Agenda - Y Pwyllgor Cydraddoldeb, Llywodraeth Leol a Chymunedau

Lleoliad:
Ystafell Bwyllgora 3 - Senedd
Dyddiad: Dydd Iau, 6 Ebrill 2017
Amser: 09.00

I gael rhagor o wybodaeth cysylltwch a:
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Rhag-gyfarfod (09.00 - 09.15)

1 Cyflwyniad, ymddiheuriadau, dirprwyon a datgan buddiannau

2 Ymchwiliad i Hawliau Dynol yng Nghymru - sesiwn dystiolaeth 1

(09.15 - 10.15) (Tudalennau 1 - 26)

Melanie Field, Cyfarwyddwr Gweithredol Cymru a Strategaeth a Pholisi Corfforaethol, Comisiwn Cydraddoldeb a Hawliau Dynol
June Milligan, Comisiynydd y Comisiwn Cydraddoldeb a Hawliau Dynol a Chadeirydd Pwyllgor Cymru

3 Ymchwiliad i Hawliau Dynol yng Nghymru - sesiwn dystiolaeth 2

(10.15 - 11.15) (Tudalennau 27 - 58)

Dr Simon Hoffman, Darlithydd Cysylltiol, Coleg y Gyfraith a Throseddeg, Prifysgol Abertawe

Yr Athro Thomas Glyn Watkin, Cyn Bennaeth Ysgol y Gyfraith, Bangor a Chwnsel Deddfwriaethol Cyntaf Cymru 2007-2010

4 Papurau i'w nodi

Gwybodaeth ychwanegol gan Ysgrifennydd y Cabinet dros Gyllid a Llywodraeth Leol mewn cysylltiad â Gweithwyr Asiantaeth

(Tudalennau 59 - 60)

Llythyr at Ysgrifennydd y Cabinet dros Gymunedau a Phlant mewn cysylltiad ag Arian Cymunedau yn Gyntaf

(Tudalennau 61 - 62)

Gwybodaeth ychwanegol gan Ysgrifennydd y Cabinet dros Gymunedau a Phlant mewn cysylltiad â ffoaduriaid a cheiswyr lloches yng Nghymru

(Tudalennau 63 - 64)

5 Cynnig o dan Reol Sefydlog 17.42 (vi) i benderfynu gwahardd y cyhoedd o weddill y cyfarfod

Egwyl (11.15 - 11.30)

6 Ymchwiliad i Hawliau Dynol yng Nghymru - trafod y dystiolaeth a ddaeth i law o dan eitemau 2 a 3

(11.30 - 11.45)

7 Tlodi yng Nghymru: papur cwmpasu

(11.45-12.00) (Tudalennau 65 - 67)

Mae cyfyngiadau ar y ddogfen hon

Introduction

The Equality and Human Rights Commission and the Wales Committee

1. The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. It operates independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights. It contributes to making and keeping Britain a fair society in which everyone, regardless of background, has an equal opportunity to fulfil their potential. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It encourages compliance with the Human Rights Act 1998 and is accredited by the UN as an 'A status' National Human Rights Institution. Find out more about the Commission's work at: www.equalityhumanrights.com

2. The Commission has a statutory role to advise the UK Government and Parliament about the implications for equality and human rights of the proposed legislative and constitutional changes that arise from the UK's decision to leave the European Union. This role is delegated to the Commission's Wales Committee in respect of advising the Welsh Government about the likely effect of proposed changes of law affecting only Wales.

Scope of response

3. The Equality and Human Rights Commission welcomes the opportunity to provide evidence to the Equality, Local Government and Communities Committee's Inquiry into human rights in Wales.

4. This response focuses on the three areas highlighted in the call for evidence. It draws on our submissions to the UK Parliament Joint Committee on Human Rights' Inquiry into the human rights implications of Brexit (Appendix I) and to the Women and Equalities Committee's Inquiry into ensuring strong equalities legislation after EU exit (Appendix II).

5. The Commission's recent submission to inform the UK's third assessment under the UN Human Rights Council's Universal Periodic Review (UPR) is at Appendix III. The UPR is a process set up by the UN Human Rights Council in 2006 to review the human rights situation in every UN Member State. Each state is assessed by a group of representatives from other Member States every five years. In May 2017, UK Government representatives will be questioned in Geneva by the UN Human Rights Council on how much progress has been made over the last five years. Our UPR report sets out the ongoing human rights challenges in Great Britain across 12 different areas of life, including education, health and privacy. It provides recommendations to the UK and Welsh governments on how to better respect and protect human rights, and fulfil their international obligations.

6. A report based on a human rights roundtable discussion held in partnership by the Equality and Human Rights Commission, Children's Commissioner for Wales and the Older People's Commissioner for Wales (July, 2014) is at Appendix IV. We welcome the Chairperson's comments in plenary that this roundtable report will inform the Committee's Inquiry. Our response includes reference to other Commission publications that may help inform the Committee's work.

The impact of the UK's withdrawal from the European Union on human rights protection in Wales

7. The UN human rights treaties stand separately from EU law. EU treaties, directives and regulations have however enshrined much human rights and equality law in EU law. As the terms of the UK's future relationship with the EU are not yet known, it is difficult to assess fully the implications for human rights and equality legislation of the UK leaving the EU.

8. The UK Government's approach will affect Wales directly, as equality and human rights are, with some exceptions, subjects not devolved to the National Assembly for Wales.

9. The Welsh Government has some powers in relation to equality and human rights. For example, the Welsh Government is able to build UN human rights treaties into Welsh legislation and policy. It has done this to some degree, most notably with regard to the UN Convention on the Rights of the Child. The Welsh Government could consider explicitly incorporating human rights principles into the service delivery of devolved functions, including health & social care, education and local government.

10. The Wales Specific Duties, passed by the National Assembly for Wales, of the Public Sector Equality Duty, provide a mechanism for the promotion of equality by devolved public bodies in Wales.

11. Much EU-derived discrimination law is fully incorporated into UK law. There is therefore no reason that any changes to these laws should automatically follow EU exit. In respect of those laws that are not currently incorporated into domestic law, but which have direct effect in the UK, the UK Government has indicated that existing protections will be maintained post-EU exit through a Great Repeal Bill, to be reviewed on a case by case basis by Parliament. Certain protections required by EU law are therefore vulnerable to repeal.

12. One particularly important source of directly applicable rights is the Charter of Fundamental Rights (the Charter). The Charter reaffirms the rights, freedoms and principles already recognised in EU law. It is divided into sections: dignity, freedoms, equality, solidarity, citizens' rights and justice. The protections under the Charter are particularly relevant in relation to equality law as Article 21 prohibits discrimination on <u>any</u> ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, sexual orientation or nationality. It therefore protects against discrimination on grounds which are not protected characteristics under the Equality Act 2010. The Charter provides protection in cases arising in an area within the scope of EU law. Article 21 of the Charter provides broader protection than the equivalent right in the Human Rights Act 1998 (HRA), because Article 14 of the European Convention on Human Rights (ECHR) is not a free-standing right to non-discrimination but can only be relied on in relation to one of the other ECHR rights. The ECHR's equivalent to Article 21 of the Charter is Protocol 12, which the UK has not ratified.

13. The protection provided by the Charter is powerful in UK law:

- Domestic legislation that conflicts with a fundamental right protected by the Charter can be ‘disapplied’ by the domestic courts.
- Claiming for damages for a breach of EU rights can be easier than claiming compensation for a breach of the Human Right Act.

14. The Charter is therefore a substantial source of protection in the UK that is unlikely to be preserved in domestic law following EU exit. To ensure that there is no regression in equality and human rights protections, a careful analysis will be required of the protections that will be lost when the Charter ceases to have effect.

15. The Commission’s view is that the UK Government should ensure that there is no regression in equality or human rights protection as a consequence of EU exit. The Commission will be working to ensure that, in leaving the EU (and in any other constitutional changes which may result), we maintain and build on our heritage of respect and inclusion. Our guiding principles are that constitutional changes must:

    - maintain, and where possible enhance, the protection and promotion of equality and human rights across the UK,
    - provide for coherent and workable frameworks of legal and administrative responsibilities and accountability for equality and human rights between bodies within the UK.

16. Possible legislative implications for equality and human rights of the UK leaving the EU

- Some rights protected by the Charter of Fundamental Rights that advance equality may no longer be protected in UK law.
- It would be possible for the UK to repeal domestic laws that protect or advance equality and human rights, which we are currently required to have in place by EU laws.
- An increased divergence between EU and UK equality and human rights protections. The UK would not be bound to implement EU laws which come into force after the UK has left the EU, some of which may enhance protection against discrimination.
- The removal of certain constraints under EU law, for example, rules which regulate public procurement and prohibit more favourable treatment of a person because of a protected characteristic, may give rise to additional opportunities to promote equality.
- EU funding that supports the equality and human rights infrastructure in the UK, such as civil society organisations, academic research and the advice sector, will no longer be available.

Divisions in society

17. In the month following the EU referendum, reports show that racist or religious abuse incidents recorded by police in England and Wales increased by 41% compared to the previous year[1]. Political and community leaders in Wales raised concern about this spike.

18. In November 2016, the Commission wrote to political parties expressing our concern that attacks on supporters of both sides of the Brexit debate have polarised many parts of the country. There are those who used, and continue to use, public concern about immigration policy and the economy to legitimise hate.

19. We welcomed the UK Government's hate crime action plan, but believe more concerted action is needed to counter the narrative from a small minority. We suggested the UK Government should carry out a full-scale review of the operation and effectiveness of the sentencing for hate crimes in England and Wales, including the ability to increase sentencing for crimes motivated by hate, and provide stronger evidence to prove their hate crime strategies are working.

20. Criminal justice is not devolved. However, the Welsh Government has taken - and could take further - legislative and policy opportunities with the aim of reducing hate crime and to help heal divisions in society. The Welsh Government's Hate Crime Delivery Plan and the Public Sector Equality Duty offer mechanisms for doing this. The Commission's monitoring of the PSED showed that many public authorities have set equality objectives that relate to tackling hate crime.

The impact of the UK Government's proposal to repeal the Human Rights Act 1998 and replace it with a UK Bill of Rights

21. The UK Government has advised that it "will return to our proposals once we know the arrangements for exit from the EU."[2] The Commission considers the Human Rights Act to be a well-crafted piece of legislation. It maintains parliamentary sovereignty and a primary role for domestic courts in the interpretation of the European Convention on Human Rights (ECHR). It has led to greater quality and accountability in public service delivery.

