

Updated briefing by the Repeal Bill Alliance: protecting parliamentary sovereignty and fundamental rights in the EU Withdrawal Bill

11th June 2018

The Repeal Bill Alliance is guided by a set of broad principles, which are:

- Parliamentary scrutiny and democratic accountability in the transposition process
- The preservation of existing rights and standards
- Protection and respect for the devolution settlements and the Good Friday Agreement

The Repeal Bill Alliance is calling on MPs to accept amendments that protects these principles. Whilst the Government has in the last week offered some concessions, the strongest amendments are still those passed by the House of Lords and we urge all MPs to support those amendments.

About the Repeal Bill Alliance

The Alliance is a loose coalition of over 80 civil society organisations. Represented in the Alliance are organisations large and small, operating in a wide range of sectors and in all four nations of the UK. The Alliance does not take a position on Brexit and activity is in line with charitable purposes. For more information, click [here](#) or contact the Alliance's coordinator, Jane Thomas at jane.thomas@repealbill.org or 0207 278 4443. This briefing has been written by the Alliance's Research and Project Assistant, Malene Bratlie, who can be contacted at malene@repealbill.org. Please note that throughout this briefing we will be referring to House of Lords changes as cited in the '[Version of the Bill showing changes made in the House of Lords](#)' PDF document, available on Parliament's website.

Parliamentary scrutiny and democratic accountability in the transposition process

Parliamentary sovereignty

There are crucial amendments that will be voted on this week - and none is more crucial than Viscount Hailsham's amendment on **Parliamentary approval of the outcome of negotiations with the European Union (now Clause 12)**¹. If this amendment is successful there will be a legal framework for the parliamentary process of approving the Withdrawal Agreement (WA). And it would also grant Parliament the power to issue a legally binding direction to the Government on the negotiations if either the WA is rejected or there is no agreement before exit day.

The Alliance strongly support the concept of parliamentary sovereignty and the necessity for appropriate scrutiny and robust analysis, especially with major pieces of legislation. This amendment is not about

¹ European Union (Withdrawal) Bill [as amended in the House of Lords], Clause 12, p. 12

stopping UK's withdrawal from the EU, but rather about affording elected parliamentarians a say about an withdrawal agreement that will have implications for years to come.

This amendment also seeks to prevent the Government using any delegated powers to implement the Withdrawal Agreement until a bill has been enacted to give effect to Withdrawal Agreement. It also sets out specific deadlines for the Government for agreeing – and legislating for – the Withdrawal Agreement with the EU. If the Government does not meet those deadlines, the amendment says that it "must follow any direction" approved by a resolution in the House of Commons and considered in the House of Lords. This gives the Commons – not the Lords – the power to decide the next steps for the Government.

The Government tabled an amendment on the 7th June concerning a meaningful vote on the outcome of negotiations with the EU. Although described as such, **the Government amendment is not a concession.**

If this amendment passes and if the House of Commons decides to reject the deal- **there will not, in practice, be any actual consequences for the Government.** All the Government have to do is to produce a written statement after 28 days of the resolution, setting out how the Government proposes to proceed in relation to negotiations for the UK's withdrawal from the EU and be published in a manner 'as the Minister considers appropriate'. This is alarmingly vague - the Government amendment effectively removes the opportunity for Parliament to decide what happens if they reject the deal. The Government amendment goes against the very core of Viscount Hailsham's meaningful vote amendment, to allow Parliament to decide what happens in the event of MPs rejecting the deal. **On this basis, we strongly urge MPs to reject the Government's amendment and stand up for the sovereignty of our Parliament by voting for Viscount Hailsham's amendment.**

The scope of delegated powers

The Repeal Bill Alliance has previously expressed serious concerns about the breadth of delegated powers in the bill. In the original drafting, the delegated powers were ill-defined and lack considerable level of parliamentary scrutiny. We are therefore pleased to see that peers have now proposed to change the words "as the minister considers appropriate" with "is necessary" in **Clause 11²- 'Dealing with deficiencies arising from withdrawal'** and **Clause 26³- 'Consequential and transitional provision'** (clauses 7 and 17 in the original bill). These changes to delegated powers will rightly result in a more objective assessment of what delegated powers can be used for, rather than the subjective discretion given to ministers in the original drafting. To avoid handing the Executive sweeping powers to amend retained EU law, we strongly recommend that MPs vote in favour of keeping this changes.

