wider workforce – an important way of addressing systemic issues such as protection from harassment and the gender pay gap.

Other changes under the RTC that would have diminished protections under the Equality Acts of 2006 and 2010 were prevented by the UK's membership of the EU, which meant that many rights could not be reduced below the standard required by EU law:

“There are good reasons to believe that [without the back stop of the EU there is] a real risk to equality legislation. For example, the 2011 Beecroft report, commissioned as part of the “Red Tape Challenge”, included proposals to cap discrimination damages awards. This was prevented by the Court of Justice of the European Union, which had ruled in 1993 that damages for sex discrimination could not be limited. That report also proposed a number of other retrograde steps, including opt-outs of equalities requirements for small businesses”⁶

We consider a minister should have no difficulty certifying that a technical provision of the kind the delegated powers in the Bill are intended to be used for does not diminish protections in equality legislation. Indeed the Government's paper: *Equalities legislation and EU exit*, confirms that “No planned changes to the Equality Acts 2006 and 2010 or secondary legislation under those Acts, using the powers under the EU (Withdrawal) Bill will substantively affect the statutory protections provided for by that equality legislation”.⁷

Finally, we support the Amendment tabled by Lord Low to Amendment 11, to add human rights protection to the list of areas subject to enhanced protection. As explained above, many areas of human rights are currently protected by EU law, such as rights to protection of

⁶ Fawcett Society Sex discrimination law review, January 2018.

⁷ An amendment to add this additional protection to paragraph 22 of Schedule 7 is likely to be subject to debate at a later stage during report.

personal data, children’s rights, the right to human dignity, and protection from trafficking. This amendment is essential to limit the power of ministers to makes changes to fundamental rights, which should only be made by Parliament following full scrutiny.

Retaining the EU Charter of Fundamental Rights

Commission’s recommendation

Support Amendment 15 to ensure protections in the Charter are retained.

Why is this amendment needed?

The purpose of this 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. The Government’s rationale is that it is not necessary to retain the Charter because the rights it contains can all be found elsewhere, and consequently there will be no loss of rights.

As Lord Pannick stated during the Committee debate, that position is “simply unsustainable”.⁸ He referred to the opinion of Jason Coppel QC, obtained by the Commission, on the Government’s analysis of the Charter. Jason Coppel’s advice is that the loss of the Charter “will lead to a significant weakening of the current system of human rights protection in the UK”.⁹ This is because:

- There will be gaps in protection, for example in relation to children’s rights, data protection and non-discrimination.

⁸ HL deb(2018)789 col.548; 26 February 2018 (day 2).

⁹This legal opinion is available on the Commission’s website: <https://www.equalityhumanrights.com/en/our-brexite-work>.

- Many rights will no longer be directly enforceable, leading to further gaps in protection.¹⁰
- Many remaining rights could be removed by ministers exercising delegated powers. This is unacceptable. Human rights should not be changed without full Parliamentary scrutiny.¹¹

The Bingham Centre for the Rule of Law, in its report on the Bill, has also stated:

“It is clear beyond doubt that non-retention of the Charter will lead to a loss of the current level of rights protection available to individuals and businesses under EU law.... This will give rise to a serious legal discontinuity which is at odds with the Government’s own Rule of Law objective for the Bill.... The Bill should not be treated as an opportunity to remove substantive protections which the Government does not like.”¹²

Similarly, a report by the Joint Committee on Human Rights (JCHR) identifies a number of gaps in protection that will result from the loss of the Charter. For example, there will be a loss of children’s rights under Article 24 of the Charter, which requires that the child’s best interests must be a primary consideration in all actions relating to children. While this right is based on the UN Convention on the Rights of the Child (CRC), the CRC is not incorporated into UK wide domestic law¹³ and therefore the right under Article 24 will not be directly enforceable without the Charter.¹⁴ This example demonstrates clearly that the Government’s assertion that there will be no loss of rights is flawed.

It is also clear that removing the Charter will create significant legal uncertainty. This is because retained EU law is incomplete without the

¹⁰ 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 to the Bill).

¹¹ We have separately recommended delegated powers in the Bill should be limited to prevent changes to human rights by secondary legislation.

¹² Bingham Centre: The EU (Withdrawal) Bill: A Rule of Law Analysis of Clauses 1-6 dated 21 February 2018.

¹³ The UNCRC has been given effect in the devolved context, although not directly incorporated. For example in Wales, the 'Rights of Children and Young Persons (Wales) Measure' 2011, places a duty on Welsh Ministers to have due regard to the rights and obligations in the United Nations Convention on the Rights of the Child.

¹⁴ JCHR: Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis dated 24 January 2018.

Charter, which is frequently referred to in EU law and provides the framework within which it operates.¹⁵

This was demonstrated by the decision of the Irish Supreme Court on 1 February 2018 to refer a question to the Court of Justice of the EU (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.¹⁶

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 decision¹⁷ for data transfers to the EU¹⁸, with potentially serious consequences for UK businesses and individuals¹⁹.

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.

During the Committee debate Lord Keen said that the Government would look at the JCHR analysis 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."²⁰

The Commission's position is that the loss of specific rights has clearly been identified in the reports referred to above and elsewhere. If the Government is unable to bring forward proposals at Report to address

¹⁵ For example the General Data Protection Regulation (EU) 2016/679 contains multiple references to the Charter.

¹⁶ Minister for Justice -v- O'Connor [2018] IESC 3.

¹⁷ 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.

¹⁸ See note [from deputy counsel to JCHR on the human rights implications of the Data Protection Bill](#), 6 December 2017.

¹⁹ The Commission has produced a [briefing on the practical impact of the loss of the Charter](#), which includes further examples, February 2018.

²⁰ HL deb (2018)789 col.570; 26 February 2018 (day 2).

the consequent loss of rights, the appropriate action must be to retain the Charter in this Bill. This will avoid gaps in protection and legal uncertainty, whilst leaving it open to Parliament to consider these matters further in due course.²¹ We support Amendment 15 which does this.

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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²¹ The Commission has produced a [supplementary legal note on how the EU Charter of Fundamental Rights works, and would work after Brexit](#), February 2018.