

## Meeting 3: Non-retention of the EU Charter

### DISCUSSION PAPER\*

13 November 2017

Chair: The Rt Hon Dominic Grieve QC MP

#### Introduction

The Expert Working Group met on 9 October to consider rule of law issues in relation to Clauses 1-6 of the EU (Withdrawal) Bill. One of the issues which has generated much discussion both within and outside of the Expert Working Group is the Bill's non-retention in Clause 5(4) of the EU Charter of Fundamental Rights. This paper picks up that thread and focuses on proposed amendments in relation to Clause 5(4). It also revisits some of the discussion in relation to other rule of law aspects of Clauses 1-6, in advance of the Committee stage of the Bill on those clauses.

## 1. The Non-retention of the Charter in Clause 5(4) and (5)

### a. Bill Provisions and Uncertainty

**Clause 5(4)** excepts the Charter of Fundamental Rights of the EU (CFREU) from becoming part of domestic law on or after exit day. With it, according to the Clause 6(7) definitions of 'retained domestic case law' and 'retained EU case law', goes case law relevant to the Charter, whether from the Court of Justice of the EU (CJEU) or a domestic court. Dr Charlotte O'Brien has identified 248 cases in the courts of England and Wales that cited the Charter, as well as 17 in Northern Ireland and 14 in Scotland.<sup>2</sup> The Explanatory Notes justify the non-retention on the basis that the Charter "did not create new rights, but rather codified rights and principles which already existed in EU law" and such rights and principles will be saved under the Bill (in clauses 2-4).<sup>3</sup> The Explanatory Notes explain that this is because the Charter "did not create new rights, but rather codified rights and principles which already existed in EU law" and such rights and principles will be saved under the Bill (in clauses 2-4).<sup>4</sup> Therefore, according to the Note, any

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<sup>2</sup> Evidence to the House of Commons Select Committee on Exiting the European Union, 11 October 2017, Q19.

<sup>3</sup> European Union (Withdrawal) Bill Explanatory notes (Bill 5-EN), para 99.

<sup>4</sup> European Union (Withdrawal) Bill Explanatory notes (Bill 5-EN), para 99.

references to the Charter in retained EU law (including retained CJEU case law) should be read as referring to “corresponding” rights and principles that will be retained under the Bill.<sup>5</sup>

**Subsection (5)** underscores this position by stating that the exception of the Charter from the Bill’s savings provisions does not affect the interpretation of retained EU law in light of fundamental rights or principles that exist irrespective of the Charter. The Explanatory Notes clarify that retained EU law “will continue to be interpreted in light of those underlying rights and principles.”<sup>6</sup> However, there is no certainty as to the source of these principles. Martha Spurrier asks whether the drafters are referring to international law sources or whether they were thinking only of the European Convention on Human Rights (ECHR).<sup>7</sup> Neither would be an adequate substitute for the Charter. Though the UK has ratified many UN and other international human rights treaties, their provisions are not directly effect and therefore do not act as a source for legal action or a basis for remedies. The ECHR also falls short because the Charter includes a fuller set of rights than those safeguarded in the European Convention on Human Rights (ECHR) by virtue of the HRA.

The uncertainty that these provisions create has been highlighted by several people, including The Rt Hon Dominic Grieve QC MP,<sup>8</sup> Professor Merris Amos,<sup>9</sup> and Professor Mark Elliott.<sup>10</sup> The Charter applies when the UK acts within the scope of EU law.<sup>11</sup> Though the UK will no longer be an EU Member State upon withdrawal, it will continue to apply EU law as ‘retained’ EU law. Much of the EU law that will be retained has been developed and interpreted in light of the Charter. What this means for the future development of these laws is unclear. For example, Angela Patrick asks, “Will domestic courts now be free to adopt their own interpretation of [the underlying EU law]?”<sup>12</sup>

Loss of the Charter therefore means a loss of the protections associated with that body of law,<sup>13</sup> some of which are not available under the framework of the European Convention on Human

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<sup>5</sup> European Union (Withdrawal) Bill Explanatory notes (Bill 5-EN), para 99.

<sup>6</sup> European Union (Withdrawal) Bill Explanatory notes (Bill 5-EN), para 100.

