FPSW Briefing on EU Withdrawal Agreement Bill 11th January 2020

*“A Bill to implement, and make other provision in connection with, the agreement between the United Kingdom and the EU under Article 50(2) of the Treaty on European Union which sets out the arrangements for the United Kingdom’s withdrawal from the EU.”*

The 2020 Withdrawal Agreement Bill proceeded to the House of Lords on 9th January 2020, having passed all stages in the House of Commons. There were many significant amendments proposed to the Bill in the Commons, including NC6[[1]](#endnote-1) , NC2[[2]](#endnote-2), NC46[[3]](#endnote-3), supported by a large number of proposers; but they all fell. The Bill is due for detailed debate in the Lords on Monday (13th); there are already many amendments put forward in relation to restricting ‘delegated powers’ to amend the law by Ministerial regulation.

**The Bill has the effect of amending the EU Withdrawal Act 2018**, which we spent some time following, supporting amendments to reduce or alleviate the Henry VIII power grab proposed by Ministers. From our point of view, most of the amendments failed and left the Equality Act 2010 (amongst others) at risk from Ministers’ Regulation without Parliamentary scrutiny and agreement. However, a few minimal safeguards succeeded, such as the setting up of a Parliamentary committee to scrutinise proposed Regulations and make recommendations as to whether they required the ‘affirmatory’ process. There was also the (in)famous inclusion of a clause requiring Ministers to assure the house that due regard had been taken to the need not to discriminate against those with protected characteristics under the Equality Act; the clause was notable in its absence of reference to the need to promote equality.

Some of the provisions of the 2018 Act affected by this 2020 Bill (as agreed in the Commons yesterday) appear to be:

1. The commitment to incorporate all laws from the EU at the date of leaving into UK domestic law is said to be subject to Part 4 of the Withdrawal Agreement – but I can’t immediately see how. Indeed the whole thing needs a contortionist lawyer to get to the bottom of!
2. The commitment to maintenance of environmental principles seems to have been repealed.
3. The commitment to seek agreement with the EU to secure the rights of a child to join parents is modified to a commitment to lay a policy before Parliament.
4. They seem to have extended the Henry VIII powers for 10 years after the end of the transition period?
5. There are worrying statements about safeguards on amending law by Regulation being dis-applied where the amendments are for the purpose of the Withdrawal Agreement (which I confess to not having fully read yet).

**The Bill also introduces new provisions in relation to the Withdrawal Agreement**, for example:

1. Implementation of the EU Agreements in relation to Citizens Rights will be by Regulation, including the amendment of primary Immigration Acts.
2. Implementation of equality rights and workers’ rights as in the Withdrawal Agreement will be done by Regulation, including by “modifying any provision made by or under an enactment” – presumably this includes primary legislation?

**The Brexit Civil Society Alliance has provided a worrying overview of this latest Bill**. <https://www.brexitcivilsocietyalliance.org/news-indexpage/brexit-is-just-beginning>

*“The key changes include:*

* *The complete removal of the limited procedural protections for workers’ rights*
* *The removal of the Government's obligations to child refugees (the Dubs amendment)*
* *The addition of a clause that could cause legal uncertainty over retained EU case law. This includes rulings over holiday pay and what is subject to VAT*
* *An added power to the Secretary of State to transfer the functions of the Independent Monitoring Authority to another public authority or even abolish it. The IMA is an important safeguard for the rights of EU citizens and the EU has already*[*raised concerns*](https://www.telegraph.co.uk/politics/2020/01/07/brussels-fires-warning-shot-citizens-rights-brexit-aseu-chief/)*about the government’s change to the Bill*

*The House of Commons Library goes into greater depth to all the changes made*[*here*](https://commonslibrary.parliament.uk/brexit/legislation/the-new-eu-withdrawal-agreement-bill-whats-changed/)*.*

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For FPSW work on the Executive power grab and democracy, some key points are:

