

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.

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

- 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.
- 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

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.

matters the Charter has no legal application".³ The Charter itself is restricted from extending the competences of the EU (see Article 51(2)).

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.

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

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.

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