

Response of the Equality and Human Rights Commission to the Select Committee Inquiry:

Title:	Secondary legislation and the European Union (Withdrawal) Bill: the sifting criteria
Source of inquiry:	The House of Lords Secondary Legislation Scrutiny Committee (SLSC)
Date:	18 May 2018

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Executive Summary

- The Equality and Human Rights Commission has recommended that any changes to equality and human rights laws should be made by primary legislation. However, if any changes are made by secondary legislation, (technical changes for example) they should be reserved for the affirmative procedure as a minimum requirement.
- The EU (Withdrawal) Bill will convert the body of EU law, as it stands when we leave the EU, into domestic law. However in doing so it delegates wide-ranging powers to ministers, enabling them to amend or repeal retained EU law and other domestic law, including primary legislation.
- Regulations made under these powers will not be subject to the same degree of scrutiny by Parliament as would be required for primary legislation. While the purpose may be to facilitate the technical withdrawal from the EU, the Commission is concerned about the significant implications for parliamentary sovereignty and democratic accountability for potential changes to laws covering equality and human rights.
- While the Bill prohibits the use of delegated powers in relation to the Human Rights Act 1998, they could be used to amend the Equality Acts of 2006 and 2010, and other legislation which protects individuals' fundamental rights. The Commission considers that it is vital that Parliament retains the ability to fulfil its important constitutional role in fully scrutinising changes to the UK's equality and human rights legal framework.
- In the circumstances, our response to the inquiry will only address question three - in respect of what categories of subject matter warrant a presumption in favour of the affirmative procedure. However, our recommendation should be viewed in the wider context that the Commission does not consider that any substantive changes to equality and human rights should be made by secondary legislation.

Our recommendation:

There should be presumption in favour of the affirmative procedure as a minimum requirement for the enactment of secondary legislation that proposes any changes to equality or human rights.

- Matters involving fundamental rights demand the highest degree of Parliamentary scrutiny - whether that be by an affirmative procedure or a new enhanced form of scrutiny.
- This includes any instrument (whether or not it is a statutory instrument) that seeks to amend or reduce, or enhance fundamental rights.
- This presumption should be required as a mandatory procedural step.
- For reasons outlined below, the Commission is of the view that there are no circumstances where the negative resolution procedure would be appropriate to make changes to fundamental rights.

Background

1. The Equality and Human Rights Commission welcomes the Secondary Legislation Scrutiny Committee's (SLSC) decision to conduct an inquiry into the sifting criteria for secondary legislation since there are some serious concerns raised by the EU (Withdrawal) Bill (the Bill), particularly in relation to the use of delegated powers.
2. The Commission's position in respect of the use of delegated powers has been clear from the outset. The Bill should explicitly limit the scope of such powers (including Henry VIII powers) to make any changes to equality and human rights law. In the circumstances, this submission will not seek to address all five questions asked by the Committee, but focus on the reasons why only the most rigorous parliamentary scrutiny should be applied to equality and human rights laws.
3. 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 introduced to Parliament 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 children's rights, certain data protection 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 rights¹. To prevent this, the Commission supported amendments to the Bill that would help to ensure any changes to fundamental rights are subject to full parliamentary scrutiny.

Question 3: Are there any categories of subject matter, aside from those stipulated on the face of the legislation for which there should be a presumption in favour of the affirmative procedure?

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

Enhanced scrutiny procedure

4. The SLSC has requested whether there are any categories of subject matter for which there should be a presumption in favour of the affirmative procedure, aside from those already “stipulated on the face of the legislation”. The Bill has been amended in the House of Lords², introducing a requirement for an enhanced scrutiny procedure for matters relating to entitlements, rights and protection in respect of employment; equality; health and safety; consumer standards; and environmental standards. The Commission supported these important safeguards on the use of delegated powers in the Bill.
5. We also supported an amendment tabled by Lord Low of Dalston 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 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.’³

6. It is important that this amendment is retained as the Bill continues its journey, with the addition of human rights protections. If the amendment is retained it will provide an assurance on the face of the Bill that an enhanced scrutiny procedure will apply to proposed changes to equality entitlements, rights and protections. However, the issue of the level of scrutiny required for changes to other fundamental rights remains outstanding as the current amendment on an enhanced scrutiny procedure does not expressly include human rights.

