



**Liberty and Amnesty International UK's Joint Briefing on the EU (Withdrawal) Bill for
Second Reading in the House of Lords
January 30/31, 2018**

The EU (Withdrawal) Bill's stated purpose is ensuring legal continuity after exit day. Yet if the Bill passes in its current form, there will be a lack of continuity in—and an unacceptable diminution of—fundamental rights and equalities protections. Currently, the Bill:

- **Grants extraordinarily wide powers to Ministers to amend 'retained' EU law—including domestic rights and equalities legislation passed by Parliament-- placing fundamental rights at risk**
- **Significantly weakens UK human rights and equality law protections by removing important rights and remedies**

The extraordinarily wide powers conferred on Ministers to amend 'retained EU law' would permit the amendment of domestic legislation like the Equality Act, the Modern Slavery Act and the future Data Protection Act, as well as directly applicable EU laws that will be incorporated after exit day, with little to no Parliamentary oversight. The Bill includes no clear prohibition on delegated powers being used to erode rights protections, leaving them at serious risk.

The Bill significantly weakens human rights and equality protections because: (i) it removes the Charter of Fundamental Rights of the European Union from UK law; and (ii) it removes the ability for court action to be brought under the general principles of EU law, including the general principle of equality.

Amendments by the Government at Report Stage in the House of Commons did not remedy these problems.

1. No rollback: Putting sensible limits on enhanced delegated legislation ('Henry VIII' powers)

In ensuring continuity on exit day, Ministers are seeking to transpose all EU law into UK law. In doing so, Ministers have chosen to use enhanced powers to amend laws where necessary to ensure they function – these are the 'correcting powers' in Clauses 7, 8 and 9. They are enhanced because they will be able to amend even primary legislation by statutory instrument. These powers are without precedent in the modern era and lack sufficient safeguards or scrutiny mechanisms.

In sum, they permit Ministers to change ‘retained EU law’ by secondary legislation in any way they consider appropriate to: (i) remedy its ineffective operation or deficiencies that arise from Brexit; (ii) fix or prevent any breaches of the UK’s international obligations arising from Brexit; and (iii) implement the terms of a future withdrawal agreement. The definition of ‘retained EU law’ includes not only directly applicable EU law but also UK domestic law that relates to areas in which the EU has regulated. The category, therefore, includes important legislation such as the Equalities Act, the Modern Slavery Act and the future Data Protection Act.

Clause 7 sets out powers for Ministers to use secondary legislation to amend or undo any EU laws they claim are not operating “effectively” or are suffering from “any other deficiency” arising from withdrawal – extraordinarily vague terms, subject to no definition or restriction and seemingly at the discretion of Ministers alone.

Similarly, Clauses 8 and 9 permit Ministers to use secondary legislation to make provision arising out of the UK’s withdrawal from the EU and to address any legal problems which may arise as a result – powers which could also be interpreted broadly by Ministers.

Safeguards

If enhanced powers are required to deal with the sizeable task of transposing EU law, then such wide powers should be accompanied by strong safeguards. A failure to appropriately constrain the unprecedented Ministerial powers in the Bill would be a serious constitutional oversight.

The Bill does exclude powers being used to make amendments in some areas, such as to the Human Rights Act 1998 or for taxation. It is notable that these expanded powers, however, are not given the same constraints as the less sweeping powers contained in the Legislative and Regulatory Reform Act 2006. Given this precedent to control weaker powers, equivalent safeguards should, at a minimum, be applied to this Bill.

The Government brought forward an amendment at Commons Report Stage limiting the scope of the deficiency-correcting power to deficiencies already set out in the list provided in Clause 7(2). This was a welcome development. However, it was immediately undermined by the simultaneous addition of Clause 7(3) which gives the minister the power to use the deficiency correcting powers in cases of a “similar kind” and the ability to set out other deficiencies by regulation.

