

The Civil Society Brexit Project: Information

BREXIT AND THE EU WITHDRAWAL BILL

About the Civil Society Brexit Project

The Civil Society Brexit Project is a collaboration between the **Scottish Universities Legal Network on Europe (SULNE)** and the **Human Rights Consortium Scotland**, funded by the **Legal Education Foundation**. We give information, insight and independent advice to make sure that organisations in Scotland are able to influence Brexit as much as possible. The Project will also help organisations to prepare for Brexit consequences for themselves or their beneficiaries.

www.hrcscotland.org/brexit

Who is this Civil Society Brexit Project: Information for?

This briefing is written for civil society organisations working in Scotland. For more information, contact hrcscotland@gmail.com

THE EU WITHDRAWAL BILL: KEY AREAS OF PROPOSED AMENDMENT

This briefing sets out some of the main areas of proposed amendment to the EU Withdrawal Bill, focusing on those of expressed interest to NGOs in Scotland. These are:

- **Strengthening parliamentary scrutiny of changes to EU retained law or related law**

The Bill gives the Government significant powers to make secondary legislation. This was done for several reasons, including that it is a much quicker process, allows some flexibility in content, and provides for some confidentiality in the exit negotiations. Secondary legislation can also enact the withdrawal agreement quickly.

Many organisations however are concerned that whilst the vast majority of changes are likely to be technical, the way in which the Bill is drafted **allows for the powers to be used to make major policy changes to retained EU law**. For example, it would

be possible to introduce new rules and standards, create new public authorities or get rid of certain legal rights.

As the Bill allows secondary legislation to be used to implement the withdrawal agreement, this is also likely to include aspects such as **the rights of EU citizens**.

In addition, because of the sheer amount of secondary legislation that will be required to repatriate EU law and the time pressure to get these changes done by March 2019, there are significant **concerns about the level of scrutiny of all of these changes**. Civil society organisations are particularly concerned that there will be a lack of consultation around some of these changes and that it will be very difficult for them to be informed about proposed legal changes that will affect those that they work with or for.

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What happened at first House of Commons stages?

MPs attempted to modify these new Government powers through various amendments. The Government accepted the call for a ‘sifting committee’ who will be able to recommend that any piece of secondary legislation should be subject to affirmative procedure – that is, be voted on in the House of Commons. The Government therefore proposed an amendment to set up this Committee which was passed.

Several amendments sought to limit Government new powers to only where Ministers deemed them ‘necessary’ to mitigate, prevent or remedy problems, rather than the condition as currently drafted of ‘appropriate’. Other probing amendments from Dominic Grieve MP sought to restrict this to only where EU law is deficient. In response, the Minister stated ‘The Secretary of State has asked me to put on record that he, too, is sympathetic to the idea of narrowing the Ministers’ discretion... I ask them to bear with me and have further meetings with us and our legal teams to try and find a way through.’

In the only Government defeat in the Commons Committee stages, the Bill was amended to ensure that, before any final secondary regulations can be passed to bring about the terms of the Brexit deal, there will have to be a statute debated and passed by the Parliament to agree the final terms of the deal.

Embedding specific rights protections in the Bill

Some children’s organisations are calling for the UN Convention on the Rights of the Child to be embedded within the Bill. They argue that EU legislation, policy and case-law developments have ‘substantially improved the landscape for children across a diverse range of areas, including: criminal and family justice, non-discrimination, child trafficking, sexual exploitation and health and safety... As EU law has children’s rights embedded throughout, the permanent requirement to act compatibly with the UNCRC is the best way to ensure that this protection continues beyond withdrawal¹’.

Environmental organisations want to see key principles in EU law around the environment included in the Bill, such as the ‘precautionary principle’ which creates a bottom line forcing those who want to build or develop, for example, to prove in law that what they are doing will not damage the environment. Principles such as the ‘polluter pays’ and the principle that preventative action should be taken to avert environmental damage are also seen as important. Organisations are asking MPs to support Amendment NC28 which puts forward a new clause to ensure that public authorities must have regard to environmental principles currently enshrined in EU law.

The rights of EU citizens to live in the UK after Brexit has been a big issue throughout discussions around Brexit. Several organisations are supporting amendments to include the freedom of movement of people in the Bill, as well as specific amendments such as around child refugee family reunion.

What happened at first stage in House of Commons?

None of these specific amendments were passed and most are likely to be raised again at the House of Lords stage.

However the Government gave a commitment to require Ministers to make a statement before the House in the presentation of any Brexit-related legislation on whether it is consistent with the Equality Act 2010.

On environmental principles, the Government stated that the amendment was not necessary because the Bill already makes sure that ‘the same protections are in place in the UK and that laws still functions effectively after exit.’