1. This new 2020 Bill differs from the 2019 Bill, which was passed by the Commons and then fell before the election, by removing more protections on rights and the environment. Clearly the new government is already taking advantage of its overwhelming majority.
2. Since the passage of the 2018 Withdrawal Act government ministers have already been laying before Parliament draft regulations which go beyond technical corrections to EU derived laws allowed by the Act; they implement policy changes and weaken standards and rights.
3. There have been so many of these that the meagre safeguards established in the 2018 Act have been overwhelmed, and the new Bill removes or weakens these safeguards further. A post on the website of the Constitutional Law Association says:

<https://ukconstitutionallaw.org/2020/01/09/alexandra-sinclair-and-joe-tomlinson-brexit-delegated-legislation-problematic-results/>

*“However, the obvious and major case study of wide delegated powers in recent history is the*[*European Union (Withdrawal) Act 2018*](http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted)*. From the powers granted to the executive in this Act has emerged a tidal wave of delegated legislation—currently totalling around 620 statutory instruments (SIs)—with the general purpose of facilitating the UK’s orderly withdrawal from the EU. The principled objections often made to broad delegated powers are important, but it is also important to examine whether broad powers, once granted by Parliament, are producing problematic results. While much delegated law-making under the 2018 Act has been done lawfully and to a good standard, we have also observed some problematic results. In this post, we explore some of those patterns.”*

*“Government has also used statutory instruments to make substantive changes to public policy, rather than just correct technical deficiencies arising due to Brexit. For instance, key laws affecting whether asylum seekers’ claims should be considered in the UK (rather than another EU state)*[*have been effectively deleted*](http://www.legislation.gov.uk/uksi/2019/745/contents/made)*. The rights of EU, EEA, Swiss, and Turkish nationals to be self-employed and to bring discrimination claims in the UK*[*have been reduced*](http://www.legislation.gov.uk/uksi/2019/1401/contents/made)*. EU nationals already living in the UK have seen their rights change through the*[*removal of their right to equal treatment when accessing social security schemes*](https://publications.parliament.uk/pa/cm201719/cmselect/cmeuleg/301-lii/30109.htm#_idTextAnchor018)*and by the authorising of their*[*immigration status to be systematically verified*](http://www.legislation.gov.uk/uksi/2019/1383/contents/made)*. Delegated legislation has also been used to*[*end UK membership*](http://www.legislation.gov.uk/uksi/2019/1339/made)*of many programmes, such as the Rights, Equality and Citizenship Programme which funds 17 projects in the UK.”*

*“The revised*[*European Union (Withdrawal Agreement) Bill*](https://services.parliament.uk/bills/2019-20/europeanunionwithdrawalagreement.html)*(WAB) is now back in Parliament and similarly sweeping powers will almost certainly be granted to the executive again. The WAB does nothing to curb risks of problematic outcomes, such as those we have identified above, from arising. In fact, the position is in some ways worse than under the 2018 Act. The new Bill*[*has 19 delegated powers*](https://publications.parliament.uk/pa/bills/cbill/58-01/0001/EU%20(Withdrawal%20Agreement)%20Bill%20-%20Delegated%20Powers%20Memorandum%20(1).pdf)*, far more than the 2018 Act. Importantly, under the WAB there will be no extra sifting procedure of the kind established in the 2018 Act, which was able to act as a further check on the Brexit statutory instruments laid using the negative procedure. At the same time, the new Bill keeps the urgent case procedure power and*[*extends it so that it now does not sunset until two years after the end of the transition period*](https://publiclawproject.org.uk/wp-content/uploads/2019/12/191218-PLP-and-Liberty-Joint-Briefing-Withdrawal-Agreement-Bill-Second-Reading.pdf)*. There are valid principled concerns around the broad powers in the new Bill but we should also be concerned about the lower-quality outcomes that may result from those concerns not being heeded.”*

1. NC6 related to a requirement for Parliament to have a say on the Negotiating mandate with the EU and specified a very full impact assessment on a wide range of sustainability (social, economic and environmental) issues. [↑](#endnote-ref-1)
2. NC2 seeks to protect workers’ rights [↑](#endnote-ref-2)
3. NC46 would require equality impact assessments of Trade Agreements by region of the UK. [↑](#endnote-ref-3)