

CAW122 Professor Alison Mawhinney, Professor of Human Rights Law, Head of Law School, Bangor University.

Consultation on the Curriculum and Assessment (Wales) Bill

Evidence submitted to the [Children, Young People and Education Committee](#) for Stage 1 scrutiny of the Curriculum and Assessment (Wales) Bill.

About you

Professor Alison Mawhinney, Professor of Human Rights Law, Head of Law School, Bangor University.

1. The Bill's general principles

1.1 Do you support the principles of the [Curriculum and Assessment \(Wales\) Bill](#)?

Yes

1.2 Please outline your reasons for your answer to question 1.1

(we would be grateful if you could keep your answer to around 1500 words)

[1] Opt-out provision with respect to the subject of 'Religion, Values and Ethics' (RVE)

The Bill does not contain an opt-out provision with respect to the new subject of 'Religion, Values and Ethics' (RVE). This absence significantly risks causing the Welsh Government to be in breach of the Human Rights Act 1998 and the European Convention on Human Rights. A breach of the latter would invalidate the relevant provisions under the Government of Wales Act 2006 and the Wales Act 2017.

In order to respect parental religious and philosophical convictions in the education and teaching of their children, the European Convention on Human Rights (Article 2 Protocol 1, Right to Education) holds that the possibility of withdrawing from a class must exist unless the State Party can prove that the information being conveyed in that class is done so in a manner which is 'objective, critical and pluralistic' (Kjeldsen v. Denmark, App. No. 5095/71, Eur. Ct. H.R. 6 (1976)).

For example, in the case of *Folgerø and Others v. Norway* [GC] 2007), a refusal to grant the applicant parents full exemption from 'Christianity, Religion and Philosophy' classes for their children in State primary schools gave rise to a violation of Article 2 of Protocol No. 1.

Here a programme that the Norwegian Government had believed to be objective, critical and pluralistic was demonstrated to have fallen short of this standard and, furthermore, aspects of it were found to have been interpreted and taught by a teacher in a manner that was not 'objective, critical and pluralistic' (it should be noted that the standard of 'objective, critical and pluralistic' applies not only to the content of the curriculum but also to the manner in which it is delivered).

The absence of an appropriate opt-out provision in the Norwegian legislation had thus caused Norway to breach the European Convention on Human Rights.

The Welsh Government should only remove a right to withdraw (which had previously existed with respect to the former religious education subject) if it is absolutely confident that the content of all RVE classes, and the manner in which it is delivered, will, in every school in Wales, always result in information being delivered and conveyed in an 'objective, critical and pluralistic' manner.

Given that schools in Wales will have a certain latitude in designing their own curricula (for example, the system of Agreed Local Conferences results in a variety of RVE programmes being taught throughout the country), and given current concerns regarding teachers' and teaching assistants' knowledge of the relevant human rights standards, it is strongly advisable to include a withdrawal provision in the Bill.

Currently, the right to withdraw (s 71, School Standards and Framework Act 1998) is an absolute (blanket) right. In other words, the decision to withdraw a pupil cannot be questioned by the school authorities nor can it be refused; it must be granted by the school. This is a historical legacy resulting from the rationale for the right's introduction in 1870.

This situation contrasts with the standard set by Article 2 of Protocol 1 of the European Convention on Human Rights where a request to withdraw can be refused where the information being conveyed is 'objective, critical and pluralistic', i.e., it is a limited right to withdraw.

For example, in the case of *Dojan and Others v. Germany*, sexuality education classes were compulsory for primary school pupils. The applicants were not permitted to withdraw their children and were fined when they prevented their children from taking part in the classes.

They took a case under Article 2 of Protocol 1 of the European Convention on Human Rights.

The European Court of Human Rights found that the sex-education classes at issue aimed at the neutral and objective transmission of knowledge regarding contraception, pregnancy and childbirth. Consequently, the refusal by the school to exempt the children from the class (regarded by their parents as incompatible with their religious convictions) was not in breach of Article 2 of Protocol No. 1.

It is therefore suggested that a prudent and wise step by the Welsh Government would be to include in the Bill a limited right to withdraw that reflected and included the standard of 'objective, critical and pluralistic' or, alternatively, retain the current opt-out provision but with statutory guidance issued to the same effect.

[2] Opt-out provision with respect to the subject of 'Relationships and Sexuality Education' (RSE)

The Bill does not contain an opt-out provision with respect to the subject of 'Relationships and Sexuality Education' (RSE).

