

Welsh Government—Written evidence (HRA0001)

1. The Welsh Government is fundamentally opposed to the repeal of the Human Rights Act 1998 and similarly to any withdrawal from the European Convention on Human Rights. It believes that the mechanisms contained within the Human Rights Act are an important and appropriate means for the people of Wales to challenge inequality and injustice and the “Convention rights” enshrined within that Act rightly continue to influence its policies, legislation and decisions.
2. The Welsh Government is grateful to the Committee for the opportunity to provide evidence in response to the four topics posed for consideration by it in the context of the repeal proposals, namely:
 - a. the protection of human rights under the European Convention on Human Rights (ECHR) and under EU law – similarities, differences, relative strengths;
 - b. how would repeal of the Human Rights Act and possible withdrawal from the ECHR affect a) the UK’s formal membership of the EU, b) its relationships with other EU Member States, and c) the current renegotiation of its relationship with the EU;
 - c. would repealing the Human Rights Act and possible withdrawal from the ECHR a) put the UK in conflict with EU law, and b) change how EU fundamental rights are relied on and interpreted in UK courts; and
 - d. the EU’s accession to the ECHR.
3. The Welsh Government notes that at this juncture, the detail of the UK Government’s proposals in relation to the repeal and replacement of the Human Rights Act 1998 is unknown. For example, whilst the Conservative Party’s proposals for reform ‘Protecting Human Rights in the UK’ mentioned the possibility of withdrawing from the ECHR, in the event that the Council of Europe did not agree to the UK Government’s proposals, it is not known what the current intention is.¹
4. Much will therefore depend on the detail of any proposals and so it may be that these questions need to be revisited upon sight of these. However, the Welsh Government is pleased to make the following, general comments in relation to each of the questions posed, which it hopes will be of assistance to the Committee.

1. The protection of human rights under the European Convention on Human Rights (ECHR) and under EU law – similarities, differences, relative strengths.

The European Convention on Human Rights

5. The United Kingdom was the first country to sign the ECHR; its lawyers were instrumental in its drafting; and its politicians had called for a charter of human

¹ https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf

rights “guarded by freedom and sustained by law” which ensured that “people owned the government and not the government the people”.²

6. Since it entered into force in 1953, it has subsequently continued to provide a basis for the protection of such important and basic human rights as the right to life, the freedom of expression, the right to a fair trial and freedom from slavery.
7. 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 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.
8. Indeed, the Human Rights Act itself represents a uniquely British approach to the implementation of the Convention. In particular, the mechanisms contained at section 4 – 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. This, coupled with the margin of appreciation afforded to the democratically elected legislature by the Strasbourg court (e.g. on issues of social policy) ensures that, in the final analysis, it remains for Parliament to draw the line between individual rights and the public interest. Moreover, in a sustained line of recent jurisprudence (Kennedy³ etc.) the UK Supreme Court has asserted the primacy of the common law, whose principles are therefore to be consulted and applied before resort to Convention rights is required. By this mechanism also the issues of fundamental rights which arise in the context of the convention and the Human Rights Act have been given a peculiarly domestic flavour deriving British conclusions. Even where the Strasbourg court has ruled in a way which appeared to conflict with “British thinking” the Supreme Court has shown itself willing and able successfully to engage in dialogue with the ECHR resulting in change of the latter’s position to accord with that “British thinking”.
9. In the Welsh context, the Human Rights Act 1998 continues to affect the Welsh Ministers and the National Assembly for Wales (“the Assembly”) in two very direct ways. First, they are “public authorities” for the purposes of the Human Rights Act 1998, which means that they cannot act in a way incompatible with Convention rights.
10. Secondly, the Welsh Ministers are under a statutory duty by virtue of the Government of Wales Act 2006 not to act or legislate incompatibly with “the

² <http://www.churchill-society-london.org.uk/WSCHague.html>

³ *Kennedy v The Charity Commission* [2014] UKSC 20.

