Liberty and Amnesty International UK's Joint Briefing on the EU (Withdrawal) Bill
Report Stage in the House of Lords
18 April – 8 May 2018

The stated purpose of the EU (Withdrawal) Bill is to ensure legal continuity after our withdrawal from the EU. Yet if the Bill passes in its current form, there will be a lack of continuity in, and an unacceptable diminution of, human rights and equalities protections. Currently, the Bill:

- **Grants extraordinarily wide powers to Ministers to amend 'retained' EU law – including domestic human rights and equalities legislation passed by Parliament – placing fundamental rights at risk**

- **Significantly weakens domestic human rights and equality law protections by removing important rights and remedies**

The extraordinarily wide powers conferred on Ministers to amend 'retained EU law' threaten rights and equality protections. They would allow the amendment of domestic primary legislation like the Equality Act 2010, the Modern Slavery Act 2015 and the future Data Protection Act, as well as all EU laws that will be incorporated after exit day, with little to no Parliamentary oversight. The Bill does not include a clear prohibition on the use of delegated powers to erode rights protections, leaving them at serious risk.

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

The Withdrawal Bill is now at a critical stage in its passage through Parliament. Report represents the last meaningful opportunity for the Bill to be amended to ensure it does not lead to a diminution of fundamental rights protections. Liberty and Amnesty International UK urge Peers to assert their vital role in ensuring a human rights-compliant Brexit by supporting the amendments outlined in this briefing. Given the number of

human rights and equality-related amendments that have been tabled for Report, we ask Peers to consider focussing exclusively on the below amendments. We believe they represent the greatest chance of securing sufficient support to pass and, ultimately, protect our hard-won rights and freedoms from regression after Brexit.

No rollback on rights: Putting sensible limits on delegated powers ('Henry VIII' clauses)

In seeking to ensure legal continuity and avoid uncertainty or chaos on exit day, Ministers are planning – sensibly – to transpose all EU law into UK law. They have chosen at the same time to give themselves powers to then amend 'retained EU law' (which includes all 'copied and pasted' legislation) – where they believe necessary. That is purportedly for the limited and technical purpose of ensuring it functions correctly after withdrawal (these are the 'correcting powers' provided for in Clauses 7, 8 and 9 of the Bill). However, these powers are unusually permissive, and further empower Ministers to amend primary legislation by statutory instrument. They are without precedent in their scope and effect in the modern era and lack sufficient safeguards or scrutiny mechanisms.

These powers 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 withdrawal (Clause 7); (ii) fix or prevent any breaches of the UK's international obligations arising from withdrawal (Clause 8); and (iii) implement the terms of any future withdrawal agreement (Clause 9). Importantly, the definition of 'retained EU law' in the Bill includes not only EU law – such as Regulations and Directives – but also UK domestic law that relates to areas in which the EU has legislated. This category of law that may be changed, therefore, includes important domestic primary legislation such as the Equality Act,[1] the Modern Slavery Act and the future Data Protection Act.

Clause 7 of the Bill allows Ministers to use secondary legislation to amend or undo any EU law they claim is not operating 'effectively' or is suffering from any other 'deficiency' arising from withdrawal. These are extraordinarily vague terms. While amendments to the Bill in the Commons have turned what was merely an illustrative list of potential 'deficiencies' – also widely drawn – into a supposedly definitive list, that apparent tightening was wholly undermined by the further addition of Clause 7 (3). This subclause permits Ministers to label anything 'of a similar kind' or which they later provide for in further regulations also as a deficiency. The Government's amendment, therefore, does nothing to reign in Ministerial law-making powers (which are wholly unprecedented in the modern era).

[1] The amendment now incorporated at section 22(4), Schedule 7 of the Bill requiring Ministers to make a statement confirming they have had 'due regard' to the need to eliminate prohibited conduct under the Equality Act 2010 before an instrument is laid will not prevent the Act itself being amended, nor steps being taken which do not in fact further that need. A duty of due regard is a duty of proper consideration, rather than one to ensure a particular outcome.

Similarly, Clauses 8 and 9 are also strikingly broad. They 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 widely by Ministers. Furthermore, Clause 17 of the Bill provides a power for Ministers to make any 'consequential and transitional provision' they believe is appropriate in order to give effect to withdrawal. This power is breathtakingly wide; giving Ministers *carte blanche* to write and re-write retained EU law with limited to no justification.