22. Furthermore, it is woven into the constitutional arrangements for the UK. The Government of Wales Act 2006 states that Acts passed by the National Assembly for Wales must be compatible with the European Convention on Human Rights.

23. The Commission on a Bill of Rights reported that debate on a UK Bill of Rights must be acutely sensitive to issues of devolution. It stated: '*To come to pass successfully a UK Bill of Rights would have to respect the different political and legal traditions within all of the countries of the UK, and to command public confidence beyond party politics and ideology. It would also, as a technical matter, involve reconsideration of the scheme of the devolution Acts, which limit the powers of the devolved legislatures and governments expressly by reference to respect for 'Convention rights'*[3].

24. The Commission's position is that any proposed changes to human rights law must not weaken the protections we all enjoy, nor jeopardise the UK's record of upholding and promoting human rights. The Commission's goal is to see a Human Rights Act "plus".

25. The Welsh Government has introduced legislation that means Ministers need to have due regard to the UN Convention on the Rights of the Child when exercising any of their Ministerial functions. It has also made some legislative proposals with regard to the UN Principles for Older People and the UN Convention on the Rights of Disabled People,

[1] Home Office statistics, reported here
[2] Minister for Courts and Justice Answer to Oral Questions 24 January 2017, available here
[3] Commission on a Bill of Rights report, view here.

passed by the National Assembly for Wales in the Social Services and Well-being (Wales) Act and in related guidance**.**

26. The Commission has called for the Welsh - and UK and Scottish - Governments to build UN human rights treaties into domestic law. We would welcome the Welsh Government taking further steps to ensure the treaties are placed on a legislative footing equivalent to that of the UNCRC in Wales. Furthermore, it is paramount that clear plans are in place to ensure legislation leads directly to the enhancement of people's rights in their everyday lives.

Public perceptions about human rights in Wales, in particular how understandable and relevant they are to Welsh people

27. The Commission has conducted surveys to ascertain people's understanding of human rights in Wales. They revealed support for human rights. However, the findings highlight the need to increase people's understanding of how human rights are relevant to their everyday lives. The Commission has a role to play in working with Government, public authorities and others to do this.

Who do you see? and Human Rights Inquiry survey

28. Soon after the Commission was established in 2007, we undertook the first major survey in Wales to look at people's attitudes towards age, race, religion, gender, sexual orientation, transgender, disability and human rights. Our Who do you see? report (2008) presents the survey findings.

29. There was overwhelming consensus in the survey that everyone should be entitled to respect, dignity and fairness when receiving public services. 93% of those surveyed supported UK laws protecting people's human rights. However, the findings show there is widespread misunderstanding about the purpose of such legislation with half of all adults believing that human rights issues do not affect them personally.

30. The Commission commissioned IPSOS Mori to conduct a survey on public perceptions of human rights (2009) in Britain as part of our Human Rights Inquiry. The survey findings include that values people hold most dear in terms of living in Britain are being treated with dignity and respect, having freedom of expression, and being treated fairly. There is a close alignment between the values that people think are important for society and those which people identify as being fundamental human rights. Two-thirds of people feel that human rights are meaningful to them in everyday life.

31. The survey highlighted that the level of knowledge about human rights could be improved. Two in five people (40 per cent) say they know a great deal or a fair amount about human rights generally compared with three in five (58 per cent) who don't know very much or anything at all.

32. Who do you see? and the IPSOS Mori survey were published some time ago, so some caution is needed when stating their relevance in today's Wales.

Human Rights roundtable

33. In 2014, the Equality and Human Rights Commission, in partnership with the Children's and Older People's Commissioners for Wales, held a roundtable discussion about the promotion and protection of human rights in Wales. Participants identified priorities for taking forward human rights in Wales.

34. Participants expressed the belief that the human rights agenda in Wales is distinctive. For example, Wales has taken a distinctive human rights approach for children and young people in Wales, based upon the UNCRC.

35. Some participants stated that they believe that human rights practice is sometimes usefully spoken about in terms of dignity, respect, fairness, safety and protection, rather than the language of UN Conventions. Some felt this approach can be helpful in enabling people to understand that human rights apply to them.

36. During the roundtable discussion, consensus emerged in a number of respects. Key points included that human rights can best be seen as a prospective tool for improving people's lives, rather than as a retrospective remedy. Human rights can be a practical tool and a moral compass for staff in organisations

37. Participants expressed the belief that human rights, if used effectively, can help develop better services and give individuals confidence in their dealings with public authorities.

38. Greater emphasis could be given to exploring how human rights can be meaningfully embedded into policy and practice. It is important that public authorities understand how human rights underpin their public service delivery and what the impact is in practice. Public authorities can be supported by third sector and other organisations in implementing an approach that takes account of human rights.

39. Participants felt that greater expertise and capacity on human rights within the civil service would support the development of human rights approaches in Wales and that this would result in more consistent level of approaches being applied in Wales.

40. **Conclusions and possible next steps identified at the roundtable included:**

- Developing a human rights narrative that sets out that human rights are for everyone and that they can be used to improve services.
- Developing and implementing tools for effective human rights scrutiny and procurement at all levels of service delivery.
- Developing the capacity of the third sector to use these tools
- Developing effective human rights impact assessment tools, which are implemented consistently in the future
- Explore possible linkages between the Public Sector Equality Duty and the promotion and protection of human rights.
- Develop a common understanding of what 'due regard to human rights' means in policy and practice terms.

41. The report's conclusions have informed the work of the Commission and others working in the field of human rights in Wales. The Commission's Equality and Human Rights Exchange of employers and service providers enables the sharing of good human rights practice, including on topics identified in the conclusions. The Commission has a range of human rights guidance, including that which sets out how human rights are relevant to people's everyday lives, can be embedded into health and social care, and what is expected in business with respect to human rights. The Commission, Government and others have a role to play in ensuring that further steps are taken on the report's conclusions – and other areas - to enable greater promotion and protection of human rights in Wales.

Further information

Appendix I
Commission submission to the UK Parliament's Joint Committee on Human Rights' Inquiry into the human rights implications of Brexit, available here.

Appendix II
Commission submission to the Women and Equalities Committee's Inquiry into ensuring strong equalities legislation after EU exit, available here.

Appendix III
The Commission's submission for the UK's third assessment under the UN Human Rights Council's Universal Periodic Review, available here.

Appendix IV
A report based on a human rights roundtable discussion held in partnership by the Equality and Human Rights Commission, Children's Commissioner for Wales and the Older People's Commissioner for Wales (July 15, 2014), available here.

Submitted by: Dr Simon Hoffman, Associate Professor, Swansea University College of Law and Criminology, Coordinator Wales Observatory on Human Rights of Children and Young People. All views expressed below are my own.

Expertise: Human rights, in particular social and economic rights, children's rights and rights of older people; implementation of human rights in multi-level governance, especially Welsh devolution. Member of the Welsh Government Children's Rights Advisory Group, Budget Advisory Group on the Economy, and UN Human Rights Stakeholder Group. I have provided consultancy services, advice and support on human rights issues to the Welsh Government, the Children's Commissioner for Wales, and the Older People's Commissioner for Wales.

General Comments

1. I welcome the opportunity to contribute to this inquiry. I submitted evidence to the Communities, Equality and Local Government Committee inquiry in 2013 on *The future of equality and human rights in Wales*. On that occasion the Committee noted my submission on the emergent possibility of 'Welsh Human Rights Law' (report, paragraph 47). The need for Welsh human rights law has now become a priority. The present inquiry comes at an opportune but depressing time for human rights: too often the political agenda seems driven by populism and deeply rooted human rights scepticism, and in the case of some politicians and elements of the media, outright antipathy.

2. The Committee's terms of reference are intimately linked to the wider human rights landscape in Wales, and the UK. Perhaps most significant in this context is the threat to repeal the Human Rights Act 1998 (HRA), and now the possibility that the government will withdraw the UK from the European Convention on Human Rights (ECHR). The EU referendum was not about the HRA, or the ECHR, but has seemingly encouraged those who are determined to reduce human rights protections in the UK. Withdrawal from the ECHR would be highly regressive, and although the threat seems to have abated for the time being, the fact that it is even being contemplated is regrettable. Repeal of the HRA and/or withdrawal from the ECHR would deny people in Wales a set of basic rights not otherwise protected in UK law. Although these could be re-stated in a UK Bill of Rights (UK BOR), there is no certainty that any future legislation would include guarantees equivalent to current protections, or that it would establish legal mechanisms similar to those introduced by the HRA to hold politicians and public bodies to account for breaches of individual human rights (section 6, HRA). Withdrawal from the ECHR would also deny people in Wales access to the European Court of Human Rights, a human rights system which has developed to a point of expertise and sophistication admired across the world.

3. With the above in mind it is very welcome that the Chair's Statement evinces a commitment to make human rights an integral part of the Committee's work. I fully endorse the view that human rights is a 'broad and complex' topic. Human rights are cross-cutting, touching on all public policy agendas. A human rights approach to law and policy in Wales is imperative to meet the public policy objectives of resilient communities, equality, well-being, social cohesion and global responsibility (Well-being of Future Generations (Wales) Act 2015). If these objectives are to become a sustainable reality for everyone in Wales there need to be further developments in the framework of Welsh legislation to embed a human rights approach in law and policy. Existing frameworks include: The Rights of Children and Young Persons (Wales) Measure 2011 (the 'Measure'); and, Section 7 of the Social Services and Well-being (Wales) Act 2014 (SSWBA). I will comment further about the options for legislation below

4. In addition public authorities should be encouraged to adopt a consistent human rights approach to public services planning and delivery. I am aware that the Children's Commissioner for Wales, and the Older People's Commissioner for Wales, each has guidance available on a rights based approach to working with children, and older people respectively. Public bodies in Wales should be encouraged to adopt this guidance.

5. If Wales is to become a nation that fully respects and guarantees human rights for all then more needs to be done to educate its people about human rights. The Welsh Government should take the lead in developing and promoting a counter-narrative to the negative, divisive and harmful discourses of fear and misunderstanding that so often undermine public awareness and understanding of human rights in the UK and in Wales. Public education on human rights needs to be made a priority.

