

The EU Withdrawal Bill – House of Lords Committee Stage Briefing

26 February 2018

Introduction

The Equality and Diversity Forum (EDF) is the national network of organisations committed to equal opportunities, social justice, good community relations, respect for human rights and an end to discrimination based on age, disability, gender and gender identity, race, religion or belief, and sexual orientation. Further information about our work is available at www.edf.org.uk. Our members can be found [here](#)

This briefing considers the effect of the European Union (Withdrawal) Bill on equality and human rights legislation. We wish to protect our current equality and human rights provisions, and ensure there can be no process for them to be changed without appropriate Parliamentary scrutiny and the involvement of citizens and civil society.

The UK has developed world leading equality and human rights legislation and our overarching area of concern is to ensure that the legal framework for equality and human rights is not weakened by leaving the EU.

We are concerned by:

- The broad and unconstitutional use of delegated powers,
- The potential threat to equality and human rights legislation,
- The exclusion of consideration of the Charter of Fundamental Rights,
- The way in which CJEU judgments will be taken into account by domestic courts,
- Making provision for funding, in substitution for EU funding lost as a result of leaving the EU.

Scrutiny of delegated powers

The EDF considers that the Bill has extremely wide and extensive delegated powers in clauses 7 to 9. These powers can be used when the Minister considers it appropriate to 'prevent, remedy or mitigate' a broad range of failures of EU law to operate effectively. We agree with the comments of the Constitution Committee that the changes currently proposed by the Withdrawal Bill 'in clause 7(7) do little to mitigate the delegation of excessive powers to the Executive. The Henry VIII power in clause 7 is not subject to appropriately significant scrutiny'.¹

While we welcome the amendment to create a sifting committee to vet the appropriate procedure to be applied to these statutory instruments as a step in the right direction, we do not consider that this procedure will allow either House of Parliament any opportunity to suggest amendments to reflect concerns about the content of the regulation.

¹ Select Committee on the Constitution, European Union (Withdrawal) Bill: Report, para 188 at https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/69/6911.htm#_idTextAnchor088

These powers are too wide to guarantee appropriate scrutiny. In particular, they could be used to amend or repeal our equality laws.

We urge peers to support amendments which would provide for a greater degree of Parliamentary scrutiny, **and to support the amendment to Schedule 7 laid by Lord Lisvane, Lord Tyler, Baroness Hayter and Lord Blencathra (Amendment 237).**

Protecting equality and human rights legislation

EDF consider there is a risk that equality and human rights legislation could be 'amended, repealed or revoked' by the use of delegated powers as the Bill currently stands.

We urge peers to support amendments that specifically protect equality and human rights and to **support the amendment laid by Baroness Hayter, Lord Warner, Baroness Smith of Newnham and Lord Kirkhope to be inserted after clause 3 (Amendment 21) as well as the Amendment laid to that Amendment by Baroness Kennedy (Amendment 22) and New Clause after Clause 3, laid by Lord Judd (Amendment 23A).**

We would also urge peers to support amendments that ensure that the withdrawal of the United Kingdom from the European Union does not diminish protection for equality in domestic legislation. **To this end please support the amendment laid by Lord Wallace of Tankerness after Clause 6, (Amendment 70A).**

Charter of Fundamental Rights

The Charter of Fundamental Rights provides important protections for rights that fall within the scope of EU law and it operates as an essential part of the body of EU law. The bill specifically excludes the Charter and the Government say that omitting the Charter will not affect 'the substantial rights of any UK citizens'. We do not agree with this assessment however, and if this is so, why is it necessary to specifically exclude it?

Specific examples of areas which would be left unprotected by the exclusion of the Charter:

- Access to justice in cases where there are gaps in domestic provisions,²
- Access to vocational and continuing training,³ and
- There would 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.

² For example, when a woman employed in a private capacity by a foreign government in their UK embassy was prevented from bringing a claim of discrimination and harassment because her former employer claimed state immunity the provisions of the Charter were used to ensure that she had a right to access to a Court to adjudicate on her claim. See - *Benkharbouche v Secretary of State for Foreign Affairs* [2017] UKSC 62 at <https://www.supremecourt.uk/cases/uksc-2015-0063.html>

³ See JCHR, Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis at https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/774/77404.htm#_idTextAnchor001

The Government say that these shortcomings can be made up by the application of relevant UN treaties that the UK has ratified. However, ratification of these treaties does not make them directly enforceable in the UK so they will not provide equivalent rights.

We urge peers to support amendments that retain the Charter of Fundamental Rights and **to support the amendment laid by Lord Goldsmith, Baroness Ludford, Lord Kerslake and Lord Bowness to leave out subsections (4) and (5) of Clause 5 (Amendment 34) and to amend Schedule 1 (Amendments 46 & 47); as well as Lord Goldsmith's supplementary amendments across Clauses 2, 3 and 4 (Amendments 14, 20 & 25).**

On the way the Charter will work after exit day, **please support the amendment laid by Lord Wallace of Tankerness and Lord Cashman to Clause 6, (Amendment 63A).**

General principles of EU law

The general principles of EU law contain important protections which individuals rely on to enforce their rights.⁴ The Bill retains these principles for interpretive purposes but not as a right of action available for individuals. Amendment 41 would correct this shortcoming by enabling recognition of general principles recognised prior to exit day. **We urge peers to support amendment 41 laid by Lord Goldsmith and Baroness Bowles of Berkhamstead.**

Consideration of CJEU judgments

The EDF considers that the provisions in clause 6 on the interpretation of retained EU law are insufficiently clear. The UK courts and tribunals will continue to have to interpret EU law after we leave, as the EU law has been incorporated into our UK law.

Consequently, we consider that the UK courts and tribunals should 'have regard to' anything done by the Court of Justice of the European Union whenever it is relevant to do so. This phrase gives a measure of discretion to British Courts but also keeps our alignment and prevents a race to the bottom.

We urge peers to support the amendment to Clause 6 laid by Lord Pannick, Lord Goldsmith, Lord Wallace of Tankerness and Viscount Hailsham (Amendment 56).

Funding

European Commission funding supports a wide range of funding initiatives provided by NGOs working in the equality and human rights field. The spend on the three European Social Fund objectives which have the most focus on equality issues is some 5 billion Euros, (£4.5 billion) in England alone, with a further £1.4 billion in Wales, Scotland and

⁴ See, for example, Walker v Innospec Ltd [2017] UKSC 47.

Northern Ireland.⁵ We urge peers to support amendments that require Parliament to report on their plans to continue to provide current levels funding. **Please support New Clause 224 after Clause 9, laid by Baroness Kennedy of the Shaws.**

26 February 2018

**For further information contact please Liz Shannon, Parliamentary and Policy Adviser
liz.shannon@edf.org.uk**

⁵ Shared Prosperity, Shared Rights: replacing EU funding for equality and human rights after Brexit, Equality and Diversity Forum, 2018.