



## Briefing note on the EU (Withdrawal) Bill Ping Pong, House of Lords, 18 June 2018

**We urge Peers to vote for Amendment 4F in lieu: enhanced protection for certain areas of EU law**

### Unified for rights

None of our organisations are concerned with whether or how the UK leaves the European Union. What does concern us is that **as a result of the Commons votes on this Bill, when that happens ordinary people will see their rights and equalities protections significantly reduced.** That is entirely unnecessary and unjustified. It is also contrary to the government's stated aims of (i) ensuring non-dilution and (ii) achieving legal continuity after exit with this Bill.

Nevertheless, that reduction is the direct result of the government's decision, indeed policy choice, to treat rights and equality protections differently to the entirety of the rest of EU law in this Bill -actively excluding them from retained EU law. Now that the majority of Members of Parliament have chosen to vote with the government to reject this House's cross-party amendments which would have restored the Charter of Fundamental Rights and the right of action based on the general principles, it is more important than ever that further roll-back of existing protections is prevented.

The only way to ensure that is for this House to hold the government to its promise of non-dilution after Brexit. That means standing above party politics to give support to the 'enhanced protections' amendment that would place sensible limits on the delegated powers, giving enhanced protection to certain hard-won rights and equalities laws<sup>1</sup>. We urge you to do so.

### The delegated powers in this Bill

During the previous stages of this Bill, the government has itself made certain changes to the extraordinarily broad powers it gives Ministers to make and amend laws, including primary legislation. Regrettably, none of those concessions have come close to the kind of sensible limits proposed by those concerned about the breadth of the enormous powers being surrendered to Ministers, and what that puts at risk.

The government amendments made include the provision that Ministers must make a statement of 'good reasons' as to why they are pursuing a 'reasonable course of action' when making statutory instruments. This not only sets an extremely low bar but would have no concrete legal effect. Ministers will still be able to use their power to correct "*deficiencies in retained EU law*" as they consider "*appropriate*" – a subjective and very low threshold

They also include a list of what 'deficiencies' are. However, that apparent limit on when the powers can be used is undermined first by again leaving it up to Ministers to decide whether they consider something to fall in that list (a permissive subjective test); and second by the inclusion of a further clause permitting the Minister to make further regulations describing what might amount to a deficiency or simply to label something of a "*similar kind*". Original clause 8, which had further empowered Ministers to amend retained EU law to '*comply with international obligations*' has been removed. Original clause 9, however, which permits the making of any such provision the Minister considers 'appropriate' to implement the as-yet-unknown Withdrawal Agreement, remains. Furthermore, original Clause 17 of the Bill provides a power for Ministers to make any 'consequential and transitional provision' they believe is appropriate in order to give effect to withdrawal. This power is long lasting and breathtakingly wide; giving Ministers

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<sup>1</sup> A similar amendment from this House (Lords Amendment 4) designed to protect rights and equalities from substantive changes without primary legislation was rejected by a narrow majority (318 to 301) on 13 June 2017. That was the closest vote of the stage.

carte blanche to write and re-write retained EU law with minimal justification. Amendments from the government intended to clarify the status of retained EU law have done little to protect rights and equalities laws.

The Government's amendments, therefore, do next to nothing to substantively rein in Ministerial law-making powers (which are wholly unprecedented in the modern era), and nothing concrete to ensure that there will be no chipping away at rights and equalities protections by the backdoor.

These extraordinarily wide powers conferred on Ministers to amend 'retained EU law' threaten rights and equality protections. They would allow the amendment of domestic primary legislation like the Equality Act 2010<sup>2</sup>, the Modern Slavery Act 2015 and the Data Protection Act 2018, as well as further EU laws that will be incorporated after exit day, with little to no Parliamentary oversight. This is strikingly different to the (far less sweeping) delegated powers in the Legislative and Regulatory Reform Act 2006, for example, which ringfenced human rights and equality law, placing those protections people could reasonably expect to retain outside the scope of the Ministerial pen.

### **Enhanced protections**

Our organisations were deeply disappointed to see the Commons reject cross-party amendments made by this House that would have introduced enhanced protections for rights and equality laws. Those sought to ensure that any non-technical post-Brexit changes would be made by primary legislation rather than delegated legislation, with further scrutiny of those changes claimed to be technical. The government's strong opposition to ring-fencing sent a stark message to those communities who depend upon such protections, such as the LGBT and disabled communities: that while the government is happy to make promises on non-dilution after Brexit, it is not willing to turn those promises into a concrete commitment.

Without the strength of the Charter of Fundamental Rights, other equality and rights protections in the UK will assume even greater importance after exit day. It is therefore critical that this House stands firm in voting for amendment 4F in lieu that would similarly seek to ring-fence some equality and rights laws, giving them enhanced protection.

This would not, as claimed below by the government, "*fundamentally limit*" its "*ability to properly correct deficiencies*". It would simply ensure that statutory instruments purporting to do so are properly assessed and do not (intentionally or otherwise) weaken critical safety nets.]. Flexibility cannot extend that far.

In fact, enhanced protection for these limited areas is in line with the Government's commitment that "*the Bill does not aim to make major changes to policy*", and the recommendation of the House of Lords Select Committee on the Constitution that this commitment should be on the face of the Bill.

If such broadly drawn powers are required to deal with the task of legislating for the UK's withdrawal from the EU, they should be accompanied by correspondingly strong safeguards for people's rights. That would ensure there can be no reduction in standards without proper scrutiny and debate. **It is now up to this House to hold the government to its word and provide concrete assurances to minority communities and others across the UK.**

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<sup>2</sup> The amendment now incorporated requiring Ministers to make a statement confirming they have had 'due regard' to the need to eliminate prohibited conduct under the Equality Act 2010 before an instrument is laid will not prevent the Act itself being amended, nor steps being taken which do not in fact further that need. A duty of due regard is a duty of proper consideration, rather than one to ensure a particular outcome.