6. It is vital to acknowledge the part played by schools in the human rights education of future citizens. In this respect the Committee may wish to take notice of a report recently prepared by the Wales Observatory on Human Rights of Children and Young People following a conference, *Brexit: Its implications for children in Wales*, held at Swansea University (19th January 2017). Children and young people, stakeholders, and academics came together to discuss Brexit and make recommendations to the Welsh Government on children's rights in a post-Brexit Wales. An insightful contribution from one of the young people present gained general approval. The contributor noted the need for a different approach to education to promote informed issue-based critical thinking on subjects such as ethnicity, religion, migration and community relations. This was formulated into a recommendation to the Welsh Government to: "*Undertake curriculum reform to ensure that today's CYP [children and young people], and CYP of the future, are properly educated about issues which proved divisive during the run-up to Brexit; including issue based education on issues such as immigration."*

7. Two further recommendations to the Welsh government arising from the conference which the Committee may wish to note are: "*Provide a 'social guarantee' to all people in Wales, including migrants, asylum seekers and refugees; this should guarantee that all people in Wales will be entitled to rights regardless of their country of citizenship"* and, "*take a lead on positive narratives about migrants, asylum seekers and refugees."* These recommendations, if accepted, would support a progressive approach to human rights in Wales generally, not just for children. The report is available here: http://bit.ly/2jZ82

The impact of the UK's withdrawal from European Union on human rights protection in Wales

8. I am perplexed at the lack of information about the possible impacts of the UK's withdrawal from the EU. Whether you take an optimistic or pessimistic view, it is apparent that much of what is now being discussed is speculation. This is equally true in the field of human rights. Some work has already been carried out on the consequences of the UK's withdrawal from the EU (see for example, The Joint Committee on Human Rights Report on *The Human Rights implications of Brexit*), but more is needed in order to determine the full human rights implications, and on the appropriate law and policy responses, including in Wales.

9. What can be said with certainty is that the EU has increasingly sought to promote human rights as an aspect of its work. EU foundational documents have been amended to incorporate human rights as part of the EU constitution. The Consolidated Version of the Treaty of the EU refers to a union based on *"…principles of liberty, democracy and respect for human rights and fundamental freedoms"*, and the EU has committed to the ECHR. This commitment is supported by the work of European Commission which administers significant funding for research, and to support collaboration and coordination and sharing of good human rights practice, as well as projects which promote human rights (including in relation to challenging issues such as asylum and migration, combating xenophobia, and poverty).

10. It is worth noting that the European Commission prioritises economic and social issues. This class of rights is recognised in the EU Charter of Fundamental Rights. The UK is party to several UN Conventions which refer to economic and social rights; including, the International Covenant on Economic and Social Rights (ICESCR) and the UN Convention on the Rights of the Child (UNCRC). Despite this, economic and social rights are not well protected in UK law. As austerity has demonstrated, these rights can be given low priority in government policy, and the UK courts are almost powerless to provide a remedy. This means that international human rights such as the right to work (ICESCR Art. 6), or the right to an adequate standard of living (ICESCR Art.11 and UNCRC Art 27), are often denied to significant numbers of people in the UK and in Wales. Wales is a net beneficiary of EU funds, and much of the available EU funding is directed toward projects that aim to tackle poverty, worklessness, and disadvantage. Loss of EU funding without full replacement would have a disastrous impact on the social and economic human rights of many of Wales' most disadvantaged communities and people. In addition, withdrawal from the EU could mean alienation from networks and non-financial resources supported or coordinated by the EU which contribute human rights knowledge and expertise to benefit communities and people in Wales (e.g. Eurochild, European Anti-Poverty Network, EU Fundamental Rights Agency).

11. One group which will almost certainly suffer as a consequence of the UKs withdrawal from the EU unless immediate protective action is taken is children in Wales. EU policies cover issues such as child poverty and social exclusion. The high rate of child poverty in Wales means that EU Structural Funds are vital to support parents and families in communities blighted by poverty to provide an adequate standard of living for children, and to ensure access to key services such as health and education. The EU has also been a leading authority and advocate on child safety and child protection. This includes legislation and policy in areas such as: family law; protection of children against abuse and exploitation; child pornography; child trafficking; asylum and immigration, and unaccompanied minors. These are all issues closely linked to children's rights under the UNCRC. The EU has also set up a number of mechanisms to protect children: EUROJUST is a judicial body responsible for co-ordinating investigations and prosecutions across EU Member States, focusing on organised criminal activity that crosses borders, particularly human trafficking; EUROPOL is a law enforcement agency that facilitates co-operation between investigative authorities in Member States with a view to combating serious crime, including crimes involving children; the European Arrest Warrant provides a fast-track extradition procedure enabling national authorities to secure extradition between EU Member States, including to assistin bringing to justice perpetrators of crimes against children; and, ECRIS which is the European Criminal Records Information System, an efficient exchange of information on criminal convictions between Member States, including convictions involving offences against children. Withdrawal from the EU and exclusion from these mechanisms could have highly damaging impacts for vulnerable children, including the most serious violation of children's rights through exploitation and abuse.

The impact of the UK Government's proposal to repeal the Human Rights Act 1998 and replace it with a UK Bill of Rights

12. The Commission on a UK BOR failed to identify shortcomings in the HRA, or its application by the Courts. The Commission's terms of reference included *"[to investigate a BOR that] incorporates and builds on all our obligations under the ECHR, [and] ensures that these rights continue to be enshrined in UK law"*. However, at this stage there is nothing to confirm that a UK BOR would provide the same guarantees as found in the ECHR, or the same effective mechanism for enforcement set out in the HRA (see above, paragraph 2). There should be deep concern about the underlying motivation for a UK BOR. The minority report by BOR Commissioners drew attention to the possibility that a UK BOR is seen by some as a path towards withdrawal from the ECHR. As I have commented above, withdrawal from the ECHR would have a significant impact on human rights protection in the UK and in Wales.

13. Repeal of the HRA would have particular consequences for the framework of law and policy making in Wales. Section 81 and section 108 of Government of Wales Act 2016 (GOWA 2006) put off-limits any Ministerial action or Welsh legislation incompatible with "the Convention rights". Convention rights is given the same meaning as under the HRA (see, GOWA 2006, s.158). If the HRA is repealed GOWA 2006 limitations on powers and competences, which are based on a legitimate concern to protect human rights, would have nothing on which to bite. Whilst I am firmly opposed to repeal of the HRA, if there is repeal, consideration will need to be given to how relevant parts of the HRA may be kept in force to the extent necessary to allow dependent GOWA 2006 provisions to continue to have effect.

14. The Wales Act 2017 will have consequences for human rights. When the relevant section is in force the Wales Act will substitute section 108 of the GOWA 2006 with a revised section 108A (section 3, Wales Act). This puts any legislation that is incompatible with "Convention rights" beyond the competence of the NAW; and puts beyond the powers of Welsh Ministers any function which would be beyond the competence of the NAW to enact or to approve by enactment (Wales Act, section 19, introducing section 58A GOWA 2006). The definition of Convention rights is as used in the GOWA 2006 (i.e. linked to the HRA, see immediately above for comments). The Wales Act also amends Schedule 7 of the GOWA 2006 which establishes the legislative competences of the NAW. The current schedule is substituted by a revised Schedule 7A which specifies competences reserved to the UK Parliament (Wales Act, Schedule 1). Whilst there is no competence to enter into human rights treaties, *"Observing and implementing international obligations, [and] obligations under the Human Rights Convention"* are not reserved. In this instance the Human Rights Convention is defined as the ECHR and its Protocols (ibid). When the revised Schedule 7A is in force the Welsh Minsters will have power to introduce legislation, and the NAW will be competent to enact legislation in the field of human rights generally (provided this is not incompatible with the UK's international human rights international obligations), and to observe and implement treaties, including human rights treaties to which the UK is a State party, and the ECHR. Presently the NAW can only legislate to implement human rights if a competence can be found under Schedule 7 of the GOWA 2006. This is not straightforward in the case of human rights generally, as opposed to human rights for certain groups, e.g. children. The Wales Act enlarges human rights powers and competences in Wales.

15. In order to safeguard human rights in Wales against the possibility of regression through repeal of the HRA or withdrawal from the ECHR the Welsh Government should prioritise draft legislation to protect and promote human rights. The Welsh Government should examine options for legislation that protects human rights by placing appropriate limitations on the powers of Minsters, on the competences of the NAW, and on the conduct of public bodies, as well as legislation that promotes better implementation of human rights. Wales already has an established precedent for a legal mechanism to promote human rights. This is the 'due regard' model adopted in the children's rights Measure and section 7 of the SSWBA. This model could readily be used for Wales-only governance legislation, a 'Human Rights (Wales) Act', with the purpose of promoting observance and implementation of human rights in Wales.

16. The Committee will be aware of a call by the Older People's Commissioner for Wales (OPC) to enact an Older People's Rights (Wales) Act. This would require the Welsh Minsters to have due regard to the UN Principles for Older Persons. I am pleased to have contributed toward the OPC's work in this regard as a member of an expert group commenting on the options for legislation. The group has concluded that the 'due regard' model would be an appropriate mechanism to promote older people's human rights. The NAW already has competence to enact such legislation. The Welsh Government should introduce draft legislation at the earliest opportunity.

Public perceptions about human rights in Wales, in particular how understandable and relevant they are to Welsh people

17. I am unable to comment authoritatively on public perceptions of human rights in Wales, or on how human rights may be understood by Welsh people. I am in no doubt that awareness and understanding of human rights in Wales would be improved if the Welsh Government were to take a proactive approach to human rights based public education. Human rights are relevant to everyone in Wales. My experience suggests that the concept of 'having rights' is well understood. Where people are given appropriate information about their actual rights these are readily appreciated and understood. Human rights and human rights legislation, unlike a lot of legislation, is almost invariably drafted in plain English, avoiding legal jargon or confusing terminology. There is a body of evidence to confirm that human rights are relevant for people in the UK, including in Wales. Cases on human rights have led to improvements in social care, health care, privacy, the treatment of older people and children in care settings, and have underpinned social advances for lesbian, gay and transgender people, and people with a disability, and have helped clarify the situation of terminally ill patients.

18. Wales has already made significant progress on making children's rights relevant to legislation and policy making. My role involves working with the Welsh Government and the public sector in Wales (e.g. the police, local authorities and health boards), on a children's human rights approach to service planning and delivery. Commitments made by a number of Welsh public sector institutions to take account of the UNCRC are having an impact service planning and delivery for children and young people. Children's rights are therefore very relevant to children in Wales as they inform policy making which in turn underpins the services children rely on.

