

Committee Stage
Brief on the Rights
Implications of the
EU (Withdrawal) Bill

Rights in need of protection



AMNESTY
INTERNATIONAL



Public Law Project



October 2017

Leaving the EU need not - and should not - result in ordinary people in the UK losing existing rights.

Yet if this Bill were to pass un-amended, that would be the inevitable result.

That is why Liberty, Amnesty International UK, the Public Law Project and JUSTICE have come together to urge MPs to support a few sensible amendments to prevent any rollback of rights. These amendments are already tabled and have cross-party support.

These changes would do no more than ensure the Bill meets its stated aims. The Government has made clear that its intent is to provide a functioning statute book on exit day. This is the “*general rule*” that “*the same rules and laws will apply after exit as the day before.*”

The Government’s position is that the Bill “*does not aim to make major changes to policy*”, with separate “*primary legislation*” introduced later to “*make such policy changes*” alongside the usual scrutiny.

But some parts of the Bill blur this distinction. And the decision to exempt fundamental rights from the Bill’s “*general rule*” of maintaining the status quo reflects a major change to policy and a political judgment that has no place in this Bill. The future of

the UK’s human rights framework should not be debated in the already-complicated context of the Brexit.

These amendments are not about opposing Brexit or thwarting the Repeal Bill. They are about remaining true to the Bill’s purpose and ensuring that neither the Bill nor the powers it creates erode fundamental rights.

Key Amendments – the People’s Clause

As drafted, the Bill will mean people losing their hard-won rights. We are asking for modest changes that will ensure that people’s rights will be undiminished on exit day. These are:

1. Put a promise in black-and-white that Ministers may not use their vast delegated powers under the Bill to water down substantive rights protections.
 - *Amendments 2, 11, 12 and 13 together accomplish this goal*
2. Retain the Charter of Fundamental Rights and the right to bring court action under General Principles that protect important rights such as fair treatment and equality.
 - *Amendments 8 and 10 together accomplish this goal*

1. Clear, Written Safeguards Against Using Delegated Powers to Erode Rights (Amendments 2, 12 and 13)

Clauses 7, 8 and 9 of the Bill give extraordinarily broad powers to Ministers to re-write UK laws, including human rights and equality protections.

They permit Ministers to tinker with ‘retained EU law’ by secondary legislation in any way they consider appropriate to (i) remedy its ineffective operation or deficiencies that arise from Brexit; (ii) fix or prevent any breaches of the UK’s international obligations arising from Brexit; and (iii) implement the terms of the future withdrawal agreement.

Although the Government characterises these purposes as significant limitations on Ministers’ power, in fact they are poorly defined and leave broad discretion to Ministers to determine what qualifies as a ‘deficiency,’ or what might be ‘appropriate’ to implement a future withdrawal agreement. Moreover, the definition of ‘retained EU law’ appears to be so broad as to include existing domestic Acts of Parliament intended to implement EU-law obligations. That would include such legislation as the Equality Act 2010.¹ Giving Ministers power to amend such laws is a legislative blank cheque and a wholesale handover of Parliamentary power to the executive.

Again and again the Government has disavowed any intent to use powers under this Bill to make substantive policy changes, including in the areas of human rights and equalities. That begs the question: *why not simply write that disavowal directly in to the Bill?*

Similar safeguards for human rights have been placed on far less sweeping delegated powers in other legislation, such as the Legislative and Regulatory Reform Act 2006 (section 3(2)). The absence of those safeguards in this Bill is all the more striking when contrasted with the specific safeguards it does contain and deems necessary in relation to taxation, retrospectivity of criminal offences, and amendments to the Human Rights Act. Without a black-and-white limit, the rights of ordinary people in the UK will be at risk.

Amendments (2), (12) and (13): Dominic Grieve MP

This identical amendment to clauses 7, 8 and 9, would introduce the same safeguards on the use of the delegated powers that were used to protect human rights in the Legislative and Regulatory Reform Act 2006 (section 3(2)). It requires that any provisions introduced by Ministers using those powers strike a fair balance between the public interest and any adverse effect on an individual, do not remove any necessary protection and do not prevent the continued exercise of any rights and freedoms that people can reasonably expect to continue to exercise. It would therefore allow for necessary amendments to removed or modify rights which become unnecessary after Brexit (e.g., the right to vote in EU elections), while preserving everything else pending a proper parliamentary debate on any desired policy changes. It is a carefully calibrated, tried and tested approach.²

¹ Elliott, M., and Thomas, R., ‘Public Law Update #3: The EU (Withdrawal) Bill, legal certainty and the rule of law’, 3 October 2017, available [here](#).

² These amendments do not deal with the same broad delegated powers that are proposed for devolved legislation set out in Schedule 2. Similar amendments are necessary to ensure devolved powers also cannot remove human rights and equality protections.