<sup>7</sup> ‘Brexit is complicated: keeping our rights is not’, *The UK in a Changing Europe* (9 October 2017), available at: <http://ukandeu.ac.uk/brexit-is-complicated-keeping-our-rights-is-not/>.

<sup>8</sup> Dominic Grieve, ‘Only a watertight withdrawal bill can put Brexit into effect’, *Evening Standard* (6 September 2017), available at: <https://www.standard.co.uk/comment/comment/dominic-grieve-only-a-watertight-withdrawal-bill-can-put-brexit-into-effect-a3628376.html>.

<sup>9</sup> Merris Amos, ‘Red Herrings and Reductions: Human Rights and the EU (Withdrawal) Bill’, *UK Constitutional Law Association* (4 October 2017), available at: <https://ukconstitutionallaw.org/2017/10/04/merris-amos-red-herrings-and-reductions-human-rights-and-the-eu-withdrawal-bill/>. This is, of course, subject to an express indication from the Government as suggested in relation to Clause 6(6) that it intends for the amended retained EU law to be interpreted retained EU case law or general principles.

<sup>10</sup> Mark Elliott, ‘The EU (Withdrawal) Bill: Initial Thoughts’, *Public Law for Everyone* (14 July 2017), available at: <https://publiclawforeveryone.com/2017/07/14/the-eu-withdrawal-bill-initial-thoughts/>.

<sup>11</sup> Case C-617/10 Åkerberg Fransson [ECR TBC], para 20; Case 206/13 Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo [ECR TBC], para 25.

<sup>12</sup> ‘Not so Great: Unpacking the human rights impacts of the (Great) Repeal’, *Doughty Street Chambers* (16 July 2017), available at: <http://brexit.doughtystreet.co.uk/post/102ebgz/not-so-great-unpicking-the-human-rights-impacts-of-the-great-repeal> (discussing this issues in light of Directive 2002/58/EC on the Privacy of Electronic Communications and Joined Cases C-203/15 and C-698/15 *Tele-Sverige & Watson*).

<sup>13</sup> Katja S. Ziegler and Cristina Saenz Perez, ‘EU Bill: ‘supermaxing’ EU Law and reducing fundamental rights protection’, *The UK in a Changing Europe* (10 October 2017), available at: <http://ukandeu.ac.uk/eu-bill-supermaxing-eu-law-and-reducing-fundamental-rights-protections/>.

Rights and the Human Rights Act 1998. For example, rights of access to a lawyer in the Charter fair trial rights provisions are applicable in the context of deportation hearings, where no such protections attach through either Articles 5 or 6 ECHR. Without the Charter, it is likely that legal challenges aimed at protecting privacy rights akin to that mounted by David Davis MP and Tom Watson MP in relation to the Data Protection and Investigatory Powers Act 2014 would be foreclosed.<sup>14</sup> In addition, the Charter offers stronger remedies than the Human Rights Act, where the only remedy available is often a declaration of incompatibility.

There is also uncertainty surrounding the relationship between EU general principles, which can be used, according to the Bill, to interpret retained EU law, but which cannot serve as a basis for legal action. Though one of the general principles of EU law is respect for fundamental rights, as has been pointed out, they will not provide the same protection “because they are vague and likely to cover only the most fundamental rights”.<sup>15</sup>

## b. Amendments

The following amendments and new clauses have been tabled in relation to the Charter provisions in the Bill.<sup>16</sup>

### NC16 (Mr Chris Leslie)

To move the following Clause—

#### **“Charter of Fundamental Rights – Government Report**

- (1) Within one month of Royal Assent of this Act, HM Government shall lay a report before both Houses of Parliament reviewing the implications of removing the Charter of Fundamental Rights from domestic law after exit day as set out in section 5(4) of this Act.
- (2) The report under subsection (1) shall set out the policy of Her Majesty’s Government specifically in relation to the fundamental rights of—
  - (a) dignity, the right to life, to freedom from torture, slavery, the death penalty, eugenic practices and human cloning,
  - (b) freedoms, the right to liberty, personal integrity, privacy, protection of personal data, marriage, thought, religion, expression, assembly, education, work, property and asylum,