19. National human rights institutions are key to making human rights relevant. The Equalities and Human Rights Commission (EHRC) is an important institution in this regard. The way the EHRC operates in Wales appears out-of-step with developing devolution. The EHRC is responsible for safeguarding and enforcing equalities and human rights in Great Britain. The Commission in Wales works with a Wales Directorate. The overall purpose of the Commission in Wales is to ensure that policy made by the UK government reflects the needs of Wales. It would be preferable to have an independent Wales EHRC with the objective of promoting and protecting human rights in Wales, in order to make rights more relevant to people in Wales. A Wales EHRC needs to be fully responsible for, and properly empowered to ensure that policy and legislation made in Wales reflects the human rights and equality needs of Wales.

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Y Pwyllgor Cydraddoldeb, Llywodraeth Leol a Chymunedau
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BRITISH ACADEMY
for the humanities and social sciences

Human Rights from the Perspective of Devolution in Wales

Thomas Glyn Watkin

Contents

About the author

Thomas Glyn Watkin was, prior to his retirement in 2010, First Welsh Legislative Counsel to the Welsh Assembly Government, with responsibility for delivering the Welsh Government's legislative programme. Before that, he had been Professor of Law and founding Head of Bangor Law School (2004–2007) and Professor of Law at Cardiff Law School (2001–2004), where he had taught successively as a Lecturer, Senior Lecturer and Reader since 1975. He combined his academic work with being Legal Assistant to the Governing Body of the Church in Wales (1981–1998), responsible for drafting the Church's bilingual legislation. Since his retirement, he has been an honorary professor at both Bangor and Cardiff Law Schools, and has frequently contributed oral and written evidence to the National Assembly for Wales and other bodies on constitutional issues affecting Welsh devolution. He is a Fellow of the Learned Society of Wales, a member of the Law Commission of England and Wales' Welsh Advisory Committee, Literary Director of the Welsh Legal History Society and an elected council member of the Selden Society. During 2016, he has been elected an ordinary academic bencher of the Middle Temple, where he was called to the bar in 1976 after having read Law at Pembroke College, Oxford. He is also a non-stipendiary priest in the Church in Wales.

Introduction

The British Academy Policy Report, Human Rights and the UK Constitution, published in September 2012 [hereinafter referred to as 'the Report'], noted that 'any attempt to de-incorporate the Convention rights from UK law' would occasion serious legal complications given that the competence of the devolved legislatures serving those parts of the UK required them all to comply with the Convention rights. The Report traced this requirement with regard to the Welsh Assembly to the Government of Wales Act 1998.[1] This paper demonstrates that, since 1998, the Convention has become deeply embedded in a distinct governance structure which it would not be possible for a mere UK-wide statute to alter without considerable attention to the detail of the Welsh government system.

The argument progresses first by showing that Welsh devolution is not simply a set of statutory provisions which a UK statute could alter easily. Rather it has been an unfolding process with far-ranging constitutional implications. Secondly, deeply embedded within the attribution of competences to the Welsh Assembly and Government lies the European Convention as a governing standard. This leads, thirdly, to a very different balance of powers between the legislature and the judiciary in Wales, compared with that of the UK as a whole or England-only acts made by the Westminster Parliament, and it encourages, fourthly, a different culture of justification for legislative acts. Fifthly, a significant difference between the UK Parliament and the Welsh Assembly is that the electoral system does not typically produce a dominant executive, so controls are exercised within the legislature and legislation is not simply the implementation of the will of a dominant executive, but often a more democratically crafted compromise. Sixth, though it is clear that subordinate legislation made by the Welsh Government may be subject to ordinary principles of judicial review as well as review for compatibility with the Convention, it is unclear whether the same is true for legislative acts of the Assembly and this needs to be considered when introducing "British rights". Finally, any new arrangement needs to take account of the way in which the European Convention is not only part of Welsh law by virtue of the Human Rights Act, but also by the operation (for the moment at least) of EU law and of other international obligations of the UK. The Welsh situation requires extensive dialogue and not just unilateral action by the UK legislature.

1. Welsh devolution – "a process not an event"

The Welsh devolution settlement has undergone repeated revisions in the first two decades of its existence. The European Convention is an essential reference point in defining the scope of the powers of the Welsh National Assembly. To alter the Human Rights Act or to add a British Bill of Rights would have a significant effect on the acquired rights of that Assembly.

The Welsh Assembly and its Powers

The Government of Wales Act 1998 has been followed by a Government of Wales Act 2006 and a Wales Act 2014. The 1998 Act created a National Assembly for Wales as a body corporate with both executive and subordinate law-making functions. Functions were not transferred from Westminster en bloc but virtually individually by a series of Transfer of Functions Orders. This model of devolution continued until 2007, during which time further functions were given to the Assembly. The Government of Wales Act 2006 ended the existence of the Assembly as a body corporate. Instead, the National Assembly became a legislature for Wales, and the Welsh Assembly Government was officially created, with Welsh Ministers, accountable to the Assembly, becoming responsible for the performance of the executive and subordinate law-making functions which the Assembly had previously undertaken in succession to the Secretary of State.[2]

Under the model of devolution which is currently in operation in Wales, the Assembly is able to legislate in relation to Wales by means of Assembly Acts, the provisions of which must, to be within competence, relate to one or more of the subjects listed under the twenty-one headings in Part 1 of Schedule 7 of the 2006 Act. Twenty of those headings, each fully populated with subjects, had been present in the Act since it was passed; the twenty-first – heading 16A Taxation – was added by the Wales Act 2014.

The competence of the Assembly to legislate in relation to those subjects is limited by the existence of certain exceptions, also to be found in Part 1 of Schedule 7, although Assembly Acts may always provide for the enforcement or appropriate implementation of provisions which are within competence. Provisions may not however breach any of the General Restrictions set out in Parts 2 and 3 of the Schedule, nor may the Assembly enact provisions which are contrary to European Union law or which are incompatible with the Convention rights incorporated into UK domestic law by the Human Rights Act 1998.[3] These limitations have applied since 1999, and also limit the subordinate law-making powers of the Welsh Ministers.[4]

2. The Consequences of Incompatibility with the Convention Rights

The Report in several places refers to the model of human rights protection which is afforded by the 1998 Act within the UK. It notes that while "In many states… written constitutions give the courts the power to overturn legislation which is deemed to violate basic rights… the UK has not followed this approach".[5] Instead, the 1998 Act represents a 'compromise' by which executive acts which violate Convention rights may be invalidated and parliamentary legislation 'as far as possible' interpreted so as to be compatible with those rights, but "the courts have no power to overturn Acts of Parliament… [but] only issue a non-binding 'declaration of incompatibility'".[6] British judges, it is stated, "have no power to strike down decisions of the legislature".[7]

While this is true with regard to UK parliamentary legislation, the same is not the case with the enactments of the devolved legislatures. If it is found by the Supreme Court that the provisions of a bill which has been passed by the Assembly would be outside the Assembly's legislative competence, the Supreme Court can prevent it from proceeding for Royal Assent, and even when an Assembly bill has received Royal Assent and become an Act, it is still possible for its provisions to be challenged before the courts as being outside of competence and for the courts to invalidate the provisions in question.[8] Incompatibility with the Convention rights is one way in which Assembly Act provisions might be held to be outside of competence and struck down by the courts, although the courts are required to interpret provisions as narrowly as is necessary to avoid such an outcome if such an approach is possible.[9] Provisions of a bill may be referred to the Supreme Court for consideration prior to Royal Assent by either the UK Attorney General or the Welsh Government's Counsel General, but after Royal Assent any person who is a party to proceedings before a UK court or tribunal may raise a question of legislative competence which will fall to be determined as a devolution issue in accordance with Schedule 9 to the 2006 Act. The adjudication of such an issue could lead to the striking down of Assembly Act provisions.[10]

To date, only one Assembly bill has been found to contain provisions which were beyond the Assembly's legislative competence with the result that it was prevented from obtaining Royal Assent. This was the Recovery of Costs of Asbestos-Related Diseases (Wales) Bill, a private member's bill passed by the Assembly and referred to the Supreme Court by the Counsel General for Wales.

The bill sought to allow Welsh Ministers to recover the costs incurred by the Welsh NHS in treating asbestos-related diseases from the employers of victims or even directly from the employers' insurers. The Supreme Court's verdict in this case [hereinafter referred to as the Asbestos Diseases case][11] will be discussed further below, as it connects with another issue raised in the Report, raising as it did issues of the compatibility of Welsh legislation with the European Convention on Human Rights.

3. The Balance of Power between the Courts and the Legislature

The Report admits that there can be considerable disagreement as to what amounts to a breach of a person's human rights. It recognizes that such disagreements can be particularly acute with regard to 'qualified rights', and concludes that, "As a result, elected politicians are usually given the authority to decide how individual rights should be balanced against the public interest".[12] Again, it states that "the political realm is generally recognized to be the appropriate forum for resolving most disputed issues relating to questions of justice, fairness and rights".[13] Indeed, the Report connects the primacy given to representative government under the UK's unwritten constitutional system, a primacy based on the view that "Parliament represents the voters", with the inability of British judges to strike down the decisions of the legislature.[14]

But, as has been noted, this inability to strike down the legislation of the voters' representatives does not extend to the devolved legislatures, including the National Assembly for Wales. Provisions which are outside of competence can be struck down by the courts, including those which are beyond competence because of incompatibility with Convention rights. However, with qualified rights, the question arises of who is to be the final arbiter of whether the public interest warrants interference with a protected right and the extent to which interference is warranted. As the Report states: "getting the balance right between respecting the decisions of elected politicians and protecting individual rights is difficult".[15]

This difficulty manifested itself in the decision referred to, the Asbestos Diseases case, and divided the Supreme Court. As already mentioned the issue was whether the provision in the bill which allowed the Welsh Ministers to recover the cost of treatment given to a victim of an asbestos-related disease by the Welsh NHS from the insurers of the victim's employers at the time of the injury, when the injury might have occurred before the passing of the Act, was incompatible with the insurers right to peaceful enjoyment of their possessions under Article 1 of Protocol 1 [hereinafter 'A1P1'] of the ECHR. A1P1 states:

- Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
- The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Lord Mance, delivering the judgment of the majority of the court, stated that:

