

Advice on the Welsh Government's proposed scrapping of the right to withdraw from Religious Education

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Summary

1. I am Professor of Public International Law at the University of Bristol. From 2002 to 2013, I was a member of the Organisation for Security and Cooperation in Europe Office for Democratic Institutions and Human Rights (OSCE/ODIHR) Advisory Council on the Freedom of Religion or Belief. In that capacity I helped prepare the Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools. I am also currently Chair of the United Nations Subcommittee for Prevention of Torture (the SPT). Between 2016 and 2018 I acted as a Commissioner on the Commission on Religious Education, established by the Religious Education Council of England and Wales to review the legal, education, and policy frameworks for religious education in England.
2. In October 2019, the Welsh Government launched a public consultation on three proposals intended to ensure 'access to the full curriculum for all learners'. These proposals relate to two key areas of the new *Curriculum for Wales*: Religious Education (RE) and Relationships and Sexuality Education (RSE). The consultation document included proposals to reform RE and RSE by removing the right parents currently enjoy to withdraw children from these subjects as well as another to rename RE to 'Religion, Values, and Ethics' in part to better reflect the fact that the subject must involve teaching pupils about a variety of religious and non-religious worldviews, including humanism.
3. This note focuses on the proposal to remove the parental right to withdraw from RE.

Current law on the RE curriculum and the right to withdraw

4. As the consultation document notes, at present, RE forms part of the 'basic curriculum' and, under Section 101(1)(a) of the Education Act 2002, all maintained schools in Wales have a statutory duty to deliver the subject to all pupils from reception age upwards.
5. Under the School Standards and Framework Act 1998 (SSFA), schools with a designated religious character, in particular voluntary aided schools, may carry out religious education 'in accordance with' the tenets of a particular religion (or denomination thereof). In schools without a religious character, RE is inspected by the Welsh schools inspectorate, Estyn, under section 28 of the Education Act 2005. However, in denominational schools religious education and the content of collective worship are inspected separately under section 50 of the same Act and are not included in section 28 inspections.

6. According to Section 71(1) of the SSFA:

‘If the parent of a pupil at a community, foundation or voluntary school requests that he may be wholly or partly excused from receiving religious education given at the school in accordance with the school’s basic curriculum, the pupil shall be so excused until the request is withdrawn.’

7. This right to withdraw has been a feature of the law on RE in England and Wales since 1870, and was enshrined in both the 1944 and 1988 Education Acts as a way to protect the right of parents to raise their children in accordance with their own religion or belief.
8. Relevant to the provision of RE and the right to withdraw from it is the European Convention on Human Rights (the Convention), including Article 2 of Protocol No. 1 (A2P1) of the Convention which stipulates that ‘in the exercise of any functions it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.’ The Convention is given direct effect in domestic law via the Human Rights Act 1998.
9. As acknowledged in the Welsh Government’s consultation document, ‘the second sentence of Article 2 of Protocol No. 1 implies... that the State... must take care that information or knowledge included in the curriculum is conveyed in an objective, critical, and pluralistic manner’ and is ‘forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions.’¹
10. Further, children enjoy their own right to freedom of religion or belief under the Convention, in accordance with Article 2 of Protocol 1’s right to education, Article 9’s right to freedom of thought, conscience and religion; article 14’s prohibition of discrimination, including on the basis of religion; and their own ability, as they get older, to make their own fully informed decisions on such matters, rather than being dependent on their parents (so-called ‘evolving capacity’). In addition, children also enjoy a right to freedom of religion or belief under the UN Convention on the Rights of the Child (1989) (UNCRC). Under the Rights of Children and Young Persons (Wales) Measure 2011, Welsh Ministers must, ‘when exercising any of their functions, have due regard to the requirements of’ the UNCRC.
11. Also of relevance in this context is the Equality Act 2010 and the accompanying public sector equality duty (PSED). According to the Equality Act, which applies in England, Scotland, and Wales, public authorities (including individual schools) cannot discriminate against individuals on the grounds of any of the ‘protected characteristics’. These characteristics include religion or belief. Under Section 149 of the Act, in the exercise of their functions, public authorities must also:

‘have due regard to the need to—

¹ As per *Folgerø v Norway* (2007) para. 84 <<http://hudoc.echr.coe.int/eng?i=001-81356>> [accessed 23 December 2019].

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.'

One way that public bodies can aim to meet their duties under the PSED is to carry out an equality impact assessment of any proposals. The Welsh Government has done so.

- 12. Although Section 89(2) of the Act explicitly excludes the *content* of the curriculum, the *delivery* of the curriculum is included, with Section 85(2)(a) of the Act stating that a school must not discriminate '*in the way it provides education for the pupil*' (emphasis added). Schedule 11 grants an exemption from this section to schools with a religious character, meaning they have some latitude to carry out RE in a way that accords with their belief systems.

