

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

### **House of Lords**

### **Report stage**

**8 May 2018**

This briefing covers amendments to:

- rule out the use of delegated powers to reduce equality protections (Amendments 83A and 83E)

### **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 point 2 above.

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

### **Commission’s recommendation**

#### **Support amendments 83A and 83E**

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, and the general rights in EU law to non-

discrimination; as well as other equality rights such as protection for pregnant and nursing mothers and maternity leave rights.<sup>1</sup>

To prevent this, it is essential that the Bill ensures 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 welcome the decision of the House on 18 April to pass Amendment 11, in the name of Baroness Hayter of Kentish Town, which requires an enhanced scrutiny procedure if delegated powers are used to make changes in a number of areas of law including equality rights and protections. We also supported the Amendment 11A tabled by Lord Low, to add human rights protection to the list of areas subject to enhanced protection.

We also welcome Amendment 83C to paragraph 22 of Schedule 7, tabled by the Government, which requires a ministerial statement before laying a statutory instrument under sections 7(1), 8 or 9 of the Act, to explain why there are good reasons for doing so, and that the provision made by the instrument is a reasonable course of action.

However we consider the Bill should be further improved by including a requirement for a ministerial statement that secondary legislation made under the Bill does not reduce protections under equality legislation. To achieve this we support Amendments 83A and 83E. 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

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<sup>1</sup> There is a prohibition on changes to the Human Rights Act 1998.

leaves the EU<sup>2</sup>, by translating that political pledge into a legal protection 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>3</sup> and the minister's statement will do no more than confirm s/he has partially complied with an existing statutory duty.
- 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(1)<sup>4</sup> without the need for any explanatory statement under the Schedule.

Amendments 83A and 83E 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.

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<sup>2</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>3</sup> The PSED is set out at s149 of the Equality Act 2010.

<sup>4</sup> Clause 17(1) 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”.

This is in line with the recommendation of the Women and Equalities Select Committee that the Bill should “explicitly commit to maintaining the current levels of equality protection”.<sup>5</sup>

The Government suggested, during debate on these Amendments in Committee, that requiring a statement that a new provision does not diminish protection may not be straightforward, for example where protection for one group may conflict with that of another, raising complex issues.<sup>6</sup> This clearly highlights a point of central concern that the use of delegated powers under this Bill should not be used to address such complex policy issues, which should be a matter for primary legislation and full parliamentary debate.

It is important to note that amendments 83A and 83E only require a minister to make a statement that s/he is satisfied that it does not remove any protection provided by equalities legislation. This subjective statement does no more than place the Government’s existing political commitment on the face of the Bill. During the debate on this Bill, the Government has asserted that ‘the language of a political commitment does not translate to the statute book’.<sup>7</sup> However, a minister should have no difficulty certifying that a technical provision of the kind 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 [**emphasis added**] provided for by that equality legislation”.<sup>8</sup>

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<sup>5</sup> House of Commons Women and Equalities Committee: Ensuring strong equalities legislation after the EU exit 22 February 2017 Seventh Report of Session 2016–17.

<sup>6</sup> HL deb (2018) 790 col.266; 21 March 2018 (day 9).

<sup>7</sup> HL deb (2018) 790 col.1461-2; 23 April 2018 (day 2).

<sup>8</sup> A number of other amendments which would restrict the use of delegated powers to change equality and human rights were debated in Committee. Some of the amendments were criticised by the Government on the grounds that they would not permit technical changes, such as changing references from “EU law” to “retained EU law”, which would need to be made to equalities legislation. It should be noted that Amendments 83A and 83E do not prevent such changes – there would be no difficulty in the minister giving the required statement that technical changes do not remove or diminish protections.

The Government also suggested during the debate that the requirement to give explanatory statements should not be extended to all the powers in the Bill because “these other powers will not be making the sorts of changes to which these statements are applicable”.<sup>9</sup> However, as the Constitution Committee has said of one of these powers, under Clause 17(1), “There are minimal restrictions on its use and the wide range of purposes for which it might be used are not clearly foreseeable... We recommend that the power to make “consequential provisions” in Clause 17 is removed.”<sup>10</sup> Therefore if such a power is to be retained it is important that it should be subject to the greatest possible level of scrutiny, including the requirement for an explanatory statement under paragraph 22 of Schedule 7.

The importance of including a requirement for a ministerial statement in the Bill, 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.

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

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<sup>9</sup> HL deb (2018) 790 col.266; 21 March 2018 (day 9).

<sup>10</sup> House of Lords Select Committee on the Constitution, 9th Report of Session 2017–19 dated 24 January 2018 at paragraph 205 and 206.

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”<sup>11</sup>

We are concerned that the Government rejected amendment 30A which would have included a principle of non-regression of equality rights in the Bill, despite its political commitment to this end. We therefore strongly recommend support for Amendments 83A and 83E that would also contribute to realising this political commitment by strengthening the terms of the ministerial statement required when exercising the delegated powers in the Bill in relation to 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)

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<sup>11</sup> Fawcett Society Sex discrimination law review, January 2018.