The limited safeguards contained in the Bill are also undermined in other clauses and schedules. Clause 17 creates a breath-taking power that permits the making of regulations “as the Minister considers appropriate in consequence of this Act”. This will have the full force of primary legislation without the cursory safeguards of Clauses 7, 8, and 9. Clause 17(3) offers a protection in that regulations made under this clause cannot affect primary legislation made after this legislative session – but that will not apply to the EU laws incorporated by the Bill which are not “primary legislation passed or made” after the end of that session. Again, that includes, among other things, the Equality Act, the Modern Slavery Act and the future Data Protection Act.

Schedule 8 ensures unfettered ability to amend retained EU law by statutory instrument. Paragraph 5(1) of Schedule 8 means that all future delegated powers may amend all retained direct EU legislation. Similarly, paragraph 3(1) of Schedule 8 retrospectively confers on all secondary legislative powers in UK the power to amend retained direct EU legislation, such as EU regulations. Thousands of powers, created in all manner of Acts for myriad different purposes, will therefore be subject to amendment by Ministers. This will happen with only the limited Parliamentary scrutiny currently in the Bill and in whatever Parliamentary time can be spared for the many thousands of Brexit-related statutory instruments the Government will be required to develop.

Amendments were tabled in the Commons by a number of MPs, including Dominic Grieve, which would have – using a variety of different mechanisms – introduced statutory limits on the powers. Some of those sought to introduce limits on the powers being used to roll back rights and equalities protections, such as Amendment 2, which would have (mirroring the LRA approach) made it a condition, *inter alia*, that provisions do not “prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise”. That amendment was not pressed to a vote.

The simplest way to guarantee the extraordinary powers contained in this Bill are used appropriately is to insert a clause prohibiting their use in important areas, such as for human rights and equalities protections. Other options would include the familiar LRA 2006 form of amendment like that (no.2) proposed by Dominic Grieve in the Commons. The Government claims it has no intent to use Withdrawal Bill powers to change substantive rights and equalities protections. That promise should be written into the Bill in order to avoid setting a constitutionally problematic precedent for the devolution of law-making power to the Executive.

Such limitations on delegated power may also resolve some of the concerns about scrutiny below, as it will ensure that important, substantive changes to law are made by Act of Parliament, thereby reducing the volume of the tidal wave of statutory instruments this Bill threatens to bring down upon Parliament.

Scrutiny

Scrutinising the large number of statutory instruments occasioned by the Bill will require effective oversight and scrutiny of any controversial legislation. However, the Bill initially made no provision for a new body or procedure to perform this function. During Commons’ Committee Stage, the Government accepted amendments from the Chair of the Procedure Committee proposing a new sifting committee.

The amendment provides for a committee of the Commons to be charged with making a recommendation as to the appropriate procedure for the instrument. The Minister does not appear to be required to accept that recommendation, and should it not be received within ten sitting days, it can proceed without it (schedule 7 para 3). Given the scope of the powers outlined above, such a mechanism is inadequate to properly scrutinise delegated legislation that can amend Acts of Parliament. Support for more effective scrutiny is widespread,

including the Women and Equalities Committee, the Joint Committee on Human Rights, and the Lords Constitution Committee.¹ More robust proposals have also been proposed by the Hansard Society.²

Speaking Points on No Rollback of Rights, Safeguards on Delegated Powers, and Scrutiny

- The Bill's unprecedented delegation of legislative powers to the Executive represents a serious constitutional problem. The Government has not made a case for why such broad, ill-defined powers are necessary.
 - If the Government's argument turns on the lack of time for Parliamentary consideration of post-Brexit legal changes, indications that there will be a post-March 2019 transition or implementation period undermine that argument.
- The Government has disavowed any intention to use delegated Henry VIII powers to make significant policy changes, including changes to substantive rights protections. Then why won't they put that promise in the Bill in black and white?
- This Bill contains fewer safeguards than legislation with far less dramatic delegated powers provisions, such as the Legislative and Regulatory Reform Act.
- People who voted for Brexit did not vote to give ministers powers to take away their fundamental rights.