Parliamentary scrutiny of delegated powers

During Committee Stage of the bill in the House of Commons, the Government agreed to set up a new committee to deal with which pieces of delegated legislation need detailed scrutiny as EU law is

² European Union (Withdrawal) Bill [as amended in the House of Lords] Clause 11 (1) , pp. 10-11

³ European Union (Withdrawal) Bill [as amended in the House of Lords] Clause 26 (1), p. 28

transferred to UK law⁴. However, this new committee is only advisory, meaning that the Government does not have to follow through on its recommendations. As pointed out by the House of Lords Delegated Powers and Regulatory Reform Committee: “**parliamentary control of delegated legislation should ultimately be a matter for Parliament**”⁵.

On this basis, we strongly encourage support for amendment 70⁶ to Schedule 7 (**now paragraph 3 of Schedule 7**), tabled by Lord Lisvane, which will result in more comprehensive scrutiny procedures for regulations made under the EU Withdrawal Bill. This amendment offers more extensive measures of scrutiny than the current sifting committee by placing a requirement on the Government to accept Parliament’s recommended level of scrutiny and oblige ministers to explain why a statutory instrument is subject to the negative procedure.

Status of retained EU law

We remain concerned about the lack of clarity around the legal status of EU retained law and have asked for an unambiguous definition of retained EU law. **The package of government amendments on the status of retained EU law have to some degree have added to more confusion and concerns.** For instance, **paragraph 10 (3) and (4) in Schedule 8** states that ‘direct EU principal legislation’ can be modified using delegated powers as long as ‘direct EU principal legislation’ is “connected to the modification of direct minor legislation”⁷. It is concerning that provisions that normally cannot be amended by delegated legislation can be modified in this way just because it is connected to a modification lower down in the legal hierarchy⁸. It is also easy to argue that any modification of direct EU principal legislation is ‘supplementary, incidental or consequential in connection with any modification of any retained direct minor EU legislation’. That ‘direct principal EU legislation’ can still be amended through delegated powers does nothing to alleviate concerns that it is too easy to modify crucial retained EU laws through delegated legislation.

The government’s amendments effectively demote the status of delegated legislation that provides employment and equality protections derived from EU law. Previously that legislation could only have been modified in a way that was compatible with the protections conferred by EU law⁹. How does the government justify this effective demotion in light of the promises to preserve employment and equality protections? To ensure legal certainty and protect the Rule of Law, we advise MPs to ask the Government for clarification on these issues and read Public Law Project’s analysis on this issue¹⁰. See also our proposed solution to this issue below, under paragraph ‘Protection of certain areas of EU law’.

⁴ HC Deb 12 December 2017, vol 633, col 280-280

⁵ Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill* (Session 2017-19, HL Paper 73) para 57

⁶ European Union (Withdrawal) Bill [as amended in the House of Lords] Schedule 7 (3) pp. 64-65

⁷ European Union (Withdrawal) Bill [as amended in the House of Lords] (HL Bill 102) Schedule 8, paragraph 10 (3) and (4) p.87-88

⁸ A.Young, ‘Status of EU Law Post-Brexit: Part Two, U.K. Const. L. Blog (available at <https://ukconstitutionallaw.org>)

⁹ European Union (Withdrawal) Bill [as amended in the House of Lords] (HL Bill 102) paragraph 7 pp. 87

¹⁰ Public Law Project, *European Union (Withdrawal) Bill Briefing for the House of Lords Report* (April 2018), para 24-26 <<http://www.publiclawproject.org.uk/data/resources/285/EU-Withdrawal-Bill-PLP-Briefing-for-Report-Stage-in-the-House-of-Lords-.pdf>>.

Protection of and respect for the devolution settlement and the Good Friday Agreement

Respecting the devolution settlements

Upon pressure from the governments of Scotland and Wales and civil society and alliance members in the respective regions the Government has recognised the threat the original Clause 11 of the bill posed to the devolution settlements. Consequently they tabled a new package of amendments to Clause 11 which the House of Lords has agreed to.

