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The UK, the EU and a British Bill of Rights

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Evidence is published online at <http://www.parliament.uk/potential-impact-repealing-human-rights-act> and available for inspection at the Parliamentary Archives (020 7219 3074).

Q in footnotes refers to a question in oral evidence

SUMMARY

This inquiry was timed to coincide with the Government's public consultation on a British Bill of Rights. The consultation was due to be launched in December last year, but in the event was delayed, and has still not been published. The Secretary of State for Justice's evidence to us in the course of this inquiry was thus the first public statement in any detail of why the Government thinks a British Bill of Rights is necessary and of what it might contain.

This report assesses that statement, and considers the likely impact of a British Bill of Rights on three areas: on human rights litigation in national courts under the EU Charter of Fundamental Rights; on the UK's EU legal obligations and international standing; and on the devolved settlements. A broad range of expert witnesses gave evidence to us, including two former Attorneys General, and our views are informed by that evidence.

The Secretary of State said in evidence that the Government's two main objectives in introducing a British Bill of Rights were to restore national faith in human rights, and to give human rights greater national identity. The reforms the Secretary of State outlined were not extensive, however, and his evidence left us unsure why a British Bill of Rights was really necessary.

Doubts about the wisdom of introducing a British Bill of Rights grew with each evidence session we held. Many witnesses thought the current Human Rights Act incorporated the European Convention on Human Rights into national law in a peculiarly British way, and doubted more needed to be done to put human rights in a national context. Many thought that any restriction of the existing scope of rights under the Human Rights Act would lead to greater reliance on the EU Charter in national courts—a perverse consequence of a Bill of Rights that is intended to stamp national identity on human rights, particularly in view of the greater enforcement powers of the EU Charter. Many of our witnesses were deeply concerned about the effect of departing from the rights provided for in the Convention on the UK's international standing, particularly among EU Member States, and on the UK's ability to participate effectively in EU policies on fighting international crime.

We also heard a range of views on whether the Court of Justice of the European Union could be accused of extending the scope of EU law over national law through its judgments on the EU Charter. The weight of expert evidence was clear, and did not support such a conclusion.

The evidence we received from the devolved nations showed strong opposition to a British Bill of Rights and a belief that the repeal of the Human Rights Act would require the consent of the devolved legislatures before a Bill of Rights could come into force. Without this the Government might be left with an English Bill of Rights. The importance of the role of the Human Rights Act in Northern Ireland's peace process was brought home to us in evidence we received from both north and south of the border.

Taken individually, the views expressed by witnesses to this inquiry raise serious questions over the feasibility and value of a British Bill of Rights of the sort described by the Secretary of State; taken together, they make a forceful case for the Government to think again before continuing with this policy.

The UK, the EU and a British Bill of Rights

CHAPTER 1: SETTING THE SCENE

A British Bill of Rights

1. In October 2014, the Conservative Party published a policy document, ‘Protecting Human Rights in the UK’, which set out its proposal to repeal the Human Rights Act 1998 and replace it with a new ‘British Bill of Rights and Responsibilities’. The 2015 Conservative Party manifesto followed this up, promising to: “scrap the Human Rights Act and introduce a British Bill of Rights”. This would “break the formal link between the British courts and the European Court of Human Rights”, and make the Supreme Court “the ultimate arbiter of human rights matters in the UK.”¹ The intention of doing so was to:

“restore common sense to the application of human rights in the UK. The Bill will remain faithful to the basic principles of human rights, which we signed up to in the original European Convention on Human Rights. It will protect basic rights, like the right to a fair trial, and the right to life, which are an essential part of a modern democratic society. But it will reverse the mission creep that has meant human rights law being used for more and more purposes, and often with little regard for the rights of wider society. Among other things the Bill will stop terrorists and other serious foreign criminals who pose a threat to our society from using spurious human rights arguments to prevent deportation.”²

2. A Bill of Rights was not included in the Queen’s Speech in May 2015, but the Prime Minister confirmed in the House of Commons the Government’s intention to enact one:

“Our intention is very clear: it is to pass a British Bill of Rights, which we believe is compatible with our membership of the Council of Europe. As I have said at the Dispatch Box before—and no one should be in any doubt about this—issues such as prisoner voting should be decided in this House of Commons. I think that that is vital. So let us pass a British Bill of Rights, let us give more rights to enable those matters to be decided in British courts, and let us recognise that we had human rights in this country long before Labour’s Human Rights Act.”³

3. The Ministry of Justice leads on the Government’s human rights policy. The Lord Chancellor and Secretary of State for Justice, Rt Hon. Michael Gove MP, announced that a consultation on the Bill of Rights would be launched before Christmas 2015. In December, however, in evidence to the House of Lords Constitution Committee, he said that the consultation

1 The Conservative Party, *Strong Leadership, a clear economic plan, a brighter, more secure future: The Conservative Party Manifesto 2015*, p 60: <https://www.conservatives.com/manifesto> [accessed 18 March 2016]

2 The Conservative Party, *Strong Leadership, a clear economic plan, a brighter, more secure future: The Conservative Party Manifesto 2015*, p 73: <https://www.conservatives.com/manifesto> [accessed 18 March 2016]

3 HC Deb, 8 July 2015, [col 311](#)

would be delayed until the New Year, following approval of a draft paper by the Cabinet. The consultation paper would “contain a series of open-ended questions, the aim being to secure the broadest possible consensus behind whatever change is considered desirable.”⁴

4. At the time of writing, a date is not known for the launch of the consultation.

The scope and purpose of the report

5. A striking feature of the Government’s statements on the proposed British Bill of Rights is that they address the UK’s relationship with the European Convention on Human Rights, but not its relationship with the Charter of Fundamental Rights of the European Union (the EU Charter). Logic suggests that if a Bill of Rights is to bring human rights under greater national control, it ought also to address the effects of the EU Charter, the other main source of legally binding international human rights norms in the UK. Yet no mention was made of the EU Charter in Government statements on launching a consultation on a Bill of Rights. Nor was reforming the EU Charter among the Prime Minister’s objectives in the recent renegotiation of the UK’s relationship with the EU.
6. We therefore decided to hold an inquiry to assess the impact of a Bill of Rights on the UK’s obligations under EU law, and, conversely, of those obligations on a British Bill of Rights. In Chapter 2 we explain the legal landscape in which the European Convention on Human Rights and the EU Charter operate. In Chapter 3 we set out the surprisingly limited ambition of the proposed Bill of Rights, as described in evidence to us by the Secretary of State for Justice. In Chapter 4 we assess the scope of application of the European Convention on Human Rights and the EU Charter in the UK. We consider whether the EU Charter would be relied on more heavily in UK courts if the Human Rights Act were repealed. In Chapter 5 we assess how effectively the European Convention on Human Rights and the EU Charter are enforced in the UK, and consider how both have been applied to prisoners’ voting rights. In the following Chapter we consider whether the EU Charter would have primacy over a British Bill of Rights. The evidence we received led us to consider whether the German Federal Constitutional Court was a model that our own Supreme Court might follow. In Chapter 7 we assess the impact of repealing the Human Rights Act on the UK’s international standing and ability to cooperate with other EU Member States. Finally, in Chapter 8 we consider how a Bill of Rights might be perceived in the devolved nations, where both the Human Rights Act and the EU Charter are constitutionally entrenched.
7. The objective of this report is to inform future consideration of a British Bill of Rights in Whitehall, Westminster, and the devolved administrations, and to inform public debate more generally. We ask the Government to pay particular attention to the report’s conclusions in the course of its consultation on a British Bill of Rights.

The conduct of the inquiry

8. We held eight evidence sessions with academic legal experts, legal practitioners, two former Attorneys General, a former Lord Chief Justice and a former UK judge in the Court of Justice of the EU. Our final evidence

4 Oral evidence taken before the Constitution Committee, 2 December 2015 (Session 2015–16), [Q 1](#) (Michael Gove MP)

session was with the Secretary of State for Justice and Dominic Raab MP, Parliamentary Under Secretary of State and Minister for Human Rights at the Ministry of Justice. We are indebted to all our witnesses for the time and expertise they provided to our inquiry, and to all who submitted written evidence. Our conclusions are informed by their views.

9. The Members of the EU Justice Sub-Committee are listed in Appendix 1; their declared interests are also listed. The list of witnesses is contained in Appendix 2 of the report.
10. **We make this report to the House for debate.**

CHAPTER 2: THE LEGAL LANDSCAPE EXPLAINED

The European Convention on Human Rights and the EU Charter—an overview

11. The EU Charter is often confused with the European Convention on Human Rights (ECHR), as the Court of Justice of the EU in Luxembourg (the CJEU) is with the European Court of Human Rights in Strasbourg (the ECtHR). While both contain overlapping human rights provisions, they operate within separate legal frameworks.
12. The ECHR is an instrument of the Council of Europe in Strasbourg, and is ultimately interpreted by the ECtHR. It is given effect in national law by the Human Rights Act 1998 (HRA).
13. The Charter is an instrument of the EU. It is part of EU law and subject to the ultimate interpretation of the CJEU. EU law is given effect in national law through the European Communities Act 1972.
14. While human rights litigation in the UK most often comes within the framework of the ECHR, and therefore the HRA, the EU in 2009 codified a wide number of human rights, which it calls fundamental rights, in the form of the EU Charter.
15. A table at the end of this Chapter lists the principal differences between the ECHR and the EU Charter.

The ECHR

16. Signed on 4 November 1950 by 12 Member States of the Council of Europe,⁵ the ECHR is an international treaty designed to protect the human rights of citizens from violation by their governments. It is a requirement of Article 1 of the ECHR that contracting States secure enjoyment of these rights. Drawing inspiration from the United Nations' Universal Declaration of Human Rights, the ECHR covers 12 civil and political rights including the right to life; the prohibition of torture; the right to liberty and security; the right to a fair trial; the right to respect for private and family life; freedom of thought, conscience, and religion; and freedom of expression. Article 14 protects an individual's ability to enjoy these rights without discrimination. Article 15 permits derogations in times of war or other public emergencies threatening the life of the nation.
17. UK representatives played a major role in the early development of the ECHR. It was drafted under the supervision of Sir David Maxwell Fyfe, who was a member of the Council of Europe's Parliamentary Assembly and *rapporteur* on the ECHR's drafting Committee. The UK was the first European nation to ratify the Convention in 1951 and the British jurist Lord McNair was the first President of the ECtHR.
18. The ECHR was drafted in response to the failure of democratic politics in Europe after the First World War, and to the widespread crimes against European citizens committed during the Second World War. Aidan O'Neill QC characterised it in this way:

⁵ Belgium, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Turkey and the United Kingdom.

“War against its own citizens is what Strasbourg is for, it is what the European Court of Human Rights is for. It is to say that the State cannot be seen to be all-powerful, that it is called to account by universal standards, and that it cannot use its powers—its monopoly on violence—its ability to change the law, to oppress its own people, to wage war on its own people.”⁶

19. The ECHR has been supplemented by Protocols containing further civil and political rights, such as the right to free elections.
20. Unlike the CJEU, where the right of access by individuals is limited, the ECtHR is a court of individual petition, meaning citizens of contracting States can seek a ruling from the ECtHR for violation of an ECHR right by their government (or its executive agencies). They must, however, have exhausted all national remedies before applying to the ECtHR. This means they must have appealed their cases to the highest level court in their own State.
21. The contracting States of the ECHR “undertake to abide by final judgment of the Court in any case to which they are parties”.⁷ Thus the ECtHR’s judgments are legally binding. Supervision of the execution of judgments is undertaken by the Council of Europe’s main decision-taking body, the Committee of Ministers, made up of representatives of each contracting State.⁸ Unlike judgments of the CJEU, however, ECtHR judgments apply only to the Member State concerned. While the finding of a violation by a contracting State is significant of itself, and can lead to compensation for the victim, compliance with ECtHR judgments is not enforced by a punitive sanctions regime, as we report in Chapter 5. This is in contrast to the enforcement of CJEU judgments.

The Human Rights Act 1998

22. The HRA came into force in the UK in October 2000. As a consequence of its enactment, UK citizens can rely on ECHR rights, and have them determined, in national courts, rather than having to go to the ECtHR in Strasbourg, as was the case before the HRA. (They can still go to the ECtHR if the highest level court in the UK rules against them, in other words when they have exhausted their domestic remedies.)
23. All UK public bodies (such as courts, the police service, local government, hospitals, publicly funded schools) and other bodies carrying out public functions have to comply with ECHR rights.
24. UK courts are required under the HRA to “take into account” the case law of the ECtHR when deciding cases in which ECHR rights are engaged. The obligation to do so only extends “so far as” the court deems that the ECtHR

6 [Q 14](#)

7 ECHR, [Article 46\(1\)](#)

8 ECHR, [Article 46\(2\)](#)

case law “is relevant” to the particular proceedings before it.⁹ Courts are not obliged to apply the ECtHR’s case law rigidly to the individual case.¹⁰

25. If, however, the court is satisfied that a provision of UK legislation cannot be interpreted in a way that is compatible with the ECHR, it can make a declaration to that effect—a declaration of incompatibility. Only the higher courts can make a declaration of incompatibility. It is then for the Government to decide whether to amend the legislative provision in question. A declaration of incompatibility does not affect the validity or continuing operation of the provision in question unless and until Parliament amends it.

The EU Charter

26. The EU Charter was originally conceived as a political declaration, before being given the same legal status as the EU Treaties by the Treaty of Lisbon. It came into force in December 2009.¹¹ It consolidates in a single charter fundamental rights that already existed under EU law. These rights derived from the EU Treaties, EU secondary legislation such as Directives and Regulations, and the case law of the CJEU. Some mirrored civil and political rights found in the ECHR;¹² others went beyond the ECHR, covering economic and social rights. The EU Charter distinguishes between rights and “principles”,¹³ however, the latter not being directly enforceable in national courts unless implemented by further legislation. The majority of economic and social rights are defined as principles, and so are not directly enforceable.¹⁴
27. The preamble to the EU Charter states that it does not create any new rights. Former Attorney General, the Rt Hon Lord Goldsmith QC, who represented the UK in the EU Charter negotiations, emphasised the importance of this point: “I believed, as I think did officials, that we had achieved what we set out to do, which was: no new rights, no justiciable rights, not extending the competence of the EU.”¹⁵
28. The EU Charter has two applications.¹⁶ First, it applies to all actions of the EU institutions and its agencies. Accordingly, EU legislation and executive action that engages rights protected by the EU Charter must be compatible with it, and EU institutions and agencies can be held to account by the

9 Human Rights Act 1998 [section 2\(1\)\(a\)](#)

10 In the case of *Ullah v Special Adjudicator* [2004] 2 AC 323, Lord Bingham stated that: “The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.” In the recent case of *Pinnock v Manchester City Council* [2010] 3 WLR 1441 Lord Neuberger said: “This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law ... Of course, we should usually follow a clear and constant line of decisions by the European court: *R (Ullah)*. But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber”.

