

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's Briefing on the White Paper on the 'Great Repeal Bill'

April 2017

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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1. After the publication of the Government's White Paper on the Great Repeal Bill,¹ Liberty urges Parliamentarians to ensure that the UK retains hard-won human rights and equalities protections as it leaves the EU.
2. Liberty is seriously concerned at what was, and was not, included in the White Paper. For a "stronger, fairer, more Global Britain"² to become a reality after withdrawal, human rights protections should be respected, rather than fatally undermined. Now more than ever, strong Parliamentary oversight is needed to ensure that fundamental rights are protected – without which Brexit cannot be a success.
3. As a domestic human rights organisation, we have longstanding concerns with so-called 'Henry VIII powers' and even greater concerns with their proposed use as part of any 'Great Repeal Bill' to legislate for the UK's exit from the European Union (EU). These concerns have only intensified with the publication of the White Paper.

Conspicuous by its absence

4. Liberty has previously called for a comprehensive and independent audit of all human rights law originating from the *acquis* – the constituent elements of EU law.³ There is nothing in the White Paper to suggest that the Government yet grasps the full extent of the law which must be implemented domestically – including law that is directly applicable and so has not needed to be implemented until now, such as Regulations, along with the rights contained within the Charter of Fundamental Rights of the EU. Doing so would provide for the identification of all EU-derived human rights law, whether directly applicable or directly effective. Liberty calls for this 'snapshot' to be protected by way of primary legislation.
5. Although the White Paper contains reassurances that the Great Repeal Bill is intended to make technical, and not substantive, amendments to incorporated EU law,⁴ Liberty is seriously concerned that proposed exemptions allow for sweeping changes to be made without any real democratic scrutiny.

¹ Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (Cm 9446, 2017).

² See Theresa May, 'The government's negotiating objectives for exiting the EU: PM speech' (London, 17 January 2017) <<https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>> accessed 11 April 2017.

³ See, for example, Liberty, 'Liberty's submissions to the Joint Committee on Human Rights' Brexit Inquiry' (October 2016) <<https://www.liberty-human-rights.org.uk/sites/default/files/Liberty%20Submissions%20to%20JCHR%20Brexit%20Inquiry%20%28Oct%202016%29.pdf>> accessed 12 April 2017.

⁴ See, for example, Department for Exiting the European Union (n 1) para 3.10.

6. As an initial safeguard, a 'non-retrogression' clause must be included in the Bill, stating that neither the Bill, nor powers conferred by it, can be used to worsen the human rights protections currently afforded by EU law. Additionally, the Government must expressly undertake to protect areas of human rights law such as workers' rights and equality protections by way of primary legislation.
7. In light of its constitutional significance, the Government must reconsider its decision not to publish a draft of the Bill.⁵ The public must be given a real opportunity to assess its potential impact and to provide detailed feedback. Government must provide sufficient detail on the Bill – such as outline clauses – to be published before its introduction in Parliament.
8. In addition, a schedule of all primary legislation to be repealed by the Bill and details of that to be introduced in tandem must be included as part of any draft. Specially, the Government must provide details of those policy areas that it believes will require significant change in light of negotiations on the UK's future relationship with the EU and will be subject to separate legislation, such as immigration and customs.
9. The White Paper also says nothing as to the non-legislative elements of EU law. From the Lisbon European Council in 2001 onwards, so-called 'soft law' has played an important role in the development of economic and social standards at EU-level. Under the European Semester, guidelines promote issues such as equality at work, social inclusion and protection in government policies, and the fight against poverty. The White Paper does not outline how or, indeed if, the UK will orientate itself towards these modes of governance in the future.
10. The role of the EU Fundamental Rights Agency, which undertakes research on the promotion and protection of human rights, is restricted to Member States. Plans must be made for its replacement with a domestic equivalent responsible for undertaking research designed to support and progress rights protections.

Worrying in its presence

11. Most worryingly, the Government expressly states that it seeks broad powers under delegated legislation to make substantive policy changes with limited democratic scrutiny. For example, the White Paper calls for the use of delegated powers in order

⁵ HC Deb 30 March 2017, vol 624, col 435.

to legislate so as to take account of the “outcome of negotiations”⁶ and to “reflect the contents of the Withdrawal Agreement”⁷.

12. Liberty has longstanding concerns with sweeping legislative powers contained within ‘Henry VIII clauses’, which are corrosive of Parliamentary democracy and provide for the erosion of rights protections by the backdoor.⁸ Henry VIII clauses risk emboldening Ministers to make changes to vast swathes of law – including law protecting fundamental rights – with the extremely brusque scrutiny that secondary legislation receives. Even the use of delegated powers to amend secondary legislation causes serious worry, since much of EU law has been implemented by way of domestic regulations. Even powers which do not amount to Henry VIII clauses risk empowering Ministers to make extensive changes to UK law without adequate Parliamentary oversight.
13. Such powers may sometimes be permissible, where strictly limited in their scope to areas that concern, for example, technical matters or where provision is needed to tie up small areas of legislation to avoid inconsistency. However, the use of such powers anywhere else, let alone with regard to fundamental rights, raises serious constitutional concerns.
14. When matters of fundamental rights are at stake, the most stringent safeguards are needed. To ensure that grave mistakes are not made, and that decisions are invested with legitimacy, the utmost democratic scrutiny is required. This can only be provided by primary legislation.
15. In all areas of law, the Parliamentary process provides for crucial oversight and brings the stamp of democracy. The passage of primary legislation allows for an assessment of the Government’s proposals, giving the public, the press and Members of Parliament time to consider the matters raised and to voice their

⁶ Department for Exiting the European Union (n 1) para 3.12.

⁷ *ibid.*

⁸ See, for example, Liberty, ‘Liberty’s Report Stage Briefing on the Digital Economy Bill in the House of Lords’ (February 2010) <<https://www.liberty-human-rights.org.uk/sites/default/files/digital-economy-bill-house-of-lords-report-briefing.pdf>> accessed 20 April 2017; Liberty, ‘Liberty’s Report Stage Briefing on Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Bill in the House of Lords’ (February 2012) <<https://www.liberty-human-rights.org.uk/sites/default/files/liberty-s-report-stage-briefing-on-part-1-of-the-laspo-bill-feb-2012-.pdf>> accessed 20 April 2017; and Liberty, ‘Liberty’s Committee Stage briefing on Part 4 of the Criminal Justice and Courts Bill in the House of Commons’ (March 2014) <[https://www.liberty-human-rights.org.uk/sites/default/files/Liberty's%20briefing%20on%20Part%204%20of%20the%20Criminal%20Justice%20and%20Courts%20Bill%20for%20Committee%20Stage%20in%20the%20House%20of%20Commons%20\(Mar%202014\).pdf](https://www.liberty-human-rights.org.uk/sites/default/files/Liberty's%20briefing%20on%20Part%204%20of%20the%20Criminal%20Justice%20and%20Courts%20Bill%20for%20Committee%20Stage%20in%20the%20House%20of%20Commons%20(Mar%202014).pdf)> accessed 20 April 2017.

objections. Over the course of a Bill, amendments may be made, or even whole Bills defeated. This is what democracy demands.

16. In respect of the UK's exit from the EU, these concerns are greatly intensified and the use of such powers even less justified. Whilst it is accepted that lawmakers face a serious challenge in legislating for withdrawal, Ministers must not be handed virtually untrammelled power to make and unmake matters needing real democratic scrutiny and legitimacy.
17. It would be an extraordinary and unprecedented abuse of these powers to allow Ministers to pull apart longstanding provisions of UK law after withdrawal. Whilst there may be some areas in which technical or tying-up changes may be needed, and in which these powers may be appropriate, wide delegated powers cannot be permissibly used in respect of substantive areas of law – much less to repeal fundamental rights by Ministerial fiat.
18. Consequently, Liberty calls for a restriction on the use of delegated powers for any purpose other than to ensure the effective functioning of incorporated EU law”.⁹ Human rights protections must not be sacrificed for political expediency.
19. Furthermore, the historically unprecedented use of delegated powers under the Bill must be formally acknowledged and, in its operation, constitutional balance between the executive and legislative branches respected.

The scrutiny this Bill needs

20. The White Paper only briefly addresses how statutory instruments will be scrutinised. Despite the sweeping powers proposed, the Government expressly favours the negative procedure for the majority of amendments to incorporated EU law. This procedure is considered appropriate for “more substantive changes”.¹⁰
21. As a safeguard, Liberty calls upon the Government to adopt the following procedure, which includes the recommendations of the House of Lords' Constitution Committee:¹¹
 - The Explanatory Memorandum attached to all statutory instruments must include a declaration of compliance with fundamental human rights.

⁹ Department for Exiting the European Union (n 1) para 1.14.

¹⁰ Department for Exiting the European Union (n 1) para 3.22.

¹¹ See House of Lords Select Committee on the Constitution, *The 'Great Repeal Bill' and delegated powers* (HL 2016-17, 123).

