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Cydraddoldeb a  
Hawliau Dynol

Equality and  
Human Rights  
Commission

Evidence to Committee

# Equality and Social Justice Committee: UK Government Human Rights Act Reform

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## Evidence details

**Nature of Enquiry:** Letter regarding the UK Government Consultation on proposals to reform the Human Rights Act 1998

**Source of Evidence:** Senedd Cymru

**Date:** 08 February 2022

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## For more information please contact

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## About the Commission

1. The Equality and Human Rights Commission ('the Commission') is Great Britain's national equality body and has been awarded an 'A' status as a National Human Rights Institution (NHRI) by the United Nations.
2. Our job is to help make Wales and Britain fairer. We do this by safeguarding and enforcing the laws that protect people's rights to fairness, dignity and respect. The Commission has been given powers to advise Governments and Parliaments across England, Scotland and Wales on the equality and human rights implications of legislation and policy. We can also publish information or provide advice on any matter related to equality, diversity and human rights.
3. We are here to offer our expert advice to support the work of the Equality and Social Justice Committee to ensure equality and human rights considerations are at the heart of the Sixth Senedd.

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## How we have approached this request

4. Our response is informed by legal and policy analysis of the three questions asked by the Committee, in the short time available to respond.
5. We have submitted our response on 8 February 2022, and thank the Committee for the opportunity to do so.

## Evidence

### **To what extent do the proposed changes set out in the Consultation represent a constitutional matter with implications for the exercise of legislative and executive competence in Wales?**

6. The proposed changes set out in the consultation represent a constitutional matter with implications for the exercise of legislative and executive competence in Wales because it is currently unclear whether the European Convention on Human Rights (ECHR) will continue to be incorporated expressly into domestic law under the proposed Bill of Rights, as it is currently under the Human Rights Act 1998 (HRA). The HRA is the principle, but by no means the only way, that ECHR rights are given effect in UK law.
7. Compliance with the ECHR is safeguarded by the Government of Wales Act 2006 (2006 Act) in two principal ways:
  - a. The power of the Welsh Government and the Senedd under the Government of Wales Act 2006 is limited by reference to the “Convention rights”. These are given the same meaning as under the HRA, which means that they are defined by reference to the ECHR but they do not include all of the ECHR rights and all of the Protocols (Article 13 for instance is omitted) (HRA s.1).
  - b. Observing and implementing obligations under the ECHR is devolved (Schedule 7A para 10(3)). This obligation applies to all ECHR rights “as they have effect for the time being in relation to the United Kingdom”.

8. The UK Government consultation proposes that the HRA will be “replaced” by a Bill of Rights. The Consultation does not, however, explain what if any status the ECHR would have under a Bill of Rights. The proposal appears to be that the “Convention rights” would be replaced by domestic rights drawing on the text of the ECHR. That seems to suggest that the ECHR would not be directly incorporated into UK law by express reference, but whether this would result in a change to the substantive rights in domestic law remains unclear.
9. Such a change would of necessity involve a change to the devolved competences of the Welsh Government and the Senedd. As noted above, these are currently defined by reference to the ECHR as given effect by the HRA. It is presumably the UK Government’s intention that competence would henceforth be defined by reference to the Bill of Rights. It is possible however that the 2006 Act could be amended to refer to the ECHR directly, in which case the amendment would be principally a formal one.
10. If however the competence of the Welsh institutions was changed so that it depended on the scope of the Bill of Rights, this might affect the breadth and nature of such competences materially.

11. A large part of the consultation document is directed at achieving greater autonomy for domestic courts and Parliament to interpret the rights set out in the Bill of Rights and loosening the authority of the European Court of Human Rights (ECtHR) within the UK's legal system. For example, the UK Government proposes to make clear that UK courts are not bound to follow judgments of the ECtHR and seeks to identify ways to legislate to restrict the development and application of the ECtHR's case law on positive obligations and on the protection of the right to privacy against press intrusion. This is significant because the ECtHR pronounces authoritatively on the meaning of the ECHR (ECHR, Articles 19, 31(1) and 46(1)). Therefore, if the domestic protection of rights is narrower than that required by the case law of the ECtHR, that would not fully reflect the UK's obligations under the ECHR. This would be a material change to the 2006 Act which, as explained above, is presently tightly connected to the ECHR through the HRA.
12. The precise impact on the legislative or governmental competences in Wales is difficult to predict. However, in general terms:
- a. If the Bill of Rights does not fully implement the case law of the ECtHR, then the protection of human rights in Wales would be reduced .
  - b. Where the ECHR rights set out prohibitions on the conduct of public bodies then, in theory, if the Bill of Rights was interpreted in a more limited manner, the competence of the Welsh institutions would be widened. However, where the ECHR rights set out positive obligations on public bodies to protect rights, a narrower interpretation of such rights under a Bill of Rights would result in the Welsh institutions not having the power to implement such duties, as they currently have.

