

HR 22

Ymchwiliad i hawliau dynol yng Nghymru

Inquiry into Human Rights in Wales

Ymateb gan: Y Brifysgol Agored

Response from: The Open University



Response to the National Assembly for Wales' Communities, Equality and Local Government Committee inquiry into Human Rights in Wales

About The Open University in Wales

1. The Open University (OU) was established in 1969, with its first students enrolling in 1971. It is a world-leader in providing innovative and flexible distance learning opportunities at higher education (HE) level. It is open to people, places, methods and ideas. It promotes educational opportunity and social justice by providing high-quality university education to all who wish to realise their ambitions and fulfil their potential.
2. Over 7,000 students across Wales are currently studying with The Open University, enrolled on around 10,000 modules. There are OU students in every National Assembly for Wales constituency and we are the nation's leading provider of undergraduate part-time higher education. Almost three out of four Open University students are in employment while they study and with an open admissions policy, no qualifications are necessary to study at degree level. Over a third of our undergraduate students in Wales join us without standard university entry level qualifications.
3. As a world leader in educational technology, our vast 'open content' portfolio includes free study units on the free online learning platform [OpenLearn](#) (including many Wales-related materials and our Welsh Language platform [OpenLearn Cymru](#)) and substantial content on YouTube and on iTunes U where we have recorded over 70 million downloads.
4. This submission has been authored by Carol Howells and Edwin Parks, Senior Lecturers in Law at The Open University.

Response to committee inquiry

5. At the time of writing it is unclear what the content and purpose of the proposed Bill of Rights will be. Two options are mooted in press releases by the UK government:
 - One option merely repeals and amends what the Westminster government perceives as the contentious parts of the Human Rights Act 1998. This option involves retaining the U.K.'s position as a

contracting party to the European Convention on Human Rights (the “ECHR”) and as one of the 47 members of the Council of Europe.

- The other option appears to be aimed at passing legislation to give Westminster the executive power to withdraw the UK from being a party to the ECHR and from the jurisdiction of the European Court of Human Rights. Westminster could then promulgate a self-standing Bill of Rights independent of any international treaty rights, such as ECHR or EDHR. The consequences of this outcome are not considered in this response. Suffice to say, in the absence of a nationally agreed substantive list of rights promulgated by a new Bill of Rights, the position would revert to what it was in common law prior to Human Rights Act 1998 (HRA98). Essentially freedom would become a residual right – a person is free to do what they want to, provided there is no law preventing it. The jeopardy with this option is that no right would be absolute, in the sense that any right can be removed by a simple majority in Parliament, or even by executive action if there were empowering legislation to do so.

6. The focus of the following response is on legal effects, rather than social effect. Our response is based on the assumption that the HRA98 is to be repealed *in toto*, and in any substituting legislation (A Bill of Rights) the UK remains party to the ECHR and to the jurisdiction of the European Court of Human Rights. To have one without the other would be problematic.

Summary of some points in relation to Wales arising from a of repealing Human Rights Act 1998

7. The obligation of public authorities (bodies) to make ‘rights based’ decisions: The Human Rights Act 1998 obliges public bodies to comply with the ECHR in all aspects of their decision-making. Unless the proposed Bill of Rights contains equivalent provisions it raises several questions.
 - Will public bodies be released from the obligation to comply with the ECHR?
 - If so, is it proper to do so?
 - What consequences will such a step have in terms of public perception?
8. *The scope of defendants to human rights based claims:* Section 7 Human Rights Act 1998 (“HRA 98”) has been interpreted to limit the range of defendants against whom a human rights based claims can be brought. The combined effect of section 6 & 7 HRA 98 is that only claims for breach of ECHR rights can be commenced against a public authorities (bodies). The HRA 98 is silent on the possibility of one individual (either natural or legal) claiming against another, solely on the ground of a breach of an ECHR right, unless that right is already recognised in UK statute law or English & Welsh common law. The term ‘Public authorities’ is interpreted

widely to include local authorities, the executive (Westminster and devolved), the courts and any other body having a public function.