- The general principles according to which a court will review legislation for compliance with the Convention rights … are
  - (i) whether there is a legitimate aim which could justify a restriction of the relevant protected right,
  - (ii) whether the measure adopted is rationally connected to that aim,
  - (iii) whether the aim could have been achieved by a less intrusive measure and
  - (iv) whether, on a fair balance, the benefits of achieving the aim… outweigh the disbenefits resulting from the restriction of the relevant protected right.[16]

While he was prepared to accept that at the first stage, and possibly at the second and third stages as well, the court would respect the legislature's judgement unless it was manifestly without reasonable foundation, he was not prepared to accept that this was the case at the fourth stage. Instead, he stated that:

- the approach in Strasbourg to at least the fourth stage involves asking simply whether, weighing all relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest being promoted and the other interests involved. The court will in this context weigh the benefits of the measure in terms of the aim being promoted against the disbenefits to other interests. Significant respect may be due to the legislature's decision, as one aspect of the margin of appreciation, but the hurdle to intervention will not be expressed at the high level of "manifest unreasonableness".[17]

4. A Culture of Justification

The Report acknowledged that such powers of the courts to protect individual rights "could be viewed as strengthening democracy" in that it "helps to create a 'culture of justification'".[18] The Assembly's Standing Orders require that every bill, upon introduction, be accompanied by an Explanatory Memorandum which must set out alternative methods of achieving the bill's purposes which have been considered, together with the reasons for having decided upon the proposed method.[19] Lord Mance regarded it as open to the court to examine the quality of the Assembly's decision making with regard to achieving a fair balance between the public interest being promoted and the protection of the rights in question. He said:

- if, at the fourth stage when the court is considering whether a measure strikes a fair balance, weight attaches to the legislative choice, then the extent to which the legislature has as the primary decision maker been in or put in a position to evaluate the various interests may affect the weight attaching to its assessment: …[20]

He asserted that it should be open to the courts to use admissible background material to make that assessment.

Lord Thomas of Cwmgïedd, the Lord Chief Justice, delivering the judgment of the minority, disagreed with the majority's view that "weight" attached to the legislative choice; the minority view was that "great weight" should be given to it, a point emphasized on several occasions in the course of that dissenting judgment.[21]

Such an examination of decision making within the legislature – while consonant with the concept of "politico-legal justification" identified in the Report, "whereby governments can be required to justify their actions and how they impact upon the individual rights of persons subject to their jurisdiction" – could be viewed as contrary to article 9 of the Bill of Rights preventing the courts from impeaching or questioning speeches, debates and proceedings in Parliament. Recognizing this possibility, Lord Mance stated that:

- Perhaps in the light of article 9 there is a relevant distinction between cases concerning primary legislation by the United Kingdom Parliament and other legislative and executive decisions.[22]

The minority failed to discern any logical distinction between the Westminster parliament and the devolved legislatures in this regard.[23] The majority approach also results in a further, considerable difference between England-only legislation made by the UK Parliament and laws made by the devolved legislatures. There is a greater duty of justification in the Welsh legislative process and any change in the framework of constitutional rights in the UK would require changes in practice to that process of justification.

5. Combatting Executive Control of Law-Making

A typical justification for a Bill of Rights is to control executive dominance of the legislature.[24] Referring to the United Kingdom, the Report states that "the executive is often in a position to dictate how Parliament and public bodies in general choose to give effect to individual rights".[25] It attributes this to the UK being "a majoritarian political system" and considers it to be potentially detrimental to the interests of minorities and other disadvantaged groups.[26]

Ironically, given the majority view in the Asbestos Diseases case, such executive dominance has not in practice been the case with devolved government in Wales. Since the Assembly was established in 1999, no single party has ever been able to form a government with a comfortable, overall working majority. The only governments to have had such a majority have been coalitions in two of the assemblies, while in the others, the majority party has had to govern by consensus with others on a confidence and supply basis.[27] As a result of the electoral system which returns forty of the sixty Assembly Members by the first-past-the-post system while the remaining twenty are elected by a method of proportional representation, the executive in Wales is not able to dominate the Welsh Assembly in the manner that a UK government with a working majority can dominate the Westminster parliament, or at least the House of Commons. It is therefore ironic that it is the quality of the highly consensual primary law-making of the Welsh Assembly that is apparently open to question in the courts, and it is significant in this regard also that the Recovery of Costs of Asbestos-Related Diseases (Wales) Bill was not a government bill but one proposed by a backbench Assembly Member, albeit a member of the party in government.

6. Judicial Review

The Report notes that "the Act requires the courts to invalidate acts of the executive which violate Convention rights",[28] and thus subordinate legislation made by the Welsh Ministers is subject to the possibility of being struck down for incompatibility. The 2006 Act expressly states that:

- The Welsh Ministers have no power –

  (a) to make, confirm or approve any subordinate legislation, or

  (b) to do any other act, so far as the subordinate legislation or act is incompatible with any of the Convention rights.[29]

Persons who would qualify as victims for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights, as well as the law officers, may bring proceedings in domestic courts and tribunals on the basis that acts of the Welsh Ministers are incompatible with Convention rights.[30] Such a challenge would constitute a devolution issue under Schedule 9 to the 2006 Act and would fall to be heard and determined according to the procedures set out in that Schedule, including the possibility that the relevant law officers could have the issue referred directly to the Supreme Court. The question of whether a failure to act by the Welsh Ministers is incompatible with the Convention rights is also a devolution issue.

Subordinate legislation made by the Welsh Ministers is also susceptible to judicial review in the same manner as other acts of the executive in the United Kingdom.

The question of whether Welsh Assembly legislation is capable of being challenged by judicial review other than on the basis of competence has not arisen before the courts in the manner in which the matter was raised concerning the legislation of the Scottish Parliament in AXA General Insurance Ltd. v Lord Advocate,[31] but it is generally agreed that what was said in that case concerning devolved legislation in Scotland is equally the case with regard to devolved legislation in Wales. This was specifically contemplated by the judgments. Lord Hope said that he was "conscious of the implications of what the court decides in this case for the other devolved legislatures",[32] and Lord Reed commented that the question of whether legislation of the Scottish Parliament "is susceptible to review by the courts under the common law as an irrational exercise of legislative authority… could in principle arise in relation to any legislation enacted by any of the devolved legislatures" and was therefore of clear constitutional importance.[33]

Addressing the question, Lord Reed believed that in so far as the powers of the Scottish Parliament, within the limits of its competence, were plenary, and did not have to be exercised for any specific purpose or with regard to any specific considerations, that grounds of review developed for administrative bodies with limited powers for identifiable purposes were not appropriate.[34] There remained however in his view the question of "whether the court possesses the power to intervene, in exceptional circumstances, on grounds other than those specified [regarding competence]… as, for example, if it were shown that legislation offended against fundamental rights or the rule of law".[35] He concluded that:

- Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so, Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law.[36]

In the later Asbestos Diseases case, Lord Mance agreed that "If a devolved Parliament or Assembly were ever to enact such a measure, I would have thought it capable of challenge, if not under the Human Rights Convention, then as offending against fundamental rights or the rule of law, at the very core of which are principles of equality of treatment".[37]

Lord Hope, in AXA, thought that in the case of "a government which enjoys a large majority":

- It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.[38]

However, Acts of the Scottish Parliament were "not subject to judicial review at common law on the grounds of irrationality, unreasonableness or arbitrariness". This, he said: "is not needed, as there is already a statutory limit on the Parliament's legislative competence if a provision is incompatible with any of the Convention rights". He thought that it would be "quite wrong for the judges to substitute their views on these issues for the considered judgment of a democratically elected legislature unless authorised to do so, as in the case of the Convention rights, by the constitutional framework laid down by the United Kingdom Parliament".[39]

Lord Hope specifically related the absence of a power to review devolved primary legislation to the protection already in place through the Convention rights. It begs the question therefore of what the position would be with regard to such review by the courts if the Convention rights ceased to be part of the domestic law of the United Kingdom.

7. European Union law and Convention Rights

The current position is that to be within competence, Assembly Acts must not be incompatible with EU law.[40] As already indicated, if they are so incompatible they can be invalidated by the courts. The Report notes that "the Convention rights form part of the 'general principles' of EU law, which member states are obliged to respect when they give effect to EU legislation… [so that] they would still be potentially applicable by UK courts whenever EU law was in play".[41] It is questionable therefore whether 'de-incorporating' the Convention rights would of itself be sufficient to free the Assembly from having to legislate compatibly with the Convention rights in order to be within competence. The situation, in this regard, will of course be different when the UK leaves the European Union and the requirement of compatibility with EU law ceases to apply, although the question of how the UK's commitment to the ECHR would affect devolved legislation remains to be considered.[42]

The Welsh Ministers can also be designated as the appropriate authority to implement EU law under section 2(2) of the European Communities Act 1972.[43] To the extent therefore that the Welsh Ministers law making is in pursuance of such a designation, they continue to be required to respect the Convention rights as part of EU law's general principles. This would remain the case even if the Convention rights ceased to be part of UK domestic law, for as long as EU law continued to apply in the UK.

As things stand at present, the failure of the Welsh Ministers to implement their obligations regarding EU law would also constitute devolution issues under Schedule 9 to the 2006 Act.

8. Other International Obligations and Convention Rights

The Report notes that "any attempt to 'de-incorporate' Convention rights in UK law and break the link with Strasbourg… may be incompatible with the UK's international commitments" and that "any amendment or repeal of the HRA which de-incorporated Convention rights would… appear to be contrary to the UK's international commitments".[44]

Although, other than with regard to EU law, compatibility with the UK's international commitments is not an issue which goes to the competence of the Welsh Assembly to legislate, it does constitute a ground upon which the Secretary of State may intervene to prevent a bill passed by the Assembly from receiving Royal Assent. If the Secretary of State has reasonable grounds to believe that an Assembly bill contains provisions which would be incompatible with international obligations, he or she may make an order prohibiting the bill from being submitted for Royal Assent. The Order, stating the reasons for its making, must be laid as a statutory instrument before both Houses of Parliament and is subject to annulment by either House, but otherwise takes effect. Ordinarily, such an order must be made within four weeks of the bill being passed by the Assembly.[45]

Should the Convention rights be de-incorporated in UK domestic law and incompatibility cease to be a specific ground for challenging Assembly legislation on the grounds of competence, intervention by the Secretary of State would remain as a mechanism for achieving compliance with the European Convention. However, such intervention prior to Royal Assent depends on the exercise of a discretion by the Secretary of State. There is no legal duty to intervene, and accountability for failure or refusal to exercise the discretion is political rather than legal. The citizen would therefore have lost the opportunity which currently exists of recourse before the UK's domestic courts. Questions would therefore need to be answered as to whether and how the citizen could proceed if prejudiced by Assembly legislation in circumstances previously covered by the requirement of compatibility with the Convention rights.