The proposal

- 13. The proposal under consideration is to remove the right to withdraw from religious education when the new Curriculum for Wales is introduced, thus making such lessons compulsory for all pupils.²
- 14. The stated aim of the proposal is to facilitate the introduction of 'a fully inclusive education system where all learners have the equity of access that meets their needs and enables them to participate in, benefit from and enjoy learning.' As well as to give children and young people 'access to learning that supports them to develop tolerance, empathy, and understanding of different people, cultures, and communities.'³
- 15. According to the consultation document, this removal of the right to withdraw would apply to the subject in all schools.
- 16. To better acknowledge the fact that RE involves the exploration of 'spiritual, philosophical, moral, social, and cultural beliefs' and is inclusive of both religious and non-religious worldviews, the consultation document also includes a proposal to rename the subject 'Religion, Values, and Ethics'. The Welsh Government argues that this will ensure the name 'appropriately reflects teaching practice within the new curriculum'.⁴

Draft integrated impact assessment

² Welsh Government, 'Consultation on proposals to ensure access to the full curriculum for all learners' (2019) para. 32 <https://gov.wales/sites/default/files/consultations/2019-10/consultation-document-ensuring-access-to-the-full-curriculum_0.pdf> [accessed 13 December 2019].

³ *Ibid* Ministerial Forward.

⁴ *Ibid.* para. 46.

17. Sections of the equality assessment highlight the risk that RE may be delivered in a way which does not meet the requirement for pluralism. However, the Welsh Government argues that it '[does] not think that this concern is best addressed by having a right to withdraw' and that 'instead, the issue should be addressed through guidance and the role of the consortia and Estyn'⁵ with inappropriate practice being targeted at school level.

International case law

18. In the view of the Welsh Government, 'the parental rights in the second sentence of Article 2 Protocol 1 will be appropriately respected [even in the absence of the right to withdraw] if the RE... provided does not involve indoctrination and is provided in an objective, critical and pluralistic manner.'

19. As pointed out in the final report of the Commission on Religious Education⁶ – a landmark report which sought to establish a vision for the future of RE in England – there are a relatively small number of legal cases from the European Court of Human Rights that have engaged with the issue of parental objections to mandatory religious education or the right to withdraw.⁷ Nevertheless, the existing cases demonstrate just how difficult it is for lessons in religious education to comply with the requirement to be 'objective, critical, and pluralistic'. They also illustrate the way in which withdrawal needs to exist in order to act as an appropriate safety valve when lessons fail to meet this requirement, and show that the intended aims of such lessons (e.g. 'to develop tolerance, empathy, and understanding of different people, cultures, and communities') are not all that matter to the Court's assessment of whether the introduction of compulsory courses may be deemed lawful.⁸

20. To illustrate, in the case of *Folgerø v Norway* (2007), the Court ruled that a course in religion, philosophy, and ethics which sought to teach the subject in a non-confessional (non-indoctrinatory) manner but was weighted towards the Christian (Evangelical Lutheran) traditions of Norway was not delivered in a manner that could be deemed sufficiently 'objective, critical, and pluralistic'. The state's decision to only grant partial exemptions was, therefore, not in conformity with Norway's human rights obligations.

21. The ruling was made despite the fact that, much like the Welsh Government, the Court acknowledged the Norwegian State's avowed aim in introducing an integrated course in 'Christianity, other religions, and philosophies' had been to 'ensure an open and inclusive

⁵ *Ibid* p.23.

⁶ Commission on Religious Education, 'Final Report. Religion and Worldviews: the way forward. A national plan for RE' (2018) para. 135 <<https://www.commissiononre.org.uk/final-report-religion-and-worldviews-the-way-forward-a-national-plan-for-re/>> [accessed 31 December 2019].

⁷ Here it is worth pointing out that the most recent judgment on such a case (*Papageorgiou and Others v Greece* <[https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22001-197254%22\]](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-197254%22])> [accessed 13 January 2020]) was issued in 2019 and thus did not form part of the discussion in the Commission's report. However, as illustrated by the discussion below, it follows the trend of the Court finding in favour of the parents in cases where limitations are placed on the right to withdraw from such lessons.

⁸ Indeed, in the Commission's view, this case law gives rise to the conclusion that, despite the importance of fully inclusive, non-partisan education in religious and non-religious worldviews, the right to withdraw should be retained to protect the freedom of religion or belief of children and their families.

school environment, irrespective of the pupil's social background, religious creed, nationality or ethnic group'. As well as to open up the school as 'a meeting place for different religious and philosophical convictions where pupils could gain knowledge about their respective thoughts and traditions'.⁹ This demonstrates that the 'duty to take care that information or knowledge included in the curriculum is conveyed in a pluralistic manner'¹⁰ may not be satisfied even in cases where the state's overarching aim is not, in itself, one of 'indoctrination'.¹¹