Convention rights”; those rights being defined as having the same meaning as in the Human Rights Act 1998.⁴ Further, any Assembly Bill provision is outside the Assembly’s legislative competence if it is incompatible with Convention Rights.⁵

11. Therefore, Wales is in a slightly different situation to England in that here, incompatibility with Convention rights will be fatal to executive and legislative competence; and indeed this has been the case since the Assembly was created in 1999, prior to the Human Rights Act 1998 coming into force. Like the other devolved administrations, the Convention is in our constitutional DNA and so we perhaps have a qualitatively different relationship with the Act to which the UK Government has.
12. One of the ECHR’s main features is that, subject to meeting the admissibility criteria set down and further interpreted by the Court, the ECHR is accessible to all individuals within the jurisdiction of the signatory states in relation to the rights and freedoms set out in section 1.
13. As a result of this important feature, one of ECHR’s potential “drawbacks” is the number of cases currently before the European Court of Human Rights and the backlog and delay to access to rights this creates. As of 1 November 2014, about 78,000 applications were pending.⁶ Indeed, some commentators have put ‘the caseload crisis’ as high as being ‘the biggest challenge in the history of the Court’.⁷
14. However the Welsh Government would note that even this “drawback” could be seen to demonstrate the ECHR’s continuing relevance to the people of Europe.
15. Domestically, the fact that the Human Rights Act provides a mechanism by which people can directly enforce their Convention rights in the courts of the United Kingdom helps mitigate and alleviate that backlog. It provides a process by which people can enforce their rights “at home”, without recourse to Strasbourg, with the additional cost and time this can entail. In cases involving Convention rights, time often being of the essence.
16. If the current framework were amended so as to limit access or standing to certain Convention rights, domestically but the UK nevertheless remained a signatory to the ECHR, then it is difficult to see how this would not result in more applications to the Court in Strasbourg. The Welsh Government is concerned by the implications such a scenario would have upon the ability of the people of Wales to access justice.
17. The practical importance of this in Wales cannot be underestimated. If, for example, people in rural communities have to travel to Strasbourg, London or even Cardiff rather than to their local court in order to obtain justice then the reality is that, for many, their rights will be practically unavailable to them. This was in effect the

⁴ See sections 81 and 158 of the Government of Wales Act 2006. Incompatibility with Convention rights can also be raised as a devolution issue under Schedule 9 to the Government of Wales Act 2006.

⁵ See section 108(6)(c) of the Government of Wales Act 2006.

⁶ Council of Europe/European Court of Human Rights, *Practical Guide on Admissibility Criteria* (Council of Europe/European Court of Human Rights, 3rd edn, 2014)

⁷ H Keller, A Fischer and D Kuhne, ‘Debating the future of the European Court of Human Rights after the Interlaken conference: two innovative proposals’ [2010] EJIL, 1025-1026.

situation prior to enactment of the Human Rights Act and the creation of direct domestic remedies to enforce the established human rights. To return to that situation and its attendant cost and delay would devalue those rights which we say are fundamental, and would damage both prosperity and well-being. It goes against the basic requirement of the Rule of Law that fundamental rights should be accessible to all.

The European Charter of Fundamental Rights

18. The Welsh Ministers have no power to make, confirm or approve any subordinate legislation, or to do any other act, so far as that legislation or act is incompatible with EU law.⁸ Similarly, an Assembly Bill provision is outside competence if it is incompatible with EU law.⁹
19. Article 6(1) of the Treaty on European Union ('TEU') gives the Charter of Fundamental Rights primary EU law status ("*The Union recognises the rights, freedoms and principles set out in the Charter... which shall have the same legal value as the Treaties*"). As confirmed by that Article, the Charter does not extend EU competence in and of itself. Further, it must be interpreted in accordance with Title VII of the Charter (which sets out general provisions as to its interpretation) and with regard to the explanations¹⁰.
20. Member States, including the UK, are bound by the Charter when acting within the scope of EU law¹¹.