2. Abandoning protections: The Charter of Fundamental Rights and The General Principles

In its current form, the EU (Withdrawal) Bill will exclude the Charter of Fundamental Rights of the European Union from retained EU law, and will remove the ability to bring legal claims based on the general principles of EU law.

This approach will have profound consequences for the promotion and protection of human rights after withdrawal. It runs counter to the Bill's stated purpose – to facilitate the wholesale transfer of EU law onto the domestic statute book – and contradicts Government assurances that the same rules will apply on the day before exit as on the day after.

It is perfectly possible to retain the Charter and deal with any redundant sections after exit, just as the rest of EU law.

¹ House of Commons Library: Brexit: a reading list of post-EU Referendum publications by Parliament and the Devolved Assemblies. Published 23rd January 2018

<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7912#fullreport>

² Hansard Society Blog <https://www.hansardsociety.org.uk/blog/a-parliamentary-scrutiny-solution-for-the-eu-withdrawal-bill> Published 5th September 2017

Leaving behind our rights: The Charter

The question of the distinct value of the Charter in the UK's human rights framework, and – perhaps – the (dis)comfort with the power it gives our judiciary to strike down rights abusive primary legislation, has proven highly contentious since this Bill was published. It has arisen at this point simply because the Government has taken the extraordinary step of copying and pasting the entirety of EU law into domestic law, but leaving its key human rights component behind³.

That is extraordinary first because in losing the Charter 'retained EU law' will lose its critical interpretive guide, and second and most importantly because the Government claims that the sole purpose of this Bill is to ensure continuity and certainty in UK law after exit day. This is the "general rule" that "the same rules and laws will apply after exit as the day before"⁴. Indeed, the Government's position is that the Bill "does not aim to make major changes to policy", instead creating delegated powers (as above) to allow for necessary technical amendments to any redundant legislative clauses in retained EU law after exit day, and promising separate "primary legislation" will be introduced later to "make such policy changes" as desired⁵.

Excluding the Charter at this initial stage runs directly contrary to that approach.

Government Ministers' justification for this anomaly is to claim that the Charter is unnecessary, and losing it will not mean losing any rights protections⁶. They claim that the Charter merely recognised rights existing elsewhere in EU law, and therefore adds nothing. However, they have at times expressed the contrary view that it adds an extra layer of rights domestically, with the implication that this is undesirable⁷. Both cannot be correct.

Taken at face value, the Government's stated intent is that the protection of substantive rights will not be weakened by excluding the Charter. Minister of State, Dominic Raab MP, made this clear during Committee Stage in the Commons, stating "members are understandably concerned that as we leave the EU we do not see any diminution or reduction in the substantive rights we all enjoy. The Government are unequivocally committed to that objective"⁸. In an attempt to support its public assurances to that effect,

³ Clause 5(4) actively excludes the Charter from 'retained EU law'.

⁴ Explanatory notes at [10] See Also 'The Repeal Bill Factsheet 1': "*The Repeal Bill is integral to ensuring that the statute book is able to function on the day we leave the EU. It is intended to promote continuity and certainty as far as possible. Therefore, the Bill is technical in nature rather than a vehicle for major policy changes*" https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/627983/General_Factsheet.pdf

⁵ Explanatory Notes at [14]: "*The Bill does not aim to make major changes to policy or establish new legal frameworks in the UK beyond those which are necessary to ensure the law continues to function properly from day one. The Government will introduce separate primary legislation to make such policy changes which will establish new legal frameworks*"

⁶ As per its right by right analysis

⁷ Junior Brexit Minister Suella Fernandes MP, writing in the Telegraph on 18 November 2017, and describing the Charter as "*much flabbier, covering everything from biomedicine and eugenics to personal data and collective bargaining. Lawyers will love the extra layers of rights and the fees that they bring, and it's also a core part of the Brussels project too*"

⁸ (Hansard 21 Nov 2017 Volume 631 Col 898)

the Government has since published a 'Right by Right' analysis which it says demonstrates where each right will be found independently of the Charter in domestic law after exit day.