Safeguards

If such broadly drawn powers are required to deal with the task of legislating for the UK's withdrawal from the EU, they should be accompanied by correspondingly strong safeguards. A failure to appropriately constrain the unprecedented Ministerial powers in the Bill would be a serious constitutional oversight.

The Bill does exclude delegated powers from being used to make amendments in some areas, such as to the Human Rights Act 1998 and taxation. It is notable, however, that these powers are not subject to the same constraints as the (far) less sweeping delegated powers provided for in the Legislative and Regulatory Reform Act 2006. There, the human rights and equalities laws that people can reasonably expect to retain are protected from dilution. Here – even though an almost unimaginably vast array of legislation is open to amendment, including people's hard-won rights and equalities protections – there is nothing. Given this precedent to restrict weaker powers, equivalent safeguards should, at minimum, be applied to the Bill. There is simply no sensible reason not to follow legislative precedent and hold Ministers to their avowed intent of only using these powers for technical rather than substantive policy changes.

The simplest way to guarantee that the extraordinary wide powers contained in this Bill are used appropriately is to insert a clause prohibiting their use to make substantive changes in important areas related to fundamental rights. Baroness Hayter's amendment after Clause 3 (supported by Lord Warner, Baroness Smith and Lord Kirkhope) would restrict the ability for Ministers to use secondary legislation to make major policy changes in the areas of employment, equality, health and safety, consumer protections and environmental law. Furthermore, Baroness Hayter's amendment includes an enhanced scrutiny procedure; providing vital Parliamentary oversight during the exercise of delegated powers.

A complementary approach to Baroness Hayter's 'ring-fencing' amendment would be to require Ministers to properly justify any changes they wish to make to retained EU law. Lord Lisvane's amendments across Clauses 7, 8 and 17 (supported by Lords Tyler, Goldsmith and

Cormack) would restrict Ministers to making regulations under these Clauses only when they can illustrate that it is 'necessary' – as opposed to 'appropriate' – to do so.

This small, semantic, change, would have significant practical consequences, in effect, introducing a more objective test for whether the use of delegated powers is strictly 'necessary' rather than the current subjective test of whether a Minister considers it 'appropriate'. As highlighted by Lord Lang at Committee, 'appropriate' is so broad and open that it is rendered almost meaningless and would give Minsters excessive influence and discretion when making regulations, whereas 'necessary' is more specific and would require far greater justification.[2] Substituting 'appropriate' for 'necessary' would guard against changes that could be made to reduced rights protections. For example, in line with the current wording of Clause 7, it could be argued that it is 'appropriate' to revise the maximum number of hours one can work in a week – under the EU Working Time Directive – to better accord with the Government's post-Brexit industrial strategy. However, it could not be argued that such a change is needed – and is therefore 'necessary' – in order to ensure the effective functioning of retained EU law.

The Government argues that this kind of change would not be possible under the Bill because its purpose – of legislating for withdrawal from the EU – is narrowly drawn. However, without clear substantive limits on the exercise of delegated powers or as the example above illustrates, tighter wording, Ministers will be free to amend retained EU law – including the Equality Act and other rights-protecting primary legislation – in whatever way they see fit. If the Government is serious about the reassurances it has given Peers on their role in the legislative process and in protecting fundamental rights, it should write these clearly and unequivocally on the face of the Bill.

Concern with the wording of the Bill's 'Henry VIII' powers was raised by the Delegated Powers and Regulatory Reform Committee who, in a recent report, recommended that "the "subjective" appropriateness test should be circumscribed in favour of a test based on objective necessity".[3] It is also worth noting that in its 'White Paper on the Great Repeal Bill', the Government pledged only to make changes to retained EU where 'necessary'.[4] The Government is yet to explain why it has rowed back on this promise and, instead, is attempting to further stretch the boundaries of what is constitutionally permissible.

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[2] HL Deb 7 March 2018, vol 789, cols 1183 – 1184.

[3] Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill* (2017 –19, HL 73) para 12.

[4] Department for Exiting the European Union, 'Legislating for the United Kingdom's withdrawal from the European Union' (March 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf> accessed 12 April 2018. See, in particular, paragraph 3.7 "… the Great Repeal Bill will provide a power to correct the statute book, where necessary, to rectify problems occurring as a consequence of leaving the EU. This will be done using secondary legislation, and will help make sure we have put in place the *necessary* corrections before the day we exit the EU."