Links between the Charter and the ECHR

21. The historical context of the Charter is important to its proper interpretation and an understanding of its relationship with the ECHR.
22. Prior to the Charter's adoption, the Court of Justice of the European Union ('CJEU') had already recognised and applied fundamental rights as part of its jurisprudence. These rights were recognised on the understanding that they already formed part of the constitutional traditions and international obligations of the Member States.
23. Fundamental rights therefore embedded into EU law before the Charter itself was adopted. The Charter does not create any new rights or freedoms in and of itself, but is instead a codification of rights already recognised by EU law.
24. The CJEU has drawn inspiration from the ECHR when developing its jurisprudence on fundamental rights. So, whilst "*The [ECHR] does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law*"¹², "*The Court draws inspiration from the*

⁸ See section 80 of the Government of Wales Act 2006.

⁹ See section 108(6)(c) of the Government of Wales Act 2006.

¹⁰ http://www.europarl.europa.eu/charter/pdf/04473_en.pdf

¹¹ Although Protocol 30 to the Treaties specifically references the UK and Poland, it does not create any 'opt out' from the Charter – see, in particular Court of Justice joined cases *NS* C-411/10 and C-493/10, C:2011:865.

¹² *Akerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 44.

constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect”¹³.

25. Article 6(3) of the TEU now confirms explicitly that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions of Member States constitute “general principles” of EU Law. All acts of the EU Institutions must comply with general principles, as must Member States when acting within the scope of EU law. General principles – including fundamental rights - are, as a result, an important element of the EU legal order.

Application of Rights Protected by the Charter and the ECHR

26. As noted above, the UK is bound by the Charter when acting within the scope of EU law. This will include circumstances in which the UK implements, or relies on a derogation from, EU law, and a specific connection with EU law must be shown¹⁴.
27. This could be seen as one of the Charter’s limitations – it is only relevant where actions are ‘within the scope of EU law’. There is no such limit within the ECHR or the Human Rights Act 1998.

Substantive Rights Protected by Charter and ECHR

28. There is overlap between the Charter and the ECHR in terms of the substantive rights protected, partly as a result of the historical development of the respective regimes (see paragraphs 21 - 25).
29. Further, Article 52(3) of the Charter confirms that, insofar as the Charter contains rights which correspond to those contained in the ECHR, the meaning and scope of the rights shall be the same. Several of the Charter explanations specifically refer to this: for example, the explanation to Article 4 of the Charter (prohibition of torture) makes clear that *“The right in Article 4 is the right guaranteed by Article 3 of the ECHR, which has the same wording... By virtue of Article 52(3) of the Charter, it therefore has the same meaning and the same scope as the ECHR Article.”*
30. That said, the Charter contains further rights which are not expressly protected by the ECHR. For example, Article 35 of the Charter confirms that *“everyone has a right to preventative healthcare and the right to benefit from medical treatment under the conditions established by national law and practices”*. There is no direct ECHR equivalent.
31. Further, some of the rights contained in the Charter may be wider in scope than their ECHR equivalents, and therefore provide extra protection for individuals. A comparison of Article 6 ECHR and Article 47 of the Charter – both of which deal with rights to a fair hearing – provides an example of this. It is noted that Article 52(3) of

¹³ *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 71.

¹⁴ See, for example, *Siragusa* C-206/13, EU:C:2014:126, paragraph 24.

the Charter confirms that, although the Charter corresponds to equivalent ECHR rights, the provision does not prevent the EU from providing “more extensive protection”.

32. Due to the potential for the rights protected by the Charter and Convention to vary in scope (and to be applicable in different circumstances – see paragraph 27, above), it is, in the Welsh Government’s view, important to ensure that both are fully and explicitly incorporated into the UK legal regime, and that citizens are able to seek the protection of these rights in the domestic courts.