11 There has been some confusion about whether the EU Charter applies in the UK, because of a Protocol on the EU Charter agreed by the UK and Poland. The CJEU has confirmed that it does. In joined cases C-411/10 and 493/10 (NS and ME), the CJEU confirmed that “Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol” (para 119). See also [Q 45](#) (Lord Goldsmith) on the purpose of Protocol 30.

12 [Article 52\(3\)](#) of the EU Charter states that EU Charter rights which correspond to ECHR rights must be given the same meaning as under the ECHR.

13 EU Charter, [Article 52\(5\)](#)

14 See para 55 of this report.

15 [Q 47](#)

16 EU Charter, [Article 51](#)

CJEU for legislation or decisions that are incompatible with it. Secondly, it applies to Member States when they “implement” EU law, the rationale being that Member States should uphold the EU’s system of fundamental rights protection when they are implementing EU law. There has been much debate, and some fear, about the extent to which this second limb of the EU Charter’s application can be used to extend the scope of EU law over national law.

29. The CJEU is not a court of individual petition: the right of access by individuals is limited, and the great majority of the cases it hears are either references for preliminary rulings from national courts, or cases brought by the EU institutions or Member States. The decisions of the CJEU are equally legally binding in all Member States. If a Member State does not comply with a judgment of the CJEU, the Commission can bring ‘infringement’ proceedings against it, which are determined by the CJEU. Findings of non-compliance lead to punitive fines.
30. Two further long-established principles of EU law are relevant to this report. The first is the principle of the ‘supremacy’ of EU law. Supremacy of EU law means, in essence, that where EU law and national law conflict, EU law prevails; in such cases, national courts must follow EU law and ‘disapply’ national law. The second is the principle of direct effect. If a provision of EU law has direct effect, it can be relied upon by an individual in a national court directly, without the need for national implementing legislation.

The European Communities Act 1972

31. The European Communities Act gives effect to EU law in national law. It is the Act of Parliament that defines the UK’s legal relationship with the EU. It provides for the principles of supremacy and direct effect and is the basis on which a national judge can disapply legislation which is inconsistent with EU law. It is also the basis on which much national secondary legislation implementing EU law, such as statutory instruments, is made.

Table 1: ECHR and EU Charter: principal differences

ECHR	EU Charter
Applies to the 47 Council of Europe States, including the 28 EU Member States.	Applies to the EU’s institutions and agencies, and its 28 Member States, but only when they are implementing EU law.
Covers fundamental civil and political rights, including the right to life, the right to a fair hearing, the right to respect for private and family life, freedom of expression, freedom of thought, conscience and religion, and the protection of property.	Covers some of the civil and political rights in the ECHR, which must be given the same meaning. It also covers economic and social rights, such as the right to fair and just working conditions, the right to preventive healthcare, the right to good administration and the right to access to documents.
Incorporated into national law through the Human Rights Act 1998.	Incorporated into national law through the European Communities Act 1972.

ECHR	EU Charter
All the rights in the ECHR can be enforced against the Government by individuals in national courts via the Human Rights Act 1998.	Those rights in the EU Charter defined as ‘principles’, which includes many economic and social rights, are not directly enforceable by individuals in national courts.
The ECHR is overseen by the European Court of Human Rights in Strasbourg.	The EU Charter is overseen by the Court of Justice of the European Union in Luxembourg.
The European Court of Human Rights is a human rights court; individuals have the right to bring cases to it once they have exhausted national remedies.	The Court of Justice is responsible for interpreting all EU law, not just the EU Charter. Individuals have limited access to it. It is not, as such, a human rights court.
European Court of Human Rights judgments are legally binding on the State concerned, but the enforcement mechanisms are less powerful.	Court of Justice judgments are legally binding on all 28 EU Member States, and carry more powerful enforcement mechanisms.
National enforcement mechanisms are weaker. National law is interpreted by courts in an ECHR-compliant way where possible. Where a court finds that national law cannot be interpreted compatibly with the ECHR, under the Human Rights Act it can recommend that the law be changed.	Where a court finds that national legislation cannot be interpreted compatibly with the EU Charter, under the European Communities Act it can disapply the law itself.
Damages in national courts for violations of the ECHR are not common.	Damages in national courts for violations of the EU Charter are more common.

CHAPTER 3: THE GOVERNMENT'S CASE FOR A BRITISH BILL OF RIGHTS

32. The Secretary of State's evidence to us was the Government's first exposition on the public record of why a British Bill of Rights was necessary and of what it might contain.

Why is a British Bill of Rights necessary?

33. The Secretary of State gave several reasons why the Government was seeking to propose a British Bill of Rights.

Time for a review

34. The first was that many of the constitutional reforms introduced since 1997 were being reviewed, as reflected, for example, in the Scotland and Wales Bills: "It seems only right that we should look at the Human Rights Act in that context because ... it was introduced at a fair lick."¹⁷

A bad name in the public square

35. Even though the UK played a role in drafting the ECHR, to the Government's regret "human rights ... have a bad name in the public square."¹⁸ The Secretary of State said they had become associated with "unmeritorious individuals pursuing through the courts claims that do not command public support or sympathy."¹⁹

Bringing human rights home

36. His greater concern, however, was that human rights were seen as a foreign intervention:

"More troublingly, human rights are seen as something that are done to British courts and the British people as a result of foreign intervention, rather than something that we originally championed and created and seek to uphold. Therefore, part of the purpose of a British Bill of Rights or a UK Bill of Rights is to affirm the fact that things like a prohibition on torture or a right to due process and an appropriate trial before a properly constituted tribunal ... are fundamental British rights."²⁰

37. He amplified these concerns in response to a further question:

"I do think that we can make changes that ensure that people recognise that these rights spring from our traditions, these rights are our patrimony and these rights can be given effect to in the courts in a better way and a more British way. If we manage to do that, it would be a gain for human rights domestically and internationally."²¹

What would a British Bill of Rights contain?

38. The Secretary of State outlined three areas of reform—two specific, one more general—on which the Government would consult widely.

17 [Q 79](#)

18 *Ibid.*

19 *Ibid.*

20 *Ibid.*

21 [Q 81](#)

Review of section 2 of the HRA

39. First, the Government was concerned that section 2 of the HRA, which requires courts to take into account judgments of the ECtHR when interpreting an ECHR right, weighed the balance too heavily in favour of the ECtHR at the expense of national courts. A review of section 2 had also been recommended by Labour politicians.²² When it was put to him that national courts did not follow ECtHR judgments as if it were a court of appeal,²³ the Secretary of State said:

“We cannot necessarily rely on a future court or future judges to take this approach. If we believe, and if there is a broad consensus among the judiciary and the public, that it is appropriate to revisit section 2, then it would seem an appropriate safeguard to take.”²⁴

British troops serving abroad

40. The Government had already flagged up the ability of British troops to operate effectively in a conflict zone as a second area for review. The Secretary of State said that this ability had been overly constrained “by a variety of laws and treaties. One question—it is an open question—is whether reform of the Human Rights Act could clear up some of that concern in order to ensure that our soldiers stand on firm legal ground while of course still being subject to appropriate legal sanctions.”²⁵ One approach that had been mooted, although it would have to wait for the consultation paper, was that “there might be a derogation when British troops were engaged in conflict in the same way as France derogated from the ECHR to create a stage of emergency in the aftermath of the Bataclan atrocity.”²⁶

Glosses on qualified rights

41. As a third area of reform, the Secretary of State highlighted what he called “glosses that could be put on the rights that are capable of being balanced.”²⁷ He gave the example of freedom of expression:²⁸ the UK placed more emphasis on this right and less on the balancing right to privacy than continental jurisdictions. So it “might be appropriate” for the Government to:

“firm up and make clearer the importance of freedom of expression. That might include everything from better protecting journalists’ sources ... to helping to ensure that some of the erosions of freedom of speech, about which not just the media but others are worried, can be fought back.”

22 [Q 79](#)

23 See footnote 11.

24 [Q 79](#)

25 *Ibid.*

26 [Q 79](#). On 24 November 2015 France informed the Secretary General of the Council of Europe of a number of state of emergency measures taken following the large scale terrorist attacks in Paris, which it said may involve a derogation from certain rights guaranteed by the ECHR. Such derogations are permitted under Article 15 of the ECHR in times of public emergency threatening the life of a nation. There can be no derogation, however, from Article 2 (Right to life), Article 3 (Prohibition of torture and inhumane or degrading treatment or punishment), Article 4 paragraph 1 (prohibition of slavery), and Article 7 (No punishment without law). See: http://www.coe.int/en/web/secretary-general/news/-/asset_publisher/EY1BJNjXtA5U/content/france-informs-secretary-general-of-article-15-derogation-of-the-european-convention-on-human-rights [accessed 27 April 2016]

27 [Q 79](#)

28 Guaranteed by [Article 10](#) of the ECHR

All ECHR rights affirmed within the Bill of Rights

42. When we asked the Secretary of State whether these reforms could put the UK in breach of its legal obligations under the ECHR, he replied: “it could be a problem, but we are “not planning to derogate absolutely from any of the rights [in the ECHR]. At the moment, we envisage that all the rights contained within the Convention will be affirmed in any British Bill of Rights, but where rights are subject to potential qualification, we may emphasise the importance of one right over another.”²⁹ Similarly, he explained that it was not the Government’s intention “to say that any individual right within the Convention no longer applies in the UK. We are going to consult on how some of those rights might be interpreted and weighed against each other, but that is a separate thing.”³⁰ He qualified this, however, by saying the Prime Minister had not ruled anything out.³¹
43. We asked the Secretary of State whether, given the limited changes to the HRA he had outlined, it was really necessary to repeal the HRA. He thought it was, “to ensure that we can make the changes I have mentioned”, and “to ensure we uphold parliamentary sovereignty ... and make Parliament’s views clear on these issues”.³²

Analysis

44. The principal motives for a British Bill of Rights are to restore national faith in human rights, and to give human rights greater national identity, rather than to enhance human rights protection in the UK. To achieve this the Government would review the extent to which national courts are bound to take account of ECtHR judgments, the application of the ECHR to the UK’s armed forces in conflict, and the extent to which different emphases—“glosses”—could be put on the competing interests within some of the qualified rights in the ECHR. The HRA would have to be repealed, rather than amended, to achieve these reforms.

Conclusions

45. **The British Bill of Rights as outlined by the Secretary of State appeared a far less ambitious proposal than the one outlined in the Conservative Party manifesto, which we set out at the beginning of this report. He made no mention, for example, of reversing the mission creep that has meant human rights law being used for more and more purposes, and often with little regard for the rights of wider society; nor of stopping serious criminals from using spurious human rights arguments to prevent deportation.**
46. **The proposals the Secretary of State outlined did not appear to depart significantly from the Human Rights Act—we note in particular that all the rights contained within the ECHR are likely to be affirmed in any British Bill of Rights. His evidence left us unsure why a British Bill of Rights was really necessary.**
47. **If a Bill of Rights is not intended to change significantly the protection of human rights in the UK, we recommend the Government give**

29 [Q 80](#)

30 [Q 81](#)

31 *Ibid.*

32 [Q 82](#)

careful thought before proceeding with this policy. As the former Lord Chief Justice Rt Hon Lord Woolf CH told us, the repeal of the Human Rights Act and its replacement by a Bill of Rights would be a constitutional change of the greatest significance.³³

48. **In Chapter 8 we outline the evidence we received on the attitude to human rights in the devolved nations, which reveals a far more positive outlook than the view expressed by the Secretary of State.**
49. **We call on the Government to explain its grounds for concluding that, as the Secretary of State expressed it, the UK public sees human rights as a “foreign intervention”, and how a Bill of Rights would address this concern any more than the Human Rights Act does. Many of our witnesses considered that the Human Rights Act gave effect to the ECHR in national law in a way that respected Parliamentary sovereignty. The Welsh Government, for example, thought this a uniquely British approach.**

CHAPTER 4: THE RELATIVE SCOPE OF THE ECHR AND THE EU CHARTER

50. A key aim of this inquiry was to establish what protection is provided by the EU Charter in parallel with, or in addition to, the ECHR. In this Chapter we consider the relative scope of the ECHR and EU Charter, whether restricting rights under the ECHR will lead to greater reliance on the EU Charter in national courts, and whether the common law and EU Charter would provide an equivalent level of human rights protection in the absence of the HRA.

The broader application of the ECHR

51. Although many of the rights in the ECHR overlap with rights in the EU Charter, the scope of application of the ECHR is much wider. All our expert witnesses considered this to be the main strength of domestic human rights protection under the ECHR. Professor Gordon Anthony, Professor of Public Law at the School of Law, Queen’s University Belfast, told us:

“The primary strength of the ECHR under the Human Rights Act is that it has a much broader reach than the EU Charter. Under Section 6 of the Human Rights Act [and Section 24 of the Northern Ireland Act] whenever public bodies make any decision they are bound by the provisions of the Convention. That is not the case with the Charter. The Charter applies only whenever public bodies make decisions within the realm of EU law ... if the Human Rights Act were to be repealed and we were left with the EU Charter, we would be left with rights that had a narrower reach”.³⁴

52. Mr Marco Biagi MSP, the then Minister for Local Government and Community Empowerment in the Scottish Government, agreed: “The biggest difference here is the scope. The EU Charter will only apply to areas within the scope of EU law, whereas in Scotland the ECHR, by being embedded via the Human Rights Act and the Scotland Act, will apply more widely.”³⁵ Professor Sionaidh Douglas-Scott, Anniversary Chair in Law at Queen Mary University of London, told us: “when it comes to the European Convention [ECHR] there are no restrictions.”³⁶ Rt Hon Dominic Grieve QC MP, the former Attorney General, also agreed: “the Charter of Fundamental Rights is confined to matters within EU competence and therefore covers a much narrower range of issues than are subject of the European Convention on Human Rights.”³⁷
53. Lord Woolf emphasised that the EU Charter, as a consequence of its limited scope, should not be seen as providing equivalent protection to the ECHR:

“However, what is provided by the charter is extremely limited ... it operates only within the Union context—whereas the great thing about the European convention is that it operates so as to give benefit to the citizens of this country and of other countries. The fact that we would still have what is left after the repeal should not be a comfort to us, because that certainly would not be sufficient.”³⁸

34 [Q 69](#)

35 [Q 35](#)

36 [Q 1](#)

37 [Q 12](#)

38 [Q 25](#)

Conclusions

54. **The main strength of domestic human rights protection under the European Convention on Human Rights is its scope. By virtue of section 6 of the Human Rights Act, every decision of every public body, including courts, must be compatible with the Convention. That is not the case with the EU Charter. The EU Charter applies only to public bodies making decisions within the scope of EU law.**

The narrower application of the EU Charter*The EU Charter and direct effect*

55. As we have already explained,³⁹ some of the provisions of the EU Charter do not have direct effect under EU law, so they cannot be directly relied upon by individuals in national courts. Lord Goldsmith explained that the distinction between ‘principles’ and ‘rights’, though “not necessarily very clearly signposted”, was nonetheless important:

“At its most basic, the point about the principles was that they were intended to be aspirational, but it was then left to Member States or the EU to implement them and start to put detailed provisions in place in relation to the aspirational aims. Those were mostly social and economic.”⁴⁰

56. Several of our academic witnesses emphasised the importance of recognising this distinction, among them Professor Michael Dougan, Professor of European Law and Jean Monnet Chair in EU Law at the University of Liverpool:

“The Charter of Fundamental Rights is often portrayed as being broader in scope than the ECHR, as containing better, more modern rights, but we should not forget that it still needs to satisfy the conditions to have direct effect before any one of its individual provisions is capable of producing autonomous legal effect within a national legal system such as the UK’s.”⁴¹

Acting within the scope of EU law

57. Article 51 of the EU Charter is the gateway to its application. It states that the EU Charter’s provisions “are addressed to the institutions, bodies, offices and agencies of the Union ... and to the Member States only when they are implementing Union law”. In this report we are concerned with the second limb of its application—in the EU’s Member States. The importance of clarifying its meaning was well expressed by Professor Anthony:

“The real issue with EU law is what is meant by implementation of EU law. If the Human Rights Act were to be repealed, I suspect there would be quite a bun fight about what the implementation of EU law means and people would be looking for as expansive an approach as possible. At the moment, I think it is relatively fluid.”⁴²

39 See para 26 of this report.

40 [Q 45](#)

41 [Q 55](#)

42 [Q 78](#)

58. Opinions differed on whether the meaning of “implementing Union law” could be clearly discerned from the CJEU’s case law. Some witnesses thought that the approach of the CJEU had been consistent with past practice, and concluded that there was some predictability in determining when the EU Charter would apply; others that Article 51 had been, and would continue to be, a means for the CJEU to expand its jurisdiction over national law.