As cautioned by Lord Wilson at Committee,[5] Peers should think carefully about how much sovereignty they are willing to cede to the Executive and should only give away what is strictly necessary for the purposes of this Act. A key role of the Lords in ensuring the delicate balance between the Executive, Legislative and Judiciary is retained cannot be overstated, nor can its vital role in safeguarding fundamental rights.

Amendments to support (limits on delegated powers):

Baroness Hayter (Lord Warner, Baroness Smith and Lord Kirkhope)
P.4 HL Bill 79 Running List of amendments (11.4.2018)

Lord Lisvane (Lord Tyler, Lord Goldsmith, Lord Cormack) (to Clause 7)
P.11 HL Bill 79 Running List of amendments (11.4.2018)

Lord Lisvane (Lord Tyler, Lord Goldsmith, Lord Cormack) (to Clause 8)
P.14 HL Bill 79 Running List of amendments (11.4.2018)

Lord Lisvane (Lord Tyler, Lord Goldsmith, Lord Cormack) (to Clause 17)
P.26 HL Bill 79 Running List of amendments (11.4.2018)

Speaking points:

- 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 Parliament to consider post-Brexit legal changes, this is undermined by indications that there will be a transition or implementation period after March 2019

- The Government has disavowed any intention to use Henry VIII powers to make significant policy changes, including changes to substantive rights protections. Why will it not put this promise in the Bill?

- The Bill contains weaker safeguards than legislation with less far-reaching delegated powers provisions, such as those in the Legislative and Regulatory Reform Act

- People who voted for Brexit did not vote to give Ministers powers to take away their fundamental rights and freedoms

[5] HL Deb 7 March 2018, vol 789, cols 1181 – 1182.

Abandoning protections: The Charter of Fundamental Rights and the general principles

In its current form, the Withdrawal Bill excludes the Charter of Fundamental Rights of the European Union from retained EU law and will remove the ability for legal claims to be brought based on the general principles of EU law.

This will have profound consequences for the promotion and protection of human rights after withdrawal. It runs counter to the stated purpose of the Bill – 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. As Lord Pannick opined at Committee:

> "*The real question is why this Bill should make an exception for one element of European Union law, the charter. There is no justification for that whatsoever*."[6]

It is perfectly possible to retain the Charter and deal with any redundant sections after exit, just as with the rest of retained EU law. In so far as the future framing of the Charter requires careful thought and given there may be discomfort with its provisions remaining 'supreme', the same could be said of each and every other part of retained EU law.

That is precisely why complex questions around appropriate policy changes are not meant to form part of this Bill.

It is simply inappropriate to take the significant step of stripping away existing rights and protections after limited debate, in a Bill the Government avows makes no substantive or policy changes to our domestic legal framework.

Leaving our rights behind: The Charter

The question of the distinct value of the Charter in the UK's human rights framework and, perhaps, discomfort with the power it gives our judiciary to strike down rights infringing primary legislation, has proven highly contentious since the publication of the Bill. Simply, this debate has arisen because the Government has taken the extraordinary step of copying and pasting the entirety of EU law into domestic law whilst leaving its key human rights component – the Charter – behind.[7]

That is extraordinary, first, because in failing to keep 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 the Bill is to ensure continuity and certainty in UK law after

[6] HL Deb 26 February 2018, vol 789, col 550.
[7] Clause 5(4) of the Bill excludes the Charter from 'retained EU law'.

withdrawal. This is the 'general rule' that "the same rules and laws will apply after exit as the day before"[8]. Indeed, the Government's position is that the Bill "does not aim to make major changes to policy", instead it provides delegated powers to allow for necessary technical amendments to be made to retained EU law and promises separate primary legislation will be introduced to "make such policy changes" as desired.[9]

Excluding the Charter runs directly against this approach.