That analysis is wholly unpersuasive. If anything, it reveals that the Government's confidence is misplaced. Indeed, independent Counsel instructed by the Equality and Human Rights Commission to review the memorandum and the Bill's approach, concludes that *"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."*⁹

Liberty and Amnesty International UK agree.

Further, the confusion and lack of legal certainty that will be occasioned from removal of the Charter from the body of retained EU law is a very real. In effect, the Charter acts as a key for understanding the operation of EU law. Without that key, interpretation will be highly problematic. Moreover, the UK may later find itself in the bizarre position of having on its books retained EU law which the EU itself finds to be in violation of the Charter, or interprets differently because the Charter continues to apply elsewhere.

Not retaining the Charter could also seriously endanger the chances of the UK reaching a favourable agreement with the EU on a transitional or implementation period following withdrawal. In recently leaked EU guidelines on the 'second phase' of negotiations with the UK, the European Council states "transitional arrangements provided for in the Withdrawal Agreement should cover the whole of the Union *acquis*".¹⁰ The Charter is a critical part of the *acquis* (the constituent elements of EU law), against which all Union law is drafted and assessed for compliance with fundamental human rights. Removing the Charter would be fundamentally at odds with the Union's commitment to ensure the inviolability of its legal order and would further complicate what are already widely considered to be both legally and politically challenging negotiations. Indeed, before Report Stage in the House of Commons, 30 cross-party MEPs urged the Government "to reassess your approach towards the Charter of Fundamental Rights to avoid endangering the new relationship you wish to develop with the EU".¹¹

The Charter provides a clear framework for protecting equality, fairness, and human dignity, and challenging abuses of power. It can simply be retained together with the rest of EU law, and applied to it rather than 'EU law', with those parts that become redundant after exit being excised through the mechanisms of this Bill. Exclusion of the Charter will significantly dilute domestic protections, in the following ways:

⁹ At [2]

¹⁰ See paras 12 and 13, Garry Gibbon, Channel 4 News, 'Exclusive: EU's negotiating guidelines for the Brexit transition' (25 January 2018) https://www.channel4.com/news/by/garry-gibbon/blogs/exclusive-eus-negotiating-guidelines-for-the-brex-it-transition?utm_source=dlvr.it&utm_medium=twitter accessed 26 January 2018.

¹¹ See Liberty, 'Thirty cross-party MEPs urge David Davis to Keep Charter of Fundamental Rights' (16 January 2018) <<https://www.liberty-human-rights.org.uk/news/press-releases-and-statements/thirty-cross-party-meps-urge-david-davis-keep-charter-fundamental>> accessed 26 January 2018.

Future Gaps

It is wrong to suggest, as the Government does, that the Charter merely reflects rights available elsewhere in EU law, and that its effects can be captured by reference to those sources at the point of exit. It is widely recognised that the Charter has created new rights – and indeed that over time further developments aligned with its aims and core rights can be expected, as with any ‘living instrument’ (including the ECHR)¹². In *Google Spain*¹³, for example, articles 7 and 8 of the Charter were interpreted by the CJEU as the source of the ‘right to be forgotten’¹⁴. Excluding the Charter therefore excludes the potential and dynamism of the Charter as our own Courts may interpret and apply it themselves in the future¹⁵.

Moreover, even setting aside the development potential that will be lost to ordinary people in the UK, excluding the Charter will create several protection gaps in domestic law. These are areas where other sources, such as the ECHR, either do not cover the same substantive rights, or do not do so comprehensively or in the same manner. That cannot be rescued by either the addition of retained EU law, or clause 5(5) of the Bill with its vague reference to “*fundamental rights or principles which exist irrespective of the Charter*”.