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<sup>14</sup> Independent Reviewer of Terrorism, ‘CJEU judgment in Watson’ (21 December 2017), available at: <https://terrorismlegislationreviewer.independent.gov.uk/cjeu-judgment-in-watson/> (including links to the judgment and press release). Martha Spurrier writes about other Charter rights that will be lost, such as the right to physical and mental integrity, or the right to vocational and continuing training in ‘Brexit is complicated: keeping our rights is not’, *The UK in a Changing Europe* (9 October 2017), available at: <http://ukandeu.ac.uk/brexit-is-complicated-keeping-our-rights-is-not/>. See also Angela Patrick, ‘Not so Great: Unpacking the human rights impacts of the (Great) Repeal’, *Doughty Street Chambers* (16 July 2017), available at: <http://brexit.doughtystreet.co.uk/post/102ebgz/not-so-great-unpicking-the-human-rights-impacts-of-the-great-repeal>.

<sup>15</sup> Katja S. Ziegler and Cristina Saenz Perez, ‘EU Bill: ‘supermaxing’ EU Law and reducing fundamental rights protection’, *The UK in a Changing Europe* (10 October 2017), available at: <http://ukandeu.ac.uk/eu-bill-supermaxing-eu-law-and-reducing-fundamental-rights-protections/>.

<sup>16</sup> Amendments in relation to Clause 5 are current up until 7 November 2017.

(c) equality, the right to equality before the law, prohibition of all discrimination including on basis of disability, age and sexual orientation, cultural, religious and linguistic diversity, the rights of children and the elderly,

(d) solidarity, the right to fair working conditions, protection against unjustified dismissal, and access to health care, social and housing assistance,

(e) citizens' rights, the rights of citizens such as the right to vote in elections and to move freely, the right to good administration, to access documents and to petition Parliament, and

(f) justice, the right to an effective remedy, a fair trial, to the presumption of innocence, the principle of legality, non-retrospectivity and double jeopardy."

**Member's explanatory statement**

*This new clause would require Ministers to produce a report reviewing in full the implications of removing from UK law the Charter of Fundamental Rights – and the rights for UK citizens which it has help to guarantee.*

**8 (Mr Dominic Grieve)**

Clause 5, page 3, line 20, leave out subsections (4) and (5).

**Member's explanatory statement**

*To allow the Charter of Fundamental rights to continue to apply domestically in the interpretation and application of retained EU law.*

**46 (Jeremy Corbyn)**

Clause 5, page 3, line 20, leave out subsection (4)

**Member's explanatory statement**

*This amendment would remove the exclusion of the Charter of Fundamental Rights from retained EU law.*

**151 (Stephen Timms)**

Clause 5, page 3, line 26, at end insert—

"(5A) Within three months of the commencement of this section, the Secretary of State must lay before Parliament regulations to create a fundamental right to the protection of personal data.

(5B) A statutory instrument containing regulations under subsection (5A) may not be made unless a draft has been laid before, and approved by a resolution of, each House of Parliament."

**Member's explanatory statement**

*Clause 5(4) of the Bill excludes the Charter of Fundamental Rights from the 'incorporation' powers in the Bill. This amendment would require the Secretary of State*

to replicate Article 8 of the Charter (the Right to Protection of Personal Data) in UK domestic law within three months of the commencement of Clause 5.

### **378** (Tom Brake)

Schedule 1, page 16, line 6, at end insert—

“(3) The rights conferred by the Charter of Fundamental Rights are not general principles of EU law for the purposes of paragraphs 2 and 3 of this Schedule.”

#### ***Member’s explanatory statement***

*This amendment is intended to make it clear that the rights conferred by the Charter of Fundamental Rights are, in so far as they are retained in domestic law by clause 4, not subject to the exceptions in paragraphs 2 and 3 of this Schedule.*

Professor Merris Amos has suggested three options with regard to amendments, two of which pertain to the Withdrawal Bill and one to the Human Rights Act 1998:

- Adding a clause in the Bill requiring that amendments to retained EU law must comply with the Charter (though she admits this does not provide direction as to what happens if they do not);
- Requiring that amendments to retained EU law be “read and given effect in a way which is compatible with the rights set out in the EU Charter” (i.e., the HRA model). Professor Amos suggests that where this is not possible, the court could issue a declaration of incompatibility or disapply the law (where it is primary legislation);
- Amending the HRA to add the additional rights protected by the Charter. In such cases, she suggests that courts could be given the power to disapply incompatible primary legislation.<sup>17</sup>