A predictable approach to defining the scope of the EU Charter

59. Professor Dougan, in the former category, has recently completed a major research project on the scope of the EU Charter, the results of which have been published in the *Common Market Law Review*.⁴³ He explained that “there was historical continuity in the case law, going back for 30 or 40 years”.⁴⁴ The CJEU, particularly in the seminal case of *Fransson*,⁴⁵ had confirmed that the expression “implementing Union law” was equivalent to “acting within the scope of EU law”. The latter was the test the CJEU had previously adopted for determining whether EU fundamental rights applied to Member State action before the existence of the EU Charter. As a consequence, this case law made clear that there were two situations in which a Member State could be said to be acting “within the scope of EU law”, and so would have to respect EU fundamental rights “in addition to, or even instead of, its own fundamental rights regime”.⁴⁶ The first situation was when a Member State was implementing EU law in the sense of applying it within its domestic legal system. The second was when a Member State was seeking to derogate from EU law—that is to say, when it does not want to respect that EU obligation fully.⁴⁷

Box 1: The case of *Fransson*

In the case of *Fransson* the CJEU held that Swedish civil penalties and criminal proceedings for tax evasion constituted the implementation of EU law even though the relevant domestic legislation had not been adopted in order to transpose EU legislation. VAT is an EU tax, and an EU VAT Directive requires every Member State to take measures to guarantee collection of VAT, including preventing evasion. The EU Treaties also oblige Member States to counter fraud affecting the financial interests of the EU. The CJEU found that the EU Charter applied to the civil penalties and criminal proceedings in question as they were intended to implement an obligation on Member States to impose effective penalties for conduct prejudicial to the financial interests of the EU.

Source: HM Government, *Review of the Balance of Competences between the United Kingdom and the European Union: Fundamental Rights*, Summer 2014, p 28: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/334999/review-of-boc-between-uk-eu-fundamental-rights.pdf [accessed 20 March 2016]

60. Professor Dougan gave the following examples of when the two types of situation would arise in practice.⁴⁸ Implementation of EU law typically covers a situation where EU legislation is implemented and applied, or in

43 Michael Dougan, ‘Judicial Review of Member State Action under the General Principles and the Charter: Defining the ‘Scope of Union Law’, *Common Market Law Review*, vol, 52(5) (2015) 1201: available at <https://www.kluwerlawonline.com/document.php?id=COLA2015102&PHPSESSID=n7qi3nmg2bklomk51q80r3n0u3> [accessed 27 April 2016]

44 Q 56

45 C-617/10, *Aklagaren v Fransson*, 26 February 2013

46 Q 56

47 *Ibid.*

48 Q 57

some cases simply applied, nationally. When exercising powers provided for under that legislation, a Member State will have to observe the human rights standards of the EU Charter. For example, making payments under the Common Agricultural Policy or executing a European Arrest Warrant would count as an implementation of EU law, and therefore come within the scope of the EU Charter. Professor Dougan said that “the implementation situations tend to be quite intuitive. They tend to be quite common-sense, on the whole.”⁴⁹

61. Cases of derogation from EU law were also relatively predictable. Professor Dougan told us that most of them involved restrictions on the right of free movement:

“It might be a restriction on the free movement of goods. A Member State might say, ‘We are restricting the availability of a certain category of goods on our market’, and the EU might reply, ‘That is fine but make sure that you respect freedom of expression; for example, commercial expression, if you are restricting advertising or you are not allowing certain types of publications’. Similarly, if a Member State says, ‘We want to expel a Union citizen from our territory because they have committed certain particularly serious crimes’, the EU would say, ‘That falls within the scope of Union law. It is derogating from a fundamental freedom under the Treaties. You have to respect the right to private life and the right to family life in that situation.’”⁵⁰

62. In all, Professor Dougan concluded that the CJEU’s case law on the scope of EU law was “both clear and predictable”.⁵¹ Its decisions “tend to be very case-by-case, quite pragmatic, quite forensic. Nevertheless, they make a lot of sense. The case law is surprisingly consistent.”⁵²
63. He did say, however, that there were “a couple of more generic lessons” which “came out of the massive case-law analysis” he had conducted.⁵³ First, the scope of EU law was “incredibly difficult to describe in the abstract”.⁵⁴ It depended “on an interpretation of particular EU measures and particular national measures in the context of a particular dispute”.⁵⁵ It was thus a very complex interaction between two different legal systems. Secondly, the scope of EU law was dynamic: “Every time that EU law changes and every time that national law changes, those complex dynamics reconfigure themselves, and you might find that some things have fallen outside the scope of the EU law that used to be within and other things have been brought within the scope of EU law that were not there before.”⁵⁶ As a result, the CJEU had, with a few exceptions, avoided trying to articulate a generalised or abstract test for when a national measure fell within the scope of EU law.
64. There were “a tiny number of cases”, such as *Siragusa*⁵⁷ and *Hernández*,⁵⁸ in which the CJEU had set out “some more abstract criteria” to describe its

49 *Ibid.*

50 [Q 57](#)

51 Written evidence from Prof Michael Dougan ([HRA0002](#))

52 [Q 57](#)

53 *Ibid.*

54 *Ibid.*

55 *Ibid.*

56 *Ibid.*

57 Case C-206/13, *Siragusa v Regione Sicilia*, 6 March 2014

58 Case C-198/13, *Hernández v Reine de España*, 10 July 2014

approach to defining the scope of EU law. These criteria were “incredibly ambiguous” and had led to some confusion and a concern that the scope of EU law might be expanded. In Professor Dougan’s view, there was no evidence that these two cases, which were decided by chambers⁵⁹ of the CJEU rather than the Grand Chamber,⁶⁰ had “in any way expanded the field of national measures that fall within the scope of EU law”, nor led to a change in practice of the CJEU.⁶¹ He found “no evidence of a predatory or expansionist court at work”,⁶² and was surprised that *Fransson* had been criticised, including by the German Federal Constitutional Court,⁶³ for expanding the scope of EU law.⁶⁴

65. The views of several other witnesses supported Professor Dougan’s analysis. Dr Tobias Lock, Lecturer in EU Law at the University of Edinburgh, agreed that the CJEU approached the definition of the scope of EU law “on a case-by-case basis,”⁶⁵ and that most of the decisions were clear:

“We could say that there are situations in which a Member State authority implements European Union law in the narrow sense—i.e., they apply an EU Regulation or they act on the basis of an Act of Parliament or statutory instrument that implements a Directive. There are clear cases where you have an implementation of EU law and where the national authority would have to comply with the Charter.

“There is another set of cases where a Member State derogates from an obligation under European Union law—for instance, on the free movement of goods or persons”.⁶⁶

66. Lord Goldsmith also agreed. While he accepted that there may “well be a difficulty inherent” in defining the scope of EU law, the expression was “intended to reflect ... the concept of implementation of EU law.” The CJEU’s judgment in *Fransson*⁶⁷ supported this view. He agreed that implementing EU law also included derogating from it.⁶⁸
67. Sir David Edward QC PC, a former judge of the CJEU, was clear that there was “no conspiracy ... to enlarge jurisdiction ... In my experience, when I was there, the idea that there would be 13 or 15 men and women sitting round to accumulate jurisdiction is preposterous.”⁶⁹ He added there was no individual right of access to the CJEU, which made it very different from the ECtHR: “You can sit in Luxembourg longing to pronounce some extension of court jurisdiction, but if the case never comes, the case never comes.”⁷⁰
68. Having reviewed the evidence we had received, the Secretary of State also concluded the CJEU’s approach was reasonably predictable:

59 Judicial panels of three or five judges.

60 Judicial panels of at least 15 judges presided over by the President of the Court of Justice of the EU.

61 [Q 58](#)

62 [Q 59](#)

63 The German Constitutional Court stated that just because domestic legislation has some connection with the abstract scope of EU law, or incidentally interacts with EU law, is not sufficient to trigger the application of the Charter (BVerfG Antiterrordatei 1 BvR 1215/07, 24 April 2013).

64 [Q 59](#)

65 [Q 2](#)

66 *Ibid.*

67 See Box 1.

68 [Q 46](#)

69 [Q 25](#)

70 *Ibid.*

“The point about the Charter of Fundamental Rights is that it is engaged when European Union law is engaged, and the evidence that has been presented to this Committee has outlined that European Union law as applied by the European Court of Justice is applied according to pragmatic but nevertheless clear principles”.⁷¹

The EU Charter as a means of expanding the scope of EU law

69. Mr Grieve, on the other hand, was deeply concerned that EU competence would be expanded as a result of the EU Charter: “The big question ... is to what extent EU competence is being expanded to the point where one might almost say that it is capable of applying large parts of the ECHR. That is ultimately an issue that depends on the extent to which the European Court of Justice decides to extend its competence in particular areas.”⁷² While he accepted that there were limits to the scope of EU competence, he thought they could not be clearly defined. These concerns led him to conclude that the proposed Bill of Rights, in omitting to address the CJEU, was avoiding the more difficult target:

“The first answer to your question whether the ECHR is low-hanging fruit is yes, it is a displacement activity. I spent my time in the past saying to colleagues, ‘Beware of leaving nurse’s hand for fear of something worse’. On this issue between the European Court of Justice and the European Court of Human Rights, it is quite clear to me that the European Court of Human Rights is a very benign institution, whereas I happen to think that the European Court of Justice in Luxembourg has predatory qualities to it that could be very inimical to some of our national practices ... But the decision to concentrate on Strasbourg is because Strasbourg is the easier target, and it is; it is red meat while you cannot do something about the other place. For 70% to 80% of the population of this country, there is no understanding whatever of the distinction between the Convention and the EU.”⁷³

70. Martin Howe QC agreed:

“So from my perspective it is a very bleak picture. There is the very important point ... about how far the scope of European Union law extends. The leading case on that is, of course, the *Åkerberg Fransson* case ... That was criticised by members of the German constitutional court, because it said that where European Union law provides for the collection of a tax—in that case, VAT—the procedural methods that the Member State uses in its court system for the collection of the tax are subject to the Charter, which is a dramatic expansion of its width. I am afraid that my analysis of it is that the Luxembourg court is a power-hungry institution. It will not step back from its continuous process of expansion of the scope of European Union law.”⁷⁴

Conclusions

71. **The application of the EU Charter is narrower than that of the European Convention on Human Rights for two main reasons: not all of its provisions have direct effect, and so they cannot be relied on**

71 [Q 82](#)

72 [Q 12](#)

73 [Q 14](#)

74 [Q 13](#)

directly by individuals in national courts; and it applies to Member States “only when they are implementing Union law”.

72. **Understanding the meaning of “only when they are implementing EU law” is central to assessing the scope of the EU Charter’s application in EU Member States.**
73. **We found Professor Dougan’s evidence particularly helpful, and draw the following conclusions from it. The expression “implementing Union law” can be equated to “acting within the scope of EU law”, the test used by the Court of Justice before the advent of the EU Charter. A Member State can be said to be acting within the scope of EU law when it either implements EU law through national legislation, or it acts on the basis of EU law, whether implemented or not, or it derogates from EU law. While the test for acting within the scope of EU law is case-specific, and often legally complex, Professor Dougan concluded that the Court of Justice’s approach had been relatively predictable, and surprisingly consistent.**
74. **We heard a range of views on this issue, but the weight of evidence we received does not support a conclusion that the Court of Justice has sought to expand the reach of EU law over Member States through its judgments on the scope of the EU Charter.**
75. **That said, the inherent difficulty in defining the scope of EU law has given rise to considerable litigation. We think it is likely to continue to do so in the future.**

Increased references to the CJEU

76. We asked our witnesses to say whether, were a Bill of Rights to restrict victims’ rights to bring legal challenges under the HRA, the EU Charter would be relied upon more in UK courts, leading to more references to the CJEU.⁷⁵ All our witnesses thought it would.
77. Mr O’Neill said: “I would think that clever and imaginative lawyers might try to push matters ... and the Court of Justice might get more references from national courts”.⁷⁶ Professor Dougan argued that it was almost certain that there would be an increase in litigation, because “lawyers would advise their clients to try to fit into the EU regime rather than the common-law regime”. More human rights cases in the UK courts invoking EU law would mean more references to the CJEU.⁷⁷ Professor Christopher McCrudden, Professor of Human Rights and Equality Law, Queen’s University Belfast, made a similar prediction: “there would be an increase in references to the European Court of Justice”.⁷⁸
78. Lord Goldsmith agreed: “if people feel the remedy they have under what is then the so-called British Bill of Rights is less than they were used to, they will look at other routes, and the Charter must be something they look to in order to get to the European Court of Justice”.⁷⁹ Mr Biagi expressed

75 Under Article 267 TFEU the CJEU can give preliminary rulings on the correct interpretation of EU law by means of preliminary rulings in cases referred to it by Member State courts.