The Government’s right by right analysis, contrary to its aim, clearly demonstrates what will be lost when the Charter is abandoned. In seeking to locate Charter rights elsewhere, for example, the memo takes refuge¹⁶ in those same unincorporated international treaties (such as the ICCPR in the case of Charter article 19, protection in the event of removal, expulsion or extradition) which it frequently argues are of limited relevance to domestic law. Worse, it frequently cites the general principles of EU as providing equivalent rights (such as in Charter article 20, equality before the law, and Charter Article 1, human dignity) - those very same principles whose enforceability is stripped away by this Bill (see below). Principles of EU law, given practical legal effect by the CJEU¹⁷, are dismissed as of little importance.

¹² The protocol to the Lisbon Treaty, referred to by the government during Committee Stage in an attempt to roll back the clock, cannot displace the reality of the nature of the Charter as applied by the CJEU. As to its value, see Aidan O’Neil, ‘Is the UK’s ‘opt-out’ from the EU Charter of Fundamental Rights worth the paper it is written on? Part 1’ (eutopia law, 15 September 2011) <<https://eutopialaw.com/2011/09/15/is-the-uk%E2%80%99s-%E2%80%9Copt-out%E2%80%9D-from-the-eu-charter-of-fundamental-rights-worth-the-paper-it-is-written-on/>> accessed 1 December 2017;

¹³ *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*

¹⁴ *Google Spain* (C- 131/12 *Google Spain SL v Agencia Espanola de Proteccion de Datos* [2014] QB 1022),

¹⁵ The importance of that potential may soon be felt in the critical area of LGBT rights. A recent Opinion of the Advocate General in the case of C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Others* was clear that the concept of spouse in Directive 2004/38 (free movement) of the EU was gender neutral and therefore had to include same sex spouses, when viewed in light of articles 7, 9 and 21 of the Charter (see, inter alia, “*it is artificial nowadays to consider that a homosexual couple cannot have a family life within the meaning of Article 7 of the Charter*” [92]). As such, same sex couples had to be given equal rights when exercising free movement. It remains to be seen whether the CJEU will follow this Opinion, and how it will then be received, but the potential for the Charter to revolutionise the lives of LGBT couples is clear.

¹⁶ Weakly referring to the “presumption against violating international law when the courts interpret legislation” [para 12] in discussing how rights may be reflected therein.

¹⁷ See C- 547/14 R (*Philip Morris Brands Sarl*) v Secretary of State for Health [2017] QB 327 where the CJEU deployed the Article 35 Principle that there be a “high level of human health protection” in rejecting a claim

Five examples of the holes that will be left in our rights protection framework are:

- Article 47 (the right to an effective remedy): far broader than the Article 6 ECHR right to a fair hearing in the determination of civil rights and obligations, this extends to cover areas like immigration hearings which the ECHR does not protect. It has also been interpreted as requiring legal aid be provided in cases where not doing so would make it impossible to ensure an effective remedy was available.
- Article 14 (the right to education): provides a right to vocational and continuing training. Unlike its analogue under the ECHR, Article 14 is framed as a positive right – rather than a right not to be denied an education (see Article 3, Protocol 1 of the ECHR).
- Article 8 (the right to protection of personal data). Already relied upon by the Brexit Minister in his successful challenge to DRIPA¹⁸, this will not be clearly and fully replicated after Brexit (even when the GDPR is taken into account).
- Article 25 (rights of the elderly): recognises the right of older people to lead a life of dignity and independence and participate in social and cultural life. This right is unique and has no equivalent under the ECHR or any justiciable international treaty or convention to which the UK is a party.
- Article 10 (freedom of thought, conscience and religion): includes a right to conscientious objection not recognised in domestic law.

