

European Union (Withdrawal) Bill

House of Lords

Third Reading

16 May 2018

The purpose of this briefing is to highlight the amendments that need to be maintained in order to:

- safeguard the UK's equality and human rights legal framework; and
- ensure that the UK remains a global leader on equality and human rights after leaving the EU.

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 provides a short overview of progress made to date to ensure the EU (Withdrawal) Bill is amended to deliver the Government's commitment to non-regression of equality and human rights protections as we leave the EU.

Significant progress has been made – including amendments we have supported to:

- retain the EU Charter of Fundamental Rights and the right to bring a claim based on a breach of general principles of EU law;
- ensure our courts can properly consider future judgments of the Court of Justice of the European Union (CJEU) where it is relevant to any matter before the court; and
- introduce enhanced scrutiny over the use of delegated powers to amend equality rights.

It is critical that these important amendments are upheld when the Bill returns to the Commons.

Despite these positive developments, there are a number of areas where we remain concerned. In particular, constraints on the use of delegated powers under the Bill to amend equality legislation do not go far enough to prevent non-regression, and safeguards to protect equality and human rights legislation beyond the Human Rights Act 1998 were not agreed.

Retaining the protections in the EU Charter of Fundamental Rights

The Commission's position

The Commission welcomes the amendment made at Report that retains the protections in the EU Charter of Fundamental Rights (the Charter) in relation to EU retained law after exit day.

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. The only exception to this approach in the original Bill was that the Charter would no longer apply after exit day.

The Commission obtained advice from Jason Coppel QC on the Government's approach¹. His advice was that the loss of the Charter "will lead to a significant weakening of the current system of human rights protection in the UK". This would create gaps in protection, for

¹ This legal opinion is available on the Commission's website: <https://www.equalityhumanrights.com/en/our-brexite-work>.

example, in relation to children’s rights, data protection and non-discrimination; mean that many rights would no longer be directly enforceable; and that many remaining rights could be removed by ministers exercising delegated powers.

It is also clear that removing the Charter would 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.²

Overview of developments

The Commission supported amendment 15 moved by Lord Pannick during Report³, which is now Paragraph 4 of Clause 6 of the Bill. It retains the Charter, except for parts that will be irrelevant after exit day (the Preamble and Chapter V) and ensures that the Charter has the same effect after exit day as it did before in relation to retained EU law, including retained case law and general principles. The amendment, agreed by 316 to 245 votes, received support from across the house.

During the Committee debate, Lord Keen said that the Government would look at the analysis of the Joint Committee for Human Rights (JCHR) 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.”⁴ The loss of specific rights has clearly been identified as a cross-party concern and it will be the responsibility of the Commons to uphold these amendments and retain the Charter through this Bill.

During debates, concerns were raised about how the Charter would work after the UK has left the EU. For Committee stage, the Commission produced a ‘Supplementary legal note on how the EU Charter of Fundamental Rights works, and would work after Brexit’⁵, to address such concerns. This note explains how courts would be able to continue

² For example the General Data Protection Regulation (EU) 2016/679 contains multiple references to the Charter.

³ Amendment 15, agreed on Report day two, 23 April 2018.

⁴ HL deb (2018)789 col.570; 26 February 2018 (day 2).

⁵ https://www.equalityhumanrights.com/sites/default/files/legal_note_-_how_the_eu_charter_of_fundamental_rights_works.pdf.

to apply the rights in the Charter to retained EU law once we leave the EU, in the same way as they do at present. While there would have to be some adjustments to the wording of some Charter rights to reflect the changed legal environment, this is no different to the position with many other provisions of retained EU law.

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

The Commission's position

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 original Bill did 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.⁶ To prevent this, we have supported amendments to ensure any changes to fundamental rights are subject to full parliamentary scrutiny.

Overview of developments

The Commission supported important safeguards on the use of delegated powers, moved by Baroness Hayter of Kentish Town, which were agreed on Report.⁷ Now Clause 4, lines 5-30 of the Bill, this amendment introduced a requirement for an enhanced scrutiny procedure where delegated powers are used to make changes to a number of areas of retained EU law, including 'equality rights and protections'. We also supported an amendment tabled by Lord Low of Dalston⁸ that would have strengthened this provision by adding human rights protection to the list of areas subject to enhanced protection. This additional amendment was not put to a vote. However, Baroness Hayter

⁶ There is a prohibition on changes to the Human Rights Act 1998.

⁷ Amendment 11 at Report, agreed on Report day 1, 18 April 2018.

⁸ Amendment 11A at Report, also considered on Report Day 1, 18 April 2018.

supported it and noted in the debate that her own amendment ‘should, of course, have included the words “human rights”’:

‘clearly the same arguments apply here to human rights as they do to the other rights: the things that we are bringing over and transposing on Brexit date should not then be vulnerable to subsequent change by secondary legislation.’⁹

We are keen to ensure that this amendment is retained, with the addition of human rights protections.