Conclusion

Any new scheme of rights needs to pay attention to the specific character of the devolution settlement that has emerged over the last 18 years. As the Report puts it, it is a question of how to get "the balance right between respecting the decisions of elected politicians and protecting rights".[46] The Report considered that recalibrating the existing balance between the British tradition of parliamentary democracy and protecting individual rights might not only be difficult and thankless, but also unnecessary. It regarded the current state of UK human rights law to be "both principled and workable as long as Parliament, the executive and the courts continue to engage constructively with one another".[47]

Such constructive engagement has not been a widely recognized feature of the working of the Welsh devolution settlement at least as regards the engagement, or lack of it, between successive UK governments of various political colours and the Welsh Government. In 2014, the Silk Commission, in considering intergovernmental relations, concluded that "While there are many examples of good practice, there is scope for improvement", and made "a number of recommendations to enhance the existing mechanisms for improving relations between the two Governments, based on mutual respect and parity of esteem".[48] Subsequently, in the words of a report by an independent review group, the history of the Draft Wales Bill 2015, "sadly illustrates… [that] the precepts of cooperation, communication and consultation which officially frame intergovernmental relations across the UK need to be taken seriously".[49] There is little if anything therefore either in the history or in the present condition of the Welsh devolution settlement to suggest that the Report's conclusion that recalibrating the defensible balance between respect for democracy and the need to protect individual rights exhibited by the current state of human rights law in the UK would be anything other than difficult.

Endnotes

1. The Report, p. 44.
2. The Welsh Assembly Government was officially renamed the Welsh Government by the Wales Act 2014, s. 4.
3. GoWA 2006, s. 108.
4. GoWA 2006, s. 81(1), discussed below.
5. The Report, Executive Summary ¶ 6; p. 16.
6. The Report, p. 37.
7. The Report, p. 48.
8. GoWA 2006, ss. 112, 149; and Schedule 9.
9. GoWA 2006, s. 154.
10. In passing, it is worth noting that while Wales-only legislation passed by the Assembly is similar in this regard to the enactments of the other devolved legislatures, it is unlike legislation passed for England only under the procedure adopted to secure 'English Votes for English Laws' by the House of Commons, which enjoys the same immunity from being invalidated as the legislation of the UK parliament generally.
11. [2015] UKSC 3.
12. The Report, Executive Summary ¶ 3.
13. The Report, p. 15.
14. The Report, p. 48.
15. The Report, Executive Summary ¶ 16.
16. [2015] UKSC 3, at ¶45.
17. Ibid., ¶46, ¶48.
18. The Report, p. 24.
19. Standing Orders of the National Assembly for Wales (September 2016), SO 26.6 (iii).
20. [2015] UKSC 3, at ¶56.
21. Ibid., ¶114, ¶118, ¶124.
22. Ibid.
23. Ibid., ¶122.
24. See Lord Hailsham, 'Elective Dictatorship', The Richard Dimbleby Lecture, The Listener, 21 October 1976, p. 496.
25. The Report, p. 16.
26. The Report, Executive Summary ¶ 4.
27. Labour and the Liberal Democrats shared power in the First Assembly (1999–2003), while Labour and Plaid Cymru formed the 'One Wales Coalition' in the Third Assembly (2007–2011). Labour governed alone without an overall majority in the Second (2003–2007) and Fourth Assemblies (2011–2016). (Assembly terms were extended to five years after the advent of fixed-term parliaments at Westminster to avoid elections to both being held in the same year). In the Fifth Assembly, elected in May 2016, Labour with 29 of the 60 seats is currently governing with the support of the sole Liberal Democrat AM, who has been included in the Welsh Cabinet.
28. The Report, p. 37.
29. GoWA 2006, s. 81(1).
30. GoWA 2006, s. 81(2), (3).
31. [2011] UKSC 46.
32. Ibid., at ¶43.
33. Ibid., at ¶99.
34. Ibid., at ¶147.
35. Ibid., at ¶149.
36. Ibid., at ¶153.
37. [2015] UKSC, at ¶97.
38. [2011] UKSC, at ¶51.
39. Ibid., at ¶52.
40. GoWA 2006, s. 108(6)(c).
41. The Report, p. 41.
42. See further below.
43. GoWA 2006, s. 59.
44. The Report, Executive Summary, ¶ 14, and p. 41; Tobias Lock, Human Rights Reform and the UK's International Human Rights Obligations, The British Academy.
45. GoWA 2006, s. 114. The four-week window for intervention opens afresh if the provisions of a bill have been referred to the Supreme Court and been held to be within competence.
46. The Report, p. 48.
47. Ibid.
48. See Empowerment and Responsibility: Legislative Powers to Strengthen Wales, the second report of the Commission on Devolution in Wales, March 2014: 5.8.1; 5.8.2.
49. See Challenge and Opportunity: the Draft Wales Bill 2015, the report of an independent review group organized by the Wales Governance Centre, Cardiff University, and the Constitution Unit, University College London, February 2016: 9.2. (The author of this paper was a member of the review group). That Draft Wales Bill was subsequently withdrawn by the UK Government, and a considerably-altered Wales Bill introduced in June 2016. This bill, which proposes the replacement of the conferred powers model of devolution for Wales with a reserved powers model, is currently before Parliament, but it makes no change to the requirement that Assembly legislation to be within competence must be compatible with the Convention rights and – despite the result of the referendum on EU membership – EU law.

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Written Evidence from Professor Thomas Glyn Watkin*

1. I am grateful to the Equality, Local Government and Communities Committee for the invitation to appear before it and give evidence in relation to this inquiry. The opinions expressed in this paper are entirely my own and do not represent the views of any body or institution with which I am or have been associated. I should stress that my knowledge and experience of the law relating to human rights is by and large limited to the connection between such issues and the legislative competence of the Assembly and the Welsh Ministers. That connection was the focus of the briefing paper, *Human Rights from the Perspective of Devolution in Wales*,[1] which I wrote for the British Academy at its invitation last year. I understand that the Committee is already aware of that paper and the views expressed in it, although I should emphasize that it was commissioned and written prior to the Brexit referendum last June.

Introductory Remarks

2. In his prizewinning book, *The Rule of Law*, the late Lord Bingham of Cornhill argued that 'affording adequate protection of fundamental human rights' should be regarded as a feature of the rule of law in a free democratic society. He thought that the rights and freedoms set out in the European Convention on Human Rights and to which direct effect had been given within the UK by the Human Rights Act 1998 deserved to be regarded as fundamental in the sense of being guarantees which 'no one living in a free democratic society such as the UK should be required to forego'.[2]

3. Few would dissent from that final statement, but there remains considerable room for debate about the best means to ensure its achievement. The basic choices lie between political and legal safeguarding of such rights, and with regard to the latter between internal safeguards within a nation state as opposed to external supra-national checks.

4. The United Kingdom would traditionally regard itself as having safeguarded such fundamental rights through internal, political means. The representative nature of the House of Commons within Parliament, coupled with the oversight afforded by the unelected House of Lords as a revising chamber, both safeguard fundamental rights as part of the regular work of scrutinizing legislative proposals and supervising the conduct of government. Questions such as whether the courts might ever intervene by refusing to apply a duly enacted piece of Parliamentary legislation because it was repugnant to reason, fundamental rights or the rule of law have been for the classroom rather than the courtroom.

5. Few modern democracies, however, have been prepared to place such trust in political checks alone. Countries with written constitutions rely ultimately on the law rather than political processes to ensure that fundamental rights are respected, setting limits to the legislative powers of even the national parliaments and allowing recourse to the courts by citizens if those limits are breached, with judicial power to annul offending enactments. As such approaches are inconsistent with the notion of parliamentary

sovereignty, they have proved unattractive within the UK – at least as far as the Westminster Parliament is concerned. The devolved legislatures, on the other hand, have statutory limitations imposed upon their competence by the UK Parliament which render their enactments susceptible to challenge, review and annulment before the courts.

6. Unsurprisingly, events in Europe in the first half of the twentieth century raised doubts concerning the efficacy of internal checks alone as a means of protecting fundamental rights from the abuse of legislative and executive power. Declarations, such as the European Convention on Human Rights (ECHR), and supra-national judicial bodies, such as the European Court of Human Rights (ECtHR), were designed to ensure state compliance with fundamental freedoms. Such supra-national obligations and determination procedures are, of course, inimical to notions of untrammelled national sovereignty.

7. The tension between the UK's traditional perspective of parliamentary sovereignty and the supra-national perspective of the ECHR is manifest in the manner in which the Human Rights Act 1998 operates. Although the incorporation of Convention rights into the domestic law of the UK meant that UK citizens no longer had to revert to the ECtHR for adjudication of their rights, the 1998 Act did not confer on UK courts the power to annul UK parliamentary legislation which was incompatible with the Convention rights. Instead, the courts were empowered to make declarations of incompatibility, following which it was for Parliament to determine whether or not the incompatible legislation should be repealed or amended to bring the rogue provisions into compliance. Declarations of incompatibility have usually, but not always, been followed by legislative correction.

8. The position of the devolved legislatures is different in this regard. If a citizen complains before the courts that a legislative provision made by a devolved legislature or a devolved government is incompatible with Convention rights, then, if the incompatibility is found to exist, the legislative provision will be annulled totally or at least tailored to the extent necessary to restore compliance. Indeed, bills passed by the devolved legislatures can, after having been passed, be referred to the UK Supreme Court by the law officers on the grounds of incompatibility so as to prevent them becoming law. This was one of the grounds of challenge in the reference of the Recovery of Costs of Asbestos-Related Diseases (Wales) Bill at the end of the fourth Assembly.[3] The devolved legislatures in this regard are more akin to legislatures working under a written constitution than they are to the UK Parliament.