2. Retaining the Charter of Fundamental Rights and the Right to Bring Court Action under the General Principles (Amendments 8 and 10)

While the Government has promised to carry over every other EU law as part of the Bill's 'cut and paste' exercise, it leaves the Charter of Fundamental Rights behind and makes rights protected by EU General Principles newly unenforceable in UK courts.

We recognise some are sceptical about the value of the Charter and the enforceability of the General Principles, but taking away these crucial tools for protecting ordinary people's rights is not an appropriate outcome of a Bill that designed to maintain the status quo. It is exactly the sort of major policy decision that the Government claims should be left to Parliament in future primary legislation. Amendments to the current UK human rights framework deserve a full, robust Parliamentary debate. They should not be rolled into a bill about the already sufficiently complex topic of Brexit.

Losing these rights on exit day will have real-life implications for ordinary people. For years, the Charter of Fundamental Rights has provided a clear framework for protecting equality, fairness, and human dignity, and challenging abuses of power. People in the UK have relied on it to protect important rights – including the Secretary of State himself, in a case challenging invasions of privacy from overreaching government surveillance.³

Likewise, the General Principles have been used to vindicate important equality rights in cases like that of Liberty's client, John Walker, who relied on the General Principles in summer 2017 to bring a court case that ended pension inequality for same-sex couples. Under the current version of the Bill, people like John Walker would not be able to bring such claims.

The government says that it has singled out the Charter and the General Principles from 'retained EU law' because they are unnecessary. It claims that the rights they protect can all be protected elsewhere. Notably, however, the government has neither identified where all the rights in the Charter and General Principles can be found nor pledged to preserve those sources of rights after Brexit.

It is true that some similar rights can be found in domestic law and the European Convention on Human Rights. But, in matters of law, similar is not the same. The Charter and the General Principles protect important rights that may not be fully secured by other sources. That includes the right to a fair hearing, which the Charter (Article 47) – unlike some statutory sources – does not limit to only certain types of proceedings. Its loss could jeopardise the fairness of such hearings as housing cases or immigration appeals. It also includes data privacy rights, which courts have held "*clearly goes further, is more specific, and has no counterpart*" in other laws. (*Davis v Secretary of State for the Home*

³ *R v Secretary of State for the Home Department ex p David Davis MP, Tom Watson MP, Peter Brice and Geoffrey Lewis* [2015] EWCA Civ 1185.

Department). It also includes provisions that cannot be found explicitly elsewhere, such as the right to conduct business (Article 16) and a right to conscientious objection (Article 10).⁴

Moreover, both the Charter and the General Principles give people stronger remedies for violations of rights than the Human Rights Act and other domestic laws, since they can be used to dis-apply rights-violating primary legislation within the scope of EU law. These remedies can continue to be provided after Brexit, as they are today, by UK courts, with no need to remain subject to the jurisdiction of the Court of Justice of the EU.

Like other parts of EU law the Government has pledged to incorporate, it is perfectly possible to keep the important parts of the Charter and General Principles that protect the fundamental rights of people in the UK while leaving those few which no longer make sense behind, like the right to vote in EU elections. This is the sort of technical, ministerial amendment the Repeal Bill is designed to permit for all EU laws. There is no justification for treating human rights differently to the rest of the body of EU law.

As organisations dedicated to people's rights and the rule of law, we see the need for the Charter and enforceable General Principles. Even if the Government does not, and wants to take those rights away from people, it is hard to see the case for using this Bill for that purpose. They are rights people have used for years and reasonably expect to be able to rely upon, and they are part of the present-day regulatory landscape that government officials and businesses expect to operate under. It is better to incorporate them rather than disrupt the status quo by removing them in a Bill that was meant to be about maintaining legal continuity.

The extraordinary carve-out for human rights protections from the approach to the rest of the body of EU law is unnecessary, imprudent and will cause people in the UK real damage. We therefore urge Members to support the following amendments:

Amendment 8: Dominic Grieve MP

This would delete clause 5(4)'s active exclusion of the Charter from the body of retained EU law, ensuring it is treated the same as all other rules and that people do not leave behind rights they currently enjoy when we leave the EU.

Amendment 10: Dominic Grieve MP

This would remove those sections of the Bill which take away people's ability to rely on their rights under the general principles as a cause of action.

For more information about the need for amendments to protect rights in the Repeal Bill, please contact Corey Stoughton (CoreyS@liberty-human-rights.org.uk), Rachel Logan (Rachel.Logan@amnesty.org.uk), Alison Pickup (a.pickup@publiclawproject.org.uk) or Jodie Blackstock (jblackstock@justice.org.uk).

⁴ Liberty, Amnesty International UK, and the Public Law Project prepared a short briefing earlier this month providing greater detail on the specific rights protected by the Charter of Fundamental Rights, available here: <https://www.liberty-human-rights.org.uk/sites/default/files/Liberty-AIUK-PLP%20Charter%20Briefing%20Oct%202017.pdf>