

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's submission to the House of
Commons Public Bill Committee on the
Trade Bill**

January 2018

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/policy/>

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Overview

1. In its current form, the Trade Bill presents a significant threat to the rule of law and fundamental rights. The Bill continues a worrying trend in recent Government-proposed legislation – including the Withdrawal Bill, the Data Protection Bill, and the Sanctions and Anti-Money Laundering Bill – of seizing extensive law-making powers from Parliament and granting Ministers the ability to amend primary legislation for a range of broadly defined reasons. This can be done at the discretion of Ministers, with little constraining guidance from legislators and limited to no Parliamentary oversight.
2. Clause 2 of the Bill gives Ministers authority to make any regulations they “consider [appropriate] for the purpose of implementing an international trade agreement” including regulations that “make provision [for] modifying primary legislation that is retained EU law”. Retained EU law appears to include a wide range of primary legislation relating to various EU mandates, including the Equality Act 2010 and the Modern Slavery Act 2015. There are no safeguards to prevent Ministers from using this power to erode rights granted by Parliament.
3. Liberty recognises the importance of the Trade Bill in allowing the UK to shape its own trade and investment agenda once we leave the EU. However, this must not be undertaken at the expense of parliamentary sovereignty or human rights and equality law protections.

Clause 2: Risks to the rule of law and fundamental rights

4. Clause 2 of the Bill confers broad law-making powers on Ministers for the purposes of implementing an international trade agreement to which the UK is a signatory. Immediate responses to the Bill have focussed on how the Bill would allow free trade agreements to be implemented without the approval of Parliament. However, it also provides Ministers with the power to amend “retained EU law”—which is defined broadly to include a raft of domestic primary legislation enacted by Parliament. This power has been justified as allowing the Government maximum flexibility when

implementing trade agreements but does not include any safeguards for protecting important rights.¹

5. Moreover, the Government is yet to provide examples of retained primary legislation which it believes will require amendment in order to implement a future international trade agreement. It is understandable that technical changes may need to be made to provisions in primary legislation that, for example, relate to tariffs. However, it should not be possible for Ministers to make substantive changes to fundamental rights. As Liberty has argued with regard to the Withdrawal Bill,² major policy changes should only ever be made by primary legislation, with the full involvement of Parliament.
6. Clause 2(1) of the Bill reads “An appropriate authority may by regulations make such provision as the authority considers appropriate for the purpose of implementing an international trade agreement to which the United Kingdom is a signatory.” In a letter to *The Guardian*, Secretary of State for International Trade, Liam Fox, claimed the powers conferred on Ministers by the Bill could only be used to amend secondary legislation.³ However, Fox is mistaken; Clause 2(6) of the Bill provides “Regulations made under subsection (1) may, among other things, make provision – [to]... modify *primary* legislation that is retained EU law”.
7. The meaning of ‘retained EU law’ is defined with reference to the European Union (Withdrawal) Act 2018 (known as ‘the Withdrawal Bill’), which has been the subject of much contentious debate in Parliament. This definition arguably includes all primary legislation introduced to give effect to EU law.⁴ Such legislation could include the Equality Act 2010 (which implements four important EU law non-discrimination

¹ HM Government, ‘Trade Bill: Delegated Powers – Memorandum by the Department for International Trade’ (November 2017) <<https://publications.parliament.uk/pa/bills/cbill/2017-2019/0122/Trade-Bill-Delegated-Powers-Memorandum.pdf>> accessed 23 January 2018.

² Liberty, Amnesty International UK, Public Law Project and Justice, ‘Committee Stage Brief on the Rights Implications of the EU (Withdrawal Bill); Rights in need of protection’ (October 2017) 2 <<https://www.liberty-human-rights.org.uk/sites/default/files/Joint%20HR%20Threats%20Brief%20Committee%20-%20Repeal%20Bill.pdf>> accessed 23 January 2018.

³ Liam Fox, ‘Liam Fox: no ‘Henry VIII powers’ in trade bill’ *The Guardian* (London, 20 November 2017) <<https://www.theguardian.com/politics/2017/nov/20/liam-fox-no-henry-viii-powers-in-trade-bill>> accessed 23 January 2018.

⁴ See Mark Elliot, ‘The Devil in the Detail: Twenty Questions about the EU (Withdrawal) Bill (Public Law for Everyone, 14 August 2017) <<https://publiclawforeveryone.com/2017/08/14/the-devil-in-the-detail-twenty-questions-about-the-eu-withdrawal-bill/>> accessed 23 January 2018.