9. There is one further twist in this tale. As England has no devolved legislature, the 'English Votes for English Laws' procedures in the House of Commons operate to prevent England-only laws being passed by the UK Parliament against the wishes of a majority of English MPs in the lower house. As such England-only legislation, when passed, is a UK Act of Parliament, it is not subject to judicial annulment following challenge for incompatibility, but only to being declared incompatible. Although 'EVEL' is often presented as a corrective counterbalance to a democratic deficit suffered by England as a consequence of devolution to other parts of the UK, the solution adopted re-inforces the view that the sovereign UK Parliament remains in truth the English Parliament to which representatives of the other nations are admitted. Such a perception goes along with a view of the UK as the union of three

other nations with England rather than as the union of four nations to form a united state. These competing perspectives are relevant to the question of how functions currently vested in the institutions of the EU are to be distributed nationally within the UK in the wake of Brexit.

The Impact of the UK's withdrawal from the EU on human rights protection in Wales

10. While withdrawal from the EU would mean that Welsh legislation would no longer have to be compatible with EU law, withdrawal of itself would make no difference to the requirement that Welsh legislation had to be compatible with the Convention rights incorporated into domestic law by the Human Rights Act 1998. The Convention rights however are concerned with rights of the fundamental kind identified by Lord Bingham as being the kind that no one living in a free democratic society should be required to forego. Lord Bingham himself commented that there was 'no universal consensus on the rights and freedoms which are fundamental, even among civilized nations'.[4] In other words, some rights not included within the Convention might be regarded as being fundamental or at least as deserving protection.

11. Many such rights are currently enjoyed by UK citizens as a consequence of their being protected by EU law. These would include, for example, rights concerning employment, parental leave and consumer protection. Questions therefore arise as to whether, and, if so, how, such rights will be 'afforded adequate protection' in the aftermath of the UK's exit from the EU.

12. Currently, within Wales, such rights are protected by the requirement that laws enacted by the Assembly or made by the Welsh Ministers have to be compatible with EU law, and – even at UK level – the European Communities Act 1972 requires that EU law be accorded primacy over UK domestic law thus ensuring compatibility. The UK government has indicated that a 'Great Repeal Bill' will be announced in the Queen's Speech this year which will propose the repeal of EU law provisions within the UK and their re-enactment in the form of provisions of UK domestic law.

13. The question therefore arises as to whether thereafter Welsh legislation will be required to be compatible with this new body of domestic law in order to be valid, and, if so, how will that new body of law subsequently be developed. While part of EU law, those provisions would fall to be interpreted by the Court of Justice of the European Union (CJEU), and could only be amended by the appropriate institutions of the EU. The UK could not amend that law without the consent of at least a weighted majority of the other member states and, on occasion, the unanimous consent of all of them. The question arises as to by whom and by what procedure the replacement body of law can be amended following Brexit. Will it be entirely under the control of the UK Parliament as a reserved matter, or will the consent of the other nations of the UK be required? Given that such changes will affect the legislative competence of the devolved nations, legislative consent motions should be required, but on this issue the question of whether such a requirement should be a mere convention or should be capable of judicial enforcement arises afresh.

14. Nor is it simply an issue of consent to proposed UK provisions. Will it be open to the devolved nations to provide greater levels of protection or different mechanisms for protection within their respective territories? One thinks of the incorporation of the rights of children and young persons into the body of Welsh law, or of the proposals to safeguard the rights of workers to take industrial action within sections of the public sector in Wales. Will such variations be permissible regarding matters which are not reserved? If such competence is devolved, will that devolution be symmetrical or will there be differing competences among the devolved nations, and will the answer to that question regarding Wales be affected by its not being a distinct legal jurisdiction?

15. In giving effect to EU legislation at present, member states are required to respect Convention rights as part of the general principles of EU law. This gives rise to the question of whether such an approach will also inform the content of the domestic law made after the Great Repeal has taken place. As long as the Convention rights remain incorporated within UK domestic law, one would expect the provisions of erstwhile EU law to remain subject to the protection mechanisms provided by the 1998 Act, although no primacy would attach to them as they may at present enjoy in those areas by virtue of being part of EU law. An interesting question is how far the other EU nations may attempt to insist that the UK observe Convention rights in areas currently governed by EU law as part of the treaty obligations to be entered into by the UK to govern its future relations with the EU, and how such obligations will be enforced as regards devolved law-making.

The Impact of the UK Government's proposal to repeal the Human Rights Act 1998 and replace it with a UK Bill of Rights

16. This is the issue which was discussed regarding Wales in my briefing paper written for the British Academy last year. As I am aware that the Committee has access to that paper, I will not repeat its contents in any detail here. I shall confine myself to emphasizing some issues of particular relevance and importance here.

17. First, repeal of the Human Rights Act 1998 would not of itself terminate the UK's adherence to the ECHR. Such adherence would remain a treaty obligation. Accordingly, although citizens would not be able to challenge legislation before the UK's domestic courts for incompatibility, they would nevertheless be able to seek redress before the ECtHR, and the Secretary of State would still have the power to intervene to prevent an Assembly bill from receiving Royal Assent where he or she had reasonable grounds to believe that its provisions were incompatible with the UK's treaty obligations relating to the Convention.

18. Secondly, with regard to the enforceability of fundamental rights before courts in the UK, everything would depend on the exact terms of the UK Bill of Rights. One suspects that compatibility with the UK Bill of Rights would become an essential ingredient of legislative competence for the devolved legislatures. Once more, however, the question will arise of whether the courts will be empowered to do anything more than issue declarations of incompatibility with regard to the legislation of the UK Parliament. Very important in this regard will be how a UK Bill of Rights is to be enforced in relation to England-only legislation made by the UK Parliament. Will such legislation continue to be treated as enactment by the sovereign parliament

or will it be treated as a form of devolved legislation. In truth, as suggested above, the manner in which this question is answered is very revealing about the status of England within the UK and how the relationship of the UK to that nation corresponds or differs to the UK's relationship with its other national components.

19. The same issue remains pertinent with regard to the manner in which the courts will review questions of compatibility when dealing with the various legislatures. In the *Asbestos-Diseases Case*, the majority of the Supreme Court were clear that, in considering whether a fair balance had been achieved between the policy goal being pursued by the legislation and the interference proposed to a fundamental right in order to achieve that goal, the court would not question or review the quality of the decision-making in the UK Parliament – as that would be contrary to article 9 of the 1689 Bill of Rights – but would be prepared to do so when reviewing legislation made by devolved legislatures. The minority judgment of the Supreme Court found this distinction to be illogical. To this must once more be added the inconsistency between the treatment of England-only legislation made by the UK Parliament under EVEL and nation-specific legislation made by the devolved legislatures. The passing of a new UK Bill of Rights would afford the opportunity to redress this imbalance, but it is questionable whether the opportunity will be welcomed let alone taken. It is in essence an opportunity to make a clear choice between defending human rights by political or legal means, rather than, as at present, imposing legal mechanisms for their defence on the devolved nations while relying on political checks at UK – and therefore England – level under cover of respecting and defending the sovereignty of parliament.

20. The content of a UK Bill of Rights will undoubtedly be a reserved matter as against the devolved legislatures, at least with regard to the minimum content or level of protection of those rights. The question, however, may remain open as to whether a devolved legislature might supplement or add to the list of protected rights within its territory or afford increased levels of protection. A precedent for such an approach can be found in the treatment of Equal Opportunities as a reserved matter in the Wales Act 2017. Despite Equal Opportunities being reserved, an exception allows the National Assembly to enact provisions which supplement or are otherwise additional to provision made by the Equality Act 2010 or to require the taking of action which is not prohibited by the 2010 Act. This would however lead to different levels of protection in the different nations of the UK, and once more the question needs to be asked whether, in considering the propriety of such variations, the continued single legal jurisdiction of England and Wales might militate against Wales enjoying the same legislative latitude as the other devolved nations.

Public perceptions about human rights in Wales, in particular how understandable and relevant they are to Welsh people

21. I cannot provide anything other than anecdotal evidence concerning how the public in Wales perceive human rights. While inevitably such perceptions are undoubtedly coloured by political opinion, my own experience is that popular understanding of human rights protection, including its importance and its relevance, is frequently confused, a confusion which results in my view from the confusing manner in which the UK has chosen to promote human rights.

22. One common source of confusion is to link adherence to the ECHR with membership of the EU, and to confuse the work of the CJEU with that of the ECtHR. There is a degree of inevitability about this confusion, but it would be wrong not to recognize that it results, at least in part, from the ambivalent attitude to supra-national, European institutions which has plagued British politics for over half a century. As long as a 'them and us' approach to European institutions prevails, with supra-national, European dimensions being regarded as 'other', such confusions will continue. It may be that this particular confusion will be redressed on realisation that Brexit does not of itself affect the UK's adherence to the ECHR, nor the UK's acceptance of the jurisdiction and jurisprudence of the ECtHR.

23. If the UK were to replace the mechanisms of the Human Rights Act 1998 with a UK Bill of Rights, it is possible that the outcome would assist in making the legal and constitutional mechanisms for the protection of human rights in the UK more accessible to its citizens. I doubt however whether that will be the case if differences continue between the treatment of England in this regard and the treatment of the other nations. The UK Parliament has successfully enacted provisions in the European Communities Act 1972 which have allowed the courts to accord primacy to EU law over later parliamentary enactments as well as the legislation of the devolved nations. It should not be impossible for it enact a similar scheme to permit the courts to accord primacy to a UK Bill of Rights over other UK parliamentary legislation, even if that were only to be a rebuttable presumption in respect of the UK Parliament, that is a presumption which could in specific cases be rebutted by express provision to the contrary or by necessary implication. Such a move would be no more a denial of parliamentary sovereignty than the existing provisions of the European Communities Act, the proposed repeal of which establishes beyond doubt that its enactment has not diminished Parliament's sovereign law-making powers.

24. Such a development would mark a clear choice by the UK of its preference for legal rather than political checks upon legislative power, rather than the mix which obtains at present. At the very least I would argue that England-only legislation in the UK Parliament should be subjected to such a regime, and that as an irrebuttable presumption, so as to ensure equal treatment for those subject to the law in all of the nations of the UK. To again quote the words of Lord Bingham on the contemporary meaning of the rule of law: 'The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation'.[5] I would argue strongly that such differences with regard to the protection of human rights should be objective differences regarding the individuals entitled to them, not differences with regard to the legislatures which enact the means for their protection. It is simply neither right nor just that an England-only law which allegedly contravenes a protected right cannot be challenged by those affected by it in the same manner as a law made in Wales, Scotland or Northern Ireland.