76 [Q 21](#)

77 [Q 66](#)

78 [Q 77](#)

79 [Q 51](#)

similar views: “If there is no scope for [legal] actions under the European Convention”, then individuals “seeking a remedy ... will have an incentive and a desire to look more closely at EU law than they do at the moment and to try and test the bounds of EU law”.⁸⁰

79. Professor Dougan believed, though, that it was unlikely that the CJEU would change its interpretation of the scope of EU law: “Just because one Member State, such as the UK, might encounter difficulties with its own domestic fundamental rights regime for situations outside the scope of EU law, I cannot imagine any situation in which the European Court of Justice would reply by changing the rules for all 28 Member States”.⁸¹ Professor Steve Peers, Professor of European Union Law and Human Rights Law at the University of Essex, also expected an increase in references to the CJEU invoking the Charter, but agreed with Professor Dougan that the Charter would not be interpreted differently.⁸²

Conclusions

80. **The weight of evidence demonstrates that, were a Bill of Rights to restrict victims’ rights to bring legal challenges under the Human Rights Act, more challenges under the EU Charter in domestic courts would be likely. This, in turn, is likely to give rise to more references from UK courts to the Court of Justice seeking guidance on the scope of EU law and the provisions of the EU Charter.**
81. **The Government should give careful consideration to this likely consequence in deciding whether to introduce a British Bill of Rights.**

Would protection provided by the common law be adequate if the HRA were repealed?

82. We asked our witnesses to say whether, in the event the HRA were repealed and a Bill of Rights did not incorporate ECHR rights, the EU Charter and the common law could provide a sufficient level of human rights protection in the UK. All our witnesses concluded that they could not, for two reasons. First, the EU Charter only applied when the Government was acting within the scope of EU law, while the ECHR applied to all Government action. Secondly, they pointed to the common law’s comparative weakness when set against an Act of Parliament or statutory instrument. As Mr Howe explained: “the common law provides some rights, but its weakness is that it cannot withstand any statute; even the most minor statutory instrument can override the common law”.⁸³ This weakness in the common law, Professor Douglas-Scott explained, was “one of the reasons why it was felt important for Britain to incorporate the European Convention in the Human Rights Act ... There were many cases in which those rights could not be adequately protected at common law, and challenges were brought to Strasbourg.”

Conclusion

83. **The common law would be unlikely to fill the gaps in human rights protection were the Human Rights Act to be replaced by legislation providing a lower level of protection.**

80 [Q 41](#)

81 [Q 66](#)

82 [Q 9](#)

83 [Q 16](#); see also [Q 3](#) (Dr Tobias Lock), [Q 23](#) (Sir David Edward), [Q 55](#) (Prof Michael Dougan), and [Q 77](#) (Prof Chris McCrudden).

CHAPTER 5: THE ENFORCEMENT OF THE ECHR AND EU CHARTER IN NATIONAL LAW

84. In this Chapter we consider how the ECHR and the EU Charter are enforced in national law and how they have been enforced in relation to one specific issue, prisoners’ voting rights.

Declaration of incompatibility v disapplication of national law

85. Opinion was united on the greater strength of the remedies available to enforce the EU Charter under national law.
86. Lord Goldsmith explained that “ever since the decision in *Factortame* ... it has been recognised that EU law is supreme. Therefore, if there is a contravention of EU law, even by Parliament itself, its sovereignty has to give way to EU law, and then the courts can, in fact, strike down the primary legislation”.⁸⁴ Mr Howe agreed: “undoubtedly the remedies [under the EU Charter] are in principle superior because they include under the *Factortame* doctrine the ability of court to disapply primary legislation, which makes it a very powerful instrument”⁸⁵. Professor Peers clarified that the CJEU has held that some of the EU Charter’s provisions have direct effect, “in some cases at least, that means that you can set aside national law”.⁸⁶
87. This view was shared by the Scottish and Welsh Governments. Mr Biagi said that “the remedies that are available for violations of EU law by the UK Government that happen to take place in Scotland are much greater because of the greater powers that the Court of Justice has, whereas the ECHR is advisory”.⁸⁷ The Welsh Government explained the relative strengths particularly clearly:

“The potential remedy for a breach of EU law is notably different to the position in relation to breach of the ECHR. Although a breach of the ECHR may trigger a declaration of incompatibility (section 4 Human Rights Act 1998), the UK law itself remains in force—Parliament would be expected to remedy the issue appropriately in those circumstances.

“A finding of a breach of EU law, on the other hand, can have a more dramatic effect: if national law breaches a directly applicable fundamental right, the national courts or CJEU can disapply that inconsistent national law, pursuant to the principle of supremacy.”⁸⁸

88. The Secretary of State had come to a similar conclusion:

“There is a clear difference between what the European Court of Justice can do and the European Court of Human Rights—and, indeed, British courts when they are applying Convention rights. British courts can say that any legislation that Parliament passes is inconsistent with the ECHR. It can issue a declaration of incompatibility. Parliament has the capacity to fast-track changes to that legislation, but if Parliament wishes to carry on in wilful denial of this declaration of incompatibility, it can.

84 [Q 49](#)

85 [Q 13](#)

86 [Q 1](#)

87 [Q 35](#)

88 Written evidence from the Welsh Government ([HRA0001](#))

What Parliament cannot do, under current legal frameworks, is to say, where European Union law is clear, that it will not apply it.”⁸⁹

89. Several witnesses emphasised the advantage to litigants of being able to ask a court to strike down national legislation. Professor Peers told us: “That is a much stronger remedy and could make a big impact in an individual case where the two [the ECHR and the EU Charter] overlap”.⁹⁰ Professor Douglas-Scott agreed:

“EU law clearly carries some advantages in terms of remedies, because very often litigants simply want a legal provision or something in an Act of Parliament not to apply in their case and to be able to get a remedy based on that. In the case of EU law, that can be a strong advantage—you can even go on and claim damages thereafter if you feel that you have suffered a loss as a result—whereas with the Human Rights Act ... the long-stop remedy is the declaration of incompatibility, which may not help the litigant much at all.”⁹¹

Parliamentary sovereignty

90. A number of witnesses saw the courts’ power to issue a declaration of incompatibility as being more consistent with parliamentary sovereignty. Professor Anthony, for example, thought that “the Human Rights Act through the declaration of incompatibility mechanism strikes an appropriate balance between the powers of the judiciary in relation to the legislature”.⁹² The Welsh Government agreed: “the mechanisms ... by which the courts may declare that a provision of national law is incompatible with the Convention, but which leaves it to Parliament to remedy the mischief—strike a unique balance between UK parliamentary sovereignty and international human rights.”⁹³ The Secretary of State said: “We need to ensure that we uphold Parliamentary sovereignty, which, to be fair, the Human Rights Act affirms”.⁹⁴
91. By contrast, the supremacy of EU law was seen by several witnesses as a greater threat to parliamentary sovereignty, even though they argued Parliament could, if it wished, repeal the European Communities Act 1972, which incorporates the supremacy of EU law into national law. The Secretary of State, for example, commented that:
- “the Court of Justice of the European Union can play the ace of trumps at the moment. It can say, ‘Sorry, European law prevails’. For that reason, as a believer in parliamentary sovereignty, I think it is preferable if the British Parliament and British courts can decide on these matters wherever possible.”⁹⁵
92. Lord Woolf agreed: “You can legally reconcile the doctrine of the sovereignty of Parliament with the European Convention on Human Rights. You cannot

89 [Q 82](#)

90 [Q 1](#)

91 [Q 4](#)

92 [Q 76](#)

93 Written evidence from the Welsh Government ([HRA0001](#))

94 [Q 82](#)

95 [Q 84](#)

do that with regard to the European Charter, because the position there is that you can trump a statute.”⁹⁶

Damages

93. Professor Dougan agreed with Professor Douglas-Scott⁹⁷ that the remedies under the EU Charter were better with regard to claiming damages: “you can get compensatory damages for breach of EU law as of right, whereas that is not the case under the Human Rights Act—compensatory damages are discretionary.”⁹⁸

Delay

94. The delay in getting a final decision from the ECtHR was a further weakness of the enforcement mechanism under the ECHR and the HRA, according to Professor Peers: “As a system, you have to go all the way to the ECHR; it does not give a ruling that has a direct impact in national proceedings in the same way that the EU Court ruling does. It also means you have a longer process in principle to exhaust your remedies in the UK before you can go to the ECHR.”⁹⁹ Professor Douglas-Scott agreed: “If we are talking about the Human Rights Act, eventually a case may have to go the whole way to Strasbourg ... Most litigants would not want to face that long, long wait for their case to go all the way”.¹⁰⁰

Conclusions

95. **The evidence we received is clear: the power of national courts under the European Communities Act to disapply a provision of national legislation that is inconsistent with the EU Charter is a more effective remedy than a declaration of incompatibility under the Human Rights Act.**
96. **A litigant can get compensatory damages for breach of EU law as of right; under the Human Rights Act damages are discretionary.**
97. **A challenge under the Human Rights Act may have to be litigated all the way to the European Court of Human Rights, in which case a significant delay will ensue.**

A case in point: prisoner voting rights

98. The relative strengths of the enforcement mechanism under the two systems are brought sharply into focus by the issue of prisoner voting rights, on which the ECtHR has ruled in relation to UK prisoners, and the CJEU in relation to a French prisoner. We set out the background to these cases, before summarising witnesses’ views on them.

The UK ban on prisoner voting

99. Section 3 of the Representation of the Peoples Act 1983 prevents convicted prisoners in the UK from voting in local, parliamentary and European parliamentary elections. In October 2005, in a case called *Hirst v United*

96 [Q 29](#)

97 [Q 1](#)

98 [Q 55](#)

99 [Q 1](#)

100 [Q 4](#)

Kingdom (No.2),¹⁰¹ the ECtHR found that the UK's ban on prisoner voting constituted a violation of Article 3 of Protocol No. 1 ECHR, which requires States to "hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." Central to the ECtHR's decision was the fact that the UK's prohibition was "automatic" on conviction, and "indiscriminate": no exceptions were made for less serious offences or shorter sentences. The UK did not amend national legislation on prisoner voting in the light of the ECtHR's judgment, despite being legally bound to comply with it.¹⁰²

100. In its judgment in *Greens and M.T. v. United Kingdom*¹⁰³ in November 2010, the ECtHR again found the UK in violation of the right to free elections, as the UK had failed to implement the *Hirst* judgment. The UK was required to introduce amending legislation before November 2012.
101. In *Firth and others v United Kingdom*, decided in August 2014, ten UK prisoners brought an application to the ECtHR that their prohibition from voting in the 2009 European parliamentary elections violated their rights to vote under the ECHR. The ECtHR noted again that the UK's legislation implementing the ban remained in place, despite the publication of a draft Bill on prisoner voting¹⁰⁴ and the appointment of a pre-legislative Joint Committee,¹⁰⁵ and found the UK to be in violation of Article 3 of Protocol 1 of the ECHR. In *McHugh and others v the United Kingdom*, decided in February 2015, applications from 1,015 UK prisoners were combined: the ECtHR found that the right to vote of each had been violated.
102. To date the blanket ban on prisoner voting remains in place.

The French ban on prisoner voting

103. In the case of *Delvigne*,¹⁰⁶ a French prisoner argued that his prohibition from voting in European parliamentary elections was contrary to Article 39(2) of the EU Charter, which states that "members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot". The French court referred the case to the CJEU for a preliminary ruling.
104. The CJEU found that Article 39(2) constituted the expression of the right to vote in elections to the European Parliament under EU law.¹⁰⁷
105. At the time of Mr Delvigne's conviction, French law banned only those prisoners convicted of criminal offences punishable by at least five years' imprisonment from voting. The CJEU considered whether this limitation on the right to vote under EU law was lawful. It found that it was for two reasons: because it "did not call into question the right to vote as such",¹⁰⁸ as it only excluded certain categories of prisoners from voting; and because

101 *Hirst v United Kingdom (No.2)* (2005), ECHR 681

102 ECHR, [Article 46\(1\)](#)

103 *Greens and M.T. v. United Kingdom* (2010) ECHR 1826

104 Ministry of Justice, *Voting Eligibility (Prisoners) Draft Bill*, Cm 8499, November 2012: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228632/8499.pdf accessed 27 April 2016]

105 See Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill* (Report of Session 2013–14, HL Paper 103, HC 924)

106 Case C-650/13, *Thierry Delvigne v Commune de Lesparre Medoc and Prefet de la Gironde*, 6 October 2015

107 *Thierry Delvigne*, paras 41, 44

108 *Thierry Delvigne*, para 48

it was proportionate as it took into account the nature and gravity of the criminal offence committed and the duration of the penalty.

The views of witnesses

Strengths and weaknesses

106. Mr Grieve saw the two strands of case-law on prisoner voting rights as an example of the strength of EU law compared to the weakness of ECHR law:

“As the Charter of Fundamental Rights has the capacity to have direct effect, it may therefore be more effective than the Convention, which can of course be disregarded by a Government; in a sense, that is the issue over prisoner voting.”¹⁰⁹

107. Dr Lock agreed that the cases of *Hirst* and *Delvigne* demonstrated “quite nicely” the impact that the much stronger remedy available under EU law of disapplying an Act of Parliament could have on litigation.¹¹⁰

The effect of Delvigne on UK prisoners

108. The majority of the witnesses thought that *Delvigne* was likely to lead to EU law-based challenges in the UK’s courts seeking to overturn the blanket ban on voting in European Parliament elections. Mr Grieve said:

“On the basis that we have not put our house in order—we could probably do so quite easily if there was the political will, but there is a political reluctance—I can see a risk that as we approach the next European elections someone will mount a challenge on the basis that they are refused the right to vote. I would be interested in the views of my two colleagues, because as I read *Delvigne* there is at least a reasonable prospect that they would be successful. The United Kingdom has a blanket prohibition, which, if you read *Delvigne*, is the thing that, looking at ECHR jurisprudence, the European Court of Justice has said it does not think is correct, even though in *Delvigne* it rejected a suggestion that the French system was wanting. A flag has been hoisted that says that this is an area in which, certainly on voting in EU elections, the court has competence.”¹¹¹

109. Mr O’Neill agreed:

“I put forward [in the Supreme Court]¹¹² the EU law point that voting in the European Parliament had something to do with EU law, and that therefore proportionality might apply to that ... *Delvigne* seems to back up the original argument that was presented ... On the question of whether *Delvigne* opens up the analysis that was rejected in *Chester and McGeoch*, I would say yes, it does.”¹¹³

109 [Q 12](#)

110 [Q 1](#)

111 [Q 13](#)

112 *Chester and McGeoch* [2013] UKSC 63, 16 October 2013, in which Aidan O’Neil QC represented Mr McGeoch. The Supreme Court held that EU law did not incorporate a right to vote paralleling that recognised by the ECHR. In any event, the general ban on prisoner voting could not have been disapplied as a whole. Nor could the Court itself have devised a scheme compatible with EU law; that would be for Parliament.