Limitations of the negative resolution procedure

7. There has been substantial criticism of the procedure for Parliamentary scrutiny of delegated legislation, which is largely directed at the negative resolution procedure. In most instances under this process, it is for the Opposition to table an Early Day Motion to annul an SI within a 40 day period starting on the date which it was first laid.⁴ The Hansard Society describes the process as “unsatisfactory”⁵. In respect of the large number of SIs which are passed without any opportunity for debate they highlight that most will:

² Amendment 11 moved by Baroness Hayter of Kentish Town which was agreed by the House on Report and is now Clause 4 lines 5-30 of the Bill.

³ HL deb (2018) 790 col. 1218; 18 April 2018 (Report day 1)

⁴ ‘The Devil is in the Detail: Parliament and Delegated Legislation’ (2014) Ruth Fox and Joel Blackwell, Hansard Society.

⁵ ‘The Devil is in the Detail: Parliament and Delegated Legislation’ (2014) Ruth Fox and Joel Blackwell, Hansard Society.

“become law in the form determined by a Minister unless one or other House of Parliament votes against them, which very rarely happens”⁶.

8. According to House of Commons Library data from 2016, Parliament has only voted against an SI introduced by the negative resolution procedure on nine occasions since the World War II, equating to around one instance every decade. The last time the House of Commons voted to annul was 1979⁷.
9. The Hansard Society also highlights the inherent risk of missing important changes made by way of secondary legislation when taking the wider reality of parliamentary constraints into consideration:

8.1 Limited and rigid parliamentary timetable. This is particularly relevant in the current parliamentary session⁸. SIs will only be debated if the Opposition can convince the Government to make time for a debate.

8.2 SIs cannot be amended in part or be redrafted. The main options available to the House of Lords under this procedure are to annul the instrument in full or to make a regret motion. The latter is not a direct challenge to the SI but is merely criticises a particular part of the instrument, it does not require the government to take any action and the SI is still passed by the House even if the motion is carried⁹.

8.3 The length or complexity of the SI might make it difficult to determine its impact, or whether a technical instrument would result in substantive legislative or policy changes without proper scrutiny¹⁰.

10. Whilst the Commission welcomes the SLSC’s attempts to make improvements, matters pertaining to equality and human rights should not be subject to such decision making processes. We recommend that under no circumstances should the negative resolution procedure be used to enact secondary legislation which deals with fundamental rights.

⁶ Select Committee on the Merits of Statutory Instruments, Hansard Society written evidence, Dec 2015: <https://publications.parliament.uk/pa/ld200506/ldselect/ldmerit/149/149we05.htm#note13>

⁷ <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06509#fullreport>

⁸ The EU Withdrawal Bill has taken up a significant proportion of Parliamentary time, so far the Bill has received 135 hours of debate in the House of Lords alone during second reading and committee stage Second reading received 20 hours of debate and 115 at Committee Stage:

<https://www.instituteforgovernment.org.uk/explainers/eu-withdrawal-bill-amendments-and-debates>

⁹ See Companion to the Standing Orders and Procedures of the House of Lords, Chapter 9: <https://publications.parliament.uk/pa/ld/ldcomp/ldctso37.htm>

¹⁰ Select Committee on the Merits of Statutory Instruments, Hansard Society written evidence, Dec 2015: <https://publications.parliament.uk/pa/ld200506/ldselect/ldmerit/149/149we05.htm#note13>

¹⁰ <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06509#fullreport>

11. Notwithstanding our clear position set out in paragraphs [1-3], the Commission recommends that in the event that substantive changes to equality and human rights are made by way of SI, then this should be under an enhanced procedure, which for equality rights is now a requirement under Clause 4 of the Bill, or as a minimum there should be a presumption in favour of the affirmative procedure for any secondary legislation which seeks to amend, reduce or enhance fundamental rights.

About the Equality and Human Rights Commission

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.

The Commission's independent advisory role is crucial in ensuring that the legislative changes that flow from the UK's decision to leave the European Union fully deliver the Government's commitment to non-regression on a range of social justice issues, including workers' rights and the protections in the Equality Acts 2006 and 2010.