- Prior to the approval of a statutory instrument, a separate impact assessment must be undertaken by an independent Parliamentary body in order to determine whether the statutory instrument does no more than incorporate EU law.
- Where this body determines that a proposed statutory instrument risks weakening former EU law protections, it must be empowered to recommend that such changes can only be made by way of primary legislation.

22. This body must also be empowered to decide the level of scrutiny to be adopted.

Where a proposed instrument touches on or concerns human rights law or equality protections, enhanced scrutiny must be ensured – which must include full debate by both Houses with real opportunities for amendment.

23. Although the White Paper provides that domestic courts will be able to determine questions relating to the meaning of incorporated EU law with reference to the case law of the Court of Justice of the European Union (CJEU),¹² it also outlines that this jurisprudence may be departed from by the Supreme Court.¹³ Liberty believes this approach allows for important principles established by the CJEU, in the seminal cases it has decided, to be revoked without the involvement of Parliament. We call for these cases to be protected by way of primary legislation.¹⁴

24. After the UK leaves the EU, its remaining human rights and equality protections will be more important than ever. The Human Rights Act (HRA) and the European Convention on Human Rights remain the most fundamental safeguard against abuses of human rights in the UK. The Government has continued to call for the repeal of the HRA and its replacement by a new ‘Bill of Rights’. By its own admission, the Government’s proposals are intended to dilute fundamental rights protections – not retain or enhance them. In its 2014 strategy paper on the HRA, it sets out myriad ways in which human rights are to be curtailed, seeking, for example, to redefine the meaning of rights, diminish rights protections, and render legal challenge of rights violations more difficult.¹⁵

¹² Department for Exiting the European Union (n 1) para 2.14.

¹³ Department for Exiting the European Union (n 1) para 2.16.

¹⁴ Illustrative cases and principles include *Enderby v Frenchay Health Authority* (equal pay for equal work); *Coleman v Attridge Law* (direct discrimination includes that by association); *Marshall v Southampton Health Authority* (removing the cap of compensation awards under the Discrimination and Race Relations Acts).

¹⁵ See ‘Protecting Human Rights in the UK – The Conservative’s Proposals for Changing Britain’s Human Rights Laws’ (October 2014)

<http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/03_10_14_humanrights.pdf> accessed 11 April 2017.

25. In advocating for the continued protection of equality and other human rights protection as we exit the EU, it would be nonsensical to support a project which is premised on the further repeal of primary legislation which protects rights and provides a vital safeguard against discrimination. Parliament's EU Justice Sub-Committee has noted, after extensive consideration, that it was left "unsure why a British Bill of Rights was really necessary", with their "[d]oubts about the wisdom of introducing a British Bill of Rights [growing] with each evidence session we held".¹⁶ It would be anomalous to use an entirely separate, discredited, Government suggestion to shore up important EU law rights. As legislative provision is made for our withdrawal from the EU, Liberty calls upon the Government not to repeal the HRA and to recommit itself to the Convention and the Council of Europe system.

Conclusion

26. It hardly needs stressing that the proposed use of broad delegated powers in legislating for Brexit would dramatically undercut the very basis on which its supporters sought this momentous change. The sovereignty of Parliament was central to the case of those campaigning to leave the EU. The use of such powers attacks the foundations of this principle, strengthening the executive and weakening Parliament. Parliamentary sovereignty demands real Parliamentary scrutiny.
27. This is why we have called for a comprehensive and independent audit of all EU law human rights obligations to ensure that they are directly incorporated into primary legislation. We call for these hard-won protections to be preserved. At the very least, any suggestion of amendment to these crucial areas of law must be undertaken through the process of primary legislation – not the scrutiny-light procedures for statutory instruments.
28. As the Bingham Centre have stated "the pressure from the extraordinary circumstances of Brexit ought not to result in fundamental UK constitutional principles being eroded or disregarded entirely".¹⁷ Liberty continues to warn against any retrenchment on fundamental rights after withdrawal. Strong rights protections will be crucial to the UK's future outside of the EU.

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¹⁶ European Union Committee, *The UK, the EU and a British Bill of Rights* (HL 2015-16, 139) 3.

¹⁷ Bingham Centre for the Rule of Law, 'Briefing Paper: Parliament and the Rule of Law in the Context of Brexit' 2016, 7-8 <http://www.biicl.org/documents/1284_briefing_paper_-_parl_and_rol_in_brexit.pdf?showdocument=1> accessed 12 April 2017 7-8.