113 [Q 13](#)

110. Professor Anthony thought that “the Northern Ireland courts would be bound to follow the Court of Justice ruling”.¹¹⁴ Mr Biagi said “the *Delvigne* ruling certainly suggests that the UK Government are going to have to provide a remedy and reconsider the blanket voting ban on European Parliament elections. That will apply in Scotland as well as in the rest of the UK.”¹¹⁵ Professor Dougan thought that “the UK rules would be found to be disproportionate” in the light of *Delvigne*.¹¹⁶
111. Sir David Edward was less sure: “the Court of Justice did not at any point in its judgment say that you could not have an indiscriminate ban. The court limited itself very carefully to the case before it”.¹¹⁷ Lord Woolf agreed: “*Delvigne* never got to the situation of the sort of ban that we have in this country in respect of prisoners’ rights to vote in European elections.”¹¹⁸
112. Dominic Raab MP, Parliamentary under Secretary of State for Justice, said that the issue of prisoners’ voting rights remained a matter for Parliament. He did not think that *Delvigne* could be relied on in national courts: “In the case of *Delvigne*, the French ban was upheld, so I do not think that there is any imminent risk of litigation” in the UK.¹¹⁹

Conclusions

113. **We agree with the majority of our witnesses who said that the case of *Delvigne* is likely to lead to the UK ban on prisoner voting again being challenged, in relation to European Parliament elections.**

114 [Q 70](#)

115 [Q 36](#)

116 [Q 61](#); see also [Q 1](#) (Professor Lock)

117 [Q 26](#)

118 [Q 27](#)

119 [Q 83](#)

CHAPTER 6: WOULD A BRITISH BILL OF RIGHTS BE SUBJECT TO EU LAW?

Supremacy of the EU Charter over a Bill of Rights

114. In the previous Chapter we concluded that the enforcement mechanisms of the EU Charter are stronger than those of the HRA because of the supremacy of EU law over national law. With this in mind, we asked our witnesses to say whether the EU Charter would have supremacy over a Bill of Rights in cases where the Bill of Rights applied to a measure in which the UK was acting within the scope of EU law. Sir David Edward's view was very clear:

“Almost every other Member State, in one fashion or another, has a Bill of Rights or rights included in the national constitution. It has been consistently said by the Court of Justice that these are national provisions and that the obligation of the state to comply with EU law cannot be refused on the ground of any provision of national law, including constitutional law. That is clear, as a matter of EU law. At the moment, there are a number of cases going on where constitutional courts of the member states have challenged that proposition—notably, over the years, the German Constitutional Court. The reality is that in each case they have tended to retreat.”¹²⁰

115. Lord Goldsmith agreed: “The European Communities Act, which is an Act of the UK Parliament, requires us to follow and to comply with EU law ... Yes, I think we would be obliged still to follow [the EU Charter].”¹²¹

116. Professor Dougan summarised this issue differently: “an EU lawyer will tell you that, yes, EU law takes priority over national law. Of course, at the national level the question is: how far do we accept that EU law takes priority over national law? In that regard, the answer to the question is that yes of course we could make an exception if we wanted to.”¹²² But, in the long term, it was:

“more a political judgment about the costs of refusing to respect the rules of the game, both for the UK—our credibility, our leadership; the sense that we are a leading member of the EU—but also for the authority of the EU as a whole. If one member state starts to take the view that it is not bound by the principle of supremacy, what is to stop the other 27 taking the view that they are not bound by the principle of supremacy? Then we would end up with something more like the United Nations than the European Union.”

117. Professor Douglas-Scott thought the national constitutional implications were increasingly relevant: “generally the doctrine of supremacy of EU law requires national law to give way. But there are some exceptional circumstances where courts have made it clear that there might not be such an obligation if EU law conflicted with some very important constitutional

120 [Q 32](#)

121 [Q 52](#)

122 [Q 65](#)

principle of national law.”¹²³ The Secretary of State agreed, citing the UK Supreme Court’s decision in the *HS2* case¹²⁴ in support:

“Lords Mance and Sumption have argued that when Parliament passed the European Communities Act, it could not have envisaged that by passing that Act it would have deliberately sacrificed certain basic constitutional principles. In stating that, they were stating a principle that finds embodiment in the German constitutional court, which is there to safeguard the basic law.”¹²⁵

The German Federal Constitutional Court as a role model

118. The Secretary of State thought the German Federal Constitutional Court might be a model that the UK Supreme Court could follow:

“Were the European Union to legislate in a way that the German constitutional court felt was contrary to the basic law, the constitutional court could express an opinion. Therefore, there is a live question ... as to whether or not our Supreme Court should be encouraged, facilitated, legislated, to become a constitutional court similar to the German constitutional court, and therefore have the capacity to say that in certain areas the European Union’s legislation ran counter to certain basic British freedoms.”¹²⁶

119. We referred the Secretary of State to a lecture given by the President of the German Federal Constitutional Court in October 2013,¹²⁷ in which the President said that EU law was accorded primacy over national law in Germany, including over the German constitution:

“In their case law, the Federal Constitutional Court and the European Court of Justice fundamentally agree, however, that EU law is in principle accorded primacy over national law ... Article 23 of the Basic Law permits the transfer of sovereign powers to the European Union by means of an act of parliament authorising the transfer. If on the basis of this empowerment institutions and bodies of the EU issue legal acts, those legal acts then as a matter of principle have primacy over German national law, even its constitutional law.”¹²⁸

120. The Secretary of State replied that:

“it is certainly the case that the [German] Constitutional Court has not struck down European Union law at any point, but I think it is a moot point as to whether it has the ability to do so. In the same way, I think that Lord Mance and Lord Sumption made it clear ... that if they felt that any point the European Union law ran counter to what they

123 [Q 5](#)

124 *R (on the application of HS2 Action Alliance Ltd and others) v The Secretary of State for Transport* [2014] UKSC 3. See also the case of *Pham v Secretary of State for the Home Department* [2015] UKSC 19.

125 [Q 82](#)

126 *Ibid.*

127 European Integration and the Bundesverfassungsgericht, Sir Thomas More Lecture at the Honourable Society of Lincoln’s Inn, London, 31 October 2013, by Prof Dr. Andreas Voßkuhle, President of the Bundesverfassungsgericht: <http://www.lincolnsinn.org.uk/images/word/education/euro/Thomas%20More%20Lecture%20Oct%202013.pdf> [accessed 27 April 2016]

128 *Ibid.*

considered to be basic constitutional principles, the court would seek to assert itself”.¹²⁹

121. The EU Select Committee touched on this issue when it took evidence from two members of the German Bundestag, Axel Schäfer MdB and Detlef Seif MdB, in the course of its inquiry on EU reform.¹³⁰ Mr Seif confirmed that the German Federal Constitutional Court had the power to quash laws passed by the Bundestag, and so might not be a suitable model for the UK’s Supreme Court to follow:

“The constitutional court in Germany was introduced to make sure that every new law and political decision was in keeping with the basic law to prevent a breach of the guaranteed principles (Article 79.3). If you were to consider having such a court, you would have to have a Supreme Court that is absolutely independent of the political process and of the judiciary below it. It would be a court that could repeal any Acts of Parliament, so you have to ask yourself whether that is really what you want to have. Otherwise, it will probably remain a German solution only.”¹³¹

Conclusions

122. **The traditional view is that EU law has primacy over national law, and therefore that the EU Charter would have primacy over the Bill of Rights. Several witnesses doubted this, however, citing instances in which courts have made it clear that there might not be an obligation to follow EU law if it conflicted with a significant constitutional principle of national law.**
123. **The model of the German Federal Constitutional Court, advocated by the Secretary of State as one our own Supreme Court could follow, appears ill-suited to the UK’s constitutional context. First, the German Basic Law gives primacy to EU law. Secondly, even though EU law can be overridden if inconsistent with the Basic Law, the German Federal Constitutional Court has yet to strike down EU legislation on this ground. Thirdly, the German Federal Constitutional Court has the power to strike down the legislation of the German Parliament if it considers it to be contrary to the Basic Law. We question whether this is a model the UK, with its constitutional principle of Parliamentary sovereignty, would want to follow.**

129 Q 82

130 European Union Committee, *The EU referendum and EU reform* (9th Report, Session 2015–16, HL Paper 122)

131 Oral evidence taken before the EU Select Committee, 9 February 2016 (Session 2015–16), Q 187. See also Lord Pannick ‘A constitutional court should not be created for political purposes’, *The Times* (11 February 2016): “The insuperable political problem faced by the Prime Minister is that however much sovereignty the House of Commons enjoys, we cannot refuse to accept part of EU law (as determined by the Court of Justice) while we remain a member of the EU. That problem cannot be avoided by creating a constitutional court.” Available at <http://www.thetimes.co.uk/tto/opinion/columnists/article4687556.ece>

CHAPTER 7: THE IMPACT OF A BRITISH BILL OF RIGHTS ON EUROPEAN COOPERATION AND THE UK'S INTERNATIONAL STANDING

124. The Secretary of State confirmed in his evidence that in introducing a British Bill of Rights the Government had no intention of derogating “absolutely” from any of the rights contained in the ECHR.¹³² This appeared to bear out the Prime Minister’s statement after the general election, already referred to, that any Bill of Rights would be “compatible with our membership of the Council of Europe”. The Secretary of State added, however, that while the Government did not intend to say that any individual right within the Convention no longer applied in the UK, “the Prime Minister has ruled nothing out”, and that “where rights are subject to potential qualification, we may emphasise the importance of one right over another.”¹³³ The extent to which a British Bill of Rights may depart from the level of protection provided for under the ECHR and the HRA is, therefore, uncertain.
125. We sought views from a number of our witnesses on the impact of repealing the HRA, and/or withdrawing from the ECHR, on the UK’s international reputation, on the operation of the ECHR, on the UK’s membership of the EU, and on the UK’s future participation in EU Justice and Home Affairs cooperation. While these considerations may be hypothetical—and we take comfort from the Secretary of State’s apparent confirmation that the Government intends to continue to abide by the ECHR—they nevertheless provide essential context for the narrower policy proposals currently being developed.

Impact on the ECHR and the UK’s international standing

126. Lord Goldsmith warned of the “terrible message” that the UK’s moving away from the standards in the ECHR, by repealing the HRA, would send to other countries. He argued that, were the UK to have its own human rights arrangements, it would give countries “who ... follow their obligations under the European Convention grudgingly and sparingly encouragement and comfort to continue”.¹³⁴ Mr Grieve agreed, telling us that there were “certainly some people around who ... have said, ‘Well, the way the Convention works, you just ignore the judgments that you don’t like’, just as we have been doing with prisoner voting”. This, however, had the “consequence of ruthlessly undermining the effectiveness of the Convention in so far as it applies to other places around Eastern Europe with poor human rights records”.¹³⁵ Ultimately, this would make the ECHR “unworkable, because the United Kingdom has always been seen as one of the principal architects and supporters of Convention principles, which also means observing ... and implementing judgments”.¹³⁶
127. Mr Biagi was concerned that any reduction in the UK’s international standing would, in turn, have a negative impact on the reputation of the Scottish Government. He wanted to see the UK remain within the ECHR

132 [Q 80](#)

133 *Ibid.*

134 [Q 49](#)

135 [Q 18](#)

136 *Ibid.*

in order “to avoid sending ... a message, which would be heard in capitals around the world that have scant regard for human rights”.¹³⁷

128. The Secretary of State did not believe that a departure from the rights contained in the ECHR would undermine the UK’s international reputation. He recognised that ECHR rights were “undoubtedly admirable and set a very high standard, and one would wish to see as many states as possible cleave as closely as possible, consistent with their own traditions” to the Convention’s values. But, he added that “I do not think that it is absolutely necessary for any country to be viewed as a human rights exemplar to be a signatory” to the ECHR.¹³⁸ He thought that the international consequences of changes to domestic human rights legislation could “sometimes be overstated”:

“I do not think that Vladimir Putin’s hand is stayed by the fact that Britain does anything in particular with respect to its domestic legislation. It is a good thing that occasionally the Strasbourg court and the Council of Europe can exercise some countervailing pressure against Russia, but countries like Russia and leaders like Putin operate above and beyond the law, and that is a brute fact of international relations.”¹³⁹

Conclusions

129. **We heard concerns that a British Bill of Rights that reduced the UK’s explicit commitment to the ECHR would undermine the UK’s standing within the Council of Europe and more widely. It could also put the effective operation of the European Convention on Human Rights, which requires all contracting States to respect its obligations, in jeopardy. The evidence of two former Attorneys General to this effect was compelling.**
130. **These concerns are heightened by the lack of clarity from the Government about whether the UK will remain a contracting State of the European Convention on Human Rights. We call on the Government to state explicitly whether or not it intends that the UK should remain a signatory to the ECHR.**

Impact on the UK’s Membership of the EU

131. Drawing on the Copenhagen criteria for EU membership¹⁴⁰ (agreed in 1993 and applied since then to all states seeking to join the EU) Mr Grieve stated: “it is quite clear that you cannot now become a candidate member and be admitted to the EU if you are not adherent to the European Convention”. But, he added, “there is nothing in the Treaties that says that you have to be”.¹⁴¹ Professor Peers recognised that once a country has joined the EU

137 [Q 39](#)

138 [Q 81](#), Martin Howe QC expressed similar views at [Q 19](#).

139 [Q 83](#)

140 The accession criteria, or Copenhagen criteria (after the European Council in Copenhagen in 1993 which defined them) are the essential conditions that all candidate countries must satisfy to become an EU Member State. These are: (i) political criteria: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; (ii) economic criteria: a functioning market economy and the capacity to cope with competition and market forces; (iii) administrative and institutional capacity to effectively implement all EU law and the ability to take on the obligations of membership; and, (iv) the European Union’s ability to absorb new members, while maintaining the momentum of European integration.

