Rt Hon David Davis MP, Secretary of State for Exiting the European Union
Department for Exiting the European Union
Correspondence Team
9 Downing Street
London
SW1A 2AS

2 November 2017

Dear David,

European Union (Withdrawal) Bill

As you will be aware, the Joint Committee on Human Rights is currently scrutinising the European Union (Withdrawal) Bill in light of the requirements of human rights law. At the outset, we note that the Government has yet to publish its memorandum detailing the Bill’s compatibility with the European Convention on Human Rights. We would be grateful if publication could be expedited.

In the meantime, the Government’s position, as we understand it, is that the “fundamental rights and principles” underpinning the Charter will be retained in domestic law such that there will be no loss of rights following exit day. Further, the Government has stated that the relegation of “general principles” from supremacy to non-justiciability is an appropriate step in disentangling UK law from EU law and restoring parliamentary sovereignty.

The Bill, as currently drafted, raises a number of significant questions regarding the human rights implications.

Scope, substance and justiciability

The Committee is concerned with the Bill’s effect on the scope, substance and justiciability of rights available after exit day.

Firstly, the term “fundamental rights and principles” is undefined in the Bill. It is, therefore, unclear as to which Charter provisions are “rights”, which are “principles”, and which are considered “fundamental” for the purpose of retention in domestic law. The Government’s assertion that no rights will be lost is therefore difficult to assess without clarification as to the exact meaning of “fundamental rights and principles”.

Secondly, we note that some of the Charter provisions are wider in substantive scope compared to the original source of the rights, such that there may be a divergence of application and interpretation between the Charter and the original source.

Thirdly, some Charter provisions have been recognised by the CJEU as “general principles”, such as legal certainty, proportionality, and equality before the law. The rights contained within the European Convention on Human Rights are also “general principles” by virtue of Article 6(3) of the Treaty on European Union (TEU). Schedule 1 paragraph 3 of the Bill provides that “general principles”, recognised as such by the CJEU, would be retained, however, they would lose their status of supremacy and justiciability under EU law. The relationship between undefined “fundamental rights and principles” and non-justiciable “general principles” is uncertain.

Consequently, the Committee is concerned with the justiciability of the retained “fundamental rights and principles” and the remedies available to individuals in the absence of the Charter. We pose a number of questions to help us understand these issues.

**Future amendment**

Further, we note that retained “fundamental rights and principles” may be subject to future amendment, revocation or repeal by way of secondary legislation. The Bill contains wide powers for Ministers to use delegated legislation for the purpose of correcting deficiencies in legislation that arise from the UK’s withdrawal. There is a limited safeguard within the Bill that prevents the use of these powers from amending, repealing or revoking the Human Rights Act 1998 or any subordinate legislation made under it. However, there is nothing within the Bill that would prevent these powers being used to amend, repeal or revoke the retained “fundamental rights and principles”, if such powers were to be exercised in accordance with the prescribed purpose (i.e. to deal with a deficiency).

The Committee’s overwhelming concern is the lack of legal certainty provided for by the Bill. In order to assist us with our scrutiny and to identify the true human rights implications of this Bill, we would be grateful if you could clarify the following:

**Defining “fundamental rights and principles”**

**Q1:** What is the definition of “fundamental rights and principles” in clause 5(5) of the Bill? In particular:

a. Does this term encompass all the provisions of the Charter?

b. If not, can you please specify which provisions of the Charter are to be retained within domestic law and which are not?

c. Which Charter provisions do you consider to be “rights” and which do you consider to be “principles”? What is the legal effect of this difference?
**Status**

**Q2:** What will be the status of "fundamental rights and principles" in domestic law? For example:

a. Are they part of "retained EU law"? If so, do they retain the status of supremacy by virtue of clause 5(2)? Can they be used to disapply primary and quash secondary legislation made before exit day? OR

b. Are they merely retained by virtue of their original source? OR

c. Are they *sui generis* – if so, how are they to be interpreted and applied?

**Justiciability**

**Q3:** Which "fundamental rights and principles" will be justiciable in domestic law post-exit, by what means, and what remedies will be available?

**Q4:** What is the relationship between "fundamental rights and principles" in clause 5(5) and non-justiciable "general principles" in Schedule 1 paragraph 3?

**Q5:** Please list the instruments which underpin the provisions of the Charter but which have not been incorporated into domestic law. Further:

a. Does the Government intend to legislate to give effect to those instruments?

b. If so, which instruments and on what timescale?

c. What safeguards will be introduced to protect these rights from amendment, revocation or repeal under the Bill?

**Courts**

**Q6:** If the UK courts are instructed to "take into account" judgments of the European Court of Human Rights (section 2 Human Rights Act 1998) and may "have regard" to the CJEU case law pre-exit day (clause 6), how are they to proceed when there are diverging interpretations of the same right?

It is likely that the Committee will want to take evidence urgently on these issues. It would be helpful to receive a response by the 20th of November.

Yours sincerely

[Signature]

Rt Hon Harriet Harman MP
Chair