The Government's justification for this anomaly is to claim that the Charter is unnecessary and its omission from retention will not result in any loss of substantive rights protections.[10] It claims the Charter merely recognises rights existing elsewhere in EU law and, therefore, adds nothing new. However, the Government has at times expressed the contrary view – that it adds an extra layer of rights – with the implication that this is undesirable. Indeed, shortly before her elevation to Parliamentary Under Secretary of State at the Department for Exiting the European Union, that argument was strongly made by Suella Fernandes MP.[11] As recognised by Lord Davies at Committee:

> *[The Government] cannot say something is a radical and pernicious measure with substantial negative consequences but at the same time say that it has no effect at all and is merely otiose. There is a fundamental contradiction there.*[12]

Taken at face value, the Government's stated aim is that the protection of substantive rights will not be weakened by excluding the Charter. Minister of State, Dominic Raab, made this clear during Committee Stage in the Commons, stating:

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[8] See Department for Exiting the European Union, 'Withdrawal Bill: Factsheet 1' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/627983/General_Factsheet.pdf> accessed 19 February 2018. "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."

[9] See HM Government, 'European Union (Withdrawal) Bill Explanatory Notes' <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf> accessed 19 February 2018. "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."

[10] As per the Government's Right by Right analysis.

[11] Suella Fernandes and John Penrose, 'Sucking up flabby Euro-rights law is not the point of Brexit independence' *The Telegraph* (London, 18 November 2017) <http://www.telegraph.co.uk/news/2017/11/18/sucking-flabby-euro-rights-law-not-point-brexit-independence> accessed 19 February 2018. Fernandes and Penrose, in arguing for the exclusion of the Charter, describe it 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".

[12] HL Deb 26 February 2018, vol 789, col 561.

> *[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*.[13]

In an attempt to support its public assurances to that effect, the Government has since published a 'Right by Right' analysis which it says demonstrates where each right can be found in domestic law.

This analysis is wholly unpersuasive. If anything, it reveals 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.*[14]

Liberty and Amnesty International UK agree.

Furthermore, the confusion and lack of legal certainty that will result from removing the Charter from 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, after withdrawal, find itself in the bizarre position of applying retained EU law which the EU itself finds to be in violation of the Charter or interprets differently because of it, and is no longer effective elsewhere.

The Charter provides a clear framework for protecting equality, fairness, and human dignity, and challenging abuses of power. It can be retained together with the rest of EU law without issue, and applied to retained EU law, with those parts that become redundant after withdrawal being removed.

Excluding the Charter from retained EU law will significantly dilute domestic protections by: (i) removing important rights protections that have no equivalent; and (ii) removing important remedies for those who have had their rights infringed.

[13] HC Deb 21 Nov 2017, vol 631, cols 890 – 890.

[14] Equality and Human Rights Commission, 'European Union (Withdrawal) Bill – E.U. Charter of Fundamental Rights' (January 2018) <https://www.equalityhumanrights.com/sites/default/files/eu-withdrawal-bill-legal-advice-jason-coppel-qc.pdf> accessed 19 February 2018 [2].

Future gaps

It is incorrect to suggest, as the Government does, that the Charter merely reflects rights available elsewhere in EU law and that its effect can be retained by reference to those sources after withdrawal. It is widely recognised that the Charter has created new rights and, indeed, that over time further developments aligned with its aims can be expected, as with any 'living instrument' (including the European Convention on Human Rights (ECHR)).[15] In *Google Spain*,[16] for example, Articles 7 and 8 of the Charter were interpreted by the Court of Justice as the source of the 'right to be forgotten', a new and novel right without equivalent in the ECHR. Excluding the Charter from retention, therefore, removes the potential of the Charter to serve as basis for important future human rights developments, as interpreted and applied by our own courts in the future.[17]

Moreover, excluding the Charter will leave serious gaps in rights protections that will not be filled by domestic law. These are areas where other sources of rights protection, such as the ECHR, either do not cover the same substantive rights or do not do so as comprehensively or in the same manner. This situation cannot be rescued by either the corpus of retained EU law or by the vague reference in Clause 5(5) of the Bill 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 analysis takes refuge in the same unincorporated international law treaties – such as the ICCPR in the case of Article 19 Charter right to protection in the event of removal, expulsion or extradition – which it frequently argues are of limited relevance to domestic law.[18] Worse still, it cites the general principles of EU as providing equivalent rights (such as the Article 20 Charter right to equality before the law and the Article 1

[15] 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 Court of Justice. 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 19 February 2018.

[16] Case C-131/12 *Google Spain SL v Agencia Espanola de Proteccion de Datos* [2014] QB 1022.

[17] The importance of that potential may soon be felt in the critical area of LGBT rights. A recent opinion of the Advocate General of the Court of Justice in *Relu Adrian Coman and Others* was clear that the concept of a *spouse* in Directive 2004/38 (free movement) 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*" at [92]). As such, same sex couples had to be given equal rights when exercising free movement. It remains to be seen whether the Court of Justice will follow the opinion of the Advocate General – and how it will be received – but the potential for the Charter to revolutionise the lives of LGBT couples is clear. See Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Others*.

[18] At paragraph 12, weakly referring to the "presumption against violating international law when the courts interpret legislation" in discussing how rights may be reflected therein.

Charter to human dignity). These are the very same principles whose enforceability is stripped away by this Bill (discussed in more detail below). Charter principles – distinct from Charter rights but given practical legal effect by the Court of Justice[19] – are also dismissed as being of little importance.

Key examples of holes that will be left in our human rights framework after the stripping away of the Charter are:

- Article 1 (providing that human dignity is 'inviolable'): has no direct equivalent in domestic law, and the equivalent related EU general principle will no longer be enforceable after withdrawal. It currently acts as a stand-alone right that can be relied on in court. It is also a lens to interpreting other Charter rights, in a way which also has no direct equivalent in the HRA or elsewhere domestically. Examples of its importance include its use by the Court of Justice to help protect LGBT asylum seekers from inappropriate psychological tests,[20] and in cases concerning extradition of individuals to countries where they would face unacceptable detention conditions (since unlike Articles 2 and 3 ECHR there is no minimum level of severity before Article 1 is engaged).[21] It adds an additional layer of protection which will be stripped away by the Bill

- Article 8 (the right to protection of personal data): relied upon by David Davis in his successful challenge to DRIPA.[22] Article 8 will not be clearly and fully replicated after withdrawal (even with the retention of the General Data Protection Regulation)

- Article 24 (rights of the child): this stand-alone right not to be discriminated against has no domestic equivalent in UK law. Article 24 echoes wording found in the United Nations Convention on the Rights of the Child (UNCRC), providing "such protection and care as is necessary for [a child's]…well-being". This means that children's best interests must be a primary consideration in all actions relating to children (whether by public authorities or private institutions). The Charter also provides that every child has "the right to maintain on a regular basis a personal relationship and direct contact with both of his or her parents, unless that is contrary to his or her interests".[23] Although the UK has ratified the UNCRC, it has not been incorporated in

[19] See C- 547/14 *R (Philip Morris Brands Sarl) v Secretary of State for Health* [2017] QB 327. Within, the Court of Justice deployed the Article 35 principle that there be a "high level of human health protection" in rejecting a claim that EU law restrictions on tobacco labelling and packaging contravened freedom of expression in Article 11 of the Charter
[20] Case C-473/16 *F v Bevandorlasi es Allampolgarsagi Hivatal*.
[21] See Joined Cases C-404/15 and C-659/15. Also see Case C-112/00 *Schmidberger* EU:C:2003:333 [80].
[22] See *David Davis and Others v Secretary of State for the Home Department* [2015] EWHC 2092 (admin).
[23] Article 24(3).

full into UK law and therefore – unlike the Charter – is not directly enforceable and cannot be relied on by children whose rights have been infringed.

- 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 26 (disability rights): goes further than domestic law, including providing for specific measures to be put in place to ensure "independence, social and occupational integration and participation" in community life. This is more wide-reaching than the Public Sector Equality Duties or the – potentially soon only to be interpretive – EU general principles of non-discrimination and equal treatment. This is in part a reflection of the UN Convention on the Rights of Disabled People ('CRDP') which has been ratified by the EU. Article 19 of the CRPD, requiring that people with disabilities are able to choose where and with whom they live is implicit in Article 26,[24] with no direct enforceable domestic law equivalent. In Germany, moreover, it has been used to require access to a profession be modified to ensure access to the workplace for disabled persons whether or not they are already in employment, in a way which arguably goes further than existing UK domestic legislation.[25] Especially when read together with Articles 1 and 14 (the right to vocational education), Article 26 provides protections which will be lost if the Charter is not retained

  Article 47 (the right to an effective remedy): is broader than the Article 6 ECHR right to a fair hearing in the determination of civil rights and obligations. It extends to cover areas like immigration hearings (which the ECHR does not protect). Article 47 has been interpreted as compelling proper disclosure of reasons for decisions made in (highly controversial) closed material procedures in order to ensure 'satisfactory guarantee of fairness'.[26] 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

During Committee, Peers raised concerns about the potential implications of not retaining the Charter for Northern Ireland. The protection of fundamental rights is central to the Good Friday Agreement and has its own dedicated section.[27] The Good Friday Agreement

[24] See, for example, EU Fundamental Rights Agency, 'From Institutions to Community Living: Part II: Outcomes for persons with disabilities' (October 2017) <http://fra.europa.eu/en/publication/2017/independent-living-outcomes accessed> 20 February 2018.
[25] *Woman v Employment Agency* (German Federal Social Court) <http://fra.europa.eu/en/caselaw-reference/germany-federal-social-court-b-11-al-514-r> accessed 20 February 2018.
[26] See *ZZ v Secretary of State for the Home Department* [2013] QB 1136.
[27] See the section 'Human Rights' under 'Rights, Safeguards and Equality of Opportunity'.

requires “at least an equivalent level of protection of human rights” is maintained between Northern Ireland and Ireland.[28] If the Charter is not retained, Northern Ireland will not benefit from the protection of the Charter. As illustrated above, the Charter protects a wider range of rights than other instruments to which the UK is a party, for example, the ECHR. As a consequence, if the Charter is not retained, a situation will arise whereby Ireland – as a party to the Charter – provides for greater levels of rights protection than Northern Ireland; calling into question the UK’s commitment to one of the central tenets of the Good Friday Agreement.

Remedy

Currently the Charter sits alongside the Human Rights Act 1998 (HRA), 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 a ‘victim’ under Section 7 of the HRA. If the Charter is not retained, ordinary people will thus lose a valuable remedy for violations of their rights, even if the same substantive rights can be accessed through alternative mechanisms.

Moreover, although the Charter applies in a narrower range of cases (those engaging EU law), it provides a stronger remedy for victims of abuses. Domestic courts are empowered to strike down legislation which violates Charter rights, whereas under the HRA, 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. On the first point, the Government has expressly provided in Clause 5(2) of the Bill for domestic courts to continue being able to strike down primary legislation where it conflicts with retained EU law – the supremacy principle – after withdrawal. It therefore appears perfectly acceptable to permit this stronger remedy for unlawful behaviour to continue, so long as 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 the same laws before their retention.

<u>Amendments to support (retention of the Charter):</u>

Lord Pannick (Lord Goldsmith, Baroness Ludford and Lord Deben)
P.6 HL Bill 79 Running List of amendments (11.4.2018)

[28] Good Friday Agreement, para 9.

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 found to be incompatible (paragraph 3, Schedule 1).

When pressed to explain the Government's position on the general principles – and why the right of action founded on them has been removed by this Bill – Lord Keen told this House during Committee on 5 March "these are retained as an interpretive tool. It may impact upon the matter of remedies but not on the issue of rights"[29]. Amnesty International UK and Liberty respectfully disagree.

To strip rights of their accompanying remedy – their enforceability – is to strip them of their practical value. That is why effective recourse to a court or tribunal or another body competent to take binding decisions and award appropriate relief is rightly prioritised in all areas of international human rights law, including the ECHR and the EU Charter itself. Without such recourse, the right is of limited value.

This basic understanding of how rights and the rule of law work is why the Government's policy decision to carry over the general principles but not the accompanying right to seek justice in a domestic court when they have been breached is so concerning.

The justification for that decision delivered by the Solicitor General in the House of Commons was that "it would not be right to allow "general principles" challenges… because that is not in line with the purposes of Brexit"[30]. Put another way by Lord Keen in this House, "allowing" such challenges to continue "would not be in keeping with our undertaking—our promise—to return sovereignty to this Parliament"[31].