Protection of the Good Friday Agreement

The Good Friday Agreement, underpinned by EU membership, is explicitly founded upon a set of fundamental principles such as dual citizenships rights, equality rights and equivalence of rights between the Republic of Ireland and Northern Ireland. Whilst the EU was never perceived as being the sole guarantor of rights in Northern Ireland, rights deriving from the EU are nonetheless an important aspect of the architecture of the Good Friday Agreement¹¹. **It is on this basis that members of the Repeal Bill Alliance in Northern Ireland have repeatedly raised concerns that Brexit may undermine the protection of rights for citizens in Northern Ireland as well as the Good Friday Agreement.**

Passport and border controls in Northern Ireland

It is also important to recognise that the issues surrounding the Irish border are not just about goods and services, but about the movement of people. There are genuine concerns about the policing of border controls in Northern Ireland and in particular about racial profiling. Passport controls on local journeys in the Common Travel Area (CTA) are precluded in UK law by virtue of Section 1(3) of the 1971 Immigration Act¹². The question post-March is how to reconcile this when Ireland and the UK are no longer party to the same rules governing free movement. The current arrangements that form part of the CTA will change post-Brexit.

Recent document cases to the Committee on the Administration of Justice and other bodies have exposed disproportionate checks for EU migrants including high use of Schedule 7 of the Terrorism Act (TACT) which contain port and border control powers, without any resultant TACT detentions¹³.

¹¹ The Royal Irish Academy- British Academy Brexit Briefings, *The Good Friday Agreement, Brexit and Rights* (October 2017) <<https://www.britac.ac.uk/sites/default/files/TheGoodFridayAgreementBrexitandRights.pdf>>

¹² Immigration Act 1971, 1 (3) "Arrival in and departure from the United Kingdom on a local journey from or to any of the Island (that is to say, the Channel Islands and Isle of Man) or the Republic of Ireland shall not be subject to control under this Act, nor shall a person require leave to enter the United Kingdom on so arriving, except in so far as any of those places is for any purpose excluded from this subsection under the powers conferred by this Act and in this Act the United Kingdom and those places or such of them as are not so excluded, are collectively referred to as the "common travel area"<<https://www.legislation.gov.uk/ukpga/1971/77/section/1>>

¹³ Committee on the Administration of Justice, *One Big Border? Brexit: passport and border controls in Northern Ireland* (April 2018) <<https://s3-eu-west-1.amazonaws.com/caj.org.uk/2018/04/25101743/CAJ-Briefing-BREXIT-and-Northern-Ireland-passport-and-border-controls-April-2018.pdf>>

The House of Lords agreed to pass an amendment which goes a long way in alleviating concerns about how the original bill undermined both the Good Friday Agreement and rights provided in the CTA. This new clause¹⁴- **‘Continuation of North- South co-operation and the prevention of new border arrangements’**, tabled by Lord Patten of Barnes will prevent any new new border arrangements as well as ensuring that a Minister of the Crown or devolved authority must act in a way that is compatible with the Northern Ireland Act 1998. The passing of this amendment strengthens the protection of rights for citizens in Northern Ireland, as such, we urge MPs to keep this new clause in the bill.

The preservation of existing rights and standards

The EU Charter of Fundamental Rights and EU general principles

As originally drafted, the bill posed a significant risk to existing rights and standards- not only as a result of the wide scope of delegated powers but also due to the exclusion of the EU Charter of Fundamental Rights and the right of action in domestic law based on failure to comply with EU general principles. The Government has repeatedly stated that it is unnecessary to keep the Charter as rights contained within are rights recognised elsewhere in EU law and thus adds nothing new.

The Repeal Bill Alliance find this argument wholly unconvincing on the basis that independent legal advice obtained by the Equality and Human Rights Commission¹⁵ as well as Liberty and Amnesty’s analysis¹⁶ point to several examples where Charter rights will not be replicated in its entirety in domestic law post-exit. For instance, the right to protection of personal data, the rights of the child, the right to effective remedy, rights of the elderly and disability rights are left vulnerable as a result of excluding the Charter from the bill.

