

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Briefing for Second Reading

Don't trade away our rights: delegated powers in the Trade Bill threaten rights protections

Overview

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 Repeal 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.

Clause 2 of the Trade 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 and the Modern Slavery Act. There are no safeguards to prevent Ministers from using this power to erode rights granted by Parliament.

We recognise 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 rights and equality law protections. We urge Members to question the necessity of this blank cheque and press for amendments to constrain this power.

Suggested questions/issues to raise for Second Reading

- **Commit not to modify ‘retained EU law’ relating to human rights and equality protections:** currently the Bill gives Ministers the power to make sweeping changes to EU laws that have been retained under the Repeal Bill, in particular, primary legislation that gives effect to EU law (such as the Equality Act). ***Will the Government confirm that it will not use ‘Henry VIII’ powers in the Bill to modify retained EU law that relates to human rights and equality law protections in any manner?***
- **Include safeguards to protect retained EU law:** as drafted, the Bill does not contain any safeguards on the broad powers it confers on Ministers to modify retained EU law. ***Will the Government commit to restrict the use of Henry VIII powers in the Bill so that they cannot be used to diminish or dilute human rights and equality law protections?***

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

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

Clause 2(1) of the Trade 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.”

Clause 2(6) of the Bill reads “Regulations made under subsection (1) may, among other things, make provision – [to]... modify primary legislation that is retained EU law”.

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.² Such legislation could include the Equality Act 2010 (which implements four important EU law non-discrimination Directives),³ 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.⁴ It will also include the Data Protection Act 2018 currently under consideration by Parliament, which implements the EU General Data Protection Regulation.

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).

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. As Liberty has

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 4 January 2018.

² 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 8 November 2017.

³ The Race Equality Directive (2000); Equal Treatment Directive (2000); Equal Treatment in Goods and Services Directive (2004); and Equal Treatment (Recast) Directive (2006).

⁴ For example, the Crime (International Cooperation) Act 2003 (giving effect to the 2002 Council Framework Decision on combating terrorism).

suggested for the proposed use of delegated powers under the Withdrawal Bill,⁵ protections could be modelled upon those included in the Legislative and Regulatory Reform Act 2006. 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 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.

How the Bill could allow our rights to be traded away

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. 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. A similar scenario can be envisaged with regard to banking and financial services, with amendments being made to the Equality Act to allow for the less favourable treatment of transsexual people when entering into insurance contracts.

For more information on the issues raised in this briefing, please contact:

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⁵ 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 8 November 2017. Liberty has also pushed for a limit on delegated powers proposed in the Data Protection Bill, see Liberty, 'Liberty's briefing on the Data Protection Bill for Committee Stage in the House of Lords (October 2017)' <<https://www.liberty-human-rights.org.uk/sites/default/files/Liberty%20Briefing%20on%20the%20Data%20Protection%20Bill%202017%20Committee%20Stage%20Lords%20Oct%202017%20.pdf>> accessed 8 November 2017.