

## Briefing to Parliamentarians: Withdrawal Agreement Bill

The Brexit Civil Society Alliance is a UK-wide Alliance of over 80 organisations, charities, membership bodies and advocacy groups. We do not take a position on the 2016 referendum but see it as crucial that the process of leaving the European Union ensures the following:

**1. Open & Accountable Lawmaking** - Legislating for Brexit must respect the democratic processes, including the devolved nature of the UK constitution. There must be clear limits and safeguards on executive power. There must be robust parliamentary scrutiny at all levels with appropriate transparency and debate.

**2. A high standards UK, with rights, standards and funding to underpin them maintained** - Leaving the EU should not mean weaker standards, fewer rights or loss of funding. A UK framework for common standards must be mutually agreed between the four administrations to enable cross-border working and internal common market.

**3. Leaving the EU should not create a governance gap** - EU institutions have a role in monitoring, oversight and ensuring compliance with the law as well as setting regulations. Where governance arrangements are changed as a result of leaving the EU there must be clear powers and procedures for ensuring the law is properly implemented and enforced on an ongoing basis.

### Protecting parliamentary sovereignty and scrutiny

#### **Sweeping powers to ministers**

The Withdrawal Agreement Bill hands exceptionally wide powers to Ministers to implement the Withdrawal Agreement with little parliamentary oversight. Despite the Government's previous promises during the passage of the EU Withdrawal Act 2018 not to use delegated powers for substantive policy changes<sup>1</sup>, we have already seen how they have indeed been used for this purpose and how little scrutiny these changes have received<sup>2</sup>.

A clear example of this is the statutory instrument that has been laid which removes the equal treatment provision which provides for EU citizens to be treated in the same way as British citizens when accessing social security schemes<sup>3</sup>.


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<sup>1</sup>[https://hansard.parliament.uk/Lords/2018-04-25/debates/A9F4CE42-D434-4DC4-8DAE-799A1265BB8A/EuropeanUnion\(Withdrawal\)Bill#contribution-8F34F7FF-3993-48AC-AB60-D638F1E209DC](https://hansard.parliament.uk/Lords/2018-04-25/debates/A9F4CE42-D434-4DC4-8DAE-799A1265BB8A/EuropeanUnion(Withdrawal)Bill#contribution-8F34F7FF-3993-48AC-AB60-D638F1E209DC)

<sup>2</sup> See more information about the use of Brexit-related delegated powers from the Public Law Project's SIFT project:

<https://publiclawproject.org.uk/what-we-do/current-projects-and-activities/brexit/the-sift-project/>

<sup>3</sup><https://ukconstitutionallaw.org/2019/03/25/alexandra-sinclair-and-joe-tomlinson-brexit-primary-legislation-and-statutory-instruments-everything-in-its-right-place/>



The sovereignty of Parliament was a central theme in the 2016 referendum and a promise was made that Parliament would 'take back control of our own laws'. Yet, the Withdrawal Agreement Bill- with at least 19 Henry VIII powers within it- shows that control of lawmaking will largely not rest with Parliament. Instead, the Executive have been given unprecedented powers to implement the Withdrawal Agreement, without proper parliamentary scrutiny. This undermines both parliamentary sovereignty and accountable lawmaking.

It is therefore essential that proper safeguards are put on delegated powers and that where powers are being used, they are subject to the highest level of parliamentary scrutiny.

*On this basis, we urge MPs to vote for amendments which would ensure this and support changes to the Bill proposed by the Public Law Project and Liberty, including:*

- That the Government confirms it cannot use the powers in the WAB in ways that are incompatible with the Withdrawal Agreement itself
- That the WAB is amended to include the EU Withdrawal Act 2018 sifting procedure. This sifting procedure requires that a designated Committee of each house scrutinise statutory instruments laid under the negative procedure and recommend whether it is needs to be upgraded for more scrutiny (the affirmative procedure). This will rightly result in better scrutiny of how delegated powers in the WAB are used.