However, the right to withdraw (as interpreted under the European Convention on Human Rights, Article 2 Protocol 1, Right to Education) applies to all subjects and activities that take place during the school day, not only to subjects related to the teaching of religion and ethics (Campbell & Cosans v. United Kingdom, App. No. 7511/76, 7743/76, 4 Eur. H.R. Rep. 293 (1982)) Jimenez Alonso and Jimenez Merino v. Spain; Appel-Irrgang and Others v. Germany).

For the reasons outlined with respect to RVE, it is highly advisable to include a limited right to withdraw with respect to RSE in the manner suggested in [1] to avoid a successful under the European Convention on Human Rights (Article 2 of Protocol 1, Right to Education), The Human Rights Act 1998 and to ensure that the Welsh Government legislates within the legislative competency set out in the Government of Wales Act 2006 and Wales Act 2017.

[3] The duty of daily acts of collective worship in schools

The Bill does not treat the current duty placed on all schools, including non-religious schools, to hold daily acts of collective worship.

The Welsh Government has chosen to view the duty as a non-curriculum matter and elected to treat the question of school collective worship as matter of school organisation

and governance. It thus argues that the question of collective worship falls outside the scope of the current Bill.

However, it is completely possible for the Government to choose to consider the duty of collective worship as a curriculum issue should it so wish. Indeed, the original duty was first introduced in the 1944 Education Act. It has been legislated upon by educational legislation since, for example, in the Education Act 1996 (Part V).

While the current duty to hold daily acts of collective worship could reasonably remain for Foundation and Voluntary controlled schools with a religious character, and Voluntary aided schools with a religious character, a decision to retain the duty for non-religious state schools substantially undermines the message that, the Curriculum and Assessments (Wales) Bill aims to deliver a 'new transformational curriculum' for all the children of Wales.

Retaining a duty of collective worship on non-religious state schools leads to legitimate concerns around the depth of authenticity that is attached by the Government to its stated key enabling objectives, in particular, the objective of creating 'strong and inclusive schools committed to excellence, equity and well-being'. Certainly, very many pupils and parents will find it hard to reconcile this aspiration of inclusive schools with a continued duty on non-religious schools to hold daily acts of worship.

Further, the duty sits uneasily and illogically with the pioneering move to introduce the new Religion, Values and Ethics subject, the first country in the United Kingdom to take such an ambitious step.

The decision as to whether to retain or remove the duty of collective worship in non-religious state schools is solely and utterly a policy decision. There are absolutely no human rights issues engaged in this decision. The question is simply: does Wales in 2020 want to retain a duty on non-religious schools to hold daily acts of collective worship?

The Curriculum and Assessments (Wales) Bill offers the perfect 'once-in-generation' opportunity to make this policy decision and remove the duty for non-religious schools through an amendment of Section 70 and 71 of the School Standards and Framework Act 1998.

School assemblies, that share and celebrate school news, achievements and aspirations, could continue to be held in non-religious state schools. It would be appropriate to issue guidance to advise schools that any activities occurring during such times must align with and promote the four purposes of the new curriculum, namely to support pupils to be

- Ambitious, capable learners, ready to learn throughout their lives;
- Enterprising, creative contributors, ready to play a full part in life and work;
- Ethical, informed citizens of Wales and the world; and
- Healthy, confident individuals, ready to lead fulfilling lives as valued members of society.

1.3 Do you think there is a need for legislation to deliver what this Bill is trying to achieve?

(we would be grateful if you could keep your answer to around 500 words)

Yes

2. The Bill's implementation

2.1 Do you have any comments about any potential barriers to implementing the Bill? If no, go to question 3.1

(we would be grateful if you could keep your answer to around 500 words)

See 1.2 above.

2.2 Do you think the Bill takes account of these potential barriers?

(we would be grateful if you could keep your answer to around 500 words)

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3. Unintended consequences

3.1 Do you think there are there any unintended consequences arising from the Bill? If no, go to question 4.1

(we would be grateful if you could keep your answer to around 500 words)

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4. Financial implications

4.1 Do you have any comments on the financial implications of the Bill (as set out in Part 2 of the [Explanatory Memorandum](#))? If no, go to question 5.1

(we would be grateful if you could keep your answer to around 500 words)

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5. Powers to make subordinate legislation

5.1 Do you have any comments on the appropriateness of the powers in the Bill for Welsh Ministers to make subordinate legislation (as set out in Chapter 5 of Part 1 of the [Explanatory Memorandum](#)). If no, go to question 6.1.

(we would be grateful if you could keep your answer to around 500 words)

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6. Other considerations

6.1 Do you have any other points you wish to raise about this Bill?

(we would be grateful if you could keep your answer to around 1000 words)

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