141 [Q 19](#)

“there is no formal requirement on each member state to be a party to the ECHR”.¹⁴² Professor Dougan agreed.¹⁴³

132. Professor Peers did argue, however, that there was an “assumption” that all Member States were parties to the ECHR, particularly as the Convention “is referred to in the Charter and in the general principles of EU law.”¹⁴⁴ Professor Anthony made a similar point, adding that while the UK remained a member of the EU, “the Convention would still permeate UK law through the medium of the European Communities Act and Charter, albeit with narrower reach”.¹⁴⁵ Mr O’Neill QC pointed out that the Lisbon Treaty was “replete” with references to the EU’s fundamental values, which were “inspired specifically” by the ECHR.¹⁴⁶
133. Professor Anthony argued that repeal of the HRA and attempts by the UK to “roll back from the Convention” would “upset the equilibrium within the European Union”.¹⁴⁷ Full withdrawal by the UK from the ECHR could, in his view, “give rise to questions about [the UK’s] EU membership”.¹⁴⁸ The Welsh Government told us that “Even if a workable solution could be found to enable the UK to leave the ECHR and yet remain in the EU, this would no doubt be a complicating factor to the UK’s relationship with the EU Institutions and other EU Member States”.¹⁴⁹
134. Focusing on the practicalities of EU cooperation, Professor Peers said:

“If the UK started to expel EU citizens and their family members to other member states for crimes that were not very serious or that did not justify removal under the EU’s citizens’ rights Directive ... that would be a breach simultaneously of EU law and of the ECHR.”¹⁵⁰

Breaches of this kind, even those that “did not fall within the scope of EU law” could give rise to “misgivings on the part of other member states as to whether they ought to co-operate with [the UK] more generally”.¹⁵¹

135. Mr Grieve,¹⁵² Professor Dougan¹⁵³ and Professor McCrudden all warned that if the UK withdrew entirely from the ECHR, this might lead to recourse by the EU to the provisions in the Treaty.¹⁵⁴ “under which ... a Member State’s actions are such as to call into serious question the Member State’s commitment to human rights and the rule of law”.¹⁵⁵

142 [Q 6](#)

143 [Q 64](#)

144 [Q 6](#)

145 [Q 73](#)

146 [Q 19](#)

147 [Q 77](#)

148 [Q 73](#)

149 Written evidence from the Welsh Government ([HRA0001](#))

150 [Q 6](#)

151 *Ibid.*

152 [Q 19](#)

153 [Q 64](#)

154 TEU, [Article 7\(i\)](#) states that if certain institutional criteria are met, the Council can determine whether “there is a clear risk of a serious breach by a Member State” of the Union’s values listed in TEU, [Article 2](#), including democracy, the rule of law and respect for human rights. TEU, [Article 7\(ii\)](#) allows the European Council, acting unanimously, to determine the “existence of a serious breach by a Member State” of the same foundational values. If the Heads of Government establish such a serious breach, then the Council can decide to suspend aspects of the State in question’s EU membership rights including voting rights, in the Council.

155 Written evidence from Professors Anthony and McCrudden ([HRA0003](#))

136. Martin Howe QC disagreed, arguing that the UK Government's stance was based on a principled disagreement with the interpretation of the European Convention by the ECtHR. It was "a completely different political scenario from either a Greek colonels situation or the situation that arose in Austria" in 1999–2000.¹⁵⁶ He concluded that "there is excessive alarmism on this point".¹⁵⁷
137. The Secretary of State did not appear concerned by this issue at all. He told us that his fellow European Justice Ministers had not raised any concerns with him. In his experience, the other EU Member States held "views about whether or not Britain should remain in the European Union and the consequences of that, but they do not ... express strong views" about the UK's adherence to human rights principles.¹⁵⁸

Conclusions

138. **We recognise that there is no formal legal obligation on an EU Member State to remain a party to the European Convention on Human Rights, but our evidence clearly suggests that any attempts by the UK to depart from its standards, or to withdraw from it entirely, would severely strain the UK's relations and cooperation with other EU States.**

Impact on the UK's participation in Justice and Home Affairs cooperation

139. Built in part on the principles common to all Member States' legal systems, which include the ECHR, mutual recognition is based on the principle of mutual respect between Member States' legal systems, and has been developed as an alternative to harmonisation through EU legislation. Mutual recognition obliges the criminal justice systems of the Members States to recognise each other's judgments and decisions, with limited grounds for refusal.

Box 2: EU Justice and Home Affairs Cooperation

In 1999, the European Council undertook to develop the EU as "an area of freedom, security and justice". The Tampere Programme¹⁵⁹, the European Council's (then) five year legislative programme for Justice and Home Affairs, endorsed "the principle of mutual recognition which ... should become the cornerstone of judicial co-operation in ... criminal matters within the Union". Subsequent Justice and Home Affairs five-year plans have maintained this focus.¹⁶⁰

156 The inclusion in the Treaties of coercive provisions policing the individual Member State's adherence to the principles of the rule of law and human rights is a comparatively recent occurrence. The lack of such provisions in this regard was highlighted by the events in 1999/2000 surrounding the formation in Austria of a coalition government between Jörg Haider's Freedom Party and Wolfgang Schüssel's People's Party.

157 [Q 19](#)

158 [Q 85](#)

159 Tampere European Council 15 and 16 October 1999, 'Presidency Conclusions': http://www.europarl.europa.eu/summits/tam_en.htm [accessed 27 April 2016]

160 The Hague Programme: strengthening freedom, security and justice in the European Union, 13 December 2004 [JAI 559](#) and the Stockholm Programme: An open and secure Europe serving and protecting citizens, 2 December 2009 [JAI 896](#).

The events of 11 September 2001 provided renewed impetus to the Member States' efforts to pass Justice and Home Affairs legislation based on the principle of mutual recognition. Since then, the EU has introduced a number of mutual recognition legal instruments, of which, the European Arrest Warrant is the most well-known.¹⁶¹

140. Mr O'Neill QC said the EU "is not just a trade agreement ... we have an area of freedom and justice and co-operation. That requires ... a common standard, a common approach to fundamental rights".¹⁶² He warned, with regard to the European Arrest Warrant (EAW) specifically, that any attempts by the Government to move away from these common standards would throw a "spanner" into the UK's participation.¹⁶³ Mr Grieve MP warned that "if the consequence of our pulling out of the ECHR or being non-compliant is that we are departing from the norms, certainly, of the western European countries with which we co-operate most closely, it would make this particular field more difficult to operate".¹⁶⁴
141. Mr Biagi said that any departure by the UK from ECHR standards "will have international consequences" for the UK's reputation and esteem. He continued, "if you step away from the principles, other Governments, other countries, are going to consider the relationships between the jurisdictions". He suggested that "in the end the question will probably be resolved by the other jurisdictions rather than by the UK itself".¹⁶⁵ Professor Peers agreed, arguing that "for a while at least" the UK's participation in JHA co-operation would be complicated by legal challenges. At the practical level, every time "we sought to enforce a UK criminal law decision ... in the national courts of another member state, anyone with the remotest argument ... would go into the courts there and say, 'You can't enforce that judgment against me'".¹⁶⁶
142. Professor Dougan doubted that repeal of the HRA on its own would automatically lead to the suspension of the UK's participation in mutual recognition based EU JHA co-operation: "the mere fact that [Member States] breach fundamental rights every now and again or in individual disputes does not exempt anyone from mutual recognition obligations".¹⁶⁷ If the changes introduced by the British Bill of Rights turned out to be "relatively minor ... and the UK continues fully to respect EU fundamental rights within the scope of application of the treaties", the CJEU would require "substantial

161 Council Framework Decision on the European arrest warrant and the surrender procedures between Member States ([OJ L190](#), 18 July 2002, p 1). Other criminal measures based on mutual recognition include: (i) Council Framework Decision on the execution in the European Union of orders freezing property or evidence ([OJ L169](#), 2 February 2003, p 45) (ii) Council Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions ([OJ L337](#), 16 December 2008, p 102); (iii) Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union ([OJ L327](#), 5 December 2008, p 27); (iv) Council Framework Decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters ([OJ L350](#), 30 December 2008, p 72); and (v) Council Framework Decision on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention ([OJ L294](#), 11 November 2009, p 20).

162 [Q 20](#)

163 [Q 19](#)

164 [Q 20](#)

165 [Q 40](#)

166 [Q 7](#)

167 [Q 63](#)

grounds to believe that there are systemic problems ... that are leading to a systematic infringement of fundamental rights” in the UK. But in the event that there were such a systematic infringement, then Professor Dougan anticipated the suspension of mutual recognition between the UK and the other Member States.¹⁶⁸

143. Martin Howe QC, in contrast, argued that the “presumption that standards of justice in all Member States are the same” was “frankly ... a diplomatic fantasy, not a reality”.¹⁶⁹ The Secretary of State, while confirming that he was “keen on the principle of mutual co-operation”, also premised his answer on the assumption that the UK Government would, in future, be seeking to introduce higher, not lower, rights protection. He argued that “it is possible that this Government or a future Government might wish to institute protection for citizens or residents in the UK that was of a higher standard than in the European Union, and that would pose an interesting question as to whether or not our commitment to mutual recognition trumped our desire to provide greater rights protections for any individual”.¹⁷⁰

Conclusions

144. **The evidence suggests that, were the UK to depart from the standards of human rights currently recognised within the EU, the system of mutual recognition which underpins EU Justice and Home Affairs cooperation would be hampered by legal arguments over its application to the UK.**
145. **We urge the Government not to introduce domestic human rights legislation that would jeopardise the UK’s participation in this important area of EU cooperation in the fight against international crime.**

168 *Ibid.*

169 [Q 20](#)

170 [Q 85](#)

CHAPTER 8: THE IMPACT OF REPEALING THE HUMAN RIGHTS ACT IN THE DEVOLVED NATIONS

146. It was clear from our first evidence sessions that the impact of a British Bill of Rights on the entrenchment of the European Communities Act and HRA in the constitutions of the devolved nations would be a central part of our inquiry. We therefore sought evidence on how a British Bill of Rights might be perceived by the devolved nations.

The Scottish Government's perspective

Human rights within the devolution settlement

147. We asked Mr Biagi to what extent the protection of human rights in Scotland under the ECHR and the EU Charter differed from that in England and Wales. The greatest difference, he said, was in the constraints on the Scottish Parliament and on the Scottish Government: “we have a very hard barrier against taking any action or passing legislation that is in violation either of convention rights or of EU law.”¹⁷¹ If the Scottish Parliament passed primary or subordinate legislation, or the Scottish Government undertook an administrative action, which was found to violate ECHR or EU law, it could be struck down by courts. The specific term was that it is “not law”.¹⁷² Mr Biagi described Scotland’s constitutional settlement through the Scotland Act 1998 as “analogous to the constitutions that bind most of the States in Europe, as opposed to the sovereign-parliament approach that is taken in Westminster.”¹⁷³

The strengths of ECHR compared to the EU Charter

148. Asked about the strengths of the human rights protections provided by the ECHR, compared to the EU Charter, in Scotland, Mr Biagi said: “we see them both as valuable ... we would not want to lose any of the efficacy of either system here, especially with the powers for remedy that there are under the Charter. But as I said, and I re-emphasise this, anything the Scottish Government or Scottish Parliament do has to be in compliance with both.”¹⁷⁴

Would legislative consent be required?

149. Asked whether the Scottish Parliament would need to pass a legislative consent motion in respect of any Bill to repeal the HRA, Mr Biagi replied

171 [Q 34](#)

172 The Scotland Act 1998, [section 29\(1\)](#) states that “an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament”. [Section 29\(2\)\(d\)](#) lists incompatibility with “any of the Convention rights or with Community law” as outside legislative competence. Similarly, under [section 57\(2\)](#), a member of the Scottish Government “has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law”.

173 [Q 34](#)

174 [Q 35](#)

that, in his view, it would.¹⁷⁵ The guidance¹⁷⁶ on the Sewel Convention¹⁷⁷ made clear that any UK legislation on a devolved area would require the consent of the Scottish Parliament—indeed, this has now been given statutory underpinning by section 2 of the Scotland Act 2016, entitled ‘The Sewel convention’, which provides that “the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament”. Importantly, the guidance also made clear that any alteration of the legislative competence of the Scottish Parliament would also require consent. Both aspects of the Sewel convention would be invoked were a Bill to repeal the HRA to be introduced.¹⁷⁸

150. The Law Society of Scotland agreed that repeal and replacement of the HRA would, in terms of the guidance,¹⁷⁹ require the amendment of provisions of the Scotland Act which affect the competences of the Scottish Parliament and Government.¹⁸⁰ However, it also noted that section 2 of the Scotland Act 2016 (at that time clause 2 of the Scotland Bill, which was then before Parliament) only applied the convention to the UK Parliament legislating in devolved matters; it did not apply the second part of the convention, which related to legislation altering the competence of the Scottish Parliament and Government. As a consequence, “if the Sewel convention is being interpreted on the narrow basis set out currently in Clause 2 then such legislation [repeal and replacement of the HRA] would not fall under the Sewel convention as provided for in the Scotland Bill”.¹⁸¹
151. Mr Biagi recognised that whether human rights were a reserved or devolved matter in Scotland was “a point of some debate between the Scottish Government and the UK Government”. But the Scottish Government was “very clear that Schedule 5 to the Scotland Act, which sets out what reserved issues are, does not mention human rights, it does not reserve human rights, and the principle of the Scotland Act is that if it is not mentioned there, it is devolved.”¹⁸² The fact that Schedule 4 of the Scotland Act lists the HRA as

175 Q 37. This is consistent with a speech given by the First Minister in Glasgow on 23 September 2015, in which she highlighted her Government’s plan to strongly oppose any attempt to scrap the Human Rights Act or withdraw from the European Convention on Human Rights. First Minister Nicola Sturgeon, ‘Speech on Human Rights at Pearce Institute, Govan’, 23 September 2015: <http://news.scotland.gov.uk/Speeches-Briefings/First-Minister-Human-Rights-1d7d.aspx> [accessed 27 April 2016]

176 Devolution Guidance Note 10 provides that: ‘Consent need only be obtained for legislative provisions which are specifically for devolved purposes, although Departments should consult the [Scottish/Welsh/Northern Irish] Executive on changes in devolved areas of law which are incidental to or consequential on provisions made for reserved purposes.’ The question arises whether legislative provisions “specifically for devolved purposes” would include legislation directly altering the powers of the Scottish Parliament and Government. Cabinet Office, *Devolution Guidance Note 10*: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60985/post-devolution-primary-scotland.pdf [accessed 20 March 2016]

177 The term “Sewel Convention” originated specifically in the context of Scottish devolution. The convention nonetheless applies to all the devolved nations. It is set out in paragraph 14 of the Memorandum of Understanding between the UK Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, dated October 2013, which states that: “The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature.”

178 Q 37

179 Cabinet Office, *Devolution Guidance Note 10*: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60985/post-devolution-primary-scotland.pdf [accessed 20 March 2016]

180 Written evidence from the Law Society of Scotland (HRA0004)

181 Written evidence from the Law Society of Scotland (HRA0004)

182 Q 37

UK legislation the Scottish Parliament cannot amend¹⁸³ did not, he believed, reserve human rights: “We therefore have the power to legislate for human rights in Scotland as long as we do not alter that bedrock of the Human Rights Act 1998. We have exercised this power in the past”.¹⁸⁴ The Law Society of Scotland agreed that human rights were not a reserved matter, and that the Scottish Parliament had legislated in the area of human rights.¹⁸⁵

Would legislative consent be given?