22. The course in question, Christianity, religion, and philosophy (*kristendomskunnskap med religions-og livssynorientering* or KRL), had two key aspects. The first was 'knowledge based' and involved learning *about* Christianity as well as other religions, philosophies, and worldviews. No exemption was permitted from this aspect of the course. The second was 'activity based'. This involved participation in activities which would generally be interpreted as religious in nature, such as reciting prayers or psalms, learning religious texts by heart, participating in religious plays and so on for which exemptions on the basis of religion or belief were granted. As paragraph 62 of the Court's judgment puts it, 'a cornerstone in the partial exemption arrangement was the separation between normative and descriptive knowledge. The pupils could be exempted from taking part in certain activities, but not from knowing the content of the activities or tuition in question. They could be exempted from reciting the Bible, singing songs and saying prayers, etc., but not from knowing what was recited, sung, prayed, etc.'¹²
23. In *Folgerø*, the Court's decision turned on the view that it was not possible to entirely separate participation in religious activities from the transmission of knowledge about them in the context of the religion, philosophy, and ethics curriculum and so it should have been possible to request an exemption from the whole subject. This position was borne out in Government evaluations of the subject which showed that teachers had not adequately understood the distinction between knowledge and participation and thus risked subjecting pupils to unwanted religious influence or indoctrination.¹³
24. A recent European Court of Human Rights judgment involving conscience-based exemptions from RE in Greece (*Papageorgio and Others v Greece* (2019)) similarly found that it is necessary for states 'in so far as possible, to avoid a situation where pupils face a conflict between the religious education given by the school and the religious or philosophical convictions of their parents.'¹⁴ And the case of *Zengin v Turkey* (2007) found that a course in religious instruction that focused on one interpretation of the Islamic faith but excluded

⁹ *Folgerø v Norway* (2007) para. 88 <<http://hudoc.echr.coe.int/eng?i=001-81356>> [accessed 31 December 2019].

¹⁰ *Fox v Secretary of State for Education* (2015) <<https://www.judiciary.uk/wp-content/uploads/2015/11/r-fox-v-ssfe.pdf>> [accessed 13 January 2020].

¹¹ *Zengin v Turkey* (2008) <[https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-82580%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-82580%22]})> [accessed 13 January 2020].

¹² *Folgerø v Norway* (2007) para. 62 <<http://hudoc.echr.coe.int/eng?i=001-81356>> [accessed 31 December 2019].

¹³ *Ibid.*

¹⁴ *Papageorgio and Others v Greece* (2019) <<http://hudoc.echr.coe.int/eng?i=001-197254>> [accessed 13 January 2020].

discussion of another interpretation – the Alevi faith – did not adequately satisfy the requirement that the teaching be ‘objective, critical, and pluralistic’ enough to warrant a restriction on exemptions.¹⁵

25. Ultimately then, the ‘duty to take care that information or knowledge included in the curriculum is conveyed in a pluralistic manner’ refers not only to what is on that curriculum, or the overarching aim of the state in including it, but also how it is delivered.
26. The removal of the right to withdraw has the potential to affect all non-religious people and all those who are religious but who or whose children attend religious schools of a different religion or denomination. This is particularly acute because many families have little real option but to send their child to a local school, and for many, particularly those living in rural areas, this school may well have a character that does not reflect their own beliefs.
27. The impact assessment notes that, under Article 14 of the UNCRC, ‘children have the right to think and believe what they want and to practice their religion, as long as they are not stopping other people from enjoying their rights.’ It also acknowledges that ‘there is an argument for retaining the right to withdraw but transferring to the learner at an appropriate point in their maturity.’¹⁶ This possibility is nevertheless dismissed without further discussion.

Conclusions

28. International case law suggests that, owing to the difficulty of delivering an RE curriculum that is genuinely ‘objective, critical and pluralistic’, it is very difficult – arguably impossible – for schools to be able to offer RE in a manner which is not subject to challenge. It is, then, best to preserve the right to withdrawal to cater for those instances in which curricula, even those designed with the best of intentions, are considered by some parents or children to fall short of the objectivity and pluralism to which they are entitled.
29. For these reasons, the right to withdraw should be retained.
30. If the Welsh Government is concerned about parents withdrawing their children from RE (or Religion, Values, and Ethics) for reasons of prejudice, then it could consider other means to address this problem. For instance, the Commission on RE recommended that the UK Government should conduct a thorough review of the right to withdraw from religious education and provide legal clarification on the scope of parents’ legal rights in this regard. It also said it should work with school leaders and other stakeholders to develop a code of good practice for managing withdrawal, and collect annual data on how the right is being

¹⁵ *Zengin v Turkey* (2007) <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-82580%22%5D%7D>> [accessed 13 January 2020].

¹⁶ Welsh Government, ‘Integrated Impact Assessment: Curriculum for Wales 2022 – Ensuring Access to the Full Curriculum’ (2019) p.18 <<https://gov.wales/sites/default/files/consultations/2019-10/integrated-impact-assessment-ensuring-access-to-the-full-curriculum.pdf>> [accessed 31 December 2019].

used at school level.¹⁷ Crucially, this work should be done before any changes are made to the overarching law to ensure that the rights of individual pupils and their families are not jeopardised in the process.

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¹⁷ Commission on Religious Education, 'Final Report. Religion and Worldviews: the way forward. A national plan for RE' (2018) para. 149 <<https://www.commissiononre.org.uk/final-report-religion-and-worldviews-the-way-forward-a-national-plan-for-re/>> [accessed 31 December 2019].