



HM Government

Review of the Balance of Competences between the United Kingdom and the European Union Fundamental Rights

Evidence: Parliamentary and Governmental

July 2014

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Contents

All Party Parliamentary Group Gypsies Travellers and Roma	4
All-Party Parliamentary Group on Modern Languages	8
Brussels & Europe Liberal Democrats	15
Liberal Democrat Home Affairs, Justice and Equalities Parliamentary Party Committee	17
Scottish Government	28
Crown Dependencies (the Isle of Man and the Bailiwicks of Guernsey and Jersey)	36
Welsh Government	37

FROM The All Party Parliamentary Group Gypsies Travellers and Roma

Dear Sir/Madam

MINISTRY OF JUSTICE BALANCE OF COMPETENCES
FUNDAMENTAL RIGHTS REVIEW

The above APPG wishes to record its support for the attached Response from Community Law Partnership to the above Review and request that you take this email as its submission

I organise the Secretariat for the group so I am not based in Parliament . The Chair is Andrew George MP . I have copied this email into his assistant XXXX so that she and your office have a record of this email

We would appreciate an acknowledgement

Regards
XXXX

Secretariat APPG
Gypsies Travellers Roma

XXXX

MINISTRY OF JUSTICE BALANCE OF COMPETENCES
FUNADAMENTAL RIGHTS REVIEW

COMMUNITY LAW PARTNERSHIP RESPONSE

1. The Community Law Partnership (CLP) is a radical, progressive firm of solicitors specialising in the law relating to Housing and Public Law. CLP incorporates the Travellers Advice Team (TAT) – a ground-breaking nationwide 24 hour advice service for Gypsies and Travellers. CLP have taken some of the leading cases in homelessness and Gypsy and Traveller law.
2. CLP supports the submission on Fundamental Rights from the Equality and Diversity Forum.
3. The Government are seeking evidence and views upon the EU's framework for ensuring that its member states respect fundamental rights and on its work to promote fundamental rights (through the Fundamental Rights Agency).
4. One commentator has said that:
*'the Fundamental Rights Review is potentially very important – the stated aim of the Balance of Competences reviews is to audit what the EU does and how it affects the UK government and those residing within the UK more generally. ...
The Review puts fundamental rights in a somewhat negative light, as a restriction on Member State action: on p10 it says "The key point is that EU fundamental rights constrain what the EU and, in certain circumstances, its Member States can do." But that is not the key point of fundamental rights at all – the key point is protecting or guaranteeing rights for individuals, organisations, etc., and the UK needs a coherent and strong policy in order to ensure that the rights of individuals and businesses within the UK are properly protected. The EU influences fundamental rights protection in different ways – for example, its institutions and Member States may be constrained to ensure protection of fundamental rights; national courts must follow the CJEU in relation to fundamental rights when interpreting or applying legislation, or considering the lawfulness of public authority action that implements EU law; and the EU's Fundamental Rights Agency carries out campaigns and educational programmes to promote rights.'*¹

The EU Fundamental Rights Framework and the Charter

5. The requirement to respect fundamental rights as a matter of EU law has been consistently recognised by the Court of Justice of the EU (CJEU) since the late 1960s. In 2000, the EU and its member states adopted the Charter of Fundamental Rights ('the Charter'). Essentially, the Charter draws together the rights that member states have already committed to respect in other international conventions and covenants (including the European Convention on Human Rights). Indeed, the preamble to the Charter states that:
The Charter reaffirms...the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member State...the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as the Social Charters adopted by the Community as well as by the Council of Europe.
6. The list includes all the civil and political rights contained in the European Convention on Human Rights as well as a number of economic, social and cultural rights.
7. When the Lisbon Treaty came into force in 2009, the Charter became a legally binding document with which EU institutions are bound to comply; and with which EU member states must also comply when they implement EU law. Article 51(1) of the Charter states that:
The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with regard for the principle of subsidiarity and to the Member States only when they are implementing EU law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers conferred on it in the treaties.ⁱⁱ
8. As a consequence individuals now have the right to complain that EU law, or national legislation that implements EU law, breaches the Charter. Complaints relating to a member state's compliance with the Charter, when implementing EU law, can be brought before the national courts (which can then seek guidance from the CJEU on the correct interpretation through the preliminary reference procedure).

The Fundamental Rights Agency

9. The EU promotes respect for fundamental rights through the work of the Fundamental Rights Agency (FRA). Excellent work has been done by the FRA in, amongst many other things, promoting and protecting the fundamental rights of Gypsies, Travellers and Roma (referred to collectively in EU documents as 'Roma') throughout Europe by producing important data and research which demonstrates the inequalities and discrimination that they face as vulnerable members of society.ⁱⁱⁱ For example, see:
FRA's 'multi annual Roma programme'
<http://fra.europa.eu/en/project/2013/multi-annual-roma-programme>

10. Without research and data such as that produced by the FRA we would not have had the April 2011 **Communication from the Commission to the EU Parliament 'An EU Framework for National Roma Integration Strategies up to 2020'** which sets goals for Roma inclusion in education, employment, health and housing across the EU.
11. To that end, EU member states were asked to adopt National Roma Integration Strategies ('NRIS'), which specify how they would contribute to the achievement of the goals and the FRA was given the important role in monitoring and assisting EU-wide efforts to implement the EU's plan for Roma integration.
12. Unfortunately, the UK Government's response to the EU's requirement that it adopt a NRIS has been disappointing. Rather than adopt a NRIS in name it published a Progress Report in April 2012 which included 28 'commitments'. However, many of those commitments seem to fall well short of the explicit measures that would need to be adopted in order to prevent and compensate for the disadvantages that Gypsies, Travellers and Roma face within our society.

Conclusion

13. It is essential that the UK Government respects fundamental rights when it implements EU law and that the FRA continues to be given the support and funding it needs so that it can promote the rights of Gypsies, Travellers and Roma and help eradicate the discrimination and social exclusion that they face as some of the most marginalised and vulnerable members of our society.

Community Law Partnership

8th January 2014

ⁱ See Catherine Taroni at <http://eutopialaw.com/2013/11/25/fundamental-rights-and-the-uks-balance-of-competences-review/>

ⁱⁱ The UK Government along with Poland sought an 'opt out' from the Charter through *Protocol No. 30 to the Lisbon Treaty on the application of the charter to Poland and the UK*. Whether the Protocol has any substantive effect is questionable. In *N.S. v Secretary of State for the Home Department*, the Advocate General of the Court opined that it did not amount to an opt out. He held that the wording of Article 1(1) of the Protocol effectively repeated what all member states had already committed to in Article 51.

ⁱⁱⁱ Excellent work is also, of course, done by the FRA in many other areas – see for example their 2013 Annual Work Programme: http://fra.europa.eu/sites/default/files/awp-2013_en.pdf

ALL-PARTY PARLIAMENTARY GROUP

on

MODERN LANGUAGES

Chair: Baroness Coussins (Crossbench) **Vice Chairs:** Paul Maynard MP (Conservative), Nia Griffiths MP (Labour), Baroness Sharp of Guildford (Liberal Democrat)

SUBMISSION TO THE MINISTRY OF JUSTICE ON THE GOVERNMENT'S REVIEW OF THE BALANCE OF COMPETENCES BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION

January 2014

SUMMARY

1. The APPG on Modern Languages welcomes the opportunity to contribute to this review. Our response is general rather than specific, bringing together evidence from a range of sources to show that the UK is failing to derive the full economic, political and educational benefits from membership of the European Union, and international engagement more broadly, because of a lack of language skills.
2. We welcome moves by the Department for Business, Innovation and Skills to boost the uptake of languages in degree courses, and to bring forward new evidence¹ on the losses to the UK economy as a result of the inability to communicate freely with international partners acting as a 'tax on trade'. Similarly, we are pleased that the Department for Education has recognised the need to improve the national capacity in languages by making the study of a foreign language part of the new National Curriculum from age 7, and giving languages a certain prominence within school performance tables through the English Baccalaureate measure.