- c. The enactment of a Bill of Rights could also result in certain enhancements of rights protections (and corresponding reduction in the power of the Welsh Government) if additional rights were included in the Bill of Rights. At present the only additional right suggested by the UK Government is the right of jury trial. In theory, however, additional rights, such as to protect the Welsh language or marriage of same-sex couples (the ECHR only extends to civil partnerships), could be included.

13. Notably, the consultation states that the proposed Bill of Rights will seek to recognise differences in the application and implementation of a human rights framework according to the needs and preferences of the nations of the UK. Question 19 is:

“How can the Bill of Rights best reflect the different interests, histories and legal traditions of all parts of the UK, while retaining the key principles that underlie a Bill of Rights for the whole UK?”

This provides an opportunity for the specific interests of the nations of the UK to be reflected in any Bill of Rights. However, it is the Commission’s position that the Bill of Rights must protect rights at least to the same extent as the ECHR and that there must not be any reduction or diminution in rights protection. There is a need for a consistent set of basic rights to be protected across the UK. This should be a good minimum standard and no lower than those in the ECHR, but with the scope to increase and protect human rights further than the current standard.

14. A further point relates to the UK Government's proposal to introduce a requirement for claims under the Bill of Rights to surmount an additional hurdle of showing that the victim has suffered "significant disadvantage". It is notable that the 2006 Act sets out a separate cause of action for persons who claim to be victims of infringements of their ECHR rights as against the Welsh institutions (s.81). The UK Government has not suggested that the proposed additional hurdle would also be introduced to the 2006 Act. Similarly, the UK Government proposes statutory guidance on the award of damages under a Bill of Rights but has not proposed any similar statutory guidance to damages awards for breach of incorporated ECHR rights under the 2006 Act. The creation of differences such as these between claims under a Bill of Rights and claims under the devolution legislation for conduct that is contrary to the Bill of Rights would be anomalous and arbitrary. It could lead to forum shopping on the part of litigants to avoid the hurdles imposed on claims brought directly under the Bill of Rights. Forum shopping is the practice of choosing the court or jurisdiction that has the most favourable rules or laws for the position being advocated.
15. It would not however appear appropriate for a "significant disadvantage" threshold to be imposed on claims under the 2006 Act given that the ECHR defines the scope of devolved competence and such a hurdle would thus prevent the courts ensuring that the Welsh institutions act *intra vires* where that threshold is not met. (In effect, the competence of the Welsh institutions would be altered to include **non-compliance** with the ECHR **that does not cause significant disadvantage**). This could result in the introduction of limits on the ability of persons to challenge infringements of their ECHR rights, which would appear to have constitutional implications relating to the scope of devolved competence.

## **What are the potential implications for existing Welsh legislation, policies and future human rights commitments set out in the Programme for Government?**

16. We consider that there are areas in the Welsh Government Programme for Government and the Co-operation Agreement 2021, for which the proposals for Human Rights (HRA) reform may have implications. The Senedd Committee may wish to seek legal clarification of these points.
17. These include proposed incorporation of the United Nations Convention for the Elimination of all forms of Discrimination against Women (CEDAW) and the United Nations Convention of the Rights of Disabled People (UNCRPD) into Welsh law.
18. There are potential implications for constitution and justice in Wales. These include:
  - a. Establishing an independent, standing commission to consider the constitutional future for Wales
  - b. Pursuing the case for the devolution of policing and justice
  - c. Developing a set of Codes of Welsh law
19. Additionally, there are a number of other commitments and activities proposed in both the Programme for Government and the Co-operation Agreement that touch on human rights, such as:
  - a. Establishing a national care service
  - b. The Disability Task Force
  - c. Implementation of the Race Equality Action Plan
  - d. Implementation of the LGBTQ+ Action Plan

However, in our view human rights actions in these areas are not likely to be touched upon by the HRA proposals.



