

HR 15
Ymchwiliad i hawliau dynol yng Nghymru
Inquiry into Human Rights in Wales
Ymateb gan: Comisiynydd Pobl Hyn Cymru
Response from: Older People's Commissioner



Older People's Commissioner for Wales
Comisiynydd Pobl Hyn Cymru

**Response from the Older People's
Commissioner for Wales**

to the

**Equalities, Local Government and
Communities Committee Inquiry into
Human Rights in Wales**

February 2017

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About the Commissioner

The Older People's Commissioner for Wales is an independent voice and champion for older people across Wales, standing up and speaking out on their behalf. She works to ensure that those who are vulnerable and at risk are kept safe and ensures that all older people have a voice that is heard, that they have choice and control, that they don't feel isolated or discriminated against and that they receive the support and services they need.

The Commissioner's work is driven by what older people say matters most to them and their voices are at the heart of all that she does. The Commissioner works to make Wales a good place to grow older - not just for some but for everyone.

The Older People's Commissioner for Wales:

- Promotes awareness of the rights and interests of older people in Wales.
- Challenges discrimination against older people in Wales.
- Encourages best practice in the treatment of older people in Wales.
- Reviews the law affecting the interests of older people in Wales.

Inquiry into Human Rights in Wales

1. I am pleased to see that the Committee is continuing the work of its predecessor in taking such an interest in human rights. As well as addressing the Committee's key areas of focus, I would like to make some general points about rights:
 - Rights have meaning and context at all times but it is when times are most difficult that they become most important
 - Rights have practical relevance to the delivery of public services at the strategic, service provider and individual levels
 - Older people value their rights and want the state to respect, protect and promote their rights, as well as addressing any breaches of their rights
2. These three principles underline my approach to the rights of older people and guide my work around respecting, protecting and promoting those rights. I believe these to be of relevance to all three areas of the Committee's inquiry.
3. My office was established with the United Nations Principles for Older Persons¹ at its heart, but even without this requirement to focus on rights, I would still champion this approach. I am a rights-based Commissioner and I have been clear that embedding rights into public service delivery improves outcomes, both for the individual and the public purse.
4. This rights-based approach has been advocated across the public sector in Wales and I note that you intend to apply it to your work going forward throughout the fifth Assembly².
5. It is widely regarded that there has been a distinctive devolved approach to equality and human rights in Wales, compared with the UK Government, as noted by the predecessor to your Committee³.

¹ United Nations (1991) United Nations Principles for Older Persons
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OlderPersons.aspx>

² Griffiths, J. (2017) Statement by the Chair on the Committee's inquiry into human rights in Wales; National Assembly for Wales;

³ Communities, Equality and Local Government Committee (2013) The Future of equality and human rights in Wales; National Assembly for Wales; p. 9

Wales was the first nation in the UK to apply Section 153 of the Equality Act 2010, which imposed further equality duties on the public sector, and I welcome that the Wales Act 2017 will further devolve elements of the Equality Act in relation to the Public Sector Equality Duty⁴.

Impact of the UK's Withdrawal from the European Union

6. The UK's withdrawal from the European Union is an unprecedented event and it is still too early to be clear about the impact that it might have on human rights, as well as on a number of other issues. The Houses of Parliament Joint Committee on Human Rights undertook a short inquiry into the human rights implications of Brexit⁵ and their report made clear that there will be both direct and indirect implications on human rights as a result of the UK's withdrawal.
7. It is possible that a so-called 'hard Brexit', which would remove the UK entirely from EU law, would result in a number of rights secured through EU directives and regulations being removed from individuals in the UK. The UK Government has proposed bringing forward a Great Repeal Bill that would embed all EU law into domestic law and then begin a process of repealing elements it does not wish to continue with. This task is so substantial that it risks removing rights from people unless there is robust analysis and scrutiny. I would require further information from the UK Government about the process that they will take forward in order to properly assess the impact on the human rights of older people in Wales.
8. There is also the issue that many of the rights that older people have under EU law have been built upon through the case law of the European Court of Justice. It is unclear whether this case law and precedent will be built into the new UK system and whether future case law will have an effect on European laws transposed across. Beyond the law, there are many networks and research communities across Europe that currently work on policy development and

⁴ Wales Act 2017; s. 44-45

⁵ Joint Committee on Human Rights (2016) The Human Rights implications of Brexit; House of Commons and House of Lords

implementation in relation to human rights; it is unclear whether the UK would still contribute towards this.