However, the need to value and develop language skills is a concern which affects **all** government departments and the review of the UK's relationship with the European Union provides an opportunity to raise awareness more widely of the need to boost Britain's linguistic capacity, in the interests of individuals' educational experience, the future competitiveness of the UK economy and our international standing and reputation.

¹ 'Research to quantify the costs to the UK of language deficiencies as a barrier to UK engagement in exporting' commissioned from Professor James Foreman-Peck, Director of the Welsh Institute for Research in Economics and Development at Cardiff University, and due to report on 31 January 2014.

BACKGROUND

3. The APPG was established in January 2008 and its terms of reference are to:
 - explore the educational, skills-related, employment, competitive and cultural benefits of learning and using modern languages throughout the United Kingdom;
 - provide a parliamentary forum for information exchange, discussion and consultation; and
 - encourage and support policies and action to improve the take-up of modern languages in schools, further and higher education, in the workplace and in the community.
4. Over the last six years, the APPG has held regular meetings at which we have had the benefit of hearing from and questioning a wide range of experts. These have included employers and departmental officials, academics, researchers and policy advisers, professional and specialist bodies as well as teachers, head teachers and pupils.
5. Recent compelling evidence shows that the UK's capacity in languages falls far below that required by business, government and third sector organisations in order to increase UK exports, attract inward investment, protect national interests in UK security and global influence, and facilitate knowledge transfer and innovation internationally².
6. **Our overall conclusion is that the national deficit in languages is now so serious that it needs to be acknowledged and redressed by coordinated cross-government action across a range of departments including the FCO, BIS, the Home Office, the Treasury and the Department for Education.**

LANGUAGE SKILLS AND EXPORTS IN THE SINGLE MARKET

7. There is now a considerable body of evidence, both policy-oriented and academic, which shows that languages are linked to export growth. In the last year or so, both the CBI and the British Chambers of Commerce have published reports calling for improved language skills among British graduates and college leavers in order to boost export performance³. Business leaders say that language availability, instead of market strategy, is driving exporting decisions, and that a lack of language and cultural capability is a barrier for non-exporters who want to start trading internationally.

² See in particular: British Council, 'Languages for the Future. Which languages the UK needs and why'. 2013 and British Academy, 'Languages, the State of the Nation'. 2013.

³ CBI/Pearson, 'Changing the Pace. Education and Skills Survey 2013'. British Chambers of Commerce, 'Exporting is Good for Britain', 2012.

8. The econometrist Professor James Foreman-Peck has shown that market failure in language skills affects the UK disproportionately: whilst there is an inbuilt tendency for everyone to under-invest in language skills, patterns of world trade show that, allowing for other factors, the UK is more likely than other countries to gravitate towards trading partners which have a language in common⁴. A pre-publication report on his latest research for BIS states that language deficiencies are costing the UK economy **£48 billion per year**, or 3.5% of GDP⁵.
9. Lack of language skills acts as a barrier to the **free movement of services** across the EU, since effective communication is a key factor in service provision. However, service providers in other member states are currently at an advantage over Britain given that English is the first language taught in most other European countries, whereas British companies are at a relative disadvantage through not having access to the necessary language skills.
10. The CBI/Ernst and Young report ‘Winning Overseas’ makes it clear that the need to improve foreign language competence is not simply a question of communication skills to service existing or future markets, but about the **internationalisation of business outlook** and the rebranding of the UK as being ‘open for business’.⁶ Whether in agriculture, energy or information technology, the inability to move beyond English limits access to innovative practices and international networks for **knowledge transfer**.
11. The British Academy’s report ‘Languages, the State of the Nation’ showed how a tendency for business and management to under-estimate the importance of foreign language skills – combined with the practice of recruiting foreign nationals with language skills, has the effect of depressing demand for languages and the motivation to study them within the UK population, creating a **vicious cycle of monolingualism**⁷.
12. **We conclude that stimulating the acquisition and exploitation of language skills would bring important benefits to British export performance and would allow employers in a range of sectors to take greater advantage of the Single Market in goods and services.**

LANGUAGE SKILLS AND JOBS IN THE SINGLE MARKET

⁴ James Foreman Peck, ‘Costing_Babel. The Contribution of Language Skills to Exporting and Productivity’.

⁵ ‘UK businesses are lost for words’, The Guardian, 10 December 2013

⁶ CBI/Ernst and Young, ‘Winning Overseas: Boosting Business Export Performance’, 2011.

⁷ British Academy, ‘Languages, the State of the Nation’, 2013.

13. Poor or non-existent language skills impact on the opportunities for UK individuals to take advantage of **labour mobility** within the Single Market, whilst leaving them open to competition from incomers. Whilst UK employers are dissatisfied with the language skills of British graduates, they are enthusiastic recruiters of multilingual graduates from other EU countries. In a recent survey, nearly 57% of UK employers said they recruited from other EU countries, compared with a European average of 30%⁸. Although this shows that the Single Market is working well in terms of the free movement of persons, British workers are limited in their ability to take advantage of this freedom in the opposite direction because of their lack of language skills.
14. The UK Treasury has noted that the UK's financial services sector benefits from the widespread use of English. Whilst this may be true, the British Academy's study of the labour market for languages⁹ shows that this and other highly globalised industries such as energy and IT also require skills in other languages. An over-reliance on English is already harming our international interests as UK monolinguals find themselves unable to compete for key jobs and this is harmful not only to the employment and career prospects of UK nationals, but to the UK's capacity for influence within these global companies.
15. The availability of language skills is one of the key factors for attracting **foreign direct investment**, as shown in the global property company Cushman and Wakefield's annual European Cities Monitor. London regularly performs well in this survey because of the diverse range of other languages spoken. In its 2011 report 'Making the UK the best place to invest', the CBI cited the English language as one of the UK's key strengths which is however offset by our relative inability to work in multiple languages¹⁰. Scotland recently lost the opportunity to attract the European sales headquarters of a major petrochemical company because of the inability to recruit staff with language skills¹¹.
16. The social and economic consequences of poor language skills are not evenly spread across the UK. Participation in language learning beyond the compulsory phase is strongly linked to social advantage and children in less developed and more deprived areas of the country are less likely to gain qualifications such as a GCSE or A level in a language¹². This adds to regional or local cycles of deprivation in terms of inward investment, unemployment rates and access to international opportunities.

⁸ Eurobarometer and European Commission, *Employers' Perception of Graduate Employability Analytical Report*, 2010.

⁹ Languages. The State of the Nation, 2013

¹⁰ CBI, 'Making the UK the best place to invest' 2011

¹¹ Grove, D., 'Talking the talk, so that Scotland can walk the walk. The case for improving language skills in the Scottish workforce'. 2011

¹² See Languages, the State of the Nation, op cit.

17. **Improving Britons' language skills would enable individuals to take greater advantage of opportunities for employment within the Single Market, and be better equipped to compete for jobs at home. It would also ensure help attract inward investment, particularly in areas which are currently poorly supplied with language skills.**

LANGUAGES AND INTERNATIONAL INFLUENCE

18. The Foreign and Commonwealth Office has noted that a **shortage of British staff in international institutions** is detrimental to the national interest and undermines UK policy influence internationally. It highlighted that UK nationals make up only 5% of the European Civil Service, whilst accounting for more than 12% of the population of Europe. In 2011 only 2.6% of applicants were from the UK - fewer than from any other member state - and a key reason for this was that English-speaking applicants must offer either French or German as a second language¹³. This situation is no doubt repeated in international organisations worldwide.
19. In recognition of the importance of languages as fundamental to effective diplomacy, the Foreign and Commonwealth Office has re-opened its language centre, and the Foreign Secretary William Hague has spoken eloquently of the way that language skills help to predict and influence behaviour in foreign cultures¹⁴.
20. An enquiry last year by the British Academy showed that in a rapidly changing landscape for international engagement and diplomacy, languages skills are essential for **effective security and international influence**¹⁵. The Rt Hon Richard Ottaway MP, Chair of the Foreign Affairs Select Committee, says that this issue has been highlighted in almost every enquiry he has undertaken since 2010.
21. **Improving Britain's language capacity would enable UK nationals to have greater influence in international organisations both within and beyond the European Union.**

LANGUAGES AND INVOLVEMENT IN EUROPEAN COOPERATION PROGRAMMES

22. UK participation in EU mobility programmes, which improve employability and equip individuals with skills and competences to work across borders, is a fraction of that of comparator countries such as France and Germany. This is a particular concern in the light of the new **Erasmus**

¹³ Blog by David Lidington, Minister for Europe on FCO website accessed 13/8/12
<http://blogs.fco.gov.uk/davidlidington/2012/03/20/more-british-nationals-in-the-eu-civil-service-can-transfrom-our-influence/>

¹⁴ <https://www.gov.uk/government/speeches/foreign-secretary-opens-foreign-office-language-school>

¹⁵ British Academy, 'Lost for Words. The need for languages in UK diplomacy and security'. 2013.

Plus programme starting in January 2014 which will provide opportunities for 4 million Europeans to study, train, gain work experience or volunteer abroad.

23. In 2011, only 4,265 Britons took part in work experience placements in another European country under the Leonardo programme, compared to more than 10,000 French and nearly 15,000 Germans¹⁶.
24. UK participation in overseas university placements under the Erasmus programme is around one third that of France and Germany, with only 13,662 Britons benefitting in 2011/12 compared to more than 33,000 in both France and Germany and nearly 40,000 in Spain¹⁷.
25. European Parliament research into take up of Erasmus placements, which interviewed students in 7 countries, found that lack of language skills was the major reason, after finance, why students were put off taking part. The deterrent effect of lack of foreign language skills was highest amongst UK students (62% compared to an average of 41% across all countries)¹⁸.
26. Organisations such as the CBI and the Council for Industry and Higher Education (CIHE) have stressed the importance of international experience for acquiring the language and cultural skills which are increasingly valued by employers¹⁹, and the Department of Business, Innovation and Skills' Joint Steering Group on Outward Student Mobility has recommended that greater emphasis should be placed on language skills at primary, secondary and tertiary levels within the education system²⁰. The House of Lords EU Committee has also concluded that the UK's prevailing monoglot culture is a barrier to British students participating in Erasmus and other mobility schemes to the same extent as those of other member states²¹.
27. **Improving Britain's language capability would enable UK individuals to take greater advantage of the opportunities to participate in work experience and study placements offered through the new European Union programme Erasmus Plus.**

RECOMMENDATIONS

¹⁶ European Commission, *Leonardo Da Vinci Mobility Figures by Country in the Years 2000 – 2011 (Number of All Individuals Who Went on Mobility to Another Country)*, 2011, mmxi, 2011. (Latest figures available)

¹⁷ European Commission, *Erasmus Figures 2010-11*, 2011.

¹⁸ European Parliament, *Improving the Participation in the Erasmus Programme*, 2010.

¹⁹ E.g. J Diamond, A, Walkely, L, Forbes, P, Hughes, T, Sheen, *Global Graduates into Global Leaders (AGR/CIHE)*.

²⁰ Joint Steering Group on UK Outward Student Mobility, *Recommendations to Support UK Outward Student Mobility Submitted to David Willetts by the Joint Steering Group on Outward Student Mobility*, March 2012.

²¹ House of Lords European Union Committee, *The Modernisation of Higher Education in Europe*, 2012.

28. In order to ensure that the UK and its citizens derive the full economic, cultural and educational benefits from membership of the European Union, and to engage more effectively in international networks more generally, the APPG on Modern Languages urges Her Majesty's Government to implement the following:
- **A national languages recovery programme** in education and training. This should include high quality language learning with ambitious targets in both primary and secondary schools up to school leaving age, as well as opportunities and encouragement for older students to continue with a language either as a specialist discipline or alongside other studies.
 - Drawing on the resources of all government departments to **stimulate demand for language skills** through training and awareness-raising and to improve practices in the strategic management of language skills. This should include, for example, auditing the linguistic skills of existing employees, implementing training and recruitment policies which favour language skills, and improving understanding of how to use specialist language services including interpreting and translation services.
 - Appointing a **single government minister** responsible for coordinating government policy on foreign languages across departments.

*Baroness Coussins
Chair, All-Party Parliamentary Group on Modern Languages
January 2014*

What evidence is there that the impact of:

- **the Charter of Fundamental Rights of the European Union (“the Charter”);**
 - **the EU’s broader framework of fundamental rights has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**
- Please provide your response in this text box.**

The Charter of Fundamental Rights has had a growing impact since it became legally binding on the EU institutions and the Member States when implementing EU law. Examples of its positive impact include privacy considerations for citizens subject to use of body scanners at airports , safeguards for Roma people facing expulsion from France , action by the European Commission, Parliament and Court of Justice to protect the rule of law in Hungary , freedom of internet providers to conduct their business and of customers data protection rights in the Scarlet and Sabam judgements by the Court of Justice , rights of same-sex spouses or registered partners to join their family members in Malta , protection of the fundamental rights of asylum seekers under the revised Dublin Regulation .

What evidence is there that the impact of the Fundamental Rights Agency has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK? - Please provide your response in this text box.

The Fundamental Rights Agency has carried out invaluable research in recent years providing an insight into issues such as discrimination faced by Jewish people, LGBT people and Roma communities in Europe. The surveys carried out by the FRA in these areas were a ground breaking contribution to policy-making. Their results are an invaluable contribution to policies designed to promote equality for the millions affected by these forms of discrimination, both at European and national level. It was the first time this sort of in-depth research was carried out on such a scale, and no other organisation could feasibly have carried it out.

The FRA’s work is thus of great importance to those individuals affected by these phenomena and will potentially help to improve millions of lives around Europe.

The benefits to business and the economy of greater inclusion of disadvantaged groups such as Roma in society and the economy are well documented (see for example research by the Open Society Institute).

Likewise, more effective equality policies are likely to reduce the negative costs of discrimination in the workplace, for example.

What evidence is there of whether the Fundamental Rights Agency demonstrates value for money? - Please provide your response in this text box.

The FRA has just 90 staff to cover operations throughout the EU and its 500 million+ population. With a budget of just €20 million, this would seem to represent rather good value for money at less than 4 cents per EU citizen per year.

What evidence is there to demonstrate the advantages or disadvantages of the Fundamental Rights and Citizenship Programme for the UK, and individuals within the UK? - Please provide your response in this text box.

The UK is one of the most successful countries in applying for and accessing EU funding under the Fundamental Rights & Citizenship Programme. For example the Child Rights International Network benefited from a grant of €137,000 in 2013, Fair Trials International from €116,000 in 2010 and LGBT Youth Scotland from €151,000 in 2010 .

**Balance of Competences Review: Liberal Democrat Home Affairs, Justice and Equalities
Parliamentary Party Committee**

Executive Summary

- I. The Liberal Democrat Parliamentary Party Committee on Home Affairs, Justice and Equalities are unanimous in our opinion that Britain's participation in the European Charter of Fundamental Rights is beneficial to the UK.
- II. As a leading advocate for Human Rights globally, Britain must show itself to be a concrete adherent to international and European standards of human rights as encapsulated by the Charter of Fundamental Rights.
- III. We believe that any disentanglement or distancing from these principles and from the Charter itself would discredit Britain's reputation and undermine our voice when speaking out against abuses elsewhere.
- IV. Furthermore we believe that the European Charter of Fundamental Rights, by bringing together our international obligations and our obligations under the ECHR in one place, makes rights more visible and accessible to European citizens, governments and businesses alike.
- V. We do not believe that the Charter confers any new rights; it consolidates rights that the UK has already accepted as being legitimate. Critics have not found a strong basis for allegations of "mission creep" or inappropriate constraint on domestic law, and we believe particular attention should be paid to Article 51 of Chapter 7 which explicitly states that "the provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the *principle of subsidiarity* and to the Member States only when they are implementing Union law." This section then clarifies that "this Charter does not establish any new power or task for the Community or the Union."

- VI. We welcome the establishment of the Fundamental Rights Agency. The agency has filled the gap of monitoring fundamental rights through a variety of methods which have enabled it to pinpoint where fundamental rights violations occur, through its establishment of a reliable, systematic and sizable pool of data, as well as co-coordinating with civil society to raise awareness about fundamental rights so as to promote monitoring of compliance by ordinary citizens in a proactive manner.
- VII. The Fundamental Rights and Citizenship Programme has also directly benefited Britain, helping to fill funding gaps and contributing to projects which have delivered successful outcomes impacting on lives of groups and communities or adding to an academic body of work. Our committee sees no disadvantages in being able to access a further funding stream particularly in the current economic climate.
- VIII. The committee found no evidence that the Charter is being used to expand the competences of the EU and it is our opinion that the balance of competences are presently correct. We therefore fully support the UK's continued and full participation in the Charter of Fundamental Rights architecture.

Introduction

1. The Liberal Democrat Home Affairs, Justice and Equalities Parliamentary Party Committee ('the committee') is the primary forum for MPs, Peers and Liberal Democrat stakeholders involved in Home Affairs, Justice and Equalities issues to exchange information and ideas. The views expressed here are those of individual members and the committee collectively, but are not currently formal Liberal Democrat policy. We have decided to respond to the general principles and questions raised in the call for evidence rather than each question individually. Any oversight reflects only our decision to structure our response under main headlines rather than responding to each question separately.
2. Britain has a long and proud tradition of being a leader in the field of Human Rights both in a European and a global context. It is not surprising that it was the British Prime Minister, Winston Churchill, who negotiated and navigated the creation of the European Convention on Human Rights ('ECHR') to which we remain party to today. This was the 'big bang' moment after the Second World War which set out the minimum human right standards that we believed all individuals had a right to. Conversely, the EU established rights at different times, forms and ways. Fundamental rights were built up incrementally during the implementation of community law, something that the Charter of Fundamental Rights of the European Union ('the Charter') sought to remedy by bringing all pre-established rights under one umbrella, making it easily accessible to all citizens of the European Union. This principle is one which the committee fully supports.

The EU Charter of Fundamental Rights

3. The fact that the **charter is a modern one** means that it includes various 'third generation' rights which could not have been foreseen at the signing of the Universal Declaration of Human Rights or the European Convention on Human Rights in the 1940s and 1950s respectively, such as e-data protection and guarantees on bio-ethics. These are not rights that are alien to us as British citizens, and by making them more explicit and visible we are strengthening them. This is undoubtedly advantageous to British citizens, the government and businesses alike.
4. The committee believe that the assertion, made on page 10 of the call for evidence, that "the key point is that EU fundamental rights constrain what the EU and, in certain circumstances, its Member States can do" skews the founding vision behind the Charter. Through discussions with those that use the Charter in their practice and work a different understanding of the 'key point' is formed. Matthew Evans, Director of the Advice on Individual Rights in Europe Centre (AIRE) said that "the key point is protecting or guaranteeing rights for individuals, organisations, etc., and the UK needs a coherent and strong policy in order to ensure that the rights of individuals and businesses within the UK are properly protected." The word 'constraint' negatively skews the perception of the Charter; the committee believe it should be viewed as clear guidelines instead.

5. Turning to look at the Charter itself, and particularly Chapter VII which the call for evidence singles out, it is clear from Article 51 that the Charter does not confer any *new* rights. Article 51 states: “the provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the *principle of subsidiarity* and to the Member States only when they are implementing Union law.” It goes on to say that “this Charter does not establish any new power or task for the Community or the Union.” As Damian Chalmers, Professor of EU Law at the London School of Economics (LSE) stated in an article for the BBC, “the Charter repackages old wine in new bottles.”¹
6. The rhetoric from senior judges and politicians has been unhelpful in this regard, stoking the flames of anti-EU feeling being perpetuated in the media. This committee believes that the Government must take the lead in making certain that an evidence-based position is taken and is clear that rhetoric must not be presented as evidence. Mr Justice Mostyn, presiding on the case, appeared surprised that the Charter could be applied in domestic courts saying ‘I was sure the British government had secured an opt-out at the negotiations of the Lisbon Treaty.’ This demonstrates the need for more training for judges and practitioners so they are better informed about the Charter’s application. Hearing from representatives of JUSTICE it appears that there was far more literature, information and in-house training made available following the coming into force of the ECHR than there has been following the Charter’s accession to treaty status. This goes some way to explaining the confusion surrounding the Charter’s applicability.
7. Nevertheless, the UK did negotiate additional safeguards in the form of Protocol 30 which clarifies the effect the Charter has in UK law. Article 1 of Protocol 30 summarises its intention:

“The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.”

8. This, however, only reaffirms what went before in the sense that the Charter does not *extend* any provisions, only consolidates them. This is very important to note. For example, equal marriage which this government recently legislated for is an issue solely for UK law; the EU has no competence in this area. Where EU law is involved, however, it is beneficial for citizens and business who work, study or trade across EU borders to have a clear understanding of the law and be assured that they can expect the same human right standards.

¹ Damian Chalmers, ‘Viewpoint: EU won’t rule by charter’, <http://news.bbc.co.uk/1/hi/world/europe/8369636.stm>

9. The Court of Justice of the European Union (CJEU) has only recently (12.12.13) ruled that employees who enter into a civil partnership with a partner of the same sex must be granted the same benefits as those granted to their colleagues upon their marriage, where marriage is not possible for homosexual couples. This will be incredibly important for British citizens in equal marriages, from next year, or those entered in Civil Partnerships who choose to work in countries within the European Union who do not yet recognise equal marriage. Given the diversity of approaches across the EU, as shown in pic.1, this type of harmonisation of fundamental rights helps our citizens to fulfil their four freedoms.



10. This ruling demonstrates a longstanding tradition of the CJEU (previously European Court of Justice) to take fundamental rights into consideration. Even in our domestic courts provisions of the Charter were being referred to and relied upon before it became legally binding at Lisbon: see, *R (Yogathas) v HS* [2003] 1 AC 920 per Lord Hope at 935, para 36; *Bellinger v Bellinger* [2003] 2 AC 467 per Lord Hope at 486, para 69; *Sepet & Anr v SSHD* [2003] 1 WLR 856 (HL) per Lord Bingham at 867–68, para 15 and Lord Hoffman at 879, para 51; *R (Robertson) v Wakefield Metropolitan District Council & Anr* [2002] QB 1052 per Maurice Kay J at para [38]. In *R (Howard League for Penal Reform) v SSHD* [2003] 1 FLR 484, Munby J noted (at 495, para 51) that:

“The European Convention is, of course, now part of our domestic law by reason of the Human Rights Act 1998. Neither the UN Convention nor the European Charter [of Fundamental Rights] is at present legally binding in our domestic law and they are therefore not sources of law in the strict sense. But both can, in my judgment, properly be consulted insofar as they proclaim, re-affirm or elucidate the content of those human rights that are generally recognised throughout the European family of nations, in particular the nature and scope of those fundamental rights that are guaranteed by the European Convention.”

11. These references to the Charter should give confidence to the fact that its existence and effect on the UK, whether legally binding or not, is positive as it allows for rights to be recognised, traced back, and harmonised across Member States.

The ECHR

12. Questions 3 and 9 touch on the relationship between the EU and ECHR. This triangular relationship – with the Human Rights Act - is likely to become even more important as the EU accedes to the ECHR. **This committee welcomes the on-going process of accession of the EU to the ECHR as a sensible measure** given that all EU states must, as an accession requirement, be party to the ECHR.
13. The accession of the EU to the ECHR should, in the committee's opinion, be seen as an exercise to close any gaps in legal protection by giving European citizens the same protection from the institutions of the EU and its directives/regulations as they presently enjoy from Member States.
14. The advantage it does bring to the Government is that previously Member States were responsible for primary EU law as the consequences of a treaty. This meant an application to the ECtHR could be brought against a Member State regardless of whether the Member State had any say in implementing EU law. It is often the case the EU law is dealt with in the ECtHR but the Member State faces the repercussions, as was in the case of [Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland](#) where the Court ruled that "it is primarily for the national authorities, notably the courts, to interpret and apply domestic law even when that law refers to international law or agreements." However, this case is particularly important as the ruling went on to say that the presumption can be rebutted where the protection in the particular case is regarded as manifestly deficient". As Lock notes in his article on the issue this saw the Court introduce a two stage test.

*"At the first stage the Court examines whether an organisation provides an equivalent protection, which will lead to the presumption to apply. At the second stage the Court will examine whether that presumption has been rebutted in the concrete case before it because of a manifest deficit in the protection of human rights."*²

15. The presumption of equivalent protection in *Bosphorus* has placed the EU for many years in a privileged position in comparison to its Member States. With the EU's accession to the Convention this privilege will be removed.³

² Tobias Lock, 'Beyond Bosphorus: the European Court of Human Rights' Case law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights,' http://epubs.surrey.ac.uk/266202/3/Lock_Beyond_Bosphorus%202.pdf .

³ C. Eckes, 'One Step Closer: EU Accession to the ECHR ' Const. L. Blog (2nd May 2013) (available at <http://ukconstitutionallaw.org>).

16. This will mean that the CJEU will have to justify its position in each case rather than hiding behind the 'Bosphorus presumption' as the CJEU will have to rule before a case can be brought to the ECtHR. **This is advantageous to Governments, citizens and businesses alike as it makes the EU structures more accountable and transparent.**

Fundamental Rights Agency

17. The European Union Agency for Fundamental Rights ("FRA") was established in 2007 and commenced its work on 1 March 2007. The objective of the FRA is "to provide the relevant institutions, bodies, offices and agencies of the Community and its member states when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competences to fully respect fundamental rights."

18. Those working on the ground, which we have had wide-ranging discussions with, believe that the FRA has filled the gap of monitoring fundamental rights. This has been achieved through a variety of methods which have enabled it to pinpoint where fundamental rights violations occur, **through its establishment of a reliable, systematic and sizable pool of data, as well as co-coordinating with civil society to raise awareness about fundamental rights so as to promote monitoring of compliance by ordinary citizens in a proactive manner.**

19. The ECJ [now CJEU] has long required the Community to respect fundamental rights, but the court has been rather less willing to strike down EU legislation when it is not compatible with fundamental rights. Although the ECJ had developed its fundamental rights-related jurisprudence, it still has some way to go before it could be considered to be satisfactorily protecting fundamental rights, thus leaving a monitoring gap.

20. **The FRA has therefore in this regard fulfilled an important role of co-operating with EU legislators in the form of drafting opinions on the application of fundamental rights in the EU, and proposing appropriate recommendations on how best to form policies which respect fundamental rights rather than conflict with them.** This approach has ensured that the FRA will proactively increase the awareness of the relevant institution within the EU, and prevent the conflicting of EU legislation and fundamental rights at a much earlier stage (on ex-ante political scrutiny and ex-post judicial control, see Kum, "*Constitutionalising*

Subsidiarity in Integrated Markets", 12 ELJ (2006), 503, 525-30.22) thereby alleviating the need to hope for a favourable judgment from the ECJ. It has therefore promoted a system of pre-emptive monitoring, by sounding out to the EU legislators what could potentially lead to a violation of fundamental rights, so that the need for further monitoring down the line would not arise.

21. In addition, by averting any potential conflict between EU legislation and fundamental rights at an early stage the FRA ensures that the ECJ is not faced with sensitive and controversial decisions such as the *Bosphorus* case, where the ECJ could only offer limited protection to fundamental rights.

22. Finally, irrespective of how efficient the ECJ may be in its judicial protection of fundamental rights, it is not sufficient to rely on it as the sole protector of fundamental rights. Ignorance, lack of resources, ineffective representation, inadequate legal standing and insufficient remedies all have the capacity to thwart the judicial enforceability of fundamental rights.⁴ This can create a gap in monitoring. In this regard, **the FRA's systematic monitoring of fundamental rights through its data gathering, data analysis, and its advisory and networking roles, acts as a protective net for those who may not have access to justice for the reasons mentioned above, thereby covering an important gap in judicial enforceability of the rights of those who may not have access to justice.** This is most readily apparent in the field of social and economic rights, as contained in the EU Charter of Fundamental Rights, and which distinguishes it from other Conventions such as the ECHR. **Through the monitoring of fundamental rights, the FRA ensures that that judicial protection of these rights is as good as the protection of civil and political rights.**

23. Although the Agency has an "advisory monitoring" mandate which is limited to collecting and analysing information and offering technical assistance, through its systematic, consistent and coherent data collection and analysis, it can still make a crucial contribution in setting out normative trends within its existing mandate. Indeed, the power of the Agency is based to a great extent on the possibility of developing these standards, thereby contributing to the emergence of a common European perception of fundamental rights

⁴ P Alston, J H H Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights", in Alston (ed), *The EU and Human Rights*, OUP (1999)

issues. The emergence of a European perception of fundamental rights will hopefully raise the expectations of civil society to receive a better standard of fundamental rights protection from their political institutions, and an acceptance on the part of those institutions to strive for such better standards of fundamental rights protection and promotion.

The Fundamental Rights and Citizenship Programme

24. The Fundamental Rights and Citizenship Programme is a funding programme set up by the EU to operate from 1 January 2007 through 31 December 2013. The primary aim of the Fundamental Rights and Citizenship Programme is to develop a European society where fundamental rights and the rights derived from citizenship to the European Union are upheld and respected.⁵ The programme awards grants to projects committed to promoting these rights, chiefly in the following areas: 1) protection of the rights of the child, 2) active participation in the democratic life of the EU, 3) data protection and privacy rights, 4) training and networking between legal professions and legal practitioners, and 5) the fight against racism, homophobia, xenophobia, and anti-Semitism.⁶

25. Over the course of the programme's operation, funding has been conferred to a number of UK-based projects, including proposals from Advice on Individual Rights in Europe, Child Rights International Network, the International Organization for Migration, LGBT Youth Scotland, the University of Leicester, Fair Trials International LBG, Brunel University, Leeds City Council, Privacy International, and the University of Liverpool.⁷ These projects have researched fundamental rights issues inside and outside the UK and often partner with organizations from other countries across Europe to gather more diverse data and promote the programme's core objectives on international as well as national scales.

⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:110:0033:0039:EN:PDF> pg. 3

⁶ <http://ec.europa.eu/justice/grants/programmes/fundamental-citizenship/>

⁷ Call for Evidence, pg. 30

26. As a whole, the Fundamental Rights and Citizenship Programme offers distinct advantages for the UK and its citizens. **The funding provided by the programme offers UK-based organizations the financial resources necessary to tackle pressing fundamental rights issues within the UK and better protects the fundamental rights of individuals throughout all levels of UK society.** These additional funding streams are extremely welcome, particularly given the current economic climate.

27. Funding enables these organizations to contribute meaningful research to the programme's core objectives; **the programme also helps position the UK as a leader in promoting fundamental rights across the EU.**

Case Study One: Privacy International

In 2008, Privacy International (PI) applied and received EUR 389,894.09 in funding for its "European Privacy and Human Rights" (EPHR) project. Partnered with the Electronic Privacy Information Centre (EPIC) and Centre for Media and Communications Studies (CMCS) at the Central European University, the project endeavoured to conduct research on privacy, surveillance, and data protection issues across the EU. Based on feedback received directly from PI, the Fundamental Rights and Citizenship Programme's funding played a critical role in enabling the organization to reach its objectives. According to Gus Hosein, the Executive Director at PI, "The EU funding made this project possible – it wasn't something that we were able to do at that time without that support."¹ Specifically, Hosein cites how the funding enabled PI to "compile detailed records on the laws and practices, and to disseminate the research in interesting packages, including maps and comprehensive reports." Ultimately, Privacy International and its partners were able to compile enough data to develop an 856-page report on the project's findings in 2010 as well as publish a series of "Country Reports" in 2011 and 2012 that survey the impact of privacy and surveillance issues in over 40 countries from around the world. In the project's 2010 report, Privacy International was able not only to deliver original, cutting-edge data on the status of privacy, surveillance, and data protection rights worldwide, but also identify the areas in which the UK can improve its own policies in these areas.¹

In this way, funding from the Fundamental Rights and Citizenship Programme enabled the EPHR project to succeed and serviced the Fundamental Rights and Citizenship Programme's objective of advancing data protection and privacy rights in the EU. As Hosein recounts, "We did accomplish everything we had hoped and it was disseminated across the policy community. It is still the benchmark study that experts point to in order to understand the law and policy landscape across EU Member States." As a whole, therefore, this case highlights the advantages of Fundamental Rights and Citizenship Programme and the benefits the programme's funding provides for the development of UK-based projects.

Case Study Two: LGBT Youth Scotland

LGBT Youth Scotland has received over 440,000 EUR in funding from the Fundamental Rights and Citizenship Programme for three of its project initiatives: “Promoting Good Practice: Addressing Homophobia in Education,” “Breaking the Walls of Silence,” and “Engaging Hearts and Minds, Changing Attitudes.” These projects all target the programme’s core objective of fighting homophobia and seek to address the marginalization and discrimination of LGBT youth within the UK and across the EU.

As a result of programme funding, LGBT Youth Scotland has been able to publish a number of reports detailing the outcomes of these projects. In the report “Challenging Homophobia Together”, for example, the organization was able to present its research from the project “Promoting Good Practice: Challenging Homophobia in Education,” which set out to equip EU Member States with strategies for addressing the inequalities LGBT youth face in education settings. The reports expose how homophobia and homophobic bullying is a problem in schools across all 27 EU Member States and provide a toolkit for how teachers can curtail these discriminatory practices in their classrooms.

LGBT Youth Scotland’s continued relationship with the Fundamental Rights and Citizenship Programme suggests that the funding is fundamental to the success of its initiatives. Specifically, programme funding provided the organization with the financial resources necessary to conduct extensive and long-term research into the treatment of LGBT individuals as well as develop effective strategies and practical tools for mitigating homophobic attitudes and encouraging tolerance, equality, and respect in classrooms. On a wider level, programme funding enabled the organization to not only tackle one of the programme’s core objectives, but also construct an authoritative voice for the UK in tackling homophobia across the EU.

BALANCE OF COMPETENCES REVIEW SCOTTISH GOVERNMENT RESPONSE

FUNDAMENTAL RIGHTS

1. The Scottish Government welcomes the opportunity to contribute to the call for evidence. We are aware that key Scottish stakeholders, including the Scottish Human Rights Commission (as part of the collective of UK National Human Rights Institutions), academics from the University of Edinburgh, the Equality Network, and the Human Rights Consortium Scotland may have provided a response as part of this exercise. We ask that, where possible, any Scottish-specific issues raised by respondents are reflected in the final Fundamental Rights report. It is important to note at the outset that, within the response, the term ‘human rights’ is used in relation to the overarching international human rights framework which applies to Scotland, and the term ‘fundamental rights’ is used in relation to the EU framework of rights, which is essentially the Charter for Fundamental Rights and its associated agencies and programmes.

Human Rights in Scotland

2. The intention of this section is to set out how the international human rights framework currently applies to Scotland in terms of domestic policy and legislation, as well as the Scottish Government’s general policy approach towards implementing and observing Scotland’s human rights obligations. In addition to setting the context, this section covers the relevant sections of the call for evidence in relation to how action in relation to fundamental rights might be taken at the national, regional and/or international level.

3. In relation to areas within devolved competence, human rights (in terms of the European Convention of Human Rights¹) in Scotland are given legal effect through the *Scotland Act 1998*². Section 29(2)(d) states that provision made in an Act of the Scottish Parliament is outside the legislative competence of the Parliament so far as it is incompatible with any of the Convention rights³. And section 57(2) states that: “*a member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights.....*” In the event that an Act of the Scottish Parliament or subordinate legislation made by the Scottish Ministers is judged to be incompatible, it may be struck down as “not law” by the courts. So far as provision in an Act of the Scottish Parliament is concerned this can be argued to deliver a particularly effective remedy when compared with the UK “declaration of incompatibility” model in relation to primary legislation⁴. It should be noted that, in this context, the Human Rights Act applies to the ECHR, and not EU law.

¹ http://www.echr.coe.int/Documents/Convention_ENG.pdf

² <http://www.legislation.gov.uk/ukpga/1998/46/contents>

³ “[T]he Convention rights” are those for which provision is made in Section 1 of, and Schedule 1 to, the Human Rights Act 1998 (<http://www.legislation.gov.uk/ukpga/1998/42/schedule/1>).

⁴ The Convention rights are incorporated into UK law by the *Human Rights Act 1998*. Section 4(2) provides: If the court is satisfied that [a provision of primary legislation] is incompatible with a Convention right, it may make a declaration of that incompatibility.’ “[P]rimary legislation” is defined in section 21.

4. Under schedule 5 of the Scotland Act, international state and institutional relations are reserved to the UK. However, in devolved areas of legislative competence, observing and implementing international obligations, including obligations under ECHR, is not reserved. The Scottish Parliament therefore has locus to protect and realise human rights in respect of devolved matters within the Scottish jurisdiction. In terms of domestic legal provision, the *Human Rights Act 1998*⁵ translates the provisions of the Convention into domestic law for the whole of the UK, and requires public authorities to act in a fashion that complies with the Convention. The Scottish Government also takes account of the broader international human rights framework established by the United Nations, particularly in relation to treaties such as the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention against Torture; the Convention on the Elimination of Racial Discrimination; the Convention on the Elimination of Discrimination against Women; the Convention on the Rights of Persons with Disabilities; and the Convention on the Rights of the Child. We are working to ensure that Scotland's distinctive approach is incorporated into the UK's reporting to international treaty bodies and their subsequent examination of our human rights records under UN and Council of Europe Conventions and Treaties to which the UK is a signatory. Most recently, the Scottish Government has actively participated in the Universal Periodic Review Process⁶ (the UN's overarching examination of the UK's human rights record) and exams on implementation of the Convention against Torture and the Convention of the Elimination of Discrimination against Women.

5. The Scottish Government is committed to creating a modern, inclusive Scotland which protects, respects and realises internationally recognised human rights. We strongly believe in and subscribe to the principles laid out in the European Convention on Human Rights. Within the current constitutional settlement, Scotland's devolved institutions have a key role in implementing and upholding human rights standards. In those areas where we already have competence, Scotland takes a distinctive approach, reflecting widely-held progressive values. An independent Scotland could do more – human rights would be secured within a codified constitution, and we could ensure that Scotland becomes a beacon of progressive opinion, in keeping with the importance we have long attached to human dignity, equality and fairness and the pursuit of social justice. Scotland's first National Action Plan for Human Rights (SNAP) was launched by the Scottish Human Rights Commission on 10 December 2013; this is designed to act as a roadmap for the realisation of human rights in Scotland. SNAP has been developed through a collaborative process involving key actors from the public and third sectors as well as wider civic society and rights holders, and has contributed to the development of a coalition of interest committed to realising SNAP's vision of a Scotland in which everyone lives with human dignity.

6. In institutional scrutiny terms, the *Scottish Commission for Human Rights Act 2006*⁷ established the Scottish Human Rights Commission⁸. The Commission is independent of Government and Parliament, and is an accountable public body

⁵ <http://www.legislation.gov.uk/ukpga/1998/42/contents>

⁶ <http://www.ohchr.org/EN/HRBodies/UPR/Pages/GBSession13.aspx>

⁷ <http://www.legislation.gov.uk/asp/2006/16/contents>

⁸ <http://www.scottishhumanrights.com/>

which regularly report on progress, finance and audit. It is a national human rights institution, and has an international role in promoting and protecting human rights⁹. The specific functions of the Commission are set out in the Act, under which it has a general duty to promote awareness, understanding and respect for all human rights (economic, social, political, cultural and civil) to everyone, everywhere in Scotland, and to encourage best practice in relation to human rights. The Commission also has a number of powers, which include: the power to conduct inquiries into the policies or practices of Scottish public authorities; the ability to provide education, training and awareness raising; the ability to publish research and recommend such changes to Scottish law, policy and practice as it considers necessary; the power to enter some places of detention as part of an inquiry; and the power to intervene in civil court cases where relevant to the promotion of human right and where the case appears to raise a matter of public interest. The Commission is under a duty to ensure it is not duplicating work that others already carry out. It also has an international role as the National Human Rights Institution (NHRI) for Scotland, one of over 80 NHRIs around the world, and one of three in the UK, alongside the Northern Ireland Human Rights Commission and the Equality and Human Rights Commission.

7. Human rights are a cornerstone of the Scottish Government's constitutional aspirations. "Scotland's Future: Your Guide to an Independent Scotland"¹⁰ was published on 26 November 2013, and in relation to fundamental rights states: "we will safeguard and strengthen Scotland's equality and human rights framework, and maintain its existing strong commitment to the European Convention on Human Rights".

EU Fundamental Rights in Scotland

8. The intention of this section is to set out how the way in which EU fundamental rights apply to Scotland, as well as the Scottish Government's views on whether the EU Fundamental Rights Framework (specifically the Charter of Fundamental Rights, the Fundamental Rights Agency and the Fundamental Rights and Citizenship Programme) have been/are advantageous or disadvantageous for Scotland.

Charter of Fundamental Rights

9. We note the Charter is distinctive from ECHR in that it reflects rights and principles that have developed across the EU over a period of time. It exists as the consolidation of these rights and principles which are, generally speaking, closely aligned with constitutional principles of various Member States and aspects of the international human rights framework, including the ECHR and the International Covenants on Civil & Political, and Economic, Social & Cultural, Rights. In our view, such consolidation is welcome in terms of ensuring that human rights are explicit, rather than implicit, in the 'fabric' of the EU.

⁹ For the purposes of the 2006 Act, this means (a) the Convention Rights within the meaning of section 1 of the Human Rights Act and (b) other human rights contained in any international convention, treaty or other international instrument ratified by the UK.

¹⁰ <http://www.scotreferendum.com/>

10. With regard to particular considerations in relation to the application of the Charter in Scotland, the starting point is (as aforementioned) that the *Scotland Act 1998* reserves international relations to the UK, subject to the exception of observing and implementing, among other things, obligations under EU law (and under the ECHR). The power of the Scottish Parliament to make primary legislation and of the Scottish Ministers to make subordinate legislation and take other action, is circumscribed with reference to EU law. It is outside the legislative competence of the Scottish Parliament to make provision in an Act of the Scottish Parliament if such provision is incompatible with EU law (or with the Convention rights), and the Scottish Ministers have no power to make subordinate legislation, or to do any other act, if such subordinate legislation, or act, is incompatible with EU law or the Convention rights. Therefore, the current devolved settlement has an inbuilt check to ensure that legislation made by the Parliament and any subordinate legislation made, or any other action taken by, the Scottish Ministers is compatible with EU law. In ensuring that this is the case, it is worth noting that the Standing Orders of the Scottish Parliament make provision for Bills introduced into Parliament be accompanied by both a statement from the Parliament's Presiding Officer and the Member in charge of the Bill that the Bill would be within the legislative competence of the Parliament¹¹. Secondly, in terms of section 33 of the Scotland Act, once passed by the Parliament, a Bill cannot be sent by the Presiding Officer for Royal Assent until after the expiry of a period of 4 weeks from the date it is passed. During this time, either the Lord Advocate, the (UK) Advocate General for Scotland or the Attorney General may refer any question of whether a Bill or any provision of it is within the legislative competence of the Scottish Parliament to the Supreme Court. More generally, section 98 of, and Schedule 6 to, the Scotland Act make specific provision for the courts to deal with 'devolution issues'. Devolution issues include both questions as to whether legislation (or legislative provision) is within the legislative competence of the Scottish Parliament or any action or proposed action by Scottish Ministers is, or would be, incompatible with any of the Convention rights or with EU law. This includes provision to allow the Lord Advocate to raise court proceedings for determination of a devolution issue. The Scottish Government and Parliament are, therefore, well used to giving consideration to whether particular legislative or administrative action is compatible with EU law, including EU fundamental rights, and that the devolved settlement provides for various supporting 'enforcement mechanisms'.

11. More generally, we would consider that the Charter does add value in making rights explicit within the framework of the EU, particularly given that at the time of writing the EU has yet to accede to the ECHR. EU action in this area adds value through ensuring that EU law developed in Brussels takes account of fundamental rights, many of which (as we have stated) are reflected in other international human rights treaties. While it is ultimately for member states to ensure that rights are observed and given effect to within their jurisdictions, it is helpful to have an EU framework to draw upon, particularly in relation to the EU institutions and their actions. In relation to the specific rights, we note that by their very nature, they are broad. The rights that might be defined as civil and political are (broadly speaking)

¹¹ The Standing Orders of the Scottish Parliament can be found at http://www.scottish.parliament.uk/Parliamentaryprocedureandguidance/StandingOrder_completeJuly13.pdf - see for example rule 9.3.

provided for within ECHR, with many of the socioeconomic rights provided for in the International Covenant on Economic, Social and Cultural Rights, which states are understood to have a positive obligation to give effect to.

12. In relation to whether the Charter has had an advantageous or disadvantageous impact upon Scotland, we would take the view that rights are a positive force for progress, and that the Charter reflects a collection of rights and principles that have been developed and agreed at the EU and international level. Our focus is on the progressive observance and implementation of these rights and principles. We note that EU fundamental rights do not apply in the domestic context in Member States beyond situations where EU law is being implemented or EU law exists to regulate the activities of Member States. Our experience does not indicate that ECHR case law, as it is given effect to through the EU fundamental rights framework, has been disadvantageous. Our experience has been one in which case law, in general, has made a positive impact. We regard the Court of Justice of the EU and the European Court of Human Rights as having an important role to play in interpreting and applying human rights standards in the context of their particular functions, and that their judgments should be respected and executed by Member States, who have willingly become a party to these standards and these institutions.

Fundamental Rights Agency

13. We note the role of the Fundamental Rights Agency (FRA) in providing research and raising awareness of fundamental rights. We welcome the contribution the FRA makes to enhancing the understanding of fundamental rights across Europe. FRA's current areas of thematic focus (such as race integration, hate crime and xenophobia) link in particular to the Scottish Government's commitment to the principles of equality, fairness and social justice. In our view, equality is integral to delivery on the Scottish Government's Purpose¹², to economic growth and wellbeing, and central to the public service reform agenda and to the shift to prevention in Scotland. We currently provide over £20 million to support and develop key projects to advance equality across Scotland, the infrastructure and key organisations to support equality work and the capacity of communities to promote equality and to engage in policy making. We note and welcome that the FRA works closely with the Council of Europe in achieving mutual objectives and avoiding duplication.

14. Stakeholders have expressed the view that the research produced by FRA is helpful in informing discussions with Government, Parliament and the UN human rights system in respect of international treaty compliance and implementation. FRA also acts as a helpful collective platform for some stakeholders to engage with their European counterparts on fundamental rights issues, particularly around equality and non-discrimination. In terms of areas for improvement, some stakeholders have indicated that the material produced could have a greater focus on the situation in Scotland in respect to fundamental rights. There is no suggestion that the work of the FRA has been disadvantageous, although it could usefully continue to promote its function within the EU and ensure that the work it produces is of maximum relevance in relation to the issues that the EU and its Member States are seeking to tackle, and where a strong and relevant evidence base would be helpful in

¹² <http://www.scotland.gov.uk/About/Performance/scotPerforms/purposes>

developing policy options in relation to observing and implementing human rights standards. There is of course a responsibility on the EU and Member States to participate actively in a dialogue with the FRA to inform its priorities, and we would encourage this.

Fundamental Rights and Citizenship Programme

15. As the call for evidence notes, LGBT Youth Scotland is funded by the Fundamental Rights and Citizenship Programme (FRCP), and is the only organisation in Scotland to receive funding through this programme. LGBT Youth Scotland is the largest youth and community-based organisation for lesbian, gay, bisexual and transgender (LGBT) people in Scotland. The organisation's mission is to "*empower lesbian, gay, bisexual and transgender young people and the wider LGBT community so that they are embraced as full members of the Scottish family at home, school and in every community.*" The organisation has been granted funding of £265,000 per annum (2012-15) from the Scottish Government Equality Fund to support LGBT young people, communities and organisations to engage with public bodies in order to improve public services so that they better meet the needs of LGBT people. This funding provides for frontline service provision, support for community development (particularly with young people), and to encourage more effective consultation and engagement with LGBT people. Policy analysis and information work undertaken by the organisation is contributing to a growing body of evidence and best practice on LGBT inclusion in public policy and services, and will be of value to national and local government and to other public bodies.

16. In relation to the funding secured through the FRCP, LGBT Youth Scotland has worked with other European LGBT organisations to deliver projects around challenging homophobia in education and changing culture in communities. The projects were delivered in partnership with organisations from Slovenia, Poland and Romania. Funding has enabled LGBT Youth Scotland to undertake international good practice sharing work that they otherwise might not have been able to do; it has added value to the work of LGBT Youth Scotland over and above its existing funding arrangements. It has enabled the organisation to work to tackle homophobia, specifically partnering with other organisations across Europe to share best practice from Scotland, learn from elsewhere and enhance the knowledge and perspective of the organisation and its partners. This would appear to be closely aligned with FRCP's objective of "promot[ing] a society based on respect for fundamental rights and rights derived from citizenship of the EU". This work would not necessarily have been taken forward (or at least, not in the same way and with the same outcomes) had the funding not been granted at the EU level and had partnership working been required in this way.

17. Some stakeholders have expressed the view that the funding process can be challenging, particularly for smaller organisations who do not necessarily have (or believe they have) the resources or expertise to develop and sustain a complex multi-partner bid. We believe that it would be helpful to raise awareness of the opportunities presented by the new Rights, Equality and Citizenship Programme, for the European Commission to effectively promote the new programme to organisations and for the Commission to provide guidance on how to apply and ensure that the application process is accessible to a wide range of stakeholders.

Whilst we would not state there were any disadvantages caused by the programme itself, we believe that more could be done to support access to the programme for those organisations which might make best use of it and are best placed to pursue the objectives of the Programme.

Future Developments

18. The intention of this section is to set out the Scottish Government's views on potential future developments relating to EU fundamental rights, which the call for evidence seeks views on in relation to impact.

19. We are not aware of evidence to suggest that fundamental rights are being used indirectly to expand the competence of the EU. We do note the ongoing debate around the Charter's role and competence at the EU level, and believe this requires careful consideration, particularly in relation to the suggestion that the Charter might be extended to apply in the domestic context more generally (i.e. in circumstances which are otherwise not within the scope of EU law). In our view, this would be a significant step, given a number of the rights contained within the Charter are not currently directly incorporated into Scots law but are rather given positive effect on an ongoing basis in a way that works for Scotland. Such a step would significantly expand the competence of the EU in relation to domestic law. We do believe there is a debate to be had about how some rights (particularly those defined as economic, social and cultural) are given effect within law, and have indicated that in the event of Scotland becoming an independent state that we anticipate a renewed Constitutional Convention giving this further consideration. Such a debate will also occur in the context of Scotland's first National Action Plan for Human Rights, with a particular focus on the impact of austerity and the impact of poverty.

20. We welcome the ongoing discussion about FRA's remit, its role in the EU legislative process and continuing efforts to increase relevance to member states within the Commission and the Council of Ministers. As stated in paragraphs 13-14, we support ongoing dialogue with a view to maximising FRA's effectiveness, relevance and contribution to the EU's collective efforts to observe and implement human rights.

21. We welcome the likely forthcoming accession of the EU to the European Convention on Human Rights. We believe that this will enhance coherence in human rights protections in Europe, by bringing EU institutions into the ECHR system along with their member states.

22. We support the renewed focus of the newly established Rights, Equality and Citizenship Programme (2014-20), noting that the programme remains under negotiation. We welcome the likelihood of a focus upon anti-discrimination, the rights of the child and combating violence against women. In relation to the effectiveness of the Programme, we would refer to our comments in paragraph 17 of this response.

22. In contributing to this evidence session, we are aware of the continuing negative rhetoric from sections of the UK Government and Parliament in relation to membership of the EU and the Council of Europe, and human rights more generally.

As we have stated, the Scottish Government views Scotland's position in the EU as integral and we see benefits of both Scottish membership of the EU, as well as benefits for the EU from Scotland's membership. We would express the view that fundamental rights are an essential component of any civilised, democratic society. Scotland takes a distinctive approach to giving effect to fundamental rights, reflecting widely-held progressive values. We welcome continued discussion and debate on how we might do so.

Scottish Government

January 2013

BALANCE OF COMPETENCES REVIEW: FUNDAMENTAL RIGHTS

THE CROWN DEPENDENCIES

This evidence is submitted jointly by the Crown Dependencies (the Isle of Man and the Bailiwicks of Guernsey and Jersey) for the report on fundamental rights by the Ministry of Justice in the Balance of Competences Review.

The Crown Dependencies are not part of the UK or of the EU, but certain aspects of EU law relating, in particular, to trade in goods and the Customs Union apply to them, as set out in Protocol 3 to the UK's Treaty of Accession. The EU Charter of Fundamental Rights (which was given legal effect by the Lisbon Treaty) postdates Protocol 3 and does not apply to the Crown Dependencies (although, broadly speaking, insofar as some residents of the Crown Dependencies are EU citizens - a concept that also postdates Protocol 3 - they may be able to rely upon it). However the European Convention on Human Rights (ECHR), which overlaps significantly with the Charter, does apply to the Crown Dependencies under their own domestic legislation.

Channel Islands Brussels Office
13 January 2014

UK GOVERNMENT'S CALL FOR EVIDENCE REGARDING THEIR BALANCE OF COMPETENCES REVIEW – FUNDAMENTAL RIGHTS

FORMAL RESPONSE FROM THE WELSH GOVERNMENT

The Minister for Community and Tackling Poverty has considered the call for evidence.

The Welsh Government is pleased to set out its formal response to the call for evidence in respect of the balance of competences between the UK and the EU on fundamental rights.

The UK needs a coherent and strong policy to ensure that the rights of individuals within the UK are properly protected and respected. It makes sense that these issues are tackled at least at an EU level where they are genuinely covered by the competences of the EU. EU level intervention helps to maintain a common approach between Member States and an EU wide approach provides access to a far greater knowledge base and expertise. It also aids Member States in meeting common objectives and sharing good practice, provides greater scope for achieving synergy with other policies, and promotes mutual learning and European cohesion.

The Welsh Government has a deep commitment to equality and human rights and we are taking our own distinctive approach in Wales.

Within the Welsh Government, equality and human rights is enshrined in our founding legislation and reflected in our guiding principles. Equality and inclusion are woven throughout the Programme for Government and addressed specifically in Chapter 8 Standing up for Equality. Equality and inclusion are also key requirements for sustainable development.

Wales was the first country in Great Britain to create specific duties under the 2010 Equality Act, further demonstrating our commitment to equality and the Public Sector Equality Duty.

Welsh Government would welcome a uniform understanding of the role of the Fundamental Rights Agency and clarity on the status of the Charter on Fundamental Rights and how it is interpreted. A point of concern is that the competence of the EU is not extended in unexpected or burdensome ways. It is important for the UK Government to examine how the EU's powers to act in the areas of competence conferred on it by the EU treaties are deployed in practice.

Within Welsh Government we have no evidence or examples of reliance or attempted reliance on the Charter in domestic decisions.