Remedies Available for breaches of the Charter and ECHR

33. 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.
34. 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 dis-apply that inconsistent national law, pursuant to the principle of supremacy¹⁵. A recent example of this in practice may be found in *R (Davis and others) v Home Secretary* [2015] EWHC 2092, in which the Divisional Court held that the communications data retention powers in the Data Retention and Investigatory Powers Act 2014 breached the EU Charter of Fundamental Rights, and should be dis-applied with effect from 31 March 2016¹⁶.
35. Therefore, although the Charter may be applicable in more limited circumstances than Convention rights (see paragraphs 26-27 above), the remedy provided in cases of breach may be more favorable to claimants – the ability of the Court to dis-apply national law is strong and potentially swift.
36. The devolution settlement as set out in GOWA 2006 gives further potential avenues for challenge – as noted above, the Welsh Ministers have no power to make, confirm or approve any subordinate legislation, or to do any other act, so far as that legislation or act is incompatible with EU law.¹⁷ Similarly, an Assembly Bill provision is outside competence if it is incompatible with EU law.¹⁸
37. Put simply, Welsh Ministers have no vires to act contrary to EU law. This is fully embedded into the current devolution settlement, and changes to the Human Rights Act have the potential to provide a diverging and complicated system by which citizens in Wales could challenge some EU / Convention rights breaches directly

¹⁵ See, for example, case C-26/62 *Van Gend en Loos*, which recognised the principle of supremacy as early as 1963 – prior to the UK’s accession to the EU itself.

¹⁶ See also, for example, *Janah v Libya* and *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33.

¹⁷ See section 80 of the Government of Wales Act 2006.

¹⁸ See section 108(6)(c) of the Government of Wales Act 2006.

(reliant on GOWA 2006) whilst other issues would have to be pursued using whatever system the reformed UK human rights legislation puts in place.

2. How would repeal of the Human Right Act and possible withdrawal from the ECHR affect a) the UK's formal membership of the EU, b) its relationships with other EU Member States, and c) the current renegotiation of its relationship with the EU?

38. It is impossible to set out the potential effect of repeal to the Human Rights Acts, or of withdrawal from the ECHR, without sight of how exactly those changes would be framed. Even small amendments to the Human Rights Act could – potentially – raise complex legal issues. Careful scrutiny of the detail of the reforms would therefore be required, and the below therefore sets out some initial considerations only. The Welsh Government would be happy to provide further evidence on these issues when more concrete proposals are made available.

39. It is noted that Article 2 TEU states that the EU is “*founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights...*”. This makes clear the central role human rights play in the EU regime

40. The Welsh Government further notes that in answer to a question in the European Parliament in 2007, the European Commission stated:

The rights secured by the Convention are among the rights guaranteed by the Charter of Fundamental Rights of the European Union. In the negotiations for the accession of new Union members, respect for the Convention and the case-law of the European Court of Human Rights is treated as part of the Union acquis.

Any Member State deciding to withdraw from the Convention and therefore no longer bound to comply with it or to respect its enforcement procedures could, in certain circumstances, raise concern as regards the effective protection of fundamental rights by its authorities. Such a situation, which the Commission hopes will remain purely hypothetical, would need to be examined under Articles 6 and 7 of the Treaty on European Union.¹⁹

41. It is clear from the analysis above (see paragraphs 21 – 25 in particular) that the links between the ECHR and EU law are now extremely strong. 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 (the Commission's concerns are, as noted above, already clear).

42. EU membership is of huge benefit to Wales, with jobs throughout the country dependent on our exports to the single market. The Welsh Government would therefore be concerned about any proposal which jeopardized existing relationships (particularly as a result of proposals to which it was strongly opposed).

¹⁹ <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2006-5000&language=EN>

43. The Welsh Government believes that it has a positive contribution to make to the EU reform agenda, and reiterates its call upon the UK Government to ensure that it and the other devolved administrations' views are taken into account in any proposals for EU reform. We welcome the inclusion of EU reform as a standing item on the agenda for the Joint Ministerial Committee (Europe) and would like to see early clarification of the UK Government's terms for a renegotiated settlement for the UK.

3. Would repealing the Human Right Act and possible withdrawal from the ECHR a) put the UK in conflict with EU law, and b) change how EU fundamental rights are relied on and interpreted in UK courts?

Would the repeal proposals put the UK in conflict with EU law?