9. If a Bill of Rights does not have an equivalence, yet it retains ECHR as the basis for human rights claims, will it be possible for the National Assembly for Wales (“NAfW”) to pass human rights primary legislation covering Wales? The NAfW has powers provided by section 3 of the Wales Act 2017 (substituting section 108 with 108A in Wales Act 2006), to extend the scope of human claims to ones between individuals and legal persons (e.g. companies). [Note: the combined effect of section 3 and schedule 1 para 10 (3) (a) Wales Act 2017 [setting out a new schedule 7A in Wales Act 2006] is that *observing and implementing international obligation under the Human Rights Convention* (ECHR) is not reserved to Westminster.]
10. It is submitted that if the NAfW passed such legislation it would enhance individual rights in Wales. The result would be new statutory based causes of action imported from ECHR rights contained in Articles 2 to 12 and 14 of the ECHR and 1 to 3 of the First Protocol: Such as the rights to respect for private and family life. There would be no need, in claims between individuals, for the claimant to bring a “vehicle case” (cases based on a known cause of action, usually in tort) in order to raise ECHR rights issues.
11. *The status of the current requirement for legislative Statements of Compliance with ECHR:* Section 19 of the Human Rights Act 1998 requires all legislation introduced to the NAfW to contain a compliance statement from the relevant Secretary. An important question for Assembly Members to consider is: Will this requirement end if the proposed Bill of Rights does not contain equivalent provisions?
12. The effect of new section 108A (2) (e) of the Wales Act 2006 is that all legislation passed by the Assembly must be compatible with EU law and Convention rights (i.e. the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950.) This poses the question: can a replacement Bill of Rights modify the application of ECHR in relation to Welsh legislation without the approval of the National Assembly for Wales?
13. It is submitted that there is a sustainable argument that, if the Human Rights Act 1998 is repealed, the NAfW is empowered to pass its own legislation “gold-plating” human rights by virtue of section 108A (2) (e) of the Wales Act 2006. An example of legislation extending rights is the Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015. However, if a substituting Bill of Rights reserves human rights competence to Westminster, the NAfW would not have this legislative power.
14. *Continuing status of decisions of European Court of Human Rights:*

By section 2 HRA 98 any judgment, decision, declaration or advisory opinion of the European Court of Human Rights must be taken into account by any court of tribunal in England & Wales. This requirement extends to opinions of the Commission given in a report adopted under Article 31 of the Convention, decision of the Commission in connection with Article 26 or 27(2) of the Convention and to decisions of the Committee of Ministers taken under Article 46 of the Convention. Assembly Members may want to consider: What will be the status of these decision once the HRA is repealed? Will it be binding, persuasive or have no effect?

15. *Appointment of judges to European Court of Human Rights:*

By section 18 of HRA 98 the holder of a judicial office in England & Wales (as defined in the Act) may become a judge of the European Court of Human Rights. Will this be retained by a new Bill of Rights?

16. *Rights of the National Assembly for Wales under ECHR:*

If the UK remains a signatory to the ECHR, the WA remains qualified to send a delegate to represent Wales in the Chamber of Regions of the Congress. This operates at a level between central and local government, which have either self-governing or state-like powers. Wales qualifies as it is *a region that effectively has the capacity to take full responsibility, in the interests of their communities, for a substantial share of matters of public concern, in accordance with the principle of subsidiarity. Member states which have regions with legislative powers.....*

17. We would be happy to provide any further information as required to assist the Committee.

17 February 2017

Contact:

Michelle Matheron, Policy and Public Affairs Manager
Michelle.Matheron@open.ac.uk

Carol Howells, Senior Lecturer in Law
Carol.Howells@open.ac.uk

Edwin Parks, Senior Lecturer in Law
E.R.Parks@open.ac.uk