9. The Joint Committee on Human Rights noted that so far there had been a significant focus on guaranteeing workers' rights, currently protected under EU law, after the UK leaves the European Union but there had been little talk of the other rights that are protected under the Charter of Fundamental Rights of the European Union, such as those relating to discrimination⁶. Article 25 of the Charter recognises the right of older people "to lead a life of dignity and independence and to participate in social and cultural life"⁷. I am sure many older people would not wish to see rights such as this taken away from them.
10. I agree with the Joint Committee's recommendations that the UK Government should set out a full list of fundamental rights guaranteed by the EU before triggering Article 50 and that the Great Repeal Bill should be published in draft to allow full and proper scrutiny⁸. This scrutiny should include the voices of the devolved administrations and I would hope that the National Assembly for Wales will be able to scrutinise the draft Bill, especially in how it relates to the distinctive approach to equality and human rights in Wales.
11. In addition to these direct impacts on human rights in Wales, it is essential that the process of leaving the European Union does not lead to a culture of opposing all things 'European', most importantly in this context, the European Convention on Human Rights⁹. Although the Convention is a creation of the Council of Europe (a distinct organisation from the European Union), it is often discussed in close proximity to the debates around the UK's membership of the European Union. There have been calls from senior members of the UK Government, including the Prime Minister herself, for the UK to cease being a signatory of the Convention. This would be not just

⁶ Joint Committee on Human Rights (2016) The Human Rights implications of Brexit; House of Commons and House of Lords; p. 6

⁷ European Union (2012) Charter of the Fundamental Rights of the European Union

⁸ Joint Committee on Human Rights (2016) The Human Rights implications of Brexit; House of Commons and House of Lords; p. 6

⁹ Council of Europe (1950) Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) (ECHR)

detrimental to the rights of people living in Wales and the UK but to the UK's standing in the world.

12. After the UK leaves the European Union, the Convention will be the most significant instrument protecting the rights of individuals in the UK from change by the UK Parliament. For human rights measures to be most effective, they must be universal. Only by retaining the UK's commitment to the European Convention on Human Rights can rights can be protected once the supremacy of EU law is ended.

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

13. I have been consistently clear that I do not support the UK Government's proposed repeal of the Human Rights Act. Whilst the Act is not perfect, it has brought the human rights enshrined in the European Convention on Human Rights into the domestic courts of the UK and made justice more accessible to UK citizens.
14. There are some areas, for example the thresholds set to bring forward a case relating to older people living in care homes and the exclusion of some self-funders in care homes from protections under the Act, which I would like to see improvement on. I have made proposals for a piece of Welsh legislation that I believe will address these issues by introducing a rights-based approach to care and support in the first instance. Further details on this Bill are included in the next section.
15. The Human Rights Act, whilst universal in its application, protects some of the most vulnerable people in society from abuse, including older people living in care homes and people living with dementia. The Act has contributed towards improving the lives of older people in many ways by protecting their fundamental human rights, as set out in the examples below.

Article 3: The Right to be free from inhuman and regarding treatment

An 89-year-old man was taken to hospital suffering from dehydration

and constipation. His condition began to deteriorate. The hospital continued to administer painful treatment for his constipation, despite the fact that it caused him to constantly cry out in pain. On more than one occasion his family found him at visiting time, clearly in distress, with nothing covering him from his waist down. His children became increasingly distressed at the treatment of their father, but found the hospital to be unresponsive to their complaints. After 5 weeks in hospital the man died from pneumonia.

The family wrote to the chief executive of the hospital, with copies to the local MP and Age Concern, complaining about how their father had been treated. They pointed out that the hospital's treatment of their father could infringe his right not to be treated in an inhuman or degrading way. Sadly, this was too late for their father to receive more dignified treatment, but a detailed reply acknowledged many shortfalls, and stated that they would learn from this case.