#### **Suggested Questions for Discussion**

- Q1.1 Do the above amendments adequately address the problem of non-retention?
- Q1.2 What can be suggested as an alternative to full retention of the Charter? For example, is it feasible to suggest the retention or adoption of specific rights to protect core Charter areas or Charter rights that are not protected by the ECHR and to assist in the interpretation of retained EU law, such as a right to equality in law, or a right to data protection?
- Q1.3 Should/can an amendment be drafted that would ensure application of the Charter in relation to the interpretation of retained EU law in the same way that retained EU case law and recognised general principles are used under Clause 6(3)?
- Q1.4 Is it feasible/desirable to amend the Bill so as to require that amendments to retained EU law be “read and given effect in a way which is compatible with the rights set out in the EU Charter”?

<sup>17</sup> Merris Amos, ‘Red Herrings and Reductions: Human Rights and the EU (Withdrawal) Bill’, *UK Constitutional Law Association* (4 October 2017), available at: <https://ukconstitutionallaw.org/2017/10/04/merris-amos-red-herrings-and-reductions-human-rights-and-the-eu-withdrawal-bill/>.

- Q1.5 What other amendments can be drafted?

## 2. Amendments relating to issues discussed at Meeting 1 on Clauses 1-6

### a. The legal status of retained direct EU law: Clause 3

It is unclear from the text of the Bill whether retained direct EU law under Clause 3 will have the status of primary or secondary legislation, or whether it should be considered as *sui generis*.<sup>18</sup> Rather, Clause 3(2)(a) treats all types of retained direct EU legislation as though it has the same legal status. Clarity regarding the legal status of retained direct EU law is important because it will dictate the procedure by which such legislation can be amended (outside the context of amendments powers within the Bill), and it will determine the extent to which the law is subject to legal challenge. Moreover, if there is a conflict between retained direct EU law and another piece of domestic legislation after exit day, which norm prevails will depend on their relative status.<sup>19</sup>

There have been no **amendments** tabled in relation to the legal status of retained direct EU law. However, the following amendment may be considered to relate to the notion of legal status as it pertains to the issue of amendment powers.

#### NC58 (Jeremy Corbyn)<sup>20</sup>

To move the following Clause—

“Retaining Enhanced Protection (No. 2)

Regulations provided for by Acts of Parliament other than this Act may not be used by Ministers of the Crown to amend, repeal or modify retained EU law in the following areas—

- (a) employment entitlement, rights and protection;
- (b) equality entitlements, rights and protection;
- (c) health and safety entitlement, rights and protection;
- (d) consumer standards; and
- (e) environmental standards and protection.”

#### ***Member’s explanatory statement***

*This new clause would ensure that after exit day, EU-derived employment rights, environmental protection, standards of equalities, health and safety standards and consumer standards can only be amended by primary legislation or subordinate legislation made under this Act.*

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<sup>18</sup> Dr Jack Simson Caird argues the lattermost position. See ‘The European Union (Withdrawal) Bill: constitutional change and legal continuity’, *Second Reading* (18 July 2017), available at: <https://secondreading.uk/elections/the-european-union-withdrawal-bill-constitutional-change-and-legal-continuity/>.

<sup>19</sup> Professor Paul Craig, Written evidence to the House of Lords Constitution Committee’s inquiry into the European Union (Withdrawal) Bill, EUW0002 (6 September 2017), § 4(b), available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/european-union-withdrawal-bill/written/69633.html>.

<sup>20</sup> See also NC2 (Corbyn) in relation to Clause 2.

### **Suggested Questions for Discussion**

- Q2a.1 Is it feasible to table an amendment on the legal status of retained direct EU law?
- Q2a.2 For example, is it feasible/desirable to carry over classifications according to classification at the EU level?
- Q2a.3 Should an amendment be tabled to explain the impact of the designation in Schedule 8, paragraph 19 of retained direct EU legislation as primary legislation for purposes of the HRA on its legal status in other contexts? A similar question arises in relation to the rule in Schedule 8, paragraphs 3 and 5 that retained direct EU legislation should be treated as secondary legislation for purposes of amendment powers.