## **Parliamentary oversight over the negotiations on the future relationship**

It is highly concerning that the Government has removed the previous provisions which attempted to ensure that Parliament had a proper role in the negotiations on the future relationship. Consequently, MPs will not get a chance to scrutinise nor have a vote on the final trade deal agreed with the EU. Our future trading relationship with the EU and other nations will have significant impacts on a number of areas, including workers' rights, human rights, environmental protections, food standards and health services<sup>4</sup>. *It is therefore crucial the bill is amended to strengthen Parliament's role in overseeing, approving and scrutinising the future relationship with the EU.*

## **Citizens' rights**

### **Rights enshrined in primary legislation**

The Withdrawal Agreement Bill gives ministers sweeping powers to implement the citizens' rights provisions of the Withdrawal Agreement. It is already concerning to see

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<sup>4</sup><https://www.brexitcivilsocietyalliance.org/blog-indexpage/2019/9/6/can-an-open-relationship-work-after-divorce>

how ministers have used delegated powers to make significant policy changes that will have a direct impact on EU citizens living in the UK<sup>5</sup>.

Again, we stress the importance of ensuring proper scrutiny and safeguards on these powers and encourage MPs seek commitment from the Government that these powers will not be used inappropriately.

*We support amendments that would ensure that citizens' rights are set out in primary legislation, rather than leaving ministers with broad discretion to implement this part of the Withdrawal Agreement.*

## **A declaratory scheme**

The Withdrawal Agreement permits either a 'declaratory' or 'constitutive' system for verifying an individual's rights. In other words, there is nothing in the WA that stops the UK from adopting a declaratory system. Together with over 30 organisations<sup>6</sup>, we have previously called on political parties to grant EU citizens and family members an automatic right to settled status and removing the current cliff-edge scenario which could result in hundreds of thousands of people losing status overnight. This is not a radical ask, but an issue with cross-party parliamentary support that was promised during the 2016 Leave Campaign. Under a declaratory system, EU citizens and family members will need to register in order to avoid difficulties in their day-to-day life. The new Government can create fair incentives for people to register, but removing someone's status makes life in the UK unlivable.

*On this basis, we urge MPs to support amendments that will make the EU settlement scheme declaratory.*

## **Physical documentation**

*We also call on MPs to support amendments that would ensure that EU citizens are provided with physical documentation of their status.*

We anticipate that a lack of physical documentation will lead to discrimination and greater vulnerability to hostile environment measures. Physical documentation allows people to live their lives with dignity and a sense of control. All other migrants and British citizens can choose to obtain physical documentation to prove their status and there is no reason why this right should be denied to EU citizens and family members.


## **Appeal rights and judicial review**

As highlighted by the Public Law Project, Clause 11 of the Withdrawal Agreement Bill fails to provide appeal rights for all applicants under the EU Settlement Scheme. If

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<sup>5</sup> See for example the statutory instrument which strip EU workers of the right to be self-employed in the UK. The draft Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019 will allow Ministers to remove the rights of EU, EEA, Swiss and Turkish nationals to own and manage companies or to provide services in the UK on the same basis as UK nationals. More information here: <https://publiclawproject.org.uk/latest/freedom-of-establishment-regulations-briefing/>

<sup>6</sup> <https://www.jcwi.org.uk/News/our-letter-to-party-leaders-on-the-eu-settlement-scheme>



appeal rights are not granted to all who fall within the scope of the Withdrawal Agreement, the WAB would be in contradiction of the directly effective rights in the Withdrawal Agreement.

Further, Clause 11 (3) gives ministers powers to make provisions for reviews, including judicial reviews. The Delegated Powers Memorandum fails to provide an explanation of why ministers should be given the power to make provision for judicial review. Importantly, because of the constitutional status of judicial review, ministers could not use powers to limit or constrain the right of access to judicial review.

