



**Equality and
Human Rights
Commission**

European Union (Withdrawal) Bill

House of Lords

Report stage

23 April 2018

This briefing covers amendments to:

- retain the EU Charter of Fundamental Rights (Amendment 15)
- clarify the status of future decisions of the Court of Justice of the EU (Amendments 21, 23, 24, and 25)
- ensure non-regression of equality rights (Amendment 30A)

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); and,
 - 2) 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:**
 - 3) guarding against future regression of equality rights; and,
 - 4) ensuring the UK keeps pace with developments in equality and human rights law by making it clear that UK courts can 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, 3 and 4 above.

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 in domestic law, and consequently there will be no loss of rights.

As Lord Pannick stated during the Committee debate, that position is "simply unsustainable".¹ 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".² This is because:

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

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."*⁵

¹ HL deb(2018)789 col.548; 26 February 2018 (day 2).

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

³ 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).

⁴ We have separately recommended delegated powers in the Bill should be limited to prevent changes to human rights by secondary legislation.

⁵Bingham Centre: The EU (Withdrawal) Bill: A Rule of Law Analysis of Clauses 1-6 dated 21 February 2018.

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 law⁶ and therefore the right under Article 24 will not be directly enforceable without the Charter.⁷ 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 Charter, which is frequently referred to in EU law and provides the framework within which it operates.⁸

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.⁹

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 decision¹⁰ for data transfers to the

⁶ 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.

⁷ JCHR: Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis dated 24 January 2018.

⁸ For example the General Data Protection Regulation (EU) 2016/679 contains multiple references to the Charter.

⁹ Minister for Justice -v- O'Connor [2018] IESC 3.

¹⁰ 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.

EU¹¹, with potentially serious consequences for UK businesses and individuals¹².

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 through the alternative sources the Government have referred to in its analysis.

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.”¹³

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 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, while leaving it open to Parliament to consider these matters further in due course.¹⁴ We support Amendment 15 which does this.

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

Commission’s recommendation

Support amendments 23, 24, and 25 which make clear a court or tribunal may have regard to future EU law where it is relevant to any matter before the court.

Why are the amendments needed?

¹¹ See note [from deputy counsel to JCHR on the human rights implications of the Data Protection Bill](#), 6 December 2017.

¹² The Commission has produced a [briefing on the practical impact of the loss of the Charter](#), which includes further examples, February 2018.

¹³ HL deb (2018)789 col.570; 26 February 2018 (day 2).

¹⁴ The Commission has produced a [supplementary legal note on how the EU Charter of Fundamental Rights works, and would work after Brexit](#), February 2018.

The case law of the European Court 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* case¹⁵. It is also unlawful to discriminate against individuals because they care for disabled people as a result of the *Coleman* case¹⁶.

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, recently retired 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.¹⁷

We therefore welcome Government Amendments 23, 24 and 25 which make clear that a court or tribunal can have regard to future decisions of the European Court, and other EU law, where relevant to any matter before the court. This will help ensure the interpretation of equality and human rights law applying in the UK does not fall behind that in the EU.

These amendments give appropriate guidance to the court, while not requiring it to follow EU case law. Parliament will of course have the final say on our domestic legal framework. We also support Amendment 21 in the name of Lord Pannick which would achieve similar aims.

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

Commission's recommendation

Support Amendment 30A

Why is it needed?

¹⁵ Association Belge des Consommateurs Test-Achats ASBL v Council of Ministers (C-236/09).

¹⁶ Coleman v Attridge Law (A Firm) (C-303/06) CJEU 17 July 2008).

¹⁷ Interview with the BBC on 8/8/2017 accessible at <http://www.bbc.co.uk/news/uk-40855526>.

Amendment 30A is needed to fulfil the Government’s commitment to protect equality rights after we leave the EU.¹⁸ It does so by replacing the safety net provided by EU Equality Directives with our own domestic protection for equality rights. It does not enhance protections, but simply protects the equality rights we already have.

Despite the Government’s political commitment, there is a risk that, without embedding the principle of non-regression within the Bill, equality rights could be undermined in the future. This is because EU law currently provides a set of minimum standards for many of our equality rights. For example, the right to equal pay for work of equal value and many of our protections from discrimination cannot be removed while the UK remains part of the EU.

The Women and Equalities Select Committee recognised this risk and recommended that the Bill should “explicitly commit to maintaining the current levels of equality protection”.¹⁹

This New Clause achieves this by providing that existing rights under the Equality Acts 2006 and 2010 will not be removed or diminished. It sets out two mechanisms to ensure this, which mirror those in the Human Rights Act 1998 by:

- requiring a minister to state, when new legislation is introduced to Parliament, whether it is compatible with the requirement not to reduce existing protections; and
- allowing the UK courts to assess the compatibility of new laws with this requirement.

This is in line with the recommendation of the Women and Equalities Committee that there is a need “to empower Parliament and the courts

¹⁸ Legislating for the United Kingdom’s withdrawal from the European Union, March 2017 at 2.17. In its White Paper the Government gave a commitment to continue to protect and enhance the rights people have at work, and that all the protections covered in the Equality Acts of 2006 and 2010 will continue to apply once the UK has left the EU.

¹⁹ House of Commons Women and Equalities Committee: Ensuring strong equalities legislation after the EU exit 22 February 2017 Seventh Report of Session 2016–17.

to declare whether legislation is compatible with UK principles of equality.”²⁰

This New Clause provides equivalent protection for equality rights after exit day as before, by replacing the foundation of those rights currently provided by EU law with an equivalent domestic underpinning. In doing so, it addresses concerns raised by the Government in Committee debates about an earlier proposal to create a new freestanding right to equality.²¹ Lord Callanan said that “the bottom line is that substantive new rights are not consistent with the intended purpose of the Bill, which is about maintaining the same level of protection on the day after exit as before”[emphasis added].²² This New Clause maintains equivalent protection for equality rights after exit day by simply replacing the foundation of our equality rights currently provided by EU law with an equivalent underpinning in our own domestic law.

This New Clause respects the UK’s constitutional position by applying the same approach as in the Human Rights Act 1998. In particular, it respects parliamentary sovereignty because it limits the role of the court in relation to primary legislation to making a declaration of incompatibility, rather than invalidating or striking down legislation as is currently the case under EU law. This approach strikes an appropriate balance between ensuring non-regression of equality rights after the UK leaves the EU, and returning control to Parliament so that Parliament will have the final say on our laws after Exit Day.

The importance of embedding a principle of non-regression in law, rather than relying on the Government’s 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.

²⁰ See Women and Equalities Committee: Ensuring strong equalities legislation after the EU exit, 22 February 2017, Seventh Report of Session 2016–17.

²¹ Amendment 70A at Committee stage.

²² HL deb (2018) 789 col.1168; 7 March 2018 (day 5).

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”²³

We therefore support Amendment 30A which will send a strong signal about the kind of country we want to be once we leave the EU by giving equality rights equivalent protection in UK law as they currently have under EU law.

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:

²³ Fawcett Society Sex discrimination law review, January 2018.

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