It is a justification which cannot withstand proper scrutiny. It is not one which has been applied to any area of EU law other than human rights and is not in keeping with other aspects of the Bill. As the Rt Hon Dominic Grieve MP responded in the Commons:

> *"My hon. and learned Friend's argument would make more sense if the Government had not decided to retain the principle of the supremacy of EU law in the Bill. Once they have done that, removing the mechanism of a*

[29] HL Deb 5 March 2018, vol 789, col 964.
[30] HC Deb 16 Jan 2018, vol 634, col 781.
[31] HL Deb 5 March 2018, vol 789, col 965.

challenge on the basis of general principles creates something that I think is rather odd."[32]

More than odd, the removal of that mechanism from human rights protections, and only from human rights protections, undermines the Government's stated aim with this Bill of ensuring continuity of rights and rule of law that is currently enjoyed.

The general principles of EU law include important protections which individuals have relied on in the UK to enforce their rights. If this Bill is not amended to remove the Schedule 1 paragraph 3 bar on such enforcement actions, protections that ordinary people currently enjoy will be diminished.

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.[33] The reason that case is so often cited is that it is precisely the kind of challenge which is so critical for rights protection and yet would not be possible in the future because of Schedule 1 paragraph 3.

As Lord Goldsmith reminded the House during Committee stage "cases concerning caps on compensation and equal pay cases have depended upon the general principles". Furthermore, the general principle of effectiveness was also relied on in the recent Supreme Court case striking down employment tribunal fees "that disproportionately affected disadvantaged women and low-paid workers"[34].

Any aspects which no longer make sense after Brexit – such as general principles relating to the functioning of the Union – could be amended using powers designed to make necessary technical changes, leaving the ability to rely on relevant general principles in court.

The Government promised during Committee Stage that it is looking again at these issues to see if "this part of the Bill can be improved"[35]. Peers will remember that the same promise was made to the Commons during the Committee Stage debate on the general principles. The outcome at Report – an offer to extend actionability for three months – was rightly described as "frankly rather paltry"[36] by Dominic Grieve, whose proposed amendment had been withdrawn in response to that promise.

From the perspective of the rights of ordinary people – those who benefit from these protections – this approach will result in a significant, unnecessary and negative change.

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[32] HC Deb 16 January 2018, vol 634, col 781.
[33] *Walker v Innospec Limited and others* [2017] UKSC 47.
[34] HL Deb 5 March 2018, vol 789, col 959.
[35] HL Deb 5 March 2018, vol 789, col 965.
[36] HC Deb 16 Jan 2018, vol 634, col 739.

Steps must be taken to ensure the Government keeps to its stated aims and maintains the status quo. Schedule 3 paragraph 1 must be deleted.

Model amendment to support (retaining the actionability of the general principles):

At the time of publication, an amendment has not been tabled at Report to retain the actionability of the general principles. We urge Peers to consider tabling the following amendments which are based on those sponsored by Lord Goldsmith at Committee.

Page 16, line 17, leave out paragraphs 2 and 3 and insert—

"2A Any general principle of EU law will remain part of domestic law on or after exit day if—

(a) it was recognised as a general principle of EU law by the European Court in a case decided before exit day (whether or not as an essential part of the decision in the case);

(b) it was recognised as a general principle of EU law in the EU Treaties immediately before exit day;

(c) it was recognised as a general principle of EU law by any direct EU legislation (as defined in section 3(2) of this Act) operative immediately before exit day; or

(d) it was recognised as a general principle of EU law by an EU directive that was in force immediately before exit day.

2B Without prejudice to the generality of paragraph 2A, the principles set out in Article 191 of the Treaty on the Functioning of the European Union shall be considered to be general principles for the purposes of that paragraph.

2C For the purposes of paragraphs 2A and 2B the exit day appointed must be the same day as is appointed for section 5(1) of this Act and must not be before the end of any transitional period agreed under Article 50 of the Treaty on the Functioning of the European Union.

Page 16, line 32, leave out "Charter of Fundamental Rights,"

Page 17, line 1, leave out "Charter"

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. Now is not a time – nor is there time in this process – for complex debates about 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 the rights of ordinary people – those who 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:

- Not retaining the Charter is a glaring, unexplained exception to the core rationale of the Withdrawal Bill: the Bill should ensure legal continuity after withdrawal rather than slip in substantial policy changes

- The Charter secures important rights that may not be fully secured otherwise, including those to dignity, privacy and data protection, education, disability, equality rights (including LGBT rights) and rights for the elderly

- Aside from categories of rights, the Charter gives victims of rights violations more powerful remedies than exist in 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 those Charter rights they do not believe are worthy of retention. 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 not a right