## **What do you consider to be the equalities impacts on individuals with particular protected characteristics, including asylum seekers and refugees, ethnic minority communities and the Gypsy, Roma and Traveller community?**

20. The potential impact on people with protected characteristics of the UK Government consultation on the HRA must be seen in the wider context of public perception of human rights and the practical barriers to their enforcement.
21. There is considerable public scepticism and lack of understanding about the operation of human rights. Our research has found that greater knowledge of human rights tends to correlate with greater levels of support for them,<sup>1</sup> and is also likely to strengthen people's ability to enjoy their rights and seek redress when they are breached. Government, public authorities, schools, civil society, and the media have important roles to play in building public understanding of human rights.
22. In particular, Government, public authorities and the media should ensure they communicate clearly and accurately about human rights, from a position of respect for the rule of law and principles of human rights, reinforcing the universal values which human rights embody, and avoiding the perpetuation of misconceptions.<sup>2</sup>

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<sup>1</sup> EHRC and ComRes (May 2018), *Human Rights Audiences and Messaging*, pp 9-10; published summary at: EHRC (September 2018) [Talking about human rights: how to identify and engage a range of audiences](#), p7

<sup>2</sup> EHRC and ComRes, [Talking about Human Rights](#). Our report provides practical advice to help public bodies, NGOs and others communicate about human rights in a way that effectively builds understanding of their importance.

23. It is necessary to address existing practical barriers to the enforcement of human rights, some of which have impacted disproportionately on people with particular protected characteristics. These include reductions in legal aid provision, advice deserts and cost regimes for HRA judicial review cases. It is also necessary to assess the specific impact of the proposals on protected characteristics, and take steps to mitigate any obstacles to the enforcement of rights affecting particular groups.
24. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 affected access to justice in England and Wales, including by weakening people's ability to enforce their human rights.
25. Removal of legal aid provision in many family law and immigration cases affects those seeking redress for violations of the right to respect for family life under the European Convention on Human Rights (ECHR) Article 8.
26. Removal of provision in education cases has affected those seeking redress for breaches of the right to education protected by ECHR Protocol 1, Article 2.
27. People with certain protected characteristics have been particularly affected including disabled people, women, children and people from ethnic minorities. The Commission on Justice in Wales emphasised that this had particular negative impact in Wales where there are areas with no access to legal aid practitioners all.<sup>3</sup>
28. Our briefing to the UK Parliament on the Nationality and Borders Bill highlighted the particular difficulties that people with certain protected characteristics (including people with a mental or physical disability, women and LGBT people) may face when engaging with certain legal

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<sup>3</sup> See: EHRC (September 2018), [Response of the Equality and Human Rights Commission to the Post-Implementation Review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#) and Commission on Justice in Wales (24 October 2019), [Justice in Wales for the People of Wales](#), p. 10

processes relating to asylum and immigration.<sup>4</sup> Any procedural changes relating to human rights claims could raise similar concerns, which would need to be understood and mitigated.

## Other sources of evidence the Committee may wish to consider

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### Human Rights Tracker

29. Our [human rights tracker](#) is one of the world's first online tools for monitoring human rights compliance. It is a searchable online tool to track how well the Welsh and UK Governments are acting on the most recent recommendations made to the UK by the UN treaty bodies and the Universal Periodic Review (UPR).

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<sup>4</sup> See: EHRC (July 2021), [Bill Briefing: Nationality and Borders Bill, House of Commons – Second Reading](#), p. 3-4

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## Is Wales Fairer?

30. [Is Wales Fairer?](#) is the most comprehensive review of how Wales is performing on equality and human rights across all areas of life, including; education, work, living standards, health, justice and security and participation in society.
31. This is the Welsh supplement to our statutory report on equality and human rights progress in Great Britain, [Is Britain Fairer?](#)
32. We have also recently produced a follow-up “[How Coronavirus has affected equality and human rights](#)” report which summarises evidence to help us understand the effects of the coronavirus (COVID-19) pandemic on different groups in society.