Source: British Institute of Human Rights – Your Human Rights: A Guide for Older People¹⁰

Article 5: The Right to Liberty & Article 8: The Right to respect for family and private life, home and correspondence

P was a 91-year-old veteran of the Second World War. He had health problems, including dementia, but liked living in his own home where he sees friends and enjoyed looking after his cat. Some of P's friends became concerned that he was being financially abused and they were worried about his ability to look after himself.

His local council then took action which meant he was held in a locked unit for 17 months. Although the records said P went with them voluntarily, he was clearly reluctant to do so, and distressed. Facts are disputed but P is said to have been wearing his dressing gown at the time, without trousers or pyjama bottoms.

This case went to court, where it was decided that the council's

¹⁰ British Institute of Human Rights (2010) Your Human Rights: A Guide for older people; Accessed: <https://www.bihhr.org.uk/olderpeopleguide>

treatment of P amounted to breaches of his human rights to liberty and to respect for private and family life (Articles 5 & 8). These breaches were said to be made worse because had they not happened, P would have continued to live at home, where he was happy, with support.

P was awarded £60,000 from the council in damages for false imprisonment. But most importantly, he was able to return home, reunited with his friends and his cat. He now has the right care support package and is reportedly happy and contented.

Source: British Institute for Human Rights – ‘Getting justice for a war veteran unlawfully detained by the Council’¹¹

16. After many delays to proposals from the UK Government, it is unclear what the proposed British Bill of Rights would look like. However, from the evidence that is available, through the Conservative Party’s *Protecting Human Rights in the UK* policy document¹², there are three areas in particular that are most concerning.
17. The first relates to the desire within the reforms to ‘clarify’ some of the Convention rights. I fear that this will further qualify and weaken some of the rights contained in the Convention and make it more difficult to bring forward claims of older people’s human rights being abused.
18. Linked to this is the proposal to limit the use of human rights laws to the most serious of cases. Human rights must be universal by their very nature and should apply to all citizens, regardless of the perceived ‘severity’ of their case. We must show a commitment to upholding the principal of universality.
19. The policy document also outlines that if the UK Government was unable to reach an agreement with the Council of Europe that their proposed Bill of Rights was compatible with the European Convention on Human Rights, they would be left with no alternative but to

¹¹ British Institute of Human Rights (2015) Getting justice for a war veteran unlawfully detained by the Council; Accessed: <https://www.bih.org.uk/FAQs/veteranunlawfuldetention>

¹² Conservative Party (2014) *Protecting Human Rights in the UK*; pp. 5-7

withdraw from the Convention¹³. This approach is dangerous for the protection of human rights in the UK.

20. I have worked with colleagues from the British Institute for Human Rights¹⁴ to make clear statements of commitment to keeping the Human Rights Act and support calls from other organisations such as Liberty¹⁵ to fight for the Act to be retained.

21. Due to the distinctive approach taken to equalities and human rights in Wales, I would expect the UK Government to fulfil the commitment made by Sir Oliver Heald MP, Minister for Human Rights, to consult extensively with the devolved nations if plans are to be put forward to repeal the Act and introduce a British Bill of Rights¹⁶.

Public perceptions about human rights in Wales

22. My engagement with older people has shown me that whilst many older people do understand their rights and are keen to engage in discussions about them, there still remain a significant number of older people that do not see how human rights impact on their day-to-day lives.

23. I used my engagement with older people to advise the Welsh Government on their Declaration of Rights for Older People in Wales, published in 2014. The declaration uses the voices of older people to set out what is important to them, the rights that they have under existing legal instruments and how these rights may be being breached¹⁷.

24. What became clear to me through this process is that we must make rights real for people. Human rights are often viewed in an abstract manner but the reality is that they make a positive impact on people's lives and can help to improve outcomes for people using

¹³ Conservative Party (2014) Protecting Human Rights in the UK; p. 8

¹⁴ British Institute of Human Rights (2016) Human Rights Day Letter 2016; Accessed: <https://www.bihr.org.uk/human-rights-day-letter-2016>

¹⁵ Liberty (2015) Save Our Human Rights Act; Accessed: <https://www.liberty-human-rights.org.uk/campaigning/save-our-human-rights-act-0>

¹⁶ Joint Committee on Human Rights (2016) Oral Evidence: What are the human rights implications of Brexit? – Rt Hon Sir Oliver Heald MP, Minister for Human Rights; 23 November 2016. Q17

¹⁷ Welsh Government (2014) Declaration of Rights for Older People in Wales

public services. There has been a problem finding language that connects with people in a way which is real and meaningful to them.