Remedy

Currently, the Charter sits alongside the Human Rights Act, offering complementary protection. A wider range of individuals may bring claims under the Charter, however, since the test for standing in judicial review is wider than that for ‘victim’ under Section 7 of the HRA. Once the Charter is excluded, ordinary people will lose in its entirety this valuable remedy for violations of their rights, even if those substantive rights can be accessed through alternative mechanisms.

Moreover, although it applies in a narrower range of cases (those engaging EU law), the Charter provides a stronger remedy for victims of abuses. Domestic Courts are empowered to strike down legislation which violates Charter rights, whereas under the Human Rights Act scheme primary legislation which violates the ECHR can only be the subject of a declaration of incompatibility.

Much has been made of whether this (existing) approach is appropriate in the domestic system, and of whether it will create confusion. As to the first - notably the Government has expressly provided in clause 5(2) for UK courts to continue being able to strike down primary legislation where it conflicts with retained EU law (the supremacy principle) after exit day – only the Charter (and general principles). It therefore appears perfectly acceptable to permit this stronger remedy for unlawful behaviour to continue, so long as

that EU law restrictions on tobacco labelling and packaging contravened freedom of expression in Article 11 of the Charter

¹⁸ *Davis v. Secretary of State for the Home Department*

the law in question is not a human rights provision. As to the second, the Charter currently and confidently co-exists with the HRA, and there is no reason to believe that its application to retained EU law will present any more of a challenge to the judiciary than its application to that same law before incorporation.

Rights without remedy: The General Principles of EU law

The General Principles of EU law include important protections which individuals have relied on in the UK to enforce their rights. The Bill retains the general principles for interpretative purposes but removes the ability for ordinary people to rely on them as a cause of action. It will no longer be possible to go to court when they are breached, and Courts will no longer be allowed to strike down legislation which is incompatible with them (Schedule 1, paragraph 3).

That is to leave the right, but remove the remedy.

The Bill's approach to the general principles robs them of their practical value. The ability of our Courts to strike down primary legislation has proven highly valuable. For example, the general principles have been used to secure equality where domestic law fails. Liberty's client, John Walker, relied on the general principles in summer 2017 to bring a court case that ended domestic pension inequality for same-sex couples. Under the current version of the Bill, people like John Walker would not be able to bring such claims.

The Government has argued that the actionability of the general principles and the associated remedy of strike down should be removed because both are a consequence of our EU membership that it would not make sense to retain after we leave. However, their origins should not be used as an excuse to change the way in which they operate. Any aspects which no longer make sense after Brexit (such as principles relating to the functioning of the Union) could be amended using powers designed to make necessary technical changes; leaving the ability to use relevant general principles in court.

In light of the Bill's twin aim of ensuring legal certainty and continuity, removing the Charter and the right of action based on the general principles is wholly inappropriate. This is not the time (nor is there time in this process) for complex debates on the UK's human rights framework, and whether or not the status quo should be radically altered and existing protections removed. From the perspective of ordinary people, those who currently benefit from these protections, this will result in a significant, unnecessary and negative change. In those circumstances, steps must be taken to ensure the Government keeps to its stated aims, and maintains the status quo.

Speaking Points on Retention of the Charter and General Principles

- Non-retention of the Charter is a glaring, unexplained exception to the core rationale of this Bill: that we should ensure legal continuity after Brexit and leave policy debates for another Bill on another day.

- The Charter secures important rights that may not be fully secured otherwise, including rights to data privacy, education and protection of the elderly, and equality rights including LGBT rights.
- Aside from categories of rights, the Charter gives victims of rights violations more powerful remedies than existing UK domestic law.
- The Government must be challenged to pledge that all rights in the Charter are fully expressed in enforceable domestic law, or they must identify which Charter rights they do not think worthy of retaining. To date, they have done neither.
- Taking away the enforceability of the General Principles would be a serious setback for human rights. A right without a remedy is no right at all.