44. As noted above, this would largely depend on the detail of the proposals, and without sight of this it is impossible to set out more than initial considerations. Again, the Welsh Government would be happy to provide further evidence on these issues when more concrete proposals are available.

45. It is, however, clear that repealing or amending the Human Rights Act and / or withdrawing from the ECHR would not negate the UK's obligations in relation to EU law. EU law, in turn, recognises fundamental rights as a general principle of EU law.

Reliance upon and interpretation of EU fundamental rights by the UK courts

46. Again, it appears clear that repealing or amending the Human Rights Act and / or withdrawing from the ECHR would not negate the UK's obligations in relation to EU law, which includes appropriate recognition of fundamental rights as a general principle of EU law.

4. The EU's accession to the ECHR.

47. Article 6(2) of the Treaty on European Union confirms that the EU shall accede to the ECHR. This formal step will crystallise the relationship between the EU and the ECHR, although the two regimes are of course already intertwined. The Welsh Government has not yet seen specific proposals detailing how the UK could remain an EU Member State without also adhering to the same international rights regime.

48. The Welsh Government is aware that EU accession to the ECHR is one of the highest priorities of the Council of Europe. It notes that the Council considers that accession would be a historical step for several reasons, amongst them that:

as a result of acceding to the ECHR, the EU will be integrated into the fundamental rights protection system of the ECHR. In addition to the internal protection of these rights by the EU law and the Court of Justice, the EU will be bound to respect the ECHR and will be placed under the external control of the European Court of Human Rights...

this will enhance consistency between the Strasbourg and the Luxembourg Courts and will afford citizens protection against the action of the EU, similar to that which they already enjoy against the action of Council of Europe member states.²⁰

49. The accession process inevitably raises complex issues, not least about the relative roles of the Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg. The Court of Justice held in Opinion 2/13 that the draft accession agreement put before it for consideration at that point was incompatible with EU law²¹. This highlights the complex interrelationship between the ECHR and EU regimes already in existence, and perhaps signals the difficulties which proposals for reform in the UK could potentially cause.
50. The Welsh Government also notes that the Council of Europe cites the positive impact the EU's accession to the ECHR will have upon the credibility of the EU in the eyes of third countries.²²
51. The Welsh Government is similarly of the view that the UK Government's proposal to repeal the Human Rights Act (and similarly any withdrawal from the ECHR) sends out a message to the world that the UK is not a place that prioritises and respects international standards in human rights.²³ This stance can be seen to be in stark contrast to that of the Council of Europe and is one which the Welsh Government will continue to oppose.
52. In some cases, the Welsh Government is very much leading the way in compliance with international obligations. An example is the choice made by the Government, on behalf of the people of Wales, to incorporate into Welsh law²⁴ and into the general operation of government the United Nations Convention on the Rights of the Child.
53. We believe that "bringing rights home" in this way, as the Human Rights Act does, is part of the fundamental responsibility of government to promote, give effect to and safeguard the Rule of Law. While it is always the case that fundamental rights such as liberty, privacy, freedom of expression, and peaceful enjoyment of property should be capable of access, assertion and enforcement in people's local courts, it is particularly important in an age of austerity, when Legal Aid is shrinking, that those rights are not made more remote from people.
54. In Wales, people do not consider the Human Rights Act 1998 to be "broken", nor in need of "fixing". We note that the UK Government's draft Wales Bill, published on 20 October 2015, proposes a similar approach to the devolution of Convention rights to that in the Scottish settlement: that is, to reserve the Human Rights Act itself to

²⁰ http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp

²¹ The Court of Justice's press release concerning Opinion 2/13 provides a useful overview of the complexities of accession: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-12/cp140180en.pdf>

²² http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp

²³ See the joint statement of the Welsh and Scottish First Ministers available at:

<http://news.scotland.gov.uk/News/First-Ministers-of-Scotland-and-Wales-meet-1988.aspx>

²⁴ Rights of Children and Young Persons (Wales) Measure 2011.

Westminster, but to devolve observing and implementing obligations under the Convention, and under EU law. It is 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.