Dear Harriet,

European Union (Withdrawal) Bill

Thank you for your letter of 27 November 2017. I hope that this letter and the attached analysis undertaken by my department on the Charter of Fundamental Rights provides further clarity on the issues you have raised. Colleagues at the Ministry of Justice will be writing to you separately to respond to your further points relating the Committee’s report entitled ‘The human rights implications of Brexit.’

For the purposes of this letter, “retained EU law” means all legislation which will be domestic law after exit by virtue of Clauses 2, 3 or 4 of the European Union (Withdrawal) Bill. This definition excludes rights which would otherwise be preserved but have been specifically excluded by that Bill.

Definition of “fundamental rights and principles”

Your letter clarifies that the term “fundamental rights and principles” refers to “the rights and principles which underlie the Charter and which are to be found elsewhere in EU law.”

i. Are we correct to infer that all the provisions in the Charter would fall within this definition and would be retained in domestic law after exit day?
Further, it is important that the Government goes beyond citing examples and clearly identifies which of the underlying rights and principles will confer an enforceable right and which will be retained merely for interpretive purposes.

ii. Please can you clarify which of the provisions you consider to be rights and which you consider to be principles in domestic law after exit day?

The attached analysis sets out for each provision of the Charter where the underlying rights and principles will continue to exist as part of retained EU law. Where possible, the analysis refers to the explanations relating to the Charter, when providing references to the underlying sources of law to the articles in the Charter.

As stated in Protocol 30, the Charter did not create any new rights. Instead it was intended to reaffirm the rights that already existed in EU law - the bill sets out how this underlying law is being retained in UK law at the point we exit the EU.

Retained EU law which conferred an enforceable right before exit will continue to do so after exit. As set out in our previous letter, the explanations to the Charter do not give an exhaustive list of the provisions of the Charter which are principles rather than enforceable rights. The attached analysis therefore seeks to set out with the greatest clarity possible how underlying rights and principles will be retained.

Status of fundamental rights and principles based on the source law

Charter provisions based on the ECHR

iii. Where the source of the Charter provision is the ECHR, but the scope of the Charter provision is wider, will the wider scope of these rights be lost?

As set out in the Charter Protocol, the Charter reaffirmed rights and principles which were already recognised in EU law. The Charter does not create new rights based on the ECHR. Therefore, any wider scope of the rights set out in the Charter as compared to the ECHR should already be recognised in EU law, which is being retained under the Bill, subject to the exceptions set out at Schedule 1. As you noted in your letter, the Government is currently considering the position on general principles set out in paragraph 3 of that Schedule. The Government is confident that the approach in the Bill does not undermine the protection of substantive rights.

Charter provisions based on EU legislation

It is important to note that some rights will be preserved in retained EU law by virtue of a combination of several of clauses 2, 3, and 4.
iv. Which of the Charter provisions will be preserved in EU-derived domestic legislation by virtue of clause 2?

Clause 2 of the Bill preserves all domestic legislation which implements EU law or is otherwise related to the EU or the EEA. The attached analysis gives examples of domestic legislation which provides for rights found in the Charter.

v. Which of the Charter provisions will be converted from direct EU legislation into domestic law by virtue of clause 3?

Clause 3 of the Bill converts specified direct EU legislation (regulations, decisions and tertiary legislation) into domestic law. The attached analysis gives examples of direct EU legislation which provides for rights found in the Charter.

vi. Which of the Charter provisions will be converted from directly effective EU rights into domestic law by virtue of clause 4?

Clause 4 of the Bill saves other directly effective rights and obligations etc. (for example, those contained in the Treaties). The attached analysis gives examples of directly effective rights which provide for rights found in the Charter.

vii. Which of the Charter provisions will not be caught by clauses 2, 3, or 4 and will not, therefore, form part of “retained EU law”? How will these rights be saved?

The European Union (Withdrawal) Bill will preserve domestic laws which implement EU law and convert directly applicable EU law into UK law. The Charter of Fundamental Rights will not be incorporated into domestic law on exit day, but insofar as the rights and principles underpinning the Charter exist elsewhere in directly applicable EU law or EU law which has been implemented in domestic law, that law will be preserved and converted by the Bill.

The attached analysis sets out for each provision of the Charter where the underlying rights and principles will continue to exist as part of retained EU law. However, some provisions in the Charter constitute rights which are intrinsically linked to EU citizenship, and make sense only in the context of the relationship between a member state and the Union. These include rights like standing for election or voting in European Parliament elections or the right to petition the European Parliament. These rights will not be relevant to the UK when we exit the EU.

Charter provisions based on international conventions

vii. Various Charter provisions are based upon international conventions that have not been fully incorporated into domestic law. Will the Government commit to fully incorporate these international instruments, or will these rights be lost?

ix. Your letter states that international instruments may have been the “inspiration and guidance” for the development of EU fundamental rights, but “those instruments are not what
gives those rights and principles legal force in EU law – it is EU law which does that”. Please can you clarify what you mean by “the EU law version of those rights and principles will have effect in UK law after exit”?

As per the terms of Protocol 30, the Charter did not create new rights; it merely reaffirmed exiting rights. There are no provisions in the Charter which are based solely on international conventions or instruments and that are not found elsewhere in EU law. Therefore no rights in international conventions will be lost as a result of non-retention of the Charter. Our previous letter and the passage you refer to was seeking to explain how any rights in international instruments as they have been given effect in EU law will be retained under the Bill and continue to have effect in UK law after exit.

General principles

We note the statement of the Solicitor General, speaking in the House on 21 November, that he will revisit paragraph 3 of Schedule 1 concerning rights of action based on general principles of EU law.

x. Please can you clarify exactly which Charter rights you consider to be largely or wholly drawn from a general principle of EU law such that they will no longer provide a right of action as currently drafted?

The attached analysis sets out, where possible, when case law has identified rights reaffirmed in the Charter as general principles of EU law. For any right to be considered a general principle of EU law, it must first be recognised as such by the CJEU. Not every provision in the Charter is a general principle; of those that are, some are also based on other sources of EU law which confer enforceable rights and will be retained after exit.

Charter analysis

We note that your department will shortly be publishing an “analysis” of the Charter of Fundamental Rights. Speaking in the House on 21 November, Dominic Raab MP confirmed that this would be published by 5 December.

xi. Please can you explain why an analysis is being undertaken at this stage and for what purpose?

The Government has been open and consistent about its approach to protecting EU fundamental rights. As we have set out, the UK has a longstanding tradition of ensuring our rights and liberties are protected domestically and of fulfilling our international human rights obligations. The decision to leave the European Union does not change this.

We recognise, however, that the rights landscape is complex and our approach is to provide the greatest possible certainty. Therefore, to aid clarity on our approach we have prepared a detailed memorandum setting out how each article of the Charter will be reflected in UK law after we leave the EU. The Parliamentary Under-Secretary of State (Steve Baker MP), committed to publishing this analysis whilst providing evidence to the select committee on Exiting the European Union on 26 October.
At Commons Committee stage of the Bill, the Minister of State (Dominic Raab MP) confirmed that the Government would publish this memorandum on the 5th December. We are now meeting this commitment.

RT HON DAVID DAVIS MP
SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION