



HM Government

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

Evidence: Legal Organisations

July 2014

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Call for Evidence on the Review of the Balance of Competences between the United Kingdom and the European Union: Fundamental Rights

Response by the Discrimination Law Association

The Discrimination Law Association ('DLA'), a registered charity, is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information; the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK, Europe and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law-makers and others and of the necessity for a complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level. The DLA has long recognised and essential overlap and interconnectivity of anti-discrimination law with other aspects of human rights law.

The DLA is a national association with a wide and diverse membership. The membership currently consists of some 300 members. Membership is open to any lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from a complainant perspective.

Before responding to the questions within this call for evidence the DLA wishes to draw attention to what we perceive to be a serious lack of knowledge regarding the EU Charter of Fundamental Rights amongst the UK population. It is regrettable that, for whatever political or other reasons, almost nothing was done after December 2009 by the previous government or since May 2010 by the present government to assist members of the public to appreciate the origins, content, scope and legal status of the Charter. The lack of any real effort to provide information and to offer or promote training on the Charter contrasts starkly with the substantial efforts to raise public awareness after enactment of the Human Rights Act in 1998. Thus the DLA doubts that this call for evidence will provide sufficient reliable objective evidence to enable a fair assessment of the balance of competences in relation to fundamental rights, since the current knowledge base amongst all sectors is still extremely limited.

The DLA submits below our responses to questions 1, 2, 3, 4 and 5, 9, 11, 12

Question 1 - 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?

In the view of the DLA there can be no question but that the Charter and the EU's broader framework of fundamental rights has been and continues to be advantageous to all parties within the UK, including individuals generally, individuals with particular characteristics or identities, public, private and voluntary sector bodies.

- a) The Charter applies directly to, and is binding on, all EU institutions, bodies, offices and agencies. As a consequence there are now mechanisms in place to ensure that any new EU legislation will be fully compliant with the fundamental rights guaranteed under the Charter. For the UK, and all other member states, this provides new certainty that fundamental rights will underpin the legislative framework which applies across the EU.

In 2012 the Court of Justice of the European Union (CJEU) examined whether EU institutions respect the principle of non-discrimination in their recruitment policies.¹ The court annulled notices of open competitions to become EU civil servants which had been published in full only in three official languages. The Court found that the disadvantage this created for potential candidates whose mother tongue was not one of these languages compared to potential candidates whose mother tongue was one of these languages was the consequence of disproportionate difference in treatment on grounds of language contrary to Art. 21 of the Charter, which prohibits discrimination on any ground, including "language".

- b) This case highlights a further advantage, specifically within the DLA's main area of interest, namely that the Charter in Article 21 prohibits discrimination on an open-ended list of grounds, thereby providing far wider protection against discrimination than the EU anti-discrimination directives. As the above case suggests, where the alleged discrimination is on grounds other than those specified in Article 19 TFEU, namely sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, the court or tribunal may well consider it appropriate to apply a proportionality test. Further the scope of prohibition under the Charter is also open-ended; therefore it will apply to all functions of EU institutions, bodies, agencies etc. and to the implementation of the full range of EU law in member states.
- c) The Charter applies to all member states whenever EU law is in play. This creates a uniform minimum standard of fundamental rights across the EU. Businesses can operate and UK citizens can choose to live and work in any member state with the confidence that these essential fundamental rights apply with equal force and are equally enforceable.
- d) The significance of the fact that the Charter provides legally binding protection of rights in all areas within the competence of the EU is gradually being

¹ 2012 Annual Report on the application of the Charter, p.10

recognised. Compliance with the Charter may require the removal of barriers to the full exercise of fundamental rights within EU or national law. This was first seen in the outcome of the *Test-Achats*², in which the CJEU ruled that Art. 5(2) of Directive 2004 /113, which enables member states to maintain indefinitely an exemption from the rule of unisex premiums and benefits, was invalid as it is incompatible with Articles 21 and 23 of the Charter. As a result of this decision the UK needed to disapply the exception to sex equality in insurance in Part 5, Schedule 3, Equality Act 2010.

A useful UK example can be found in the EAT decision in the joined cases of *Benkharbouche v Embassy of the Republic of Sudan* and *Janah v Libya*.³ In order to comply with the requirement of Article 47 of the Charter guaranteeing a right to an effective remedy before a tribunal to any person whose rights are guaranteed by the law of the EU, the EAT disapplied relevant provisions of the State Immunity Act 1978 which gives other States immunity from the jurisdiction of the UK courts. The EAT held that with respect to the claims of each claimant regarding rights within the material scope of EU law (breach of the Working Time Regulations and race discrimination) neither the Sudan nor Libya could avoid the jurisdiction of UK courts.

Question 2 - What evidence is there on whether the Charter is being interpreted and applied in line with the general provisions set out in Title VII of the Charter?

Title VII specifies in Article 51 that the Charter applies to EU institutions, agencies, bodies and to member states only when they are implementing EU law. The DLA is not aware of any instance in which the Charter has been wrongly applied at EU level or by the UK; we are aware that the CJEU ensures that the Charter is being applied as intended as it consistently declares inadmissible questions which arise under a national law which is neither a measure implementing EU law nor connected in any other way with EU law.

Title VII in Article 52 defines the scope of the Charter, specifying the conditions which must be satisfied for any limitation on the exercise of Charter rights, requiring rights for which provision is made in the Treaties to be exercised within the conditions and limits defined by the Treaties. Where rights in the Charter correspond to rights in the ECHR they are to be interpreted in the same way as the ECHR rights. The DLA is unaware of anything done at EU level or in the UK contrary to these provisions.

Article 52 also recognises that the Charter includes principles as well as rights and provides that principles do not give rise to direct claims but may be implemented by legislative or executive acts by EU bodies and by member states when they are

² Association belge des Consommateurs Test-Achats ASBL and others v Conseil de ministres, CJEU Case C-236/09 judgment of 1 March 2011

³ [2013] UK EAT/0401/12 and UK EAT/0401/13

implementing EU law. Many commentators have expressed concerns regarding the lack of clarity within the Charter and accompanying Explanations of the Charter as to precisely which articles of the Charter are principles rather than rights. The Explanations give as illustrations of principles articles on respecting the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life⁴ or respecting the right of persons with disabilities to benefit from measure designed to ensure their independence, social and occupational integration and participation in community life.⁵ The Explanations suggest that some articles may contain elements of a right and a principle, giving as an example that equality between women and men must be ensured in all areas.⁶ The DLA welcomes Charter provisions which set high equality standards which should influence EU legislation and UK legislation within the scope of EU law. In our view such provisions can only lead to more positive outcomes for individuals and private enterprises without disadvantage to business or public services.

We anticipate that over time the CJEU will provide greater clarity as to the status and enforceability of articles which are considered to include an element of principle. We therefore submit that it is not possible at this time to give a comprehensive assessment as to whether this part of article 52 has been correctly met at EU level or by the UK or other member states.

We have looked at what has been done consistent with Title VII by EU institutions, bodies, agencies and member states.

- a) Since 2010 all European Commission proposals and legal acts undergo a detailed assessment regarding their possible impact on fundamental rights. The European Parliament and Council, when adopting new legislation, have also committed to systematically assessing the impacts on fundamental rights.⁷ The European Commission has also initiated proposals to give concrete effect to Charter provisions. For example,
 - reform of the EU's rules on the protection of personal data,
 - a pro-active approach to accelerate progress towards better gender balance on the corporate boards of European companies listed on stock exchanges, and
 - steps to safeguard procedural rights and victims' rights, including non-discrimination and dignity.⁸

- b) The European Commission has used its powers to bring infringement proceedings where member states have acted contrary to EU law combined with relevant Charter provision.

⁴ Article 25

⁵ Article 26

⁶ Article 23.

⁷ <http://ec.europa.eu/justic/events/assisses-justice-2013>

⁸ 2012 Annual Report on the application of the Charter pp. 7 - 8

- c) There has been increased judicial application of the Charter. The CJEU quoted the Charter in 87 of its decisions in 2012, compared to 43 decisions in 2011. The number of references to the CJEU by national courts in 2011 was 27 and 41 in 2012.⁹ The DLA is aware of three reported UK cases¹⁰ in 2013 in which particular provisions of the Charter played a main part.
- d) The judgment in *R(AB) v Secretary of State for the Home Department*¹¹ also illustrates how little known as a legally binding instrument the Charter has been, even amongst the judiciary. Mostyn, J. refers to the decision in *Secretary of State for the Home Department v ME and others*¹² in which the CJEU held that seventh protocol to the Lisbon Treaty (the so-called 'UK and Polish opt-out') does not exempt the UK from the obligations to comply with the provisions of the Charter or prevent a UK court from ensuring compliance with those provisions. Mostyn, J then states:

“The constitutional significance of this decision can hardly be overstated. The Human Rights Act 1998 incorporated into our domestic law large parts, but by no means all, of the European Convention on Human Rights. Some parts were deliberately missed out by Parliament. The Charter of Fundamental Rights of the European Union contains, I believe, all of those missing parts and a great deal more. Notwithstanding the endeavours of our political representatives at Lisbon it would seem that the much wider Charter of Rights is now part of our domestic law. Moreover, that much wider Charter of Rights would remain part of our domestic law even if the Human Rights Act were repealed.”¹³

Question 3 - What evidence is there that the impact of ECHR case law, as it is given effect through the EU's fundamental rights framework, has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?

The EU's fundamental rights framework enhances and strengthens the rights and freedoms guaranteed under the ECHR. As required under Article 52(3) where Charter rights correspond to ECHR rights then they are to be interpreted consistent with ECHR case law. In applying the Charter alongside the ECHR, national courts and the CJEU may be able to use Charter rights that are not explicitly covered by the ECHR to expand the scope of the ECHR protection. For example, Article 8 of the ECHR provides to everyone the right to respect for private and family life, and this is replicated as Article 7 in the Charter. However with respect to protection of privacy, the Charter includes as Article 8 a legally binding right of everyone to the protection

⁹ 2012 Annual Report on the application of the Charter

¹⁰ Benkharbouche and Janah (op.cit) and R (AB) v Secretary of State for the Home Department [2013] EWHC 3453 (Admin)

¹¹ Op. cit.

¹² 21 December 2011

¹³ Op.cit. para 14

of personal data concerning him or her. With respect to protection of family life where children form part of the family, as often arises as an issue in proposed deportations, the Charter includes as Article 24(2) a legally binding requirement, "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration".

Questions 4 and 5 - What evidence is there that the impact of the Fundamental Rights Agency (FRA) has been advantageous or disadvantageous to individuals, business the public sector or any other groups in the UK? What evidence is there of whether the FRA demonstrates value for money?

The DLA finds it difficult to answer these two questions since, from the perspective of a small, mainly UK-based NGO, we are not directly engaged in any way with the FRA and rarely make use of its research and policy reports. Whether the fault lies in part with the UK government, which appoints a UK representative for the Management Board, or with the FRA, or with UK civil society we cannot say; however it is our view that far more of the work of the FRA should be known and used by public, private and voluntary sector bodies within the UK.

Further, for the same reasons, we are not in a position to say whether the work by the FRA represents value for the money it receives from the EU (€21.3 million in 2013).

Question 9 - What evidence is there that the impact of the EU's accession to the ECHR will be advantageous or disadvantageous to individuals, business, the public sector or other groups in the UK?

The first thing to note is that the UK in ratifying the Lisbon Treaty officially agreed to EU accession to the ECHR.

The significant change that EU accession to the ECHR will bring is to make the EU, its institutions, bodies and agencies directly liable to comply with the ECHR and will enable natural or legal persons to bring proceedings in the European Court of Human Rights (ECtHR) to challenge non-compliance by EU entities. This will clearly be advantageous to individuals and business who currently have no means to seek legal redress for actions by the EU which involve breach of ECHR rights. It will also be advantageous to those public sector bodies which are subjected to interventions or other actions by EU institutions, bodies or agencies that are non-compliant with the ECHR.

Questions 11- What other future challenges and opportunities in respect of EU fundamental rights are relevant to the UK?

The DLA considers that the Charter could prove invaluable in resolving some of the issues within the competence of the EU which create the greatest conflicts within member states, between member states and between member states and the EU.

Respect for Charter rights across the EU, with EU institutions and all member states meeting its minimum standards, should underpin and facilitate effective functioning of the EU, with an appropriate balance between EU and member states' duties and powers. Today this is the basic challenge and the critical opportunity for the EU and all member states.

Looking at the UK, the DLA can see important opportunities in respect of EU fundamental rights that should not be ignored. As we have emphasised above, the recognition of EU fundamental rights is still at a very early stage in the UK. We submit that much wider discussion is needed as to how EU fundamental rights can be better understood as an integral part of UK law. By virtue of s.2 European Communities Act 1972, the Charter is automatically given legal effect and enforceable in the UK. This should trigger positive steps to ensure compliance by all state bodies. What is stated as a specific obligation on public authorities with regard to the ECHR in s.6 Human Rights Act 1998 is implicit in the legal status of the Charter. Similarly, separate legislation should not be required to require a Minister of the Crown, before introducing new legislation, to ensure that the proposed measure is Charter-compliant. Unlike the flexibility provided under s.19(1)(b) of the Human Rights Act, we cannot envisage a situation in which a Minister of the Crown is able to justify a government bill which is not compatible with Charter rights.

Given that whenever the UK is acting within the scope of EU law it is obliged to comply with Article 21 of the Charter, which prohibits any discrimination based on an open-ended list of grounds, should not discussions be re-opened regarding UK ratification of Protocol 12 of the ECHR?

Separately, consideration needs to be given to how best to inform the UK population of their rights under the Charter and to ensure that as a minimum, all public authorities are fully aware of their obligations under the Charter, including elected members, boards, governors, officers and staff. From our experience as an organisation whose members include legal practitioners and legal advisers, there is an urgent need for effective training on the contents and implications of the Charter for lawyers, legal advisers and especially for judges at every level.

Question 12 - How could action in respect of fundamental rights be taken differently - including nationally, regionally or by other international organisations - and how would this affect the UK?

The UK without a written constitution and possibly unique within the EU, has not incorporated into national law the rights and freedoms provided in the international instruments which the UK has ratified. Thus to make provisions of the ECHR enforceable in the UK, primary legislation, the Human Rights Act 1998, was necessary. For all EU Treaty obligations and the Charter, the 1972 Act provides automatic legal effect. Looking beyond the EU, the DLA is aware of important protections of fundamental rights in various UN declaration, covenants and conventions and Council of Europe instruments which the UK has ratified; while periodically UK compliance is reviewed by the relevant UN or Council of Europe

body and recommendations made, in reality little change occurs. More concerning, because these international obligations are not widely known or understood, successive governments are rarely held to account by UK citizens for non-compliance. Therefore we believe it is right to open discussions on possible mechanisms which would enable the fundamental rights to which the UK formally subscribes to form part of UK law and to be enforceable before UK courts.

Discrimination Law Association

13 January 2014



FACULTY OF ADVOCATES

RESPONSE
BY
THE FACULTY OF ADVOCATES

to

the call for evidence by the Ministry of Justice on the review of the balance of competences between the United Kingdom and the European Union

Introduction

1. This response has been prepared by the Faculty of Advocates (the “Faculty”) following the call for evidence by the Ministry of Justice on the review of the balance of competences between the United Kingdom (the “UK”) and the European Union (the “EU”) in the field of fundamental rights. The Faculty is grateful for the opportunity to respond to the call for evidence. The Faculty is a professional body, the members of which comprise the Scottish Bar. The Faculty notes that the evidence requested from respondents is objective and factual evidence from within the respondent’s area of expertise (paragraph 1, page 5). This response therefore limits itself to the questions in respect of which the Faculty considers it has relevant evidence to offer. It restricts itself to the Faculty’s experience as to how the issues raised by the call for evidence have been dealt with in the Scottish court system. The particular calls or questions in respect of which the Faculty wishes to respond follow.

Question 1

2. By question 1 the call for evidence asks whether the impact of (i) the Charter of Fundamental Rights of the EU (the “Charter”) and (ii) 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.
3. The Faculty knows of no reported case in the Scottish courts in which Charter rights have in practice made any difference to the outcome. The effect so far of Charter and fundamental rights on litigants has accordingly been neutral, other than perhaps in terms of legal expense incurred arguing the points. However, the Faculty considers that the rights have the potential to be advantageous to litigants in the future because they are broader in scope than Convention rights currently enforceable in the Scottish courts, and EU remedies for violation may be more far reaching than those available for Convention rights breaches¹.
4. The Charter, which effectively codifies the EU’s fundamental rights protection, entered into force on 1 December 2009. The Faculty notes that although since then (and to a limited extent prior to that date) the provisions of the Charter and fundamental rights have been invoked in Scottish cases, their use is rare. Examples of some of the recent cases in which Charter rights have been invoked in the Scottish courts follow.
5. In *McGeoch v Lord President of the Council* (“*McGeoch*”)² the petitioner was a Scottish prisoner serving a life sentence in a Scottish prison. He sought to invoke article 40 of the Charter in conjunction with article 20(2)(b) of the Treaty on the Functioning of the European Union (“TFEU”) to challenge the refusal of his application to have his name included on the Register of Local Government

¹ See Poole and Irvine, *EU Charter of Fundamental Rights* 2012 JR Part 3 p235, and Poole, *EU Law Based Claims against Public Authorities* 2009 SLT (News) 21

² 2011 SLT 633 (Outer House); 2012 SC 410 (Inner House); [2013] UKSC 63 (Supreme Court), reported as the conjoined case of *R (Chester) v Secretary of State for Justice* [2013] 3 WLR 1076.

Electors. Article 40 of the Charter (and article 20(2)(b) TFEU) provides that every citizen of the EU has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides, under the same conditions as nationals of that State. The petitioner's argument, that the refusal of his application was contrary to EU law, was rejected at first instance and on appeal, before the Charter was even considered by the courts, on the basis that the application of the relevant provision of the TFEU was limited to situations in which a 'cross-border' element was present³.

6. The Charter was also invoked in the Scottish cases of *Cairn Energy Plc v Greenpeace Ltd*, 2013 SLT 570 ("*Cairn Energy*"), *Russell v Transocean International Resources Ltd*, 2011 SC 175 ("*Russell*"), and *Walton v Scottish Ministers*, [2011] CSOH 131 ("*Walton*").
7. In *Cairn Energy*, the petitioning oil and gas exploration company sought to interdict various manifestations of an environmental campaigning organisation from *inter alia* invading its premises. The petition ultimately proceeded to proof as against the third respondent, an international arm of Greenpeace based in the Netherlands. The Charter rights to freedom of speech and information (article 11) and freedom of assembly and association (article 12) were invoked by the third respondent alongside the equivalent provisions of the European Convention on Human Rights ("ECHR") in an attempt to resist the order being granted. The petition was ultimately refused on the basis of a lack of evidence that the third respondent was actually involved other than by way of having given the invasion of the petitioner's premises publicity. The judge at first instance, Lord Glennie, considered *obiter* that the grant of interdict in the terms sought would not, in any event, have interfered to any significant degree with the third respondent's rights, including those under the Charter, and there was

³ On further appeal to the Supreme Court, it was held that EU law did not in any event confer an individual right to vote which paralleled that recognised by the ECHR, and that the question of eligibility was a matter for national Parliaments, the provisions concerning individual voting rights further relating to concerns of equality between nationals and freedom of movement within the EU and so applying only to citizens resident in a state other than that of their nationality.

no basis for contending that the third respondent's rights would be rendered less valuable were they to be restricted to protest in a public area (as had been sought), nor was there a basis for saying that the third respondent should be allowed, in the name of these rights, to obtain the benefit of documents taken from the petitioner's premises.

8. The case of *Russell* concerned the annual leave entitlement of offshore workers under the Working Time Directive ("WTD"), and in particular the question of whether leave arising as a result of a shift pattern could properly be considered part of that annual entitlement. On appeal from the Employment Appeal Tribunal, the appellant workers sought to argue that the requirement in the WTD for the provision of a minimum amount of annual leave required, under reference to the Charter, to be construed from the perspective of bringing about an improvement to, rather than mere maintenance of, existing employment conditions. The argument was rejected, on the basis that the requirement for leave was directed at matters of health and safety, and was, in any event, a harmonising measure imposing minimum standards only.
9. Finally, *Walton* concerned a challenge by various interested parties to the proposed route of the Aberdeen city bypass, the Aberdeen Western Peripheral Route ("AWPR"). The Charter was invoked by the second appellants who owned and ran an organic farm located close to the proposed route of a 'Fastlink' section of the AWPR. The second appellants, in addition to invoking article 6 and article 1 of the first protocol to the ECHR ("A1P1"), argued that the lack of available state-funded legal representation at the public inquiry into the route of the AWPR constituted a breach of their rights under 47 of the Charter, which provides, in the third paragraph, for legal aid to be "made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice." The second appellant's argument under reference to article 47 of the Charter was rejected on the basis it added nothing to the arguments which had already been advanced under reference to the ECHR.
10. The Faculty observes, in summary, that the Charter rights which were invoked in the various cases cited above did not, in the final result, advantage any of the

litigants who relied on them. Charter rights have tended to be used to support other arguments, rather than forming a freestanding challenge. But because Charter and fundamental rights have a wider scope and may entitle litigants to additional remedies in comparison to Convention rights, in the future it is possible that their use may increase and advantage litigants. Where the Charter is invoked its effect is likely to reinforce a proportionality based approach to review of administrative action, because of the provisions of Article 52 (see below).

Question 2

11. By question 2 the call for evidence is directed at whether or not the Charter is being interpreted and applied in line with the general provisions set out in 'Title' (Chapter) VII of the Charter. Those general provisions include, in article 51, limitations on the Charter's scope of application; article 51(1) providing that the Charter is directed to the institutions and bodies of the EU with due regard for the principle of subsidiarity, and to the Member States only where they are implementing EU law; and article 51(2) providing that the Charter does not extend the field of application of EU law beyond the existing powers of the EU, or establish any new power or task, or modify powers and tasks as already defined in the EU treaties.
12. Article 52 of Chapter VII goes on to define the scope of the rights which the Charter guarantees; article 52(1) imposing the requirement that any limitations on the exercise of the rights and freedoms recognised by the Charter may only be made, subject to the principle of proportionality, if they are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others; article 52(2) requiring that rights recognised by the Charter which are based on the Treaties shall be exercised under the conditions and within the limits defined by those Treaties; and, finally, article 52(3) providing that, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same.

13. The Faculty considers that the Scottish courts are fairly rigorously applying the Charter in accordance with the provisions of Chapter VII, and in accordance with article 51 in particular. In *McGeoch* at first instance, for example, Lord Tyre, after considering that the petitioner's reliance on the Charter did not "add anything" to his argument, noted:

"As Article 51 makes clear, the provisions of the Charter apply only when member states are implementing EU law. If, as I consider to be the case, the right to vote in municipal elections of "same-state" nationals is not an EU law right, *the Charter has no application*. In any event, Article 40 of the Charter is in terms identical to Article 20(2)(b). The preamble to Protocol 30 to the Charter confirms that the Charter makes rights recognised in the EU "more visible", but does not create new rights."⁴ (emphasis added)

14. Similarly, in *Walton*, the same judge, in assessing the significance of the appellants' Charter rights in that case, said:

"... I bear in mind that, in terms of Article 51(1) of the Charter, it is addressed to the Member States only when they are implementing EU law ... As the preamble to Protocol No 30 on the application of the Charter to Poland and to the United Kingdom notes, the Charter "reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles". Article 1 of the Protocol confirms that the Charter does not extend the ability of any court of the United Kingdom to find that the laws of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms ... I have held in this opinion that there has been no breach of the appellants' Community law rights under [the relevant EU Directive]. I have further held that there has been no breach of their rights under Article 6 [ECHR] or under A1P1. It may be that if I had held that there had been any such breach, the existence of rights under the Charter would have made a difference to the range of remedies available to this court, though it is unnecessary for me to

⁴ *McGeoch* at 2011 SLT 633, 644 [42] (Lord Tyre).

express a view on that. In the absence of such breach, I consider that the appellants' argument based upon rights under the Charter adds nothing to what has gone before. The Charter creates no new rights or principles and accordingly, in the circumstances of this case, takes the appellants no further.”⁵

15. As to article 52(1) and proportionality, the Faculty is not aware of any Scottish cases in which the application of article 52(1) has been specifically addressed. Two points may usefully be made on the subject however. First, there is evidence that a fairly wide margin of appreciation is given by the Scottish courts to the Scottish Parliament and Scottish government where the issue of proportionality has arisen in other EU contexts: see, for example, the minimum alcohol pricing case of *The Scotch Whisky Association v Lord Advocate*, 2013 SLT 776, currently being reclaimed; and the cigarette vending machine case of *Sinclair Collis v Lord Advocate*, 2013 SC 221.
16. The main difficulty as regards proportionality in general appears to the Faculty to be its intrinsic uncertainty. First of all, in reality, there is no single ‘proportionality principle’, but related and differing proportionality principles. There is a helpful analysis demonstrating these differences in the speech of Lord Reed in *Bank Mellat v Her Majesty’s Treasury (No 2)* [2013] 3 WLR 17 (“*Bank Mellat*”); although this is an English case it is likely to be considered authoritative in Scotland. Secondly, there is a difficulty predicting the outcome of the application of proportionality. Proportionality gives the courts more room to intervene than *Wednesbury* reasonableness. This is in keeping with the modern trend of accountability of bodies which are publicly funded, and may be seen as a positive development. But with the additional space for intervention comes more room for disagreement between judges, and a consequent loss of legal certainty. *Bank Mellat* is a good example. The case concerned a challenge to the proportionality of an Order in Council, the effect of which was to prohibit all persons operating in the UK financial sector from entering into or continuing to participate in any transaction or business relationship with the claimant, which was a major Iranian commercial bank. Lords Reed and

⁵ *Walton* at [117] (Lord Tyre).

Sumption appeared to agree as to the principles governing proportionality in that context, but came to opposing conclusions as regards its application; as did the other judges of the Supreme Court. The end result of the case was that the Order was found disproportionate; but it appears that if the opinions of the first instance and Court of Appeal Judges are taken into account, more judges thought the Order proportionate than not. Accordingly, the evidence so far is that the Scottish courts will be careful to apply the Chapter VII provisions when considering the Charter, but there may be difficulties ascertaining the precise scope and content of those provisions in the current state of development of the law.

Question 3

17. By question 3 the call for evidence asks what evidence there is that the impact of ECHR case law, as given effect through the EU's fundamental rights framework, has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK.
18. The Faculty notes that, whereas there is a large body of Scottish case-law in which the ECHR rights are invoked in general, there are few examples of cases in which the ECHR is sought to be invoked through the medium of the EU framework on fundamental rights. In the case of *Cairn Energy* already mentioned, ECHR rights (and the equivalent Charter rights) were both invoked. However, generally speaking, such cases are the exception rather than the rule. The very limited evidence so far suggests the impact of ECHR case law as given effect through the EU's fundamental rights framework on individuals, business, public sector and other groups in the UK is currently neutral.

Question 9

19. By question 9, the call for evidence asks what evidence there is that the impact of the EU's accession to the ECHR will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK.

20. The Faculty considers that the impact of the EU's accession to the ECHR on individual litigants is likely to be marginal. Both Charter and ECHR rights are already available to litigants in the UK; Charter rights are by the Explanations (Treaty on European Union Article 6, Charter Article 52(7)) to be interpreted in accordance with ECHR rights where they correspond (Charter Article 52(3)); and for some time the Court of Justice of the European Union ("CJEU") has had regard to Strasbourg case law when deciding fundamental or Charter rights based arguments. The Faculty welcomes, however, the opportunity which the accession presents for a negotiated, considered and consistent approach to the determination of rights cases. Accession also presents an opportunity to work out arrangements so that cases raising EU Charter and fundamental rights, and Convention rights, can be routed to the appropriate international court. The Faculty is conscious that care requires to be taken so that a multiplicity of litigations is avoided; expedition and transfer between courts, where appropriate, is available; and delay and legal expenditure are kept within reasonable bounds.

Question 11

21. By question 11, the call for evidence asks what other future challenges and opportunities are relevant to the UK as regards EU fundamental rights.
22. The Faculty considers that the main challenge for the future is likely to be in the balancing of fundamental rights with other important democratic principles including legal certainty and finality, and the proportionality of public expenditure on the determination of the issues involved. The changing landscape of rights, including the proposed UK Bill of Rights; the potential for further UK-wide devolution; and the continued development of fundamental rights at the EU and Strasbourg levels, may suggest, depending on its contours, the need for a degree of rationalisation.

Question 12

23. By question 12, the call for evidence asks how action in respect of fundamental rights could be taken differently, whether at the national or regional level, or by international organisations—and if so taken, how this would affect the UK.
24. The Faculty notes that alternative frameworks protecting fundamental rights have existed in Scotland for a long time. Domestic Scots law aims to protect fundamental rights. International rights protection through the ECHR has shown that Scots domestic law on its own has not always been sufficient to meet rights guarantees in international rights instruments to which the UK is a signatory, and there have been beneficial and important changes to the Scottish domestic legal system due to the effect of the ECHR and EU. But it remains the case that there has always been a significant degree of rights protection within domestic Scots law. Further, Scotland has had an additional level of fundamental rights protection since devolution. Sections 28 and 57(2) of the Scotland Act 1998 have the effect that legislation is not law if it is incompatible with either any of the ECHR rights (as defined) or with EU law; and members of the Scottish Government have no powers to act incompatibly with ECHR rights or EU law. An individual litigant is thus able to challenge an act which is claimed to be so incompatible on the basis that it is *ultra vires*. The Human Rights Act 1998 also made Convention rights directly enforceable in the Scottish courts. Other international conventions not formally incorporated into domestic law may be relevant to the interpretation of domestic fundamental rights. Then there are the EU Charter and fundamental rights upon which the call for evidence focuses.
25. Protection of fundamental rights is an important value for a democratic country, and this legal framework provides multi-layered rights protection. But although the layers overlap, they can differ significantly. Fundamental rights law in its various guises is constantly developing. The overall effect is a complex system of rights protection, so that enforcing fundamental rights is frequently expensive for litigants and the public purse. The Faculty considers that there is an argument to be made for the current framework of rights to be simplified for

litigants, whether that framework is viewed at the devolved or at the UK-wide level. The simplification suggested is not a removal of any of the existing rights, but the rationalisation of the various systems. One option would be a hierarchy of rights protection to cut out the need for litigants and their advisors to go to every potential rights-source. In a Convention rights context this is already being done to some extent. In *R (Osborn) v Parole Board* (also known as *In re Reilly*) [2013] 3 WLR 1020 (“*Reilly*”), the Supreme Court made it clear that the first port of call for a litigant seeking to invoke fundamental rights protection should be domestic administrative law, this being on the basis that “the protection of human rights is not a distinct area of the law, based on the case law of the European Court of Human Rights, but [one which] permeates our legal system.”⁶ But where EU Charter and fundamental rights are concerned, the hierarchy may well have to be different, and start with the Charter, because of principles of primacy of EU law. There are other options for simplification. The Faculty suggests that rationalisation is of itself an important aspiration for rights organisations.

Question 13

26. By question 13, evidence is called for as to whether fundamental rights are being used indirectly to expand the competence of the EU. Question 13 concludes by asking whether, if so, such an expansion of competence has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK.
27. The Faculty is not aware of any evidence that fundamental rights are being used indirectly to expand the competence of the EU. On the contrary, the few cases in which such matters have been raised in Scotland clearly indicate that a conservative approach is being taken by the Scottish courts. There is nothing of which the Faculty is aware to suggest that this approach will not continue.

⁶ *Reilly* at 1041 [55], 1044 [63]. (Lord Reed).



**RESPONSE TO THE MINISTRY OF JUSTICE
BALANCE OF COMPETENCIES
FUNDAMENTAL RIGHTS REVIEW**

BY

**GARDEN COURT CHAMBERS
ROMANI GYPSY & TRAVELLER TEAM
JANUARY 2014**

About the Team

1. Garden Court Chambers Romani Gypsy & Traveller Team consists of barristers who have specialised in providing advice and representation to the Romani Gypsy and Traveller community for many years. Members of the team are recognised for their outstanding commitment to, and expertise in, this and other areas of law, in particular housing law and discrimination.
2. We have been involved in many of the leading cases in this area of law over many years, among them: *South Bucks DC v Porter (No. 1)* [2003] UKHL 26; [2003] 2 AC 558; *Harrow LBC v Qazi* [2003] UKHL 43; [2004] 1 AC 983; *Connors v United Kingdom* (2004) 40 EHRR 189; *Codona v Mid-Bedfordshire* [2004] EWCA Civ 925; [2005] H.L.R. 1; *South Bucks DC v Porter (No. 2)* [2004] UKHL 33; [2004] 1 WLR 1953; *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 AC 465; *McCann v United Kingdom* (2008) 47 EHRR 913; *Doherty v Birmingham CC* [2008] UKHL 57; [2009] 1 AC 367; *Kay v United Kingdom* (2010) 21st September 2010; *Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441; *London Borough of Hounslow v Powell and Others* [2011] UKSC 8; and *Buckland v United Kingdom* (2012) Application No 40060/08, 18th September 2012.

Our response

3. The Ministry of Justice (MOJ) issued a call for evidence for a review on the balance of competences between the UK and EU in relation to fundamental rights on 21st October 2013.

4. In essence the Government seek 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).
5. 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
6. We agree with those observations. We consider it essential that EU law is implemented in a way which is compatible with fundamental rights; and that the valuable work of the Fundamental Rights Agency is recognised and supported by the UK.
7. We have also had the advantage of reading the responses submitted by the following organisations: the Equality and Diversity Forum, the Traveller Movement, the Community Law Partnership ('CLP') and endorse all the points made by them.
8. In addition we wish to make the following points in relation to questions 4 and 5 and the work of the Fundamental Rights Agency (FRA).

¹ See Catherine Taroni at <http://eutopialaw.com/2013/11/25/fundamental-rights-and-the-uks-balance-of-competences-review/>

9. The EU promotes respect for fundamental rights through the work of the FRA. We would like to highlight the excellent work done by the FRA on promoting and protecting the fundamental rights of Gypsies, Travellers and Roma throughout Europe by producing important data and research which demonstrates the inequalities and discrimination that they face as vulnerable members of society.² For example, see:
- FRA's 'multi annual Roma programme'
<http://fra.europa.eu/en/project/2013/multi-annual-roma-programme>
 - Analysis of FRA Roma survey results by gender
<http://fra.europa.eu/en/publication/2013/analysis-fra-roma-survey-results-gender>
 - The FRA report 'The situation of Roma in 11 EU Member States'
<http://fra.europa.eu/en/publication/2012/situation-roma-11-eu-member-states-survey-results-glance>
 - The FRA report 'Housing conditions of Roma and Travellers in the European Union - Comparative report'
<http://fra.europa.eu/en/publication/2011/housing-conditions-roma-and-travellers-european-union-comparative-report> and
 - The 'EU-MIDIS Data in Focus Report 1: The Roma'
<http://fra.europa.eu/en/publication/2009/eu-midis-data-focus-report-1-roma>
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.³
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.

² See <http://fra.europa.eu/en/theme/roma>

³ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0173:FIN:EN:HTML>

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 Report⁴ 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.⁵

Conclusion

13. We consider that it is vital that the UK Government respects fundamental rights when it implements EU law and that 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.
14. As a result of this Review we hope that the MoJ will grasp the nettle and ensure that the UK Government complies with its obligations and adopts a robust and coherent NRIS which will improve the lives of Gypsies Travellers and Roma living in the UK.

Marc Willers

On behalf of

**The Romani Gypsy & Traveller Team
Garden Court Chambers,
57 – 60 Lincoln's Inn Fields,
London WC2A 3LJ.**

13th January 2014

⁴ See http://ec.europa.eu/justice/discrimination/files/roma_uk_strategy_annex2_en.pdf

⁵ See the article by Willers and Greenhall at

<http://www.gypsy-traveller.org/wp-content/uploads/2012/01/TAT-News-Roma-Strategies-18.3.2012.pdf>

8 July 2014

www.lccsa.org.uk



LCCSA RESPONSE TO THE BALANCE OF COMPETENCES
FUNDAMENTAL RIGHTS REVIEW

The London Criminal Courts Solicitors' Association (LCCSA) represents the interests of specialist criminal lawyers in the London area. Founded in 1948, it now has over 750 members including lawyers in private practice, Crown prosecutors, freelance advocates and many honorary members who are circuit and district judges.

The objectives of the LCCSA are to encourage and maintain the highest standards of advocacy and practice in the criminal courts in and around London, to participate in discussions on developments in the criminal process, to represent and further the interest of the members on any matters which may affect solicitors who practice in the criminal courts and to improve, develop and maintain the education and knowledge of those actively concerned with the criminal courts including those who are in the course of their training.

The LCCSA has decided to only respond to those questions which are pertinent and within the ambit of knowledge and concerns.

Any queries on this response should be addressed to:

XXXX

LEWIS NEDAS LAW

24 CAMDEN HIGH STREET

NW1 0JH

DX: 57056 CAMDEN TOWN

[XXXX](#)

President

Nicola Hill

Kingsley Napley
14 St John's Lane
London EC1M 4AJ
DX 22 London Chancery Lane
020 7814 1200
nhill@kingsleynapley.co.uk

Vice-President

Jonathan Black

BSB Solicitors

5-7 Euston Road
London NW1 2SA
DX 37905 Kings Cross
020 7837 3456
jonathanb@bsblaw.co.uk

Junior Vice-President

Julian Hayes

Hayes Law

1 Lyric Square
London W6 0NB
DX 46767 Hammersmith 3
020 7348 5100
Julian.hayes@hayeslaw.co.uk

Training Officer

Diana Payne

Blackfords LLP

Hill House, 1 Mint Walk
Croydon CR0 1EA
DX 2617 Croydon
Tel: 020 8686 6232
diana.payne@blackfords.com

News Editor & Hon.

Secretary

Melanie Stooks

TV Edwards

190-196 Deptford High Street
London SE8 3PR
DX 56700 Deptford
020 8479 8000
melanie.stooks@tvedwards.com

Hon. Treasurer

Tim Walker

Sonn Macmillan & Walker

19 Widgate Street
London E1 7HP
DX 857 London Chancery Lane
020 7377 8889
twalker@smw-law.co.uk

Administrator

Sandra Dawson

Po Box 6314

London N1 0DL

DX 122249 Upper Islington

020 7837 0069

sandra@admin4u.org.uk

VAT 524 9410 52

Question 1 – As lawyers engaged in the criminal courts mostly but not exclusively representing the accused, there is in our view cogent evidence that the Charter and the EU's broader framework of fundamental rights have been advantageous to individuals in the UK. Examples include – and we recognise these were ECHR decisions although Charter rights were being upheld – whole life tariffs equating to degrading treatment, the retention of DNA samples from persons never convicted of any criminal offence being an infringement on an individual's right to privacy and the blanket ban on prisoners being allowed to vote was a breach of the right to free elections. Regrettably, in each of the above examples the Government was slow to respond to the upholding of the individual's right or failed altogether to reconcile the conflict between EU and domestic law.

Question 3 – Following on from our response to the first question, we believe ECHR case law has been advantageous certainly within the scope of the decisions which impact on our area of practice and expertise. Again the failure of Government to adequately to respond in a timely manner to ECHR rulings remains an issue which has a negative impact on the rule of law being upheld.

- S and Marper v UK ruled the blanket and indiscriminate retention policy in respect of samples of DNA breached the right to privacy under the ECHR.
- Vinter and other v UK ruled whole life tariffs were degrading and a breach of Article 3 ECHR.
- Hirst v UK (no2) stated that a blanket prohibition on prisoners voting in all elections was a breach of Article 3 of Protocol 1 which bestows the right to free elections.

Question 8 – The only project on which we can comment is Fair Trials International which provides an extremely important resource for citizens arrested and/or prosecuted abroad. In this the programme achieves its objectives by protecting a number of fundamental rights enshrined in the Charter and the ECHR.

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



Bar Council response to the Review of the Balance of Competences: Fundamental Rights

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice's call for evidence entitled: Review of the Balance of Competences: Fundamental Rights.
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.
4. This response concentrates on questions 1 – 3 and 13 of the consultation document. Save in one particular, we leave it to those more familiar with the operations of the Fundamental Rights Agency and European Commission funding programmes in this area, to comment on those. The caveat relates to the CJEU Grand Chamber judgment of 22 January 2014 in case C-270/2012, which dealt inter alia, with the conferral of powers under the Meroni doctrine, and which may thus have an impact on the role and reach of the Fundamental Rights Agency. We thus add a necessarily preliminary view on that at the end of this paper.

The operation of EU fundamental rights

5. Members of the Bar litigating on behalf of individuals have relied upon the principle of fundamental rights, where EU law is in scope, for decades. In some areas, EU fundamental rights have played a greater role than the European Convention on Human Rights (the Convention), since the Convention could not be relied upon as creating legal duties for public authorities until the Human Rights Act (HRA) came into force in the year 2000. By contrast, EU law was clearly binding upon the UK from at least 1972 with the European Communities Act. Strong principles developed from the 1960s onwards regarding

rights of EU citizens to free movement across the EU to work. With this cornerstone principle came employment, consumer and migration rights set out in EU legislation and developed by the European Court of Justice. Over this period of time, the EU led the development of anti-discrimination legislation, access to courts and the proper administration of decisions, and in particular proportionality of legal acts. These principles have been relied upon in arguments by members of the Bar across the spectrum of EU competence for many years, offering redress to individuals in a way that the Convention would have been unable to do, by way of conforming interpretations with EU law, pursuant to the *Factortame* doctrine and *Francovich* damages. To this extent, fundamental rights principles have offered many advantages to individuals when faced with unfair or discriminatory application of EU legislative acts in the UK.

The impact of the Charter of Fundamental Rights

6. The Charter of Fundamental Rights, as a codifying and clarifying document, contributes to the advancement of fundamental rights by making these rights clearly identifiable in one, legally binding instrument. The Charter has been pleaded increasingly since its inception in 2000, as an interpretative tool, and since 2009, as a binding set of rights with equal treaty status. From the perspective of a litigator, it gives more definite and concrete form to certain fundamental rights, and spells out some rights that might otherwise be less obvious to discern from general principles or case law (for example, the right of access to documents). Where previously one would have to be an EU lawyer or particularly active in a given field to know that the EU provided a protection or duty, perhaps across many directives and cases of the European Court, it is now possible for all lawyers who come across an EU law point in their cases to refer to the Charter and Explanations to establish whether it offers any assistance to an individual in need of redress. The Explanations are particularly helpful in signposting the origins of a Charter article so that the Treaty, secondary legislation or case law can be drawn upon to establish the parameters of the right under consideration. If appearing before an English judge, particularly in the lower courts where they may be unfamiliar with EU law, being able to point to a specific instrument spelling out the rights may help to give the court confidence that they must (in an appropriate case) apply the right. To non-specialists, the Charter provides transparency and accessibility over the prior disparate fundamental rights principles.

The advantage of the Charter over the Convention

7. The most significant and practical advantage of the Charter over the Convention is the effectiveness of the remedy available by way of the Charter that is not present with the Convention, namely the disapplication of primary domestic legislation to give effect to a Charter right. From the perspective of the individual it is little comfort to find that the law is incompatible with a Convention right, but that the courts can do nothing other than declare as such and defer to Parliament to make amends for others in the future, pursuant to section 4 HRA. Whereas, applying the same rights provided by the Convention, but under their Charter articles, a person may obtain immediate and effective redress by the requirement to ensure the domestic measure conforms with the Charter right.

8. Furthermore, the Charter provides more expansive rights than appear in the Convention – with regard in particular to human dignity (article 1 CFR), the right to a fair trial and effective remedy (article 47 CFR), and non-discrimination (article 21 CFR). The extensive presence of what might be termed ‘socio-economic’ rights that may proactively be invoked, as opposed to limited civil liberties that ought not to be interfered with is a significant distinction to the Convention, though of course the interpretation of these articles of the Charter varies.

9. As such, it is possible to see members of the Bar relying on the Charter across a wide spectrum of practice areas, either in addition to or instead of, the Convention.¹ That does not necessarily always mean that the *outcome* is ‘advantageous’ to the individual when otherwise it would not have been. It may add little, dependent upon the facts of the case, established EU principles in the secondary EU legislation, or effective application of the Convention. Nevertheless, we consider the Charter to add value by the greater accessibility it brings to EU rights and, therefore, the greater potential to identify rights based claims than existed prior to the drafting of the Charter.

Difficulties in relying upon the Charter

10. The main difficulty with the Charter as opposed to the Convention is establishing that it is engaged, i.e. that there is a sufficient nexus between the issue and EU competence. It is not always easy to show that a matter falls within the scope of EU law, and the case law of the CJEU has been widely variant on this issue, from general competence being sufficient (e.g. VAT in the case of *Fransson*²), to a requirement for a specific factual engagement (e.g.

¹ Recent examples that have come before the UK Supreme Court include *Rugby Football Union v Consolidated Information Services Ltd (formerly Viagogo Ltd)* (in liquidation) Supreme Court 21 November 2012 [2012] UKSC 55 [2012] 1 W.L.R. 3333 – reliance on article 8 CFR (right to personal data) to prevent a Norwich Pharmacal order for information. The claim was amended to include reference to the Charter where no reliance was made upon article 8 ECHR. The Court referred to EU fundamental rights principles and protections set out in data protection directives and the requirement of proportionality in all EU law actions, as well as ECHR case law; *Assange v Swedish Prosecution Authority* [2012] UKSC 22 – The European arrest warrant system was always intended to comply with the ECHR, and now must comply with Charter, therefore national implementing legislation must be compliant. Reference was made to ECHR jurisprudence by some justices, but offered no particular guidance on the specific issue of judicial authorities being required to issue an EAW; *Saint Prix v Sec State for Work and Pensions* [2012] UKSC 49 – the UK Supreme Court decided to seek a reference to the CJEU on the question of the right to reside where a worker temporarily ceases to be employed by reason of late stages of pregnancy and aftermath of child birth, and whether the right to equal treatment is engaged to prevent the loss of status under the Citizenship directive; *R (on the application of Chester) v Sec State for Justice*; *McGeoch v the Lord President* [2013] UKSC 63 - prisoners right to vote in national and EU parliamentary elections. No further declaration of incompatibility with the ECHR to that already made in *Hirst* could be given, but no other remedy is available. EU law is concerned with ensuring equal treatment in national voting schemes for non-nationals, not a right to vote per se. A general non-discrimination principle could not be applied since prisoners and non-prisoners are not comparable.

² Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, Grand Chamber (unreported 26th February 2013)

European arrest warrants in the case of *Radu*³), dependent often on how established the area of competence is, and how fundamental to the EU project. Likewise, whether the Charter has horizontal application seems to have been accepted by the CJEU, at least to the extent of recording general principles of EU law that courts must give effect to in cases before them, and now applied in the UK in *Benkharbouche v Embassy of the Republic of Sudan*, [2013] IRLR 918 (which we understand will be appealed).

11. It is also necessary to demonstrate what the Charter may add to other claims, given that it does not create new rights, as otherwise courts may see it as a futile addition. Here, explaining the value of a remedy otherwise not available by way of the Convention is necessary, or an explanation that it is a codifying document, and the previous interpretations of the right remain the most helpful interpretative tool. To this end, it is also necessary to engage with the question of whether a Charter article creates a right or a principle, or whether this in fact matters in practice at all. Often the CJEU can be seen to refer to the Charter as a starting point, as providing a point of principle, but its prior case law and other legislative instruments are what the Court considers to find how the right in question ought to be applied in a given case.

Interpretation in accordance with Title VII

12. In our view all cases considering the Charter indicate that it is being interpreted in accordance with the general provisions. As is necessary, these are being taken as the starting point of any application of the Charter. As indicated above, this does not necessarily mean that an easy decision can be reached about the application of the Charter since ‘when implementing EU law’, pursuant to article 51, continues to be given a wide interpretation, in accordance with pre-Charter jurisprudence of the CJEU. This means that matters falling within the ‘scope’ of EU law alone may satisfy the condition precedent in article 52 (such as in *Fransson*). The general provisions provide for competing interests, as between the application of a right and a justified interference with it (pursuant to article 52), which has often been considered by the CJEU, in accordance with the general principle of proportionality, or the European Court of Human Rights jurisprudence. They also provide for competing interests between the rights contained in the Charter and national constitutional rights (pursuant to article 53), which has now been interpreted and applied in *Melloni*,⁴ and followed in *Fransson* such that national fundamental rights principles are free to be applied, so long as they do not compromise ‘the primacy, unity and effectiveness’ of EU law.

Expansion of EU competence through the ambit of fundamental rights

13. We consider there to be very little indication of the Court of Justice using the Charter to expand EU competences. Indeed, it would be odd for the Court to need to do so since throughout its history, the Court has borrowed concepts from the Member States, international agreements, and the Convention in particular, to develop principles of EU law where it considers that the EU Member States adhere to those concepts as fundamental

³ Case C-396/11 *Curte de Apel Constanța (Romania) v Radu*, Grand Chamber (unreported, 29th January 2013)

⁴ Case 399/11 *Stefano Melloni v Ministero Fisca*, Grand Chamber (unreported 26th February 2013)

rights. The Charter as a codifying document has simply made it easier for the Court to identify the starting point, rather than provide an impetus for expansion.

Possible impact of Case 270/2012 on the role of the Fundamental Rights Agency?

14. Finally, the Bar Council draws your attention to the recent judgment of the Grand Chamber of the Court of Justice delivered on 22 January 2014 in case C-270/2012 (the UK's challenge of Article 28 of the Short Selling Regulation (236/2012), in particular relating to the European Securities and Markets Authority ("ESMA"). The case concerned, inter alia, the type of powers that can be conferred on EU agencies, and thus involved interpretation of the "*Meroni*"⁵ doctrine and related case law, with possible implications for the conferral of powers on other EU agencies.

15. The Commission in that case accepted that the *Meroni* jurisprudence remains of "*particular relevance for the constitutional order of the Union*". The Court of Justice in *Meroni* itself had referred to the "*fundamental guarantee*" as to "*the balance of powers which is characteristic of the institutional structure of the Community*", and said "[t]o delegate a discretionary power, by entrusting it to bodies other than those which the Treaty has established to effect and supervise the exercise of such power each within the limits of its own authority, would render that guarantee ineffective".

16. The Bar noted, in its recent response to the review of the Balance of Competences in the area of Financial Services, that, in its judgment in Case 270/2012 above, the Court of Justice, while purporting to adhere to *Meroni*, has applied it in such a way as to deprive it of any real effect. Drawing from that response, we observed that "The Court concluded that the *Meroni* principle was satisfied because the power given to ESMA to regulate short selling in an emergency requires ESMA to "*examine a significant number of factors*", ESMA can take only certain types of measure, and ESMA has duties to consult and notify various bodies. On any realistic view, however, the extremely broad nature of the factors to be weighed up, and the far-reaching nature of the measures available to ESMA, make Article 28 of the short selling regulation a very clear breach of *Meroni*. It is difficult to understand the Court's decision on any basis other than pure expediency."

17. It has not been possible in the time available to analyse the possible implications of this judgment beyond the immediate field of financial services, and on the conferral of powers on EU agencies generally. For present purposes, we highlight the possibility that that judgment may open the door to a future extension of the competences of the Fundamental Rights Agency beyond what would have been expected based on a pure application of the *Meroni* doctrine, the repercussions of which would merit further analysis. The Bar would of course be happy to consider this issue in greater depth at a later stage should that be of interest.

Bar Council
January 2014

⁵ Case 9/56 *Meroni v High Authority* [1957 & 1958] ECR 133.

For further information please contact:

XXXX

The General Council of the Bar of England and Wales, Brussels Office

Avenue des Nerviens 85,

Brussels B-1040

Direct line: XXXX

Email: [XXXX](#)

Balance of Competences Consultation Response

Fundamental Rights

January 2014

This is a joint response from the Law Society of England and Wales and the Law Society of Scotland (the Law Societies).

The Law Society of England and Wales is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 166,000 members, promoting the highest professional standards and the rule of law.

The Law Society of Scotland is the professional body for Scottish solicitors, established in 1949. It is not only the representative and regulatory body for all practising Scottish solicitors but also has an important duty to work towards the public interest.

- I. UK membership of the EU has brought significant benefits to the legal services sector and in particular solicitors, law firms and their clients, primarily through the ability to trade, provide services and establish businesses across the EU and to seek effective redress to cross-border legal issues.
- II. The legal services sector plays a key role in the UK economy, the UK's competitive advantage and in improving the efficiency of doing business. Legal services directly contributed £27.2bn¹ in turnover to the UK economy in 2011. This included almost £4bn of exports – a substantial volume of which was generated through trade with EU Member States.
- III. The UK legal services sector is globally focussed with offices and lawyers based throughout Europe and the world. Law firms exist in order to serve the needs of their clients; these are commonly British businesses trading throughout the Internal Market and increasingly non-British clients doing business in the Internal Market.
- IV. The legal professions in all parts of the UK play a key role in upholding the rule of law. The rule of law cannot exist without a transparent legal system which includes an independent legal profession, access to justice and an independent judiciary to protect citizens against the arbitrary use of power by the state, individuals or any other organisation.
- V. Law underpins the widest range of transactions and facilitates the administration of justice and rule of law for that business to take place. Without the rule of law, prolonged and sustainable economic growth is not possible.
- VI. The legal professions in the UK work day-to-day with clients throughout the EU dealing with a broad range of legal issues across a diverse range of fields, ranging from commercial transactions, intellectual property and competition law to employment law, civil justice and dispute resolution.
- VII. It is for these reasons that the Law Societies and the legal profession have an interest in the stability of the UK's position within the EU.

¹ <http://www.ons.gov.uk/ons/rel/abs/annual-business-survey/2011-revised-results/index.html>

VIII. The Law Societies nevertheless accept that there is a debate as to the appropriate level of EU competence in various policy areas and will input into the other reviews of the balance of competences of most relevance to the legal profession.

Question 1

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?

1. The Law Societies have no evidence as to whether these have been advantageous or disadvantageous but a number of relevant points are set out in the following paragraphs.
2. The Charter is an innovative instrument which brings together in one text all the fundamental rights protected in the Union².
3. The rights, freedoms and principles laid out in the Charter provide citizens with clear, visible and legally secure rights.
4. The Charter contains rights and freedoms under six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. Proclaimed in 2000, the Charter has become legally binding on the EU with the entry into force of the Treaty of Lisbon in December 2009.
5. The Charter has provided more extensive protection than the European Convention on Human Rights (ECHR). For example, in relation to non-discrimination, Article 21 of the Charter goes further than Article 14 of the ECHR. Similarly, in relation to fair trial rights, Article 47 of the Charter is not limited to disputes relating to civil rights and obligations and therefore provides more extensive protection than Article 6(1) of the ECHR.
6. Following the entry into force of the Lisbon Treaty in 2009 the Charter has the same legal value as the European Union treaties. Article 6(1) of the Treaty on European Union (TEU) recognises the Charter and accords it the same legal value as the Treaties.
7. The scope of the Charter is such that "the Member States are only affected when they are implementing Union law. So where Member States are dealing with non-EU matters the Charter has no legal application".³ The Charter itself is restricted from extending the competences of the EU (see Article 51(2)).

² The rights and principles enshrined in the Charter combine constitutional traditions, international conventions common to the Member States, the ECHR, Social Charters adopted by the Community and the Council of Europe, and the case law of the Court of Justice of the Union and the European Court of Human Rights.

³ A Constitutional Treaty for the EU: The British Approach to the European Union Intergovernmental Conference 2003, Cm 5934, September 2003, para. 102.

8. 'The UK and Polish Protocol', which is too often confused with an 'opt-out' provision, is a legally binding text which seeks to prevent the Charter being interpreted in a way that creates rights additional to those already provided for in British or Polish law.
9. Despite the foregoing, there is widespread confusion regarding the Charter and its applicability especially regarding the so-called 'opt-out' provision.
10. Government could do more to ensure that business and the public sector as well as individuals have a clear understanding of what the Charter means and how it applies.

Question 2 - What evidence is there on whether the Charter is being interpreted and applied in line with the general provisions set out in Title VII of the Charter?

11. Cases are being interpreted in line with Title VII. The Luxemburg courts may tend to be more expansive in their interpretations of the spirit and intention of Title VII as compared with the current UK government's narrow view of this - but that is not the same as saying that they are not being interpreted in a way that is consistent with the instrument.
12. NOTE: The case law reflects the fact that there are differing legal jurisdictions and systems encompassed within the EU.

Question 3 - What evidence is there that the impact of ECHR case law, as it is given effect through the EU's fundamental rights framework, has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?

13. Article 52(3) provides that in so far as the Charter contains rights that correspond to rights guaranteed by the ECHR, the meaning and scope of Charter rights shall be the same as those laid down by the ECHR.
14. Article 52(3) states that it "shall not prevent Union law providing more extensive protection".

Examples of when the Charter has provided more extensive protection include:

- **Non-discrimination**
Article 21 of the Charter goes further than Article 14 ECHR: unlike Article 14 of the ECHR it is applicable even outside the scope of the other protected rights.
 - **Fair Hearing**
Unlike Article 6(1) ECHR - Article 47 of the Charter is not limited to disputes relating to civil rights and obligations
15. Where the Charter and ECHR provisions are the same Article 52(3), generally speaking, provides a more generous interpretation of the Charter right.
 16. By its amendments and additions to the ECHR the Charter itself acknowledges that the formulation of fundamental rights is a dynamic process. While there has been criticism of this, any system of law must react to the changing conditions of society and the principles applied to new situations which were not necessarily thought of when the Convention was drafted.

17. It is imperative that such criticism be responded to by resolute support for the principles of the convention, myth-busting and championing of the good things that it achieves.

Question 4 - 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?

18. One example of when the work of the Fundamental Rights Agency has proved advantageous to the Law Society of England and Wales was when it carried out analyses on the proposal for a European Investigation Order. In particular the Law Society found this useful as an analysis of the implications of the proposal for fundamental rights.
19. In addition the Law Societies understand that a fundamental rights analysis is carried out for every European Commission proposal issued to ensure that it complies with the EU fundamental rights legal framework. These should be made public in order to assess whether a beneficial impact on all EU citizens is being produced by the legislation.

Question 5 - What evidence is there of whether the Fundamental Rights Agency demonstrates value for money?

20. The Law Societies have no evidence to produce.

Question 6 - 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?

21. While the Law Society of England and Wales does not have direct experience of the Fundamental Rights and Citizenship Programme (FRCP), it notes that one of the FRCP's goals is to support the training of legal professionals advising on instruments in these fields. The Law Society has provided the following comments to the House of Lords' Sub-Committee F inquiry into the next EU 5-year JHA Work Programme in relation to the analogous scheme Justice Programme being negotiated for 2014-2020:

"...[W]e believe that it is vitally important that UK opts in to the Regulation establishing for the period 2014 to 2020 the Justice Programme. As EU law develops, lawyers, judges and parties making use of EU law in the UK must have access to adequate training. This Regulation aims to encourage a more consistent application of EU legislation in the field of judicial cooperation in civil and criminal matters. We understand that the final text will provide for funding for training activities from which legal practitioners, as well as judges, will be able to benefit.

"While a failure by the UK to opt in would not prevent legal professionals from the UK from taking part in co-financed training, they would be required to bear the costs themselves without any reimbursement. It is clear that these additional costs may be prohibitive for many practitioners and that all but a few legal professionals from the UK would be unable to attend such training courses on EU legislation. This could result in a position where specialist up-to-date EU law advice could only be obtained from firms that can afford to fund such training. It might also put UK litigants and those subject to criminal proceedings with a cross-border element at a disadvantage to their counterparts in other Member States as they may receive less advice on EU instruments that could assist them. Conceivably if our lawyers and judges are not properly trained it may also result in more references to the CJEU."

The Law Society of Scotland endorses these comments.

Question 7 - What evidence is there that the Fundamental Rights and Citizenship programme provides value for money?

22. The Law Societies have no evidence regarding the Fundamental Rights and Citizenship programme concerning its value for money.

Question 8 - Do the projects funded under the Fundamental Rights and Citizenship programme help the programme meet its stated objectives?

23. The Law Societies have no evidence regarding the Fundamental Rights and Citizenship programme concerning the projects it funds in relation to its stated objectives..

Question 9 - What evidence is there that the impact of the EU's accession to the ECHR will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?

24. The EU's accession to the ECHR will be advantageous to all those mentioned above. It is important that human rights are treated in a consistent manner not only by Member States but also at a supranational level. EU accession to the ECHR will assist in ensuring consistent application across all aspects of EU law.

Question 10 - What evidence is there that the impact of the Rights, Citizenship and Equality Programme will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?

25. The promotion of awareness of these rights opens up opportunities as people are more confident in considering cross border trade, moving from one country to another and in investing in other countries

Question 11 - What other future challenges and opportunities in respect of EU fundamental rights are relevant to the UK?

26. Current trends in the political climate in the UK may present a future challenge. There is an increasingly negative depiction of human rights within the UK – often linked to human rights law and/or cases being reported incorrectly in the press. Some politicians refer to human rights in a negative way without fully explaining how the current human rights framework is dependent on the Council of Europe as distinct from the EU. The media frequently report human rights cases and issues in "sound bite" format with no attempt to explain the underlying facts and context. The resulting public perception is that human rights are being used by those in prison, facing criminal trials and those liable to be deported to avoid the "proper" application of the law and to gain an unfair advantage.
27. It is important to emphasise that human rights are for all and not dependent on whether the person relying on them is popular or unpopular in society. This is a consequence of living in a society where the rule of law applies and which respects individual rights.
28. Inevitably there will be unpopular judgments involving those in prison, facing criminal trials and those liable to be deported and there will also be inconvenient results for people who breach the law. There is no reason to suggest that the results are disproportionate.

29. These things have resulted in members of the current Government publicly stating the desire and drive to pull out of the Human Rights Act (HRA). This could have a read across to the Charter by way of general criticism of the EU.
30. In the context of devolution to the Scottish Parliament and Welsh Assembly, this is intertwined with the role of the ECHR in relation to devolved legislation.

Question 12 - How could action in respect of fundamental rights be taken differently – including nationally, regionally, or by other international organisations – and how would this affect the United Kingdom?

31. Compliance with the UK's international human rights obligations, in particular the ECHR, gives it moral authority and credibility when speaking out in support of human rights violations throughout the world.
32. In areas where it has a particularly strong record or expertise, it is possible to help take the lead in negotiating the overall EU position. As such, maintaining the UK's strong reputation in the field of human rights is of particular importance.
33. As part of the EU the UK can benefit from the combined negotiating power generated as part of a bigger block, with the potential for increased influence in international negotiations, including those in relation to Human Rights.

Question 13 - Is there any evidence of fundamental rights being used indirectly to expand the competence of the EU? If so, is this advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?

34. The Law Societies have no evidence that fundamental rights are being used indirectly to expand the competences of the EU.

Question 14 - Is there any other evidence in the field of EU fundamental rights which is relevant to this review?

35. The Law Societies offer no further evidence.

**For further information please contact:
XXXX (EU Policy Assistant)**

Joint Brussels Office of the Law Societies

T: XXXX

E: XXXX