25. Nor is the injustice confined to the treatment of individuals. If the UK Parliament chooses political means to protect and redress human rights violations for the laws it makes, leaving it ultimately to the democratically elected representatives of the people to determine whether particular interferences are justifiable, it is not clear why the same method of protection should not be regarded as effective with regard to the legislative choices of the devolved legislatures in matters within their competence. If the people's elected representatives at Westminster can be trusted to make the

appropriate choices on such issues, why cannot the same people's choice of representatives be trusted in Cardiff Bay, Holyrood and Stormont? A consistent and articulated principle underlying the UK's approach to human rights protection would, in my view, go far to increase public understanding of the system, and appreciation of its significance.

I hope these views will be of some assistance to the Committee in its deliberations.

Thomas Glyn Watkin
25 March 2017

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* Professor Thomas Glyn Watkin, since retiring, has been an honorary professor at both Bangor and Cardiff Law Schools. Prior to retirement, he was First Welsh Legislative Counsel to the Welsh Assembly Government (2007–10), Professor of Law and Head of Bangor Law School (2004–2007) and Professor of Law at Cardiff Law School (2001–2004), having previously been successively Lecturer, Senior Lecturer and Reader in Law at Cardiff (1975–2001) and Legal Assistant to the Governing Body of the Church in Wales (1981–1998). He is a Fellow of the Learned Society of Wales, and an ordinary academic bencher of the Middle Temple.

Notes

[1] http://www.britac.ac.uk/news/british-academy-publishes-human-rights-briefings-devolution-wales-and-uk%E2%80%99s-international.
[2] Tom Bingham, *The Rule of Law* (London: Penguin Books, 2010), p. 66.
[3] [2015] UKSC 3.
[4] Bingham, *The Rule of Law*, p. 68.
[5] Bingham, *The Rule of Law*, p. 55.

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Llywodraeth Cymru
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Eich cyf/Your ref
Ein cyf/Our ref

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27 Mawrth 2017

Annwyl John

Yn fy sesiwn rhoi tystiolaeth i'r Pwyllgor ar 9 Mawrth, addewais y byddwn yn ysgrifennu at y Pwyllgor unwaith y byddwn wedi ystyried yr ymatebion i'r ymgynghoriad ynglŷn â gwahardd defnyddio gweithwyr asiantaethau yn lle gweithwyr sy'n gweithredu'n ddiwydiannol, ac unwaith y byddwn wedi penderfynu sut i fwrw ymlaen â'r mater.

Fel y gŵyr y Pwyllgor, cynhaliodd Llywodraeth y DU ymgynghoriad ym mis Gorffennaf 2015 ar gynnig i ddirymu Rheoliad 7 o Reoliadau Cynnal Asiantaethau Cyflogaeth a Busnesau Cyflogaeth 2003. Mae Rheoliad 7 yn gwahardd busnesau cyflogaeth rhag darparu gweithwyr dros dro i gymryd lle gweithwyr sy'n gweithredu'n ddiwydiannol. Er nad yw Llywodraeth y DU wedi gweithredu eto yn dilyn yr ymgynghoriad, pe bai yn dirymu'r rheoliad, byddai hynny'n gymwys i weithredu diwydiannol gan weithwyr ym mhob sector, gan gynnwys gweithwyr a gyflogir yn y sector cyhoeddus yng Nghymru.

Ym mis Medi 2016, cyhoeddais ymgynghoriad er mwyn gofyn a ddylai'r sefyllfa gyfreithiol barhau fel y mae yng Nghymru – h.y. cadw'r sefyllfa lle nad yw awdurdodau Cymreig datganoledig yn cael defnyddio gweithwyr dros dro yn lle staff sy'n gweithredu'n ddiwydiannol. Byddem yn cyflawni hynny drwy wahardd yr awdurdodau eu hunain rhag defnyddio gweithwyr asiantaethau, gan gyflwyno rheoliad â'r un effaith â Rheoliad 7, sy'n gymwys i fusnesau cyflogaeth.

Ar ôl yr ymgynghoriad, rwyf wedi penderfynu cyflwyno gwelliant gan y Llywodraeth yng Nghyfnod 2 i gadw'r sefyllfa fel y mae, lle mae awdurdodau cyhoeddus Cymru yn cael eu gwahardd rhag defnyddio gweithwyr asiantaethau yn lle gweithwyr sy'n gweithredu'n ddiwydiannol. Pe bai Llywodraeth y DU yn penderfynu dirymu Rheoliad 7, byddai effaith gwneud hynny yn gymwys i bob cyflogwr arall yng Nghymru.

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Rwyf yn anfon copi o'r llythyr hwn at y Pwyllgor Cyllid.

Yn gywir

Mark Drakeford AC/ AM
Ysgrifennydd y Cabinet dros Gyllid a Llywodraeth Leol
Cabinet Secretary for Finance and Local Government

28 Mawrth 2017

Y Pwyllgor Cydraddoldeb, Llywodraeth Leol a Chymunedau
Equality, Local Government and Communities Committee
ELGC(5)-12-17 Papur 5/ Paper 5

Annwyl Ysgrifennydd Cabinet

Cyllid Cymunedau yn Gyntaf

Yn ddiweddar, cawsom gyfarfod gyda staff o'r pedwar clwstwr Cymunedau yn Gyntaf yng Nghasnewydd. Roedd hyn yn rhan o waith parhaus y Pwyllgor i ystyried y penderfyniad i ddod â'r rhaglen Cymunedau yn Gyntaf i ben.

Roeddem yn cael ar ddeall, ar sail y dystiolaeth lafar a roddwyd gennych i'r Pwyllgor ym mis Chwefror, y byddai'r lefelau cyllid yn parhau tan fis Mehefin 2017:

> "I made the announcement on Tuesday to start a transition period, which was about fully funding the programme until June with a 70 per cent profile over the first 12 months of business."[1]

Fodd bynnag, yn ystod y trafodaethau gyda staff, roeddent yn nodi y bydd y cyllid yn gostwng o fis Ebrill.

[1] Y Pwyllgor Cydraddoldeb, Llywodraeth Leol a Chymunedau, 15 Chwefror 2017, y Cofnod [15]

Byddem yn ddiolchgar pe gallech egluro i ni pryd fydd y lefelau cyllid yn gostwng.

Yn gywir

John Griffiths AC

Cadeirydd y Pwyllgor Cydraddoldeb, Llywodraeth Leol a Chymunedau

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.

Carl Sargeant AC/AM
Ysgrifennydd y Cabinet dros Gymunedau a Phlant
Cabinet Secretary for Communities and Children

Llywodraeth Cymru
Welsh Government

Y Pwyllgor Cydraddoldeb, Llywodraeth Leol a Chymunedau
Equality, Local Government and Communities Committee
ELGC(5)-12-17 Papur 6/ Paper 6

Ein cyf/Our ref MA/P/CS/0153/16

John Griffiths AC
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16 Mawrth 2017

Annwyl John

Rwy'n amgáu'r wybodaeth ychwanegol (gweler isod ac yn yr atodiad) y mae'r Pwyllgor wedi gofyn amdani mewn perthynas â'r Ymchwiliad i gefnogaeth ar gyfer ffoaduriaid a cheiswyr lloches yng Nghymru.

Cyfarfodydd a Chylch Gwaith y Bwrdd Gweithrediadau

Gallaf gadarnhau bod y Bwrdd Gweithrediadau wedi cwrdd ar 27 Chwefror, ac wedi cytuno ar Gylch Gorchwyl diwygiedig, gan gynnwys cylch gwaith ehangach a newid enw'r Bwrdd i Fwrdd Gweithrediadau ar gyfer Ffoaduriaid a Cheiswyr Lloches yng Nghymru. Cynhaliwyd y cyfarfod blaenorol ar 13 Mehefin 2016.

Adnewyddu'r Cynllun Cyflawni ar gyfer Ffoaduriaid a Cheiswyr Lloches

Cytunodd y Bwrdd Gweithrediadau y dylai'r Cynllun Cyflawni gael ei adnewyddu yn ystod 2017. Fodd bynnag, nid yw'n hollol gywir y bydd y broses hon yn dechrau drwy gynnal cynhadledd yn yr haf. Bydd y gwaith i adnewyddu'r cynllun yn dechrau cyn gynted â phosibl. Ar y llaw arall, dim ond megis dechrau yr ydym o ran cynllunio ar gyfer y gynhadledd. Fe wnaeth y Bwrdd Gweithrediadau ddatgan y byddai'n cefnogi'r egwyddor o gynnal digwyddiad o'r fath, ond nid yw'r manylion na'r dyddiadau wedi cael eu cadarnhau eto. Er ein bod yn gobeithio y byddai'n cyfrannu at y broses o ddiweddaru'r Cynllun Cyflawni, mae'n rhy gynnar i ddweud sut y byddai hyn yn digwydd.

Gwiriadau Hawl i Rentu

Nid yw Llywodraeth Cymru wedi cael gwybod pa ddyddiad y bwriedir dechrau cynnal y gwiriadau Hawl i Rentu yng Nghymru, ond rydym yn awyddus i sicrhau bod y broses yng Nghymru yn cael ei rheoli mewn ffordd briodol, er mwyn caniatáu digon o amser i

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landlordiaid ddeall eu cyfrifoldebau newydd ac i sicrhau bod y system yn gweithio fel y dylai, heb wahaniaethu.

Mae Ysgrifennydd y Cabinet wedi ysgrifennu at y Gweinidog Mewnfudo, Robert Goodwill AS, yn ddiweddar i esbonio hyn (gweler y llythyr amgaeedig).

Llety ar gyfer ceiswyr lloches

Ysgrifennais atoch ar 2 Mawrth i gadarnhau fy mod o ddifrif ynghylch y mater hwn, ac y byddaf yn ei ystyried ymhellach. Rwyf eisoes wedi gofyn i swyddogion portffolios tai mewn awdurdodau lleol ystyried unrhyw enghreifftiau o lety gwael yn eu hardaloedd nhw a rhoi gwybod i mi amdanynt. Byddaf yn parhau i roi sylw i'r mater hwn.

Yn gywir

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Ysgrifennydd y Cabinet dros Gymunedau a Phlant
Cabinet Secretary for Communities and Children

Mae cyfyngiadau ar y ddogfen hon