The House of Lords has voted in favour of amendments that will retain the EU Charter of Fundamental Rights¹⁷ in **Clause 6- ‘Saving for rights etc. under section 2(1) of the ECA’** and the right of action in domestic law if there is a failure to comply with any of the general principles of EU law in **Schedule 1 (3)**¹⁸. With the passing of these amendments, the bill significantly strengthen existing rights and protections that UK citizens enjoy and rely upon. It is also worth noting that there is strong public support for either retaining or strengthening EU-derived standards¹⁹. We urge MPs to support these amendments to ensure that there is no erosion of rights and standards as a result of Brexit.

¹⁴ European Union (Withdrawal) Bill [as amended in the House of Lords] (HL Bill 102) Clause 17, p. 14

¹⁵ Equality and Human Rights Commission, *European Union (Withdrawal) Bill- E.U. Charter of Fundamental Rights* (January 2018) <<https://www.equalityhumanrights.com/sites/default/files/eu-withdrawal-bill-legal-advice-jason-coppel-qc.pdf>>

¹⁶ Liberty and Amnesty International UK, *Joint Briefing on the EU (Withdrawal) Bill, Report Stage in the House of Lords* (April 2018)

<<https://www.libertyhumanrights.org.uk/sites/default/files/Liberty%20and%20Amnesty%20International%20-%20Joint%20EU%20%28Withdrawal%29%20Bill%20Brief%20Lords%20Report%20Stage%20-%20April%202018.pdf>>

¹⁷ European Union (Withdrawal) Bill [as amended in the House of Lords] Clause 6, p.4

¹⁸ European Union (Withdrawal) Bill [as amended in the House of Lords] Schedule 1, paragraph 3, p.24

¹⁹ Institute for Public Policy Research, *No public appetite for deregulation post-Brexit according to new polling for IPPR* (February 2018)

<<https://www.ippr.org/news-and-media/press-releases/no-public-appetite-for-deregulation-post-brexit-according-to-new-polling-for-ippr>>

Environmental principles and standards

The original drafting of the bill leaves gaps in environmental protections by excluding vital environmental principles such as the ‘polluter pays’ and ‘precautionary principles’ as well as EU directives that include environmental safeguards and obligations. The passing of Lord Krebb’s new clause- ‘**maintenance of EU environmental principles and standards**’ resolves these concerns and we urge MPs to support this change to the bill²⁰

Protection of certain areas of EU law

Peers have also voted by strong majority to enhance protection for certain areas of EU law (Now **Clause 5- ‘Enhanced protection of certain areas of EU law’**)²¹. This new clause sets out that a Minister of the Crown may not amend, repeal or revoke retained EU law relating to employment, equality, health and safety entitlements, rights and protections as well as consumer and environmental standards, except by primary legislation or by subordinate legislation insofar as this subordinate legislation are subject to an enhanced scrutiny procedure.

While the Alliance strongly supports the scope (i.e. to which law they apply) of this clause, we do, however, have reservations about the enhanced scrutiny procedure in the clause. It sets out a range of requirements that the enhanced scrutiny procedure must meet but does not adequately explain the substance of this procedure and it also raises questions about how this procedure will interact with the new sifting committee established as a result of the passing of Lord Lisvane’s amendment 70. In addition, Clause 5 as drafted allows the Government to implement a scrutiny procedure via delegated legislation.

A solution to this problem would be to **combine the scope of Clause 5 and the approach set out Clause 10- ‘Status of retained EU law’** (Government amendment agreed to during Report in the House of Lords)²². Clause 10 on retained EU law has an advantage in that it distinguishes between ‘principal’ and ‘minor’ retained EU law. This distinction between different forms of EU law means that Clause 10 permits the modification of technical aspects of the law through an appropriate subordinate legislation procedure. A combination of the two clauses will prevent Parliament from spending unnecessary time on scrutinising technical regulations while also protecting essential laws such as the Habitats Directive and the Working Time Directive from being modified without proper scrutiny. Lord Callanan said on behalf of the Government that both Clause 5 and Clause 10 are not “mutually exclusive” and they “can both stand”²³. **As such, we recommend that MPs propose this solution to this Government.**

²⁰ European Union (Withdrawal) Bill [as amended in the House of Lords], Clause 4, p. 3

²¹ European Union (Withdrawal) Bill [as amended in the House of Lords] Clause 5, p.4

²² European Union (Withdrawal) Bill [as amended in Report] Clause 10, p. 5

²³ HC Deb, 18 April 2018, Vol 790, col 1124-1225