

Written evidence to the Joint Committee on Human Rights on the human rights implications of the EU (Withdrawal) Bill

Introduction

1. The Law Society of England and Wales is the independent professional body that works globally to support and represent its 170,000 solicitors, promoting the highest professional standards and the rule of law. The Society makes representations to regulators and Government both domestically and in the European Union on law and justice issues.

Ensuring protections in the Charter are retained

The Law Society's recommendation

2. Rights contained in provisions of the EU Charter of Fundamental Rights (the Charter), which have equivalent UN treaty rights, and which do not already form part of domestic UK law, should be brought into UK law, and be explicitly protected.
3. Some Charter rights, for example relating to children and older people, have no equivalent protection in UK law at a constitutional level, such as those protected in the Human Rights Act.
4. Substantive rights currently protected by the Charter should therefore be fully protected in domestic law.

Analysis

5. Whilst clause 5(4) provides that the "Charter of Fundamental Rights is not part of domestic law on or after exit day", clause 5(5) provides that 5(4) does not "affect the retention in domestic law on or after exit day [...] of any fundamental rights or principles which exist irrespective of the Charter" and that "references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles".
6. A domestic court interpreting retained EU law will therefore be able to utilise Charter rights as though they were "fundamental rights and principles which exist irrespective of the Charter". These "underlying rights", as defined in the EU (Withdrawal) Bill, are undefined however, and it therefore unclear whether this comprises all the rights and principles contained in the Charter, or only those that have been affirmed in UK case law.
7. In the Bill's explanatory notes that accompanied the Bill, the role of general principles of EU law are explained. As the note points out these include fundamental rights. The note also explains that the Charter sets out 'EU fundamental rights', which are general principles of EU law that have been recognised over time through the case law of the Court of Justice of the European Union (CJEU) and which have been codified in the Charter. The Note further acknowledges that the underlying rights and principles which form the Charter will be converted into UK law.

8. The obligation to interpret retained EU law compatibly with these “underlying rights” however, will only last for as long as it takes for retained EU law to be amended, replaced or repealed by the UK Parliament. Furthermore, these changes to retained EU law need not take place via primary legislation.
9. Finally, certain rights contained in the Charter go beyond existing human rights contained in EU case law. The “Right to be Forgotten”, for example, is explicitly derived from “the right to data protection” in the Charter.
10. There is therefore an important issue relating to a diminution of human rights protection when retained EU law is converted into domestic law, and the Charter officially stops having a legal effect.
11. A simple way to protect the rights in the Charter would be to give it the same status as the European Convention of Human Rights in UK law (that is by way of the Human Rights Act) but only in relation to the retained EU law. The judgments of the Court of Justice of the European Union (CJEU) should be given the same status in UK law as the judgments of the European Court of Human Rights but restricted to the retained EU law. Under section 2 of the HRA, whose judgments are not binding but must be taken into account by the UK courts.

Retaining existing equality and human rights protections

The Law Society’s recommendation

12. The Government should ensure that the EU (withdrawal) Bill protects and enshrines all existing EU law protections for equality and human rights into UK law.

Analysis

13. The Bill provides that CJEU case law in place at the time the UK exits the EU will be given the same binding, or precedent, status in our courts as decisions of our own Supreme Court. This would mean that, while treating the CJEU’s former decisions as normally binding, the Supreme Court could depart from them “when it appears right to do so.”
14. It is essential that the Bill is carefully scrutinised to ensure that all current protections for equality and human rights, including those in unincorporated EU law, are incorporated into UK law. These include:
 - Under clause 4, rights in EU treaties that can be relied on directly in domestic courts such as the right to equal pay in Article 157 of the Treaty on the Functioning of the European Union (TFEU)
 - Under clause 3, directly applicable EU Regulations, for example governing rights of disabled people to access transport
 - Under clause 4, rights in EU Directives which the Government have not incorporated in UK law, such as certain provisions of the EU Trafficking Directive
 - Under clause 6, rights in CJEU case law, for example governing the calculation of holiday pay entitlements for workers.