25. For example, the duty to investigate deaths and allegations of torture, contained in human rights legislation, has led to the Hillsborough inquests, the investigations into child abuse in Rotherham and to finding responsibility when the police fail to treat calls on domestic violence seriously enough¹⁸. In Wales, we have seen human rights help to bring about investigations into the abuse on the Tawel Fan ward in North Wales¹⁹ and Operation Jasmine in care homes in Gwent²⁰. These incidents are not framed to the public in terms of human rights breaches and therefore fail to develop a positive perception of the impact of human rights.
26. That is why I have proposed a Bill to protect and promote the rights of older people in Wales. My proposals aim to create a duty for Welsh Ministers and public bodies in Wales to have due regard to the United Nations Principles for Older Persons when exercising their functions. In addition to this, Welsh Ministers would have a duty to promote the UN Principles across Wales to the public as well as to public authorities.
27. The Bill would enshrine a rights-based approach to public service delivery to older people across all sectors, which builds upon the duties in the Social Services and Well-being (Wales) Act 2014 and the Regulation and Inspection of Social Care (Wales) Act 2016 to pay due regard the UN Principles in relation to social care.
28. The Bill would mirror the provisions made for children and young people in the Rights of Children and Young Persons (Wales) Measure 2011, which placed a duty on the Welsh Ministers to pay regard to the UN Convention on the Rights of the Child. I have had positive discussions with the First Minister and the Minister for Social Services and Public Health about their commitment in principle to legislating in

¹⁸ McGregor, L. (2016) Reclaiming Human Rights; Rightsinfo.org; Accessed: <http://rightsinfo.org/reclaiming-human-rights/>

¹⁹ Hughes, G. (2016) Investigators probing care at scandal-hit Tawel Fan ward want to speak to families of 20 more patients, *Daily Post*; Accessed: <http://www.dailypost.co.uk/news/north-wales-news/another-20-families-potential-tawel-11897545>

²⁰ Hill, K. (2013) Care Bill: How the Human Rights Act can provide a safety net, *Age UK*; Accessed: <https://ageukblog.org.uk/2013/07/19/care-bill-how-the-human-rights-act-can-provide-a-safety-net/#more-3252>

this area. I hope to be able to comment on further progress of the Bill in the coming months.

29. As well as shifting the tone of discussions around rights, I would add my support to previous calls for the Equality and Human Rights Commission in Wales to be given further independence, as is the case in Scotland. An independent Commission would be able to do increased work on devolved policy areas and help inform the public about their rights, including the additional ones they have via the National Assembly for Wales. As your predecessors recommended, the Welsh Government and Equality and Human Rights Commission in Wales should draw up a concordat for joint working and move towards further independence for the Commission²¹.

Conclusion

30. There are many challenges ahead that will test our commitment to universal human rights in this country. There is no 'half-way' position when it comes to adopting a rights-based approach to public service: either you are committed to protecting and promoting human rights or you are not. It is important that the National Assembly for Wales and the Welsh Government show strong leadership and clear commitment to human rights in Wales.
31. The loss of rights enshrined in EU law, as well as the potential loss of rights in the Human Rights Act and ECHR, means that the Welsh Government must act to ensure that these rights are retained for the people of Wales. I welcome the commitment of the First Minister to block the repeal of the Human Rights Act²² but there must be proactive steps taken to protect and promote human rights in Wales.
32. I will continue to make the case for a rights-based approach to public service and to further enshrine the rights of older people in Welsh law. I hope that the Committee will take my evidence into consideration as you progress through your Inquiry.

²¹ Communities, Equality and Local Government Committee (2013) The Future of equality and human rights in Wales; National Assembly for Wales; p. 15

²² Deans, D. (2015) Welsh Government will do 'everything it can' to block repeal of the Human Rights Act, *Wales Online*; Accessed: <http://www.walesonline.co.uk/news/wales-news/welsh-government-everything-can-block-9279496>