



## HRC Briefing / January 2018

### **Exclusion of the Charter of Fundamental Rights of the EU (CFREU) from the EU Withdrawal Bill and the UK Governments Right by Rights Analysis**

In the course of its passage through the House of Commons in November 2017 a number of strongly supported amendments to the EU Withdrawal Bill called on the UK Government to remove its proposal to exclude the Charter of Fundamental Rights from 'Retained EU Law'. In response Government Ministers moved to issue assurances to elected representatives about the position of the Charter within UK law.

**Dominic Raab**, Minister of State for Justice

'It is not necessary, therefore, to retain the charter in order to retain such substantive rights. With that in mind, it is right ... for me to reaffirm the Government's commitment, which the Secretary of State for Exiting the European Union made to the Select Committee, to publish a detailed memorandum setting out how each article of the charter will be reflected in UK law after we leave.

...

*If, when we publish the memorandum, ...any Member on either side of the House thinks that there is a gaping gap, we will be able to address that.'*

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Instead of addressing concerns the UK Government's '[right by right analysis](#)', published on the 5 December 2017 provides further evidence of the human rights gap that will be created if the EU Charter of Fundamental Rights is not carried over into UK law in the EU Withdrawal Bill. EU law is currently embedded in the constitution of the UK and the EU (Withdrawal) Bill is an important mechanism to ensure that human rights are protected in the UK. While the UK government insists in its analysis that removal the EU Charter it will not undermine human rights standards, the report demonstrates the contrary. This report suggests that not only is the government aware of this human rights gap, but is disingenuous when it states that it 'does not intend that the substantive rights protected in the Charter of Fundamental Rights to be weakened'.

The EU Charter began its life as a political declaration to increase the visibility of human rights within the EU and to emphasise their importance within the European

project. They were a reminder for the EU institutions and member states when acting within the scope of EU law, that human rights were and continue to be a central consideration in law, policy and other actions. The EU Charter confirmed that human rights were at the core of the EU. This was reaffirmed by the Treaty of Lisbon, which conferred on the Charter the force of law and ensured that it had the same legal force as the EU treaties. This meant that the Charter was recognised as underpinning all law and policy within the EU.

The Charter reaffirmed rights that existed within EU law, including the rights in the ECHR and the common constitutional traditions of all the member states. By codifying these rights and placing them at the core of the EU constitutional framework, the Treaty of Lisbon fortified human rights within the EU. This codification has had a significant impact on rights protections here, with the UK courts relying directly on the Charter in cases such as *Benkharbouche* and [Unison](#), ensuring that individuals can vindicate their rights through the courts. The Charter is entrenched in UK law as a constitutional safeguard to ensure that all actions within the scope of EU law are human rights compliant. The EU (Withdrawal) Bill will create a new form of law within the UK which will continue to have some of the characteristics of EU law, such as supremacy, but it will not maintain the human rights context within which that law currently operates.

While the government claims that the EU (Withdrawal) Bill will preserve domestic laws which implement EU law and convert directly applicable EU law into UK, the decision to exclude the Charter means that the overarching human rights framework which informed the development of these laws and their implementation will no longer be part of UK law. This creates a gap that cannot be rectified by relying on 'general principles' which will depend on the courts recognising an underlying human right safeguard without the guidance of the Charter. The Charter has created a codified human rights framework. It provides certainty and clarity for individuals, businesses and public bodies. Replacing this framework with the vagaries of the common law will create further complexities and complications in understanding the relevant human rights law applicable. In addition, by replacing actionable 'rights' with 'general principles' as interpretative tools, the government is making it harder for individuals to bring cases to vindicate their rights.

Moreover, by removing the Charter the government removes it as a consideration in the development of laws, policies and other mechanisms. If human rights are not explicitly considered at an early stage of development it may lead to a situation where these rights safeguards are inadvertently undermined and are instead being invoked through the courts. While the Charter incorporates ECHR rights, it modernises, supplements and expands many of these protections. In addition, the Charter protects a much more extensive list of rights including economic, social and cultural rights and

explicitly protects the rights of vulnerable groups, such as children and young people, disabled people and older people.

EU citizenship rights will continue to apply to EU citizens living in Northern Ireland. Specifically, the [Phase 1 agreement](#) between the UK and the EU confirms that ‘the people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland’. In this context, it is very worrying that the UK government considers the chapter on citizen’s rights of the EU Charter of Fundamental Rights as superfluous. The Belfast/Good Friday Agreement makes it clear that it is the birthright of everyone born in Northern Ireland to identify themselves as British, Irish or both – something that has been recognised by the UK government as an essential tenet of the constitutional settlement for Northern Ireland. In this context to refuse to recognise in law rights that are associated with this citizenship guarantee is very worrying.

The Government’s commitment to human rights is somewhat questionable in light of the ongoing threat to the Human Rights Act and the European Convention on Human Rights which is currently only paused while the government addresses the complexity of Brexit. In this context the assurances on protecting rights are problematic.

The Government gave the following [assurance](#) on the protection of rights: ‘The rights landscape is complex and our approach is to maximise certainty and minimise complexity and not remove any substantive rights that UK citizens currently enjoy.’ However, this is set against a government narrative where any criticism of this Bill is a threat to Brexit and would undermine the Government’s negotiating position with the EU. The government’s claims that it will maintain current human rights standards is also contradicted by the fact that they are simultaneously using the EU Withdrawal Bill to invest Ministers with powers to be able change any rights that exists in EU law through ministerial fiat, either by accident or design. While the rights in the Human Rights Act remain immune to such amendment, in the context of the EU Charter which provides a more extensive range of rights than those in the ECHR, this is an important, but insufficient safeguard to ensure there is no diminution of rights.

In this context, the Governments assurances on the protection of rights ring hollow and highlight why the Charter of Fundamental Rights must, as a priority, be retained in UK Law if there is to be no diminution of rights in Northern Ireland.



[www.humanrightsconsortium.org](http://www.humanrightsconsortium.org)  
[info@humanrightsconsortium.org](mailto:info@humanrightsconsortium.org)  
+44 (0)2890313780  
[@BillofRightsNI](#)