The Commission also supported amendments specifically aimed at enhancing scrutiny over the use of delegated powers to amend equality legislation. The Government made an amendment on this point in the Commons, which requires a minister, when introducing secondary legislation under certain powers in the Bill, to state whether it amends, repeals or revokes any provision of equalities legislation and if so its effect; and that the minister has ‘had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010’.¹⁰

However, we expressed concerns that this change 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 also risks confusion about compliance with the Public Sector Equality Duty.

The Commission therefore supported amendments 83A and 83E tabled by Lord Low of Dalston at Report. 83E would have required a ministerial statement to confirm that any secondary legislation made under the Bill does not reduce protections under equality legislation. This amendment was rejected by the Government, stating that ‘the language of a political commitment does not translate to the statute book’.¹¹ This is disappointing in particular because while Lord Callanan, responding for the Government, asserted here and elsewhere in debate that the word

⁹ HL deb (2018) 790 col. 1218; 18 April 2018 (Report day 1)

¹⁰ Schedule 7, Paragraph 27 (4) and (5) of the Bill as amended on Report.

¹¹ HL deb (2018) 791 col. 120; 8 May 2018 (Report day 6).

"protection" does not have any statutory basis and therefore is not appropriate, the Legislative and Regulatory Reform Act 2006 provides, as one of the preconditions for the exercise of delegated powers under that Act, that a provision "does not remove any necessary protection".¹² However, the Minister did reiterate the firm commitment made on the Hansard record, and elsewhere, that the Government 'will maintain the existing protections in and under the Equality Acts 2006 and 2010 after our exit from the EU.'¹³

83A would have extended the requirement to make explanatory statements to all enabling powers in the Bill. That amendment was not voted on. However, we welcome the Government amendment on this point, which extended the provisions of Paragraph 27 of Schedule 7 to include the exercise of powers to make consequential provision under Clause 22(1), and to certain powers under Schedule 2.

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

The Commission's position

The case law of the Court of Justice of the European Union (the CJEU) has had an important impact on equality and human rights in the UK. Although the original Bill provided discretion for courts to have regard to future EU law, there was no indication of when Parliament thought it may be appropriate to do so. The Commission therefore supported amendments to make clear that a court or tribunal may have regard to future decisions of the CJEU where relevant to any matter before the court, whilst also making clear that the UK courts are not bound to follow such case law.

¹² This was pointed out by Lord Wallace of Tankerness. See HL deb (2018) 791 col. 116; 8 May 2018 (Report day 6).

¹³ HL deb (2018) 791 col. 120; 8 May 2018 (Report day 6).

Overview of developments

Following discussions between peers and Ministers on this matter, the Government introduced amendments, supported by the Commission, that are now paragraph 2 of Clause 7 in the Bill as amended on Report.¹⁴ These ensure the Bill now makes clear that a court or tribunal may have regard to future EU law where it is relevant to any matter before the court.

Guarding against future regression of equality rights

The Commission's position

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. The Commission therefore called for the introduction of a UK right to equality in the Bill to replace the safety net of minimum standards for many of our equality rights currently provided by EU law. We also called for the introduction of a clear principle of non-regression of equality rights to be embedded in the Bill, to place the Government's political commitments on this issue on a statutory footing.

Overview of developments

The Commission supported amendment 70A during the Lords' Committee stage, tabled by Lord Wallace of Tankerness, that would have introduced a new right to equality intended to apply across the UK (subject to discussion and agreement by devolved administrations). The proposed new right would have set 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. The Minister, responding for the Government during the Committee debate, objected to this proposal, asserting that "the bottom line is that substantive new rights are not consistent with the intended purpose of the Bill, which is about

¹⁴ Government Amendments 23, 24, and 25, agreed on Lords' Report day two, 23 April 2018.

maintaining the same level of protection on the day after exit as before”.¹⁵

Lord Wallace of Tankerness introduced a new amendment at Report stage taking on board the Government’s concerns, while seeking to achieve the same aim of non-regression of equality rights. Amendment 30A at Report – which was not put to a vote – sought to ensure that existing rights under the Equality Acts 2006 and 2010 will not be removed or diminished. It set out two mechanisms (mirroring those in the Human Rights Act 1998) to ensure this 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.

The Commission was disappointed by the response from the Minister, who stated that the amendments could not be accepted for a number of reasons, including that terms such as ‘protection’ and ‘diminish’ do not have a sufficiently clear and precise meaning, and that the amendment could risk legal uncertainty. The Commission remains concerned about the loss of underpinning of our equality laws.

The Commission is disappointed that the Government has not meaningfully engaged with the purpose and intent behind these amendments – or provided alternative formulations to ensure the loss of underpinning of our equality laws as we leave the EU is replaced by a domestic safety net. It is not clear why the mechanisms of the Human Rights Act 1998, that have proven successful, could not be extended to this context or indeed would risk introducing uncertainty.

¹⁵ HL deb (2018) 789 col.1168; 7 March 2018 (day 5).

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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