Retaining the Charter of Fundamental Rights

Alongside general rights protections in the Bill, other organisations are calling specifically for retention of the EU Charter of Fundamental Rights. This Charter

1. 1. Children’s Society, Children in Scotland and others briefing for Committee Stage EU Withdrawal Bill

gives broader rights that are not part of the European Convention of Human Rights. For example, the Charter includes wider data protection rights, a right to asylum, a right to education and an overarching right to non-discrimination.

What happened at first stage in House of Commons?

- There was an opposition tabled amendment to keep the Charter in retained EU law (Amendment 46) but this was narrowly defeated 311 against vs 301 for.
- The Government committed to publishing by 5th December a detailed analysis of how the Charter rights are found elsewhere in UK law. This analysis was duly published but was highly criticised as being ‘woefully inadequate’ (Keir Starmer, Labour). The EHRC issued a statement that they still want to see the Charter retained, and commissioned legal advice on the issue. The legal advice states on the assurances of the Government that rights are adequately protected without the Charter, ‘those assurances are not correct and a failure to preserve relevant parts of the Charter in domestic law after Brexit will lead to a significant weakening of the current system of human rights protection in the UK.’
- It is expected that this issue will come back up in the House of Lords.

Taking account of the Court of Justice and maintaining progress on social rights

The Bill states that UK courts will ‘be able to consider’ post-Brexit decisions by the EU Court of Justice after Brexit. However many organisations are concerned that this is too vague, places too much responsibility on judges to interpret what this means and that a crucial layer of oversight will be lost. For example, this is a concern by those involved with the complex area of immigration law. There are also concerns that we need to take into account ECJ decisions in the UK so that we don’t fall behind the rest of Europe in social protections.

There are also calls for employment rights to be secured for the future by the Bill to ensure that the UK does not fall behind the EU in social protections.

What happened at first House of Commons stages?

An SNP backed amendment to ensure that courts ‘pay due regard to any relevant decisions of the European Court’ was defeated 296 in favour, 316 against.

Another amendment was defeated which sought to specifically ensure that worker’s rights are no less favourable than they would have been if we had stayed part of the EU.

Committing the Government to continue engagement with EU strategies and programmes

There are some proposed amendments to the Bill which aim to commit the Government to continuing participation in key EU strategies and programmes. These would include for example, Euratom, Europol, Erasmus +.

What happened at first House of Commons stages?

These amendments were not passed. The UK Government elsewhere has stated publicly that the United Kingdom is committed to continuing full participation in the Erasmus+ programme up until the UK leaves the European Union. The UK will continue to benefit from all EU programmes, including Erasmus+, until the end of the current budget plan (2014-2020).

Bringing EU law in areas that are devolved directly back to the devolved regions – and not to the UK level

As noted above, currently the Scottish Parliament (and other devolved legislatures) have responsibility for several areas where there is considerable EU law. For example, the EU has passed many laws and regulations around agriculture. Whilst the Scottish Parliament cannot legislate contrary to this EU law, it currently can and has passed law and regulations on other aspects of agriculture.

The Bill proposes that this situation should continue – at least temporarily. Hence all EU law is brought back to the UK level even if it would ordinarily be

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within devolved competence. The UK Government has said that they will then consult with devolved legislatures on those areas which should be devolved. The reasoning for doing this is because this will enable a common UK approach to many elements of retained EU law.

However the Scottish Government are concerned that this is a 'power grab' and want amendments to the Bill that ensure that these areas of EU law are devolved on exit day. They argue that there can then be discussion about a UK level approach.

What happened at first House of Commons stages?

There are several amendments proposed that dealt with issues around devolution. The Government argued that where there are areas of law where Scotland and the rest of the UK differ in some way or where differences can be resolved with non-legislative means, then these will be devolved on exit day or as close to it as possible. They argued that there are some areas where a common framework across the UK would make sense, and assurance was sought from the Government that they would 'urgently' identify and agree areas where there is a need for common frameworks. The amendments were all defeated.

Securing the future of health and social care

If Brexit leads to fewer people from other EU countries living in the UK, there is significant concern about the potential impact of this on the health and social care workforce. This in turn could have implications for the care and quality of life of disabled and older people and those with long-term

health conditions. Camphill Scotland, the ALLIANCE, CCPS, the Genetic Alliance UK, Inclusion Scotland, Scottish Care and SCVO therefore want to see an amendment that would introduce a duty to implement an independent evaluation of the impact of Brexit on the health and social care sector.

What happened at first House of Commons stages?

Joanna Cherry MP proposed this amendment for independent evaluation of the impact of the legislation on health and social care but this was defeated 294 in favour, 318 against. This will be raised again in the House of Lords.

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WHERE CAN I GET MORE INFORMATION?

If there is any aspect of the briefing or a particular issue around Brexit where you would like more detailed advice or information, we are happy to help! Please get in touch with us at hrcscotland@gmail.com

There is also information available online at www.hrcscotland.org/brexit