152. Mr Biagi said that there was controversy in the Scottish Parliament about the UK Government’s plans to repeal the HRA. When the HRA was debated in the Scottish Parliament in 2014 “it was backed by 100 votes to 10 ... There was an overwhelming view in the Scottish Parliament that these proposals, which we are still to see the detail of, do not represent the views of the Scottish legislature.”¹⁸⁶
153. If the UK Government sought to repeal the HRA in Scotland:

“The Scottish Parliament would be invited by the Scottish Government to refuse legislative consent. Based on the vote that we had last year, I think that would be passed, and given that the main opposition party supports the Scottish Government in this interpretation, it is likely that any Scottish Parliament after next May’s election would do the same.”¹⁸⁷

154. If the UK Government decided to legislate without the consent of the Scottish Parliament, it would be “a very substantial step”,¹⁸⁸ which would lead the UK into “uncharted constitutional territories”, and “generally speaking, uncharted constitutional territories are something that you should think a lot about before you enter.”¹⁸⁹

The Welsh Government’s perspective

155. We received written evidence from the Welsh Government on the impact of repealing the HRA in Wales.

Human rights within the devolution settlement

156. The HRA affects the Welsh Government and the National Assembly for Wales (the Assembly) in two ways. First, they are “public authorities” for the purposes of the HRA, which means that they cannot act in a way which is incompatible with ECHR rights. Secondly, as in Scotland, Welsh Ministers are under a statutory duty, by virtue of the Government of Wales Act 2006, not to act or legislate incompatibly with “Convention rights”; those rights being defined as having the same meaning as in the HRA. Incompatibility with Convention rights can also be raised as a devolution issue under Schedule 9 to the Government of Wales Act 2006.¹⁹⁰ Any provision in an Assembly

183 The Scotland Act 1998, [Schedule 4](#) lists the Human Rights Act as an “enactment protected from modification”.

184 [Q 37](#)

185 Written evidence from the Law Society of Scotland ([HRA0004](#))

186 [Q 34](#)

187 [Q 37](#)

188 [Q 38](#)

189 [Q 37](#)

190 The Government of Wales Act 2006, [section 81](#) and [section 158](#). Incompatibility with Convention rights can also be raised as a devolution issue under the Government of Wales Act 2006, [Schedule 9](#).

Bill is outside the Assembly’s legislative competence if it is incompatible with ECHR rights.¹⁹¹

157. Thus Wales too has a different constitutional arrangement from the UK, in that incompatibility with ECHR rights will be fatal to executive and legislative competence; this has been the case since the Assembly was created in 1999, prior to the Human Rights Act 1998 coming into force. The Welsh Government commented that, as for the other devolved administrations, the Convention “is in our constitutional DNA and so we perhaps have a qualitatively different relationship with the Act to [that] which the UK Government has.”¹⁹²
158. As with Scotland, the Welsh Government also has no power to make, confirm or approve any subordinate legislation, or to do any other act, that is incompatible with EU law.¹⁹³ Similarly, a provision in an Assembly Bill is outside competence if it is incompatible with EU law.¹⁹⁴ Changes to the HRA “have the potential to provide a diverging and complicated system by which citizens in Wales could challenge some EU/Convention rights breaches directly (reliant on Government of Wales Act 2006) whilst other issues would have to be pursued using whatever system the reformed UK human rights legislation puts in place.”¹⁹⁵

The HRA—a ‘uniquely British approach’

159. In the Welsh Government’s view, the HRA represented a uniquely British approach to giving effect to ECHR rights in UK law:

“In 1998, the Human Rights Act was passed so as to allow individuals to argue cases involving Convention rights directly before a Court in the UK. At the time of this Act’s passing, it was hailed as ‘rights brought home’. That is why the Welsh Government finds the UK Government’s aim of introducing a ‘British’ Bill of Rights and Responsibilities unnecessary: we already have a British Bill of Rights in the form of the Human Rights Act. Further, it is crucial to have well in mind in considering these issues that, contrary to inaccurate media comment on the way in which the convention rights are now translated into domestic law in the UK, through the mechanisms provided specifically for this purpose by the Human Rights Act, those rights are in almost all cases interpreted and applied to the British context solely by British judges necessarily applying their British values ... Indeed, the Human Rights Act itself represents a uniquely British approach to the implementation of the Convention.”¹⁹⁶

Policy on repeal of the HRA

160. The Welsh Government was “fundamentally opposed”¹⁹⁷ to the repeal of the HRA and to withdrawal from the ECHR. It believed that the mechanisms contained within the HRA were “an important and appropriate means for the people of Wales to challenge inequality and injustice and the ‘Convention

191 Government of Wales Act 2006, [section 108\(6\)\(c\)](#)

192 Written evidence from the Welsh Government ([HRA0001](#))

193 Government of Wales Act 2006, [section 80](#)

194 Government of Wales Act 2006, [section 108\(6\)\(c\)](#)

195 Written evidence from the Welsh Government ([HRA0001](#))

196 *Ibid.*

197 *Ibid.*

rights’ enshrined within that Act rightly continue to influence its policies, legislation and decisions.”¹⁹⁸ In Wales, people did not consider the Human Rights Act 1998 to be “broken”, nor in need of “fixing”.¹⁹⁹

161. The Welsh Government drew our attention to the fact that the UK Government’s draft Wales Bill, published on 20 October 2015, proposed a similar approach to the devolution of ECHR rights to that contained in the Scottish settlement—that is, to reserve the HRA itself to Westminster, but to devolve observing and implementing obligations under the ECHR, and under EU law. It was therefore important that:

“the UK Government gives careful consideration to the involvement of the devolved administrations in matters which go to the heart of our respective constitutional settlements, and affords appropriate respect to the views of our democratically elected legislatures in relation to any proposals to amend or repeal the Act.”²⁰⁰

The Northern Ireland perspective

162. We received written and oral evidence from Professors Anthony and McCrudden on the impact of repealing the HRA in Northern Ireland. The Northern Ireland Executive did not respond to our invitation to submit evidence. The Government of the Republic of Ireland responded by drawing our attention to a letter from Frances Fitzgerald TD, Minister for Justice and Equality,²⁰¹ to the Secretary of State, concerning the incorporation of the ECHR into Northern Ireland law.

Human rights within the devolution settlement

163. As in Scotland and Wales, legislative measures of the Northern Ireland Assembly and executive acts of the Northern Ireland Executive must conform to the ECHR and to EU law, and can be struck down by courts if they do not.²⁰²
164. Professors McCrudden and Anthony explained that human rights were neither an excepted nor a reserved matter, subject to certain qualifications.²⁰³ Neither Schedule 2 of the Northern Ireland Act 1998 (on what constitutes an excepted matter) nor Schedule 3 (on what constitutes a reserved matter) mention “human rights”, save where mention is made of the ECHR. The principle of the Northern Ireland Act is clearly set out in section 4(2), that a “transferred matter” means “any matter which is not an excepted or reserved matter”. As a result, it could be said that the Northern Ireland Assembly has power to legislate in respect of human rights as a transferred, in other words a devolved, issue.²⁰⁴
165. This interpretation is supported by section 69 of the Northern Ireland Act 1998 and related provisions in the Assembly’s Standing Orders, which require that the Northern Ireland Human Rights Commission should be consulted on whether Assembly legislation complies with human rights. In addition, under Schedule 2 of the Northern Ireland Act (on excepted

198 *Ibid.*

199 *Ibid.*

200 *Ibid.*

201 [Letter from the Office of the Minister for Justice and Equality](#), Dublin dated 3 February 2016

202 Northern Ireland Act 1998, See sections [6](#), [24](#), [81](#) and [83](#)

203 Written evidence from Professor Gordon Anthony and Professor Christopher McCrudden ([HRA0003](#))

204 *Ibid.*

matters), “observing and implementing international obligations, obligations under the Human Rights Convention and obligations under [EU] law” are specifically not included as excepted matters. Observing and implementing these obligations are therefore also devolved responsibilities.²⁰⁵

166. Although human rights are devolved, and the Assembly is empowered (and obliged) to act to observe and implement the ECHR, the Assembly and Northern Ireland Ministers are disabled from amending the Human Rights Act 1998 (as with Scotland and Wales). This is because the Human Rights Act constitutes an entrenched provision, meaning that it cannot “be modified by an Act of the Assembly or subordinate legislation made, confirmed or approved by a Minister or Northern Ireland department.”²⁰⁶

The particular status of the ECHR

167. Professor McCrudden explained that the status of the ECHR in the devolution settlement of Northern Ireland differed from that of Scotland and Wales in four important respects.
168. The first difference was that the domestic implementation of the ECHR, in the form of the HRA, was a critical part of the Belfast-Good Friday Agreement. Section 6 of the Agreement provided that:

“The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.”

In Professor McCrudden’s view, “that has brought about greater stability and reconciliation than has been possible since the foundation of Northern Ireland in 1920. The repeal of the Human Rights Act, therefore, risks destabilising the peace agreement by removing a critical part of that agreement.”²⁰⁷

169. The second difference was that the HRA currently played a role in Northern Ireland that was significantly different from that of the rest of the United Kingdom, “in addressing issues from the past that continue to dog the path to complete transition, such as the alleged complicity of security forces in paramilitary murders. The EU Charter of Fundamental Rights, for example, is no substitute for that.”²⁰⁸
170. Thirdly, the necessity of domestic incorporation of the ECHR in Northern Ireland was not only part of the peace agreement between the contending parties in Northern Ireland; it was also part of an international legal agreement between the Republic of Ireland and the UK: “Therefore repeal of the Human Rights Act risks at least breaching the UK’s legal obligations”.²⁰⁹
171. The fourth major difference was “that there is no guarantee that the Assembly would step in to fill the vacuum left by any repeal of the Human Rights Act in so far as it applies to Northern Ireland. There has already been a 17-year stand-off in implementing another part of the Good Friday

205 *Ibid.*

206 Northern Ireland Act 1998, [section 7\(1\)](#)

207 [Q 68](#)

208 *Ibid.*

209 *Ibid.*

Agreement, which envisaged the enactment of a Bill of Rights in Northern Ireland” supplementing the ECHR.²¹⁰

172. Frances Fitzgerald TD, the Republic of Ireland Minister for Justice and Equality, wrote to the Secretary of State on 3 February 2016 concerning the incorporation of the ECHR into Northern Irish law.²¹¹ The letter was prompted by the UK Government’s proposals to replace the HRA and the Irish Government’s concerns, insofar as the proposals related to Northern Ireland. Ms Fitzgerald urged that, in advance of any public consultation, the UK Government should give the fullest consideration to the provisions of the Good Friday/Belfast Agreement, particularly to the requirement to incorporate the ECHR into Northern Ireland law. She explained that the Irish Government’s view was that “while a domestic Bill of Rights could complement incorporation, it could not replace it.” She continued:

“In addition, a strong human rights framework, including external supervision by the European Court of Human Rights, has been an essential part of the peace process and anything that undermines this, or is perceived to undermine this, could have serious consequences for the operation of the Good Friday/Belfast Agreement.”

173. She added that it was “essential that the two Governments are seen to be working together to strengthen the institutions of the Good Friday/Belfast Agreement.”

Would legislative consent be required?

174. Echoing the evidence of Mr Biagi, Professor McCrudden said there was a broad and a narrow interpretation of the Sewel convention and the relevant guidance.²¹² The broader interpretation was that all matters that significantly affected devolved matters in Northern Ireland were subject to the convention, such that if the UK Parliament wished to legislate in these areas, the agreement of the Assembly should be obtained. The narrower interpretation was that consent needed to be obtained only if the UK Parliament wished to legislate in areas specifically devolved to Northern Ireland.²¹³

175. Professors Anthony and McCrudden concluded that enacting a new domestic Bill of Rights that applied to Northern Ireland:

“would involve amending the existing Northern Ireland Act’s allocation of powers to Ministers and the Assembly and would therefore require Assembly approval. We would suggest that this is certainly true as a matter of politics if not also a matter of law. We would also note that this directly involves the UK Parliament acting in the area of ‘human rights’, which we have seen to be a devolved matter.”²¹⁴

176. If the broader reading of the convention were adopted, repeal of the Human Rights Act (as distinct from repeal and replacement with a Bill of Rights) would also seem to require Assembly approval.²¹⁵

210 *Ibid.*

211 [Letter from the Office of the Minister for Justice and Equality](#), Dublin dated 3 February 2016

212 Cabinet Office, *Devolution Guidance Note 10*: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60985/post-devolution-primary-scotland.pdf [accessed 20 March 2016]

213 [Q 71](#)

214 Written evidence from Professor Gordon Anthony and Professor Christopher McCrudden ([HRA0003](#))

215 [Q 71](#); written evidence from Professor Gordon Anthony and Professor Christopher McCrudden ([HRA0003](#))

Would legislative consent be given?

177. Asked whether legislative consent would be given, Professors Anthony and McCrudden said that “the answer is likely to be ‘no’, at least as things stand politically”.²¹⁶ Any significant issue before the Northern Irish Assembly could be made the subject of a Petition of Concern, triggered by a group of Members of the Assembly. The effect of such a Petition of Concern would be to give both the major parties (Sinn Féin and the Democratic Unionist Party) effective vetoes over any issue before the Assembly, because a super-majority was required where such a Petition had been triggered. It seemed “highly unlikely that either Sinn Féin or the Social Democratic and Labour Party (to say nothing of the other political parties represented in the Assembly) would be willing to vote in favour of a legislative consent motion of this type, and highly likely that they would (separately or together) initiate a Petition of Concern.”²¹⁷

The views of the UK Government

178. We asked the Secretary of State to comment on the views of Mr Biagi that human rights were a devolved matter in Scotland. He replied that they were:

“neither reserved nor devolved. Any reform or change to the Human Rights Act is a matter for the Westminster Parliament, but the application of human rights is a matter for Scots courts and, indeed, for the Scottish Government. If you can imagine a state of permanent pregnancy, then that is what we have. As to consent, we will consult on what we think is the best way of involving all the constituent parts of the United Kingdom in understanding the case for rights reform. However, I would not want to prejudge at this stage exactly how we might do so.”²¹⁸

179. Asked whether there was a risk of a UK Bill of Rights becoming an English Bill of rights the Minister replied that he “hoped there would be a UK Bill of Rights.”²¹⁹ He could not predict how individual politicians in the devolved assemblies would react, but, in terms of Northern Ireland:

“a majority of politicians in Northern Ireland would certainly like to see change. The fundamental principles of the convention are also, of course, there to protect individuals, and there are also minorities in Northern Ireland who look to that protection. It is not our intention to dilute that protection, and when people see the consultation document, people’s fears may well prove to be phantoms.”²²⁰

Conclusions

180. **Human rights are entrenched in the devolution settlements of Scotland, Wales and Northern Ireland in a way that they are not under the UK’s constitution: acts of the devolved legislatures can, for example, be quashed by courts for non-compliance with the European Convention on Human Rights or the EU Charter.**
181. **The evidence we received from the Scottish and Welsh Governments demonstrates strong support for the role of the European Convention**

216 Written evidence from Professor Gordon Anthony and Professor Christopher McCrudden ([HRA0003](#))

217 *Ibid.*

218 [Q 88](#)

219 *Ibid.*

220 [Q 89](#)

on Human Rights and the EU Charter to be preserved in those nations. The evidence we received from the Government of the Republic of Ireland and Professors Anthony and McCrudden went somewhat further in emphasising the vital role being played by the European Convention on Human Rights and the Human Rights Act in implementing the Good Friday Agreement.

