**Response of the Equality and Human Rights Commission to the Joint Committee on Human Rights call for evidence on the Human Rights implications of the EU (Withdrawal) Bill**

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| Title: | Human rights implications of the EU (Withdrawal) Bill |
| Source of inquiry: | Joint Committee on Human Rights |
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**Executive summary**

* The Commission considers 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. This would mean requiring changes to be made by primary legislation rather than through new delegated powers.
* There is a risk that, without embedding the principle of non-regression within the Bill, equality and human rights could be undermined in the future. This risk is particularly acute because many of those rights are currently protected by EU law.
* Transposing the wide and complex body of EU law, while dis-applying the general principles set out in the Charter that underpin them, leaves the risk of significant unforeseen gaps in protection both during the process of amending EU legislation under the EU (Withdrawal) Bill and afterwards.
* A right to equality would help protect and promote domestic equality rights on leaving the EU and ensure that Britain remains a world leader in protection of the right to fair and equal treatment.
* EU case law has had an important impact on equality and human rights in the UK. It is important UK courts can take account of such developments in the future, ensuring the UK remains a global leader in equality and human rights.

**Our recommendations**

The Bill should:

1. rule out the use of delegated powers to amend equality and human rights laws;

2. include a principle of non-regression of equality and human rights law in the Bill;

3. retain the protections in the EU Charter of Fundamental Rights (the Charter);

4. introduce a right to equality; and

5. ensure the UK keeps pace with developments in equality and human rights law by ensuring the courts have regard to relevant EU case law after exit day.

**General Comment**

*Delegated powers*

1. The EU (Withdrawal) Bill provides Ministers with wide-ranging powers to amend or repeal retained EU law and other domestic law, including primary legislation.
2. Regulations made under this power 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 technical withdrawal from the EU, the Commission is concerned about the significant implications for parliamentary sovereignty and democratic accountability of potential changes to equality and human rights laws.
3. 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.
4. 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. This would mean requiring changes to be made by primary legislation rather than through new delegated powers.

*Principle of non-regression of equality and human rights law*

1. The Government has committed 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.[[1]](#footnote-1) We welcome this commitment and believe it is essential that it is included in the Bill to ensure it is fulfilled in a sustainable way. Yet, there is nothing in the Bill which gives legislative effect to the Government’s commitment to maintain current levels of protection.
2. Consequently there is a risk that, without embedding the principle of non-regression within the Bill, equality and human rights could be undermined in the future. This right is particularly acute because many of those rights are currently protected by EU law.

*The EU Charter of Fundamental Rights (the Charter)*

1. The Charter of Fundamental Rights currently provides important protections for rights that fall within the scope of EU law, for example by guaranteeing a right to an effective remedy under Article 47 of the Charter[[2]](#footnote-2) The Charter should continue to apply to retained EU law which would be in line with the Government’s stated intention (1) that there should be no loss of rights, and (2) to ensure legal certainty and consistency as we leave the EU.
2. There are some Charter rights - for example the right to human dignity; the right for a child’s best interests to be a primary consideration in all actions taken by a public or private institution; freedom to conduct a business; and the free standing right to non-discrimination – which have no equivalent[[3]](#footnote-3) protection in UK law.
3. In addition, there will be no right of action in domestic law based on a failure to comply with any of the general principles of EU law, which include the fundamental rights set out in the Charter; and the courts will not be able to dis-apply or quash any law because it is incompatible with any of the general principles of EU law, including fundamental rights.
4. Retaining the Charter in UK law will ensure that these rights remain protected. It is also worth noting that the UK courts have not had difficulty in applying the Charter to domestic cases that fall within the scope of EU law.
5. As the Government’s own Equality Analysis acknowledges, respect for fundamental rights is a general principle of EU law and one of the key legal principles governing the way EU law operates. Transposing the wide and complex body of EU law, while dis-applying the general principles set out in the Charter that underpin them, leaves the risk of significant unforeseen gaps in protection both during the process of amending EU legislation under the EU (Withdrawal) Bill and afterwards.
6. Ensuring there is no loss of fundamental rights as we leave the EU is particularly significant for rights under the UNCRPD[[4]](#footnote-4) because it is has been ratified by the EU and is legally binding upon the EU, and Member States when acting within the scope of EU law. It is unclear how or to what extent these rights in EU law[[5]](#footnote-5) will be converted into retained law by the Bill. In this context, the Commission has called for UN human rights treaties to be given further effect in UK and devolved law in order to ensure we remain a global leader in equality and human rights.

*A right to equality*

1. A right to equality would help protect and promote domestic equality rights on leaving the EU and ensure that Britain remains a world leader in protection of the right to fair and equal treatment.
2. Much of our domestic equality legislation is currently underpinned by EU law. This means that rights guaranteed by EU law, for example the right to equal pay for work of equal value, protection of pregnant workers, and many other matters, cannot be removed while the UK remains part of the EU. Exiting the EU will result in the loss of this underpinning of equality rights.
3. EU law also currently provides a free standing right to non-discrimination under Article 21 of the Charter.
4. The Bill presents an opportunity for Parliament to replace this EU law with the UK’s own guarantee of equal treatment, and ensure that a free standing right to non-discrimination is enshrined in domestic law after we leave the EU.[[6]](#footnote-6)

*The courts should have regard to relevant EU case law after exit day.*

1. EU case law has had an important impact on equality and human rights in the UK, for example in data protection[[7]](#footnote-7), and in extending the protection of equality law domestically. It is important UK courts can take account of such developments in the future, ensuring the UK remains a global leader in equality and human rights.
2. As it stands, the Bill provides the option for courts to consider future EU law, but offers no indication as to when it may be appropriate to do so. This uncertainty has prompted Lord Neuberger to call on parliament to spell out, in statute, what judges should do about decisions of the European Court after the UK leaves the EU.

**About the Equality and Human Rights Commission**

The Equality and Human Rights Commission has been given powers by Parliament to advise on the equality and human rights implications of laws and proposed laws. 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 and equivalent legislation in Northern Ireland.

1. Legislating for the United Kingdom’s withdrawal from the European Union, March 2017 at 2.17. [↑](#footnote-ref-1)
2. Benkharbouche v Embassy of Sudan [2015] EWCA Civ 33). [↑](#footnote-ref-2)
3. That is not to say these matter are not covered at all in domestic law but there is no equivalent general codified right. [↑](#footnote-ref-3)
4. United Nations Convention on the Rights of Persons with Disabilities [↑](#footnote-ref-4)
5. For example there is a duty when interpreting relevant legislation within the scope of EU law for the courts to do so, so far as possible, consistently with the CRPD. [↑](#footnote-ref-5)
6. See New Clause 78 which sets out the proposed right to equality. It provides that all individuals are equal before the law and have the right to the equal protection and benefit of the law; and that all individuals have a right not to be discriminated against by a public authority. It would be enforceable in the same way as rights under the Human Rights Act 1998 and would give the right to fair and equal treatment the same status as the rights protected by that Act. [↑](#footnote-ref-6)
7. See for example *Google Spain SL v Agencia Espanola de Proteccion de Datos CJEU, (C-131/12)* which established that an internet search engine provider could in appropriate circumstances be required to remove information from the list of results of a search in order protect an individual’s legitimate interest to privacy (sometimes referred to as the right to be forgotten). [↑](#footnote-ref-7)