*On this basis, we strongly support the following proposals suggested by the Public Law Project:*

- The Withdrawal Agreement Bill should be amended to place a duty on Ministers to provide appeal rights for all applicants of the Scheme
- Remove the words in parentheses in Clause 11 (3) (“including judicial reviews”)

### **Citizens’ rights: implications for Northern Ireland**


We also strongly agree with the following issues identified by our Northern Ireland member, the Committee on the Administration of Justice:

- Citizens’ Rights - the 4.8 million: In addition to the issues facing the 3 million EU citizens, there is also the fate of the additional 1.8 million people who are (or are entitled to be) EU citizens due to birthright in Northern Ireland to Irish citizenship, but who at present, the Home Office has excluded from retaining EU citizens rights under part II of the Withdrawal Agreement, and instead sought to rely on largely vague and non-binding promises relating to the Common Travel Area that fall short of the equality of British-Irish citizenship provisions of the Good Friday Agreement
- Citizens Rights: frontier workers, notwithstanding the problems with the EU Settlement Scheme, the Home Office has so far failed to introduce any equivalent scheme at all for frontier workers, despite similar rights for frontier workers being provided for under the Withdrawal Agreement, this has a particular impact in Northern Ireland, given the land border

### **The revised Protocol on Northern Ireland**

We echo the concerns set out by our Northern Ireland members, Human Rights Consortium and the Committee on the Administration of Justice, specifically that the Withdrawal Agreement Bill gives UK ministers broad powers to change Northern Ireland’ laws without parliamentary scrutiny.

Article 18 of the revised Protocol which sets out that the NI Assembly can consent to Northern Ireland’s continuing relationship with the EU. Instead of outlining how this will work, the consent mechanism is included within the scope of the very broad Henry VIII



powers in Clause 21. Consequently, as highlighted by the Human Rights Consortium, “this means UK ministers can change the provisions relating to the Petition of Concern and cross-party consent mechanisms in the Northern Ireland Act with minimal oversight and scrutiny”<sup>7</sup>

Further, the commitment on protecting human rights safeguards in the Belfast/Good Friday Agreement as set out in Article 2 of the revised Protocol prohibits the NI Assembly and NI ministers from legislating contrary to Article 2 (this is incorporated in Schedule 3 of WAB). It is highly concerning that no such safeguards apply to UK Ministers who have been granted sweeping powers with few limitations.

Finally, as the CAJ has highlighted, the WAB contains new enforcement powers to be vested in the Northern Ireland Human Rights and Equality Commissions over the commitment in Article 2(1) of the NI Protocol to ‘non-diminution’ in some rights under the Good Friday Agreement as a result of Brexit, however there is no date on the face of the bill for the commencement of these powers, (meaning they may be left to after the transition period when most of the diminution of rights has already occurred). There is also no commitment to resource the Commissions to exercise the new powers and only explicit powers to render offending acts unlawful relate only to Northern Ireland departments, rather than UK Ministers and other public authorities with functions in Northern Ireland.

## **Protection of rights and standards**

The WAB does nothing to ensure non-regression of workers rights, consumer standards, human rights or environmental protections as the UK exits the EU. While the government has said that they intend to bring forward a separate Employment Bill, the details on what it will contain or when it will be published is far from clear. Coupled with the removal of the level playing field commitments in the Withdrawal Agreement<sup>8</sup>, there are now no concrete guarantees in law that will protect rights and standards post-Brexit.

*For this reason, we would support amendments which ensures non-regression in the areas mentioned above.*

## **Conclusion**

The issues highlighted above clearly shows the crucial need for proper scrutiny of the Withdrawal Agreement Bill, a bill of utmost constitutional, legal and political significance. Parliamentarians have a critical role in scrutinising legislation and the impacts it will have on the UK. We urge MPs to vote for amendments which will ensure proper parliamentary scrutiny; protect fundamental rights and places proper limits on ministerial powers.

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<http://www.humanrightsconsortium.org/wp-content/uploads/2019/10/Withdrawal-Agreement-Bill-HRC-Initial-Analysis.pdf>

<sup>8</sup> <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8713>