182. **The evidence demonstrates that the Scottish Parliament and Northern Ireland Assembly are unlikely to give consent to a Bill of Rights which repealed the Human Rights Act (we did not receive evidence on this point from the National Assembly for Wales). Were the UK Government to proceed without such consent, it would be entering into uncharted constitutional territory.**
183. **The difficulties the Government faces in implementing a British Bill of Rights in the devolved nations are substantial. Given the seemingly limited aims of the proposed Bill of Rights, the Government should give careful consideration to whether, in the words of the Secretary of State, it means unravelling “the constitutional knitting for very little”.²²¹ If for no other reason, the possible constitutional disruption involving the devolved administrations should weigh against proceeding with this reform.**

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

The Government's case for a British Bill of Rights

1. The British Bill of Rights as outlined by the Secretary of State appeared a far less ambitious proposal than the one outlined in the Conservative Party manifesto, which we set out at the beginning of this report. He made no mention, for example, of reversing the mission creep that has meant human rights law being used for more and more purposes, and often with little regard for the rights of wider society; nor of stopping serious criminals from using spurious human rights arguments to prevent deportation. (Paragraph 45)
2. The proposals the Secretary of State outlined did not appear to depart significantly from the Human Rights Act—we note in particular that all the rights contained within the ECHR are likely to be affirmed in any British Bill of Rights. His evidence left us unsure why a British Bill of Rights was really necessary. (Paragraph 46)
3. If a Bill of Rights is not intended to change significantly the protection of human rights in the UK, we recommend the Government give careful thought before proceeding with this policy. As the former Lord Chief Justice Rt Hon Lord Woolf CH told us, the repeal of the Human Rights Act and its replacement by a Bill of Rights would be a constitutional change of the greatest significance. (Paragraph 47)
4. In Chapter 8 we outline the evidence we received on the attitude to human rights in the devolved nations, which reveals a far more positive outlook than the view expressed by the Secretary of State. (Paragraph 48)
5. We call on the Government to explain its grounds for concluding that, as the Secretary of State expressed it, the UK public sees human rights as a “foreign intervention”, and how a Bill of Rights would address this concern any more than the Human Rights Act does. Many of our witnesses considered that the Human Rights Act gave effect to the ECHR in national law in a way that respected Parliamentary sovereignty. The Welsh Government, for example, thought this a uniquely British approach. (Paragraph 49)

The relative scope of the ECHR and the EU Charter

6. The main strength of domestic human rights protection under the European Convention on Human Rights is its scope. By virtue of section 6 of the Human Rights Act, every decision of every public body, including courts, must be compatible with the Convention. That is not the case with the EU Charter. The EU Charter applies only to public bodies making decisions within the scope of EU law. (Paragraph 54)
7. The application of the EU Charter is narrower than that of the European Convention on Human Rights for two main reasons: not all of its provisions have direct effect, and so they cannot be relied on directly by individuals in national courts; and it applies to Member States “only when they are implementing Union law”. (Paragraph 71)
8. Understanding the meaning of “only when they are implementing EU law” is central to assessing the scope of the EU Charter’s application in EU Member States. (Paragraph 72)

9. We found Professor Dougan’s evidence particularly helpful, and draw the following conclusions from it. The expression “implementing Union law” can be equated to “acting within the scope of EU law”, the test used by the Court of Justice before the advent of the EU Charter. A Member State can be said to be acting within the scope of EU law when it either implements EU law through national legislation, or it acts on the basis of EU law, whether implemented or not, or it derogates from EU law. While the test for acting within the scope of EU law is case-specific, and often legally complex, Professor Dougan concluded that the Court of Justice’s approach had been relatively predictable, and surprisingly consistent. (Paragraph 73)
10. We heard a range of views on this issue, but the weight of evidence we received does not support a conclusion that the Court of Justice has sought to expand the reach of EU law over Member States through its judgments on the scope of the EU Charter. (Paragraph 74)
11. That said, the inherent difficulty in defining the scope of EU law has given rise to considerable litigation. We think it is likely to continue to do so in the future. (Paragraph 75)
12. The weight of evidence demonstrates that, were a Bill of Rights to restrict victims’ rights to bring legal challenges under the Human Rights Act, more challenges under the EU Charter in domestic courts would be likely. This, in turn, is likely to give rise to more references from UK courts to the Court of Justice seeking guidance on the scope of EU law and the provisions of the EU Charter. (Paragraph 80)
13. The Government should give careful consideration to this likely consequence in deciding whether to introduce a British Bill of Rights. (Paragraph 81)

The enforcement of the ECHR and EU Charter in national law

14. The common law would be unlikely to fill the gaps in human rights protection were the Human Rights Act to be replaced by legislation providing a lower level of protection. (Paragraph 83)
15. The evidence we received is clear: the power of national courts under the European Communities Act to disapply a provision of national legislation that is inconsistent with the EU Charter is a more effective remedy than a declaration of incompatibility under the Human Rights Act. (Paragraph 95)
16. A litigant can get compensatory damages for breach of EU law as of right; under the Human Rights Act damages are discretionary. (Paragraph 96)
17. A challenge under the Human Rights Act may have to be litigated all the way to the European Court of Human Rights, in which case a significant delay will ensue. (Paragraph 97)
18. We agree with the majority of our witnesses who said that the case of Delvigne is likely to lead to the UK ban on prisoner voting again being challenged, in relation to European Parliament elections. (Paragraph 113)

Would a British Bill of Rights be subject to EU law?

19. The traditional view is that EU law has primacy over national law, and therefore that the EU Charter would have primacy over the Bill of Rights. (Paragraph 122)

20. Several witnesses doubted this, however, citing instances in which courts have made it clear that there might not be an obligation to follow EU law if it conflicted with a significant constitutional principle of national law. (Paragraph 122)
21. The model of the German Federal Constitutional Court, advocated by the Secretary of State as one our own Supreme Court could follow, appears ill-suited to the UK's constitutional context. First, the German Basic Law gives primacy to EU law. Secondly, even though EU law can be overridden if inconsistent with the Basic Law, the German Federal Constitutional Court has yet to strike down EU legislation on this ground. Thirdly, the German Federal Constitutional Court has the power to strike down the legislation of the German Parliament if it considers it to be contrary to the Basic Law. We question whether this is a model the UK, with its constitutional principle of Parliamentary sovereignty, would want to follow. (Paragraph 123)

The impact of a British Bill of Rights on European Cooperation and the UK's international standing

22. We heard concerns that a British Bill of Rights that reduced the UK's explicit commitment to the ECHR would undermine the UK's standing within the Council of Europe and more widely. It could also put the effective operation of the European Convention on Human Rights, which requires all contracting States to respect its obligations, in jeopardy. The evidence of two former Attorneys General to this effect was compelling. (Paragraph 129)
23. These concerns are heightened by the lack of clarity from the Government about whether the UK will remain a contracting State of the European Convention on Human Rights. We call on the Government to state explicitly whether or not it intends that the UK should remain a signatory to the ECHR. (Paragraph 130)
24. We recognise that there is no formal legal obligation on an EU Member State to remain a party to the European Convention on Human Rights, but our evidence clearly suggests that any attempts by the UK to depart from its standards, or to withdraw from it entirely, would severely strain the UK's relations and cooperation with other EU States. (Paragraph 138)
25. The evidence suggests that, were the UK to depart from the standards of human rights currently recognised within the EU, the system of mutual recognition which underpins EU Justice and Home Affairs cooperation would be hampered by legal arguments over its application to the UK. (Paragraph 144)
26. We urge the Government not to introduce domestic human rights legislation that would jeopardise the UK's participation in this important area of EU cooperation in the fight against international crime. (Paragraph 145)

The impact of repealing the Human Rights Act in the devolved nations

27. Human rights are entrenched in the devolution settlements of Scotland, Wales and Northern Ireland in a way that they are not under the UK's constitution: acts of the devolved legislatures can, for example, be quashed by courts for non-compliance with the European Convention on Human Rights or the EU Charter. (Paragraph 180)

28. The evidence we received from the Scottish and Welsh Governments demonstrates strong support for the role of the European Convention on Human Rights and the EU Charter to be preserved in those nations. The evidence we received from the Government of the Republic of Ireland and Professors Anthony and McCrudden went somewhat further in emphasising the vital role being played by the European Convention on Human Rights and the Human Rights Act in implementing the Good Friday Agreement. (Paragraph 181)
29. The evidence demonstrates that the Scottish Parliament and Northern Ireland Assembly are unlikely to give consent to a Bill of Rights which repealed the Human Rights Act (we did not receive evidence on this point from the National Assembly for Wales). Were the UK Government to proceed without such consent, it would be entering into uncharted constitutional territory. (Paragraph 182)
30. The difficulties the Government faces in implementing a British Bill of Rights in the devolved nations are substantial. Given the seemingly limited aims of the proposed Bill of Rights, the Government should give careful consideration to whether, in the words of the Secretary of State, it means unravelling “the constitutional knitting for very little”. If for no other reason, the possible constitutional disruption involving the devolved administrations should weigh against proceeding with this reform. (Paragraph 183)

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Lord Blair of Boughton
 Lord Cromwell
 Baroness Eccles of Moulton
 Baroness Hughes of Stretford
 Lord Judd
 Baroness Kennedy of The Shaws (Chairman)
 Baroness Ludford
 Baroness Neuberger
 Baroness Newlove
 Lord Richard
 Lord Scriven
 Baroness Shackleton of Belgravia

Declarations of Interest

Lord Blair of Boughton
No relevant interests declared

Lord Cromwell
Director: The British East-West Centre

Baroness Eccles of Moulton
United Kingdom delegate to the Parliamentary Assembly of the Council of Europe

Baroness Hughes of Stretford
No relevant interests declared

Lord Judd
Member of the Advisory Board of the Centre for the Study of Human Rights LSE
Member of the LSE Commission on Diplomacy

Baroness Kennedy of The Shaws (Chairman)
Chair of JUSTICE
Co Chair of International Bar Association's Human Rights Institute
Member of Law Faculty, Oxford University
Fellow of Royal Society of Edinburgh
Fellow (Hon) British Academy

Baroness Ludford
Vice-Chair JUSTICE (NGO)
Patron Fair Trials International (NGO)

Baroness Neuberger
No relevant interests declared

Baroness Newlove
No relevant interests declared

Lord Oates
No relevant interests declared

Lord Richard
No relevant interests declared

Baroness Shackleton of Belgravia
No relevant interests declared

The following Members of the European Union Select Committee attended the meeting at which the report was approved:

Baroness Armstrong of Hill Top
Lord Blair of Boughton
Lord Borwick
Lord Boswell of Aynho (Chairman)
Earl of Caithness
Lord Davies of Stamford
Baroness Faulkner of Margravine
Lord Green of Hurstpierpoint
Lord Jay of Ewelme
Baroness Kennedy of The Shaws
Lord Liddle
Lord Mawson
Baroness Scott of Needham Market
Baroness Suttie
Lord Trees
Lord Tugendhat
Lord Whitty
Baroness Wilcox

During consideration of the report the following Member declared an interest:

Lord Jay of Ewelme

Patron, Fair Trials International

A full list of Members' interests can be found in the Register of Lords Interests <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

APPENDIX 2: LIST OF WITNESSES

Evidence is published online at <http://www.parliament.uk/potential-impact-repealing-human-rights-act> and available for inspection at the Parliamentary Archives (020 7219 3074).

Evidence received by the Committee is listed below in chronological order of oral evidence session and in alphabetical order. Those witnesses marked with a ** gave both oral and written evidence. Those marked with * gave oral evidence and did not submit any written evidence. All other witnesses submitted written evidence only.

Oral evidence in chronological order

- | | | |
|----|---|--------------------------|
| * | Professor Sionaidh Douglas-Scott, Anniversary Chair in Law, Queen Mary University of London and co-director of the Centre for Law and Society in a Global Context | QQ 1–11 |
| * | Dr Tobias Lock, Lecturer in EU Law, School of Law, University of Edinburgh | QQ 1–11 |
| * | Professor Steve Peers, Professor of European Law and Human Rights Law, University of Essex | QQ 1–11 |
| * | Rt Hon Dominic Grieve MP | QQ 12–22 |
| * | Mr Martin Howe QC | QQ 12–22 |
| * | Mr Aidan O’Neill QC | QQ 12–22 |
| * | Sir David Edward KCMG, QC, FRSE | QQ 23–33 |
| * | Rt Hon Lord Woolf CH | QQ 23–33 |
| * | Mr Marco Biagi MSP | QQ 34–43 |
| * | Rt Hon Lord Goldsmith QC | QQ 44–53 |
| ** | Professor Michael Dougan, Professor of European Law and Jean Monnet Chair in Law, University of Liverpool | QQ 54–67 |
| ** | Professor Gordon Anthony, Professor of Public Law, Queen’s University Belfast | QQ 68–78 |
| ** | Professor Christopher McCrudden, Professor of Human Rights and Equality Law, Queen’s University Belfast | QQ 68–78 |
| * | Rt Hon Mr Michael Gove MP, Lord Chancellor and Secretary of State for Justice | QQ 79–90 |
| * | Mr Dominic Raab MP, Parliamentary Under Secretary of State for Justice | QQ 79–90 |

Alphabetical list of all witnesses

- | | | |
|----|--|-------------------------|
| ** | Professor Gordon Anthony, Professor of Public Law, Queen’s University Belfast (QQ 68–78) | HRA0003 |
| * | Mr Marco Biagi MSP (QQ 34–43) | |

- ** Professor Michael Dougan, Professor of European Law and Jean Monnet Chair in Law, University of Liverpool (QQ 54–67) [HRA0002](#)
- * Professor Sionaidh Douglas-Scott, Anniversary Chair in Law, Queen Mary University of London and co-director of the Centre for Law and Society in a Global Context (QQ 1–11)
- * Sir David Edward KCMG, QC, FRSE (QQ 23–33)
- * Rt Hon Lord Goldsmith (QQ 44–53)
- * Rt Hon Mr Michael Gove MP, Lord Chancellor and Secretary of State for Justice (QQ 79–90)
- * Rt Hon Dominic Grieve MP (QQ 12–22)
- * Mr Martin Howe QC (QQ 12–22)
- Law Society of Scotland [HRA0004](#)
- * Dr Tobias Lock, Lecturer in EU Law, School of Law, University of Edinburgh (QQ1–11)
- ** Professor Christopher McCrudden, Professor of Human Rights and Equality Law, Queen’s University Belfast (QQ 68–78) [HRA0003](#)
- * Mr Aidan O’Neill QC (QQ 12–22)
- * Professor Steve Peers, Professor of European Law and Human Rights Law, University of Essex (QQ 1–11)
- * Mr Dominic Raab MP, Parliamentary Under Secretary of State for Justice (QQ 79–90)
- Welsh Government [HRA0001](#)
- * Rt Hon Lord Wolf CH