Directives),⁵ the Modern Slavery Act 2015 (which implements the EU Anti-Trafficking Directive) and a number of legislative acts designed to fight terrorism and serious and organised crime.⁶ It will also include the Data Protection Act 2018 currently under consideration by Parliament, which implements the EU General Data Protection Regulation.

8. As the Bill is currently framed, it would allow Ministers to modify 'retained EU law' if they believe changes are necessary in order to implement an international trade agreement. This can be done without regard for fundamental human rights, specifically, those protected by domestic primary legislation. For example, the Government could reach an agreement with a foreign state on the provision of services, such as transport, and make changes to the Equality Act 2010. This could include removing the duty on service providers to make reasonable adjustments for people with disabilities, making access to transport more difficult for 1 in 5 of the UK's population.
9. Outside of Liberty's core concerns of human rights and equalities law, similar changes can be envisioned in other policy areas. For example, the Energy Act 2013 gives effect to the EU Carbon Capture and Storage Directive, which establishes a legal framework for the environmentally safe geological storage of carbon dioxide (with the aim of combatting climate change). Just as with the Equality Act 2010, because the Energy Act gives effect to an EU law obligation, it would be susceptible to amendment by the powers conferred on Ministers by Clause 2 of the Bill.
10. Irrespective of whether you voted to leave or remain in the EU, supporters of parliamentary sovereignty would agree it is unacceptable that such a power could be used to amend primary legislation by Ministerial fiat. The new category of 'retained EU law' created by the Withdrawal Bill should not be used by the Government as a signal that our age-old checks and balances on executive power do not apply (especially as the net cast by the Withdrawal Bill is so wide as to include laws that have only the most tentative of links to our membership of the EU).
11. It is highly likely that statutory concepts created by the Withdrawal Bill – like that of 'retained EU law' – will feature heavily in forthcoming Brexit-related legislation. It is

⁵ The Race Equality Directive (2000); Equal Treatment Directive (2000); Equal Treatment in Goods and Services Directive (2004); and Equal Treatment (Recast) Directive (2006).

⁶ For example, the Crime (International Cooperation) Act 2003 (giving effect to the 2002 Council Framework Decision on combating terrorism).

therefore incumbent on Parliament to ensure they are not abused. Providing a power for the vast corpus of retained EU law to be amended by Ministers, with little to no Parliamentary oversight, would set a dangerous precedent for forthcoming supplementary Brexit legislation – such as on immigration – and usurp efforts to introduce clear substantive limits on similar powers contained in the Withdrawal Bill.

Clause 2: Suggested amendments

12. If such a power is necessary at all, it is vitally important that safeguards are introduced to ensure that human rights and equality laws passed by Parliament cannot be amended by Ministers whose foremost agenda is to conclude trade agreements. In its current form, the Bill does not include any restrictions on the use of delegated powers. This stands in stark contrast to the Withdrawal Bill – which although woefully inadequate – contains safeguards preventing regulations from being made that: (i) make retrospective provision; (ii) create a ‘relevant criminal offence’; or (iii) amend, repeal, or revoke the Human Rights Act 1998.⁷

13. As Liberty has suggested for the proposed use of delegated powers under the Withdrawal Bill,⁸ protections could be modelled upon those included in the Legislative and Regulatory Reform Act 2006. This approach has been tried and tested and has received broad cross-party support as a way of restricting the scope of delegated powers and protecting rights under the Withdrawal Bill.

Model amendments

Implementation of international trade agreements

Clause 2, page 2, line 31, at end insert—

“(5A) Regulations under subsection (1) may not make provision unless the Minister is satisfied that—

- (a) the policy objective intended to be secured by the provision could not be secured by non-legislative means;
- (b) the effect of the provision is proportionate to the policy objective;
- (c) the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it;
- (d) the provision does not remove any necessary protection;
- (e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise;
- (f) the provision is not of constitutional significance”

⁷ See European Union (Withdrawal Bill) HL Bill (2017-19) [79], cl 7(7).

⁸ See Liberty et. al. (n2).

Explanatory statement

To narrow the circumstance in which the power provided for in Clause 2 can be exercised.

Clause 2, page 2, line 33, leave out subsection (a).

Explanatory statement

This amendment would prevent the power provided for in Clause 2 from being used to change primary legislation that is 'retained EU law'.

Conclusion

14. The decision not to safeguard existing rights is a dangerous oversight that leaves the door open to the unscrutinised erosion of vitally important protections. Liberty propose that members of the Public Bill Committee either reconsider delegating such broad law-making powers to Ministers or, at a minimum, support clear substantive limits on the powers contained in the Trade Bill with express safeguards for human rights and equality protections, designed to prevent hard-won rights from degradation or roll-back in the pursuit of international trade deals.

George Wilson