

HR 10

Ymchwiliad i hawliau dynol yng Nghymru

Inquiry into Human Rights in Wales

Ymateb gan: Dr Simon Hoffman

Response from: Dr Simon Hoffman

**National Assembly for Wales, Equality, Local Government and Communities Committee  
Inquiry into Human Rights in Wales**

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Expertise: Human rights, in particular social and economic rights, children's rights and rights of older people; implementation of human rights in multi-level governance, especially Welsh devolution. Member of the Welsh Government Children's Rights Advisory Group, Budget Advisory Group on the Economy, and UN Human Rights Stakeholder Group. I have provided consultancy services, advice and support on human rights issues to the Welsh Government, the Children's Commissioner for Wales, and the Older People's Commissioner for Wales.

**General Comments**

1. I welcome the opportunity to contribute to this inquiry. I submitted evidence to the Communities, Equality and Local Government Committee inquiry in 2013 on *The future of equality and human rights in Wales*. On that occasion the Committee noted my submission on the emergent possibility of 'Welsh Human Rights Law' (report, paragraph 47). The need for Welsh human rights law has now become a priority. The present inquiry comes at an opportune but depressing time for human rights: too often the political agenda seems driven by populism and deeply rooted human rights scepticism, and in the case of some politicians and elements of the media, ill-informed antagonism.
2. The Committee's terms of reference are intimately linked to the wider human rights landscape in Wales, and the UK. Most significant in this context is the threat to repeal the Human Rights Act 1998 (HRA), and now the possibility that the government will withdraw the UK from the European Convention on Human Rights (ECHR). Until recently withdrawal from the ECHR would have been unthinkable for a country that has contributed so much to the European human rights project. The EU referendum was not about the HRA, or the ECHR, but has seemingly encouraged those who want to remove human rights protections in the UK. Withdrawal from the ECHR would be highly regressive, and although the threat seems to have abated for the time being, the fact that it is even being contemplated is regrettable. Repeal of the HRA and/or withdrawal from the ECHR would deny people in Wales a set of rights not otherwise protected in UK law. Although these rights could be re-stated in a UK Bill of Rights (UK BOR), there is no certainty that any future legislation would re-instate the mechanisms established by the HRA and the ECHR to hold politicians and public bodies to account for breaches of individual human rights. Withdrawal from the ECHR would deny people in Wales access the European Court of Human Rights, a human rights system which has developed to a point of expertise and sophistication admired across the world.
3. With the above in mind it is very welcome that the Chair's Statement evinces a commitment to make human rights an integral part of the Committee's work. I fully endorse the view that human rights is a 'broad and complex' topic. Human rights are cross-cutting, touching on all public policy agendas. A human rights approach to law and policy in Wales is imperative to meet the objectives of resilient communities, equality, well-being, social cohesion and global responsibility (Well-being of Future Generations (Wales) Act 2015). If these objectives are to become a sustainable reality for everyone in

Wales there need to be further developments in the framework of Welsh legislation to embed a human rights approach in law and policy. Existing frameworks include: The Rights of Children and Young Persons (Wales) Measure 2011 (the 'Measure'); and, Section 7 of the Social Services and Well-being (Wales) Act 2014 (on children and older people) (SSWBA). I will comment further about the options for legislation below.

4. If Wales is to become a nation that fully respects and guarantees human rights for all then more needs to be done to educate its people about human rights. The Welsh Government should take the lead in developing and promoting a counter-narrative to the negative, divisive and harmful discourses of fear and misunderstanding that so often undermine public awareness and understanding of human rights in the UK and in Wales. Public education on human rights needs to be made a priority.
5. It is vital to acknowledge the part played by schools in the human rights project. In this respect the Committee may wish to take notice of a report recently prepared by the Wales Observatory on Human Rights of Children and Young People following a conference, *Brexit: Its implications for children in Wales*, held at Swansea University (19<sup>th</sup> January 2017). Children and young people, stakeholders, and academics came together to discuss Brexit and make recommendations to the Welsh Government on children's rights in a post-Brexit Wales. An insightful contribution from one of the young people present gained general approval. The contributor noted the need for a different approach to education to promote informed issue-based critical thinking on subjects such as ethnicity, religion, migration and community relations. This was formulated into a recommendation to the Welsh Government to:

*'Undertake curriculum reform to ensure that today's CYP [children and young people], and CYP of the future, are properly educated about issues which proved divisive during the run-up to Brexit; including issue based education on issues such as immigration.'*

6. Two further recommendations to the Welsh government arising from the conference which the Committee may wish to note are:

*'Provide a 'social guarantee' to all people in Wales, including migrants, asylum seekers and refugees; this should guarantee that all people in Wales will be entitled to rights regardless of their country of citizenship.'*

And;

*'Take a lead on positive narratives about migrants, asylum seekers and refugees.'*

7. These recommendations, if accepted, would support a progressive approach to human rights in Wales generally, not just for children. The report is available here: <http://bit.ly/2jz82>

### ***The impact of the UK's withdrawal from European Union on human rights protection in Wales***

8. I am perplexed at the lack of information about the possible impacts of the UK's withdrawal from the EU. Whether you take an optimistic or pessimistic view, it is apparent that much of what is now being discussed is speculation. This is equally true in the field of human rights. Some work has already been carried out on the consequences of the UK's withdrawal from the EU (see for example, The Joint Committee on Human Rights Report on *The Human Rights implications of Brexit*), but more is needed in order to determine the full human rights implications, and on the appropriate law and policy responses, including in Wales.
9. What can be said with certainty is that the EU has increasingly sought to promote human rights as an aspect of its work. EU foundational documents have been amended to incorporate human rights as part of the EU constitution. The Consolidated Version of the Treaty of the EU refers to a union based on '...principles of liberty, democracy and respect for human rights and fundamental freedoms', and the EU has committed to the ECHR. This commitment is supported by the work of European Commission

which administers significant funding for research, and to support collaboration and coordination and sharing of good human rights practice, as well as projects which promote human rights (including in relation to challenging issues such as asylum and migration, combating xenophobia, and poverty).

10. It is worth noting that the European Commission prioritises economic and social issues. This class of rights is recognised in the EU Charter of Fundamental Rights. The UK is party to several UN Conventions which refer to economic and social rights; including, the International Covenant on Economic and Social Rights (ICESCR) and the UN Convention on the Rights of the Child (UNCRC). Despite this, economic and social rights are not well protected in UK law. As austerity has demonstrated, these rights can be given low priority in government policy, and the UK courts are almost powerless to provide a remedy. This means that international human rights such as the right to work (ICESCR Art. 6), or the right to an adequate standard of living (ICESCR Art.11 and UNCRC Art 27), are often denied to significant numbers of people in the UK and in Wales. Wales is a net beneficiary of EU funds, and much of the available EU funding is directed toward projects that aim to tackle poverty, worklessness, and disadvantage. Loss of EU funding without full replacement would have a disastrous impact on the social and economic human rights of many of Wales' most disadvantaged communities and people. In addition, withdrawal from the EU could mean alienation from networks and non-financial resources supported or coordinated by the EU which contribute human rights knowledge and expertise to benefit communities and people in Wales (e.g. Eurochild, European Anti-Poverty Network, EU Fundamental Rights Agency).
11. One group which will almost certainly suffer as a consequence of the UK's withdrawal from the EU unless immediate protective action is taken is children in Wales. EU policies cover issues such as child poverty and social exclusion. The high rate of child poverty in Wales means that EU Structural Funds are vital to support parents and families in communities blighted by poverty to provide an adequate standard of living for children, and to ensure access to key services such as health and education.
12. The EU has also been a leading authority and advocate on child safety and child protection. This includes legislation and policy in areas such as: family law; protection of children against abuse and exploitation; child pornography; child trafficking; asylum and immigration, and unaccompanied minors. These are all issues closely linked to children's rights under the UNCRC. The EU has also set up a number of mechanisms to protect children: EUROJUST is a judicial body responsible for co-ordinating investigations and prosecutions across EU Member States, focusing on organised criminal activity that crosses borders, particularly human trafficking; EUROPOL is a law enforcement agency that facilitates co-operation between investigative authorities in Member States with a view to combating serious crime, including crimes involving children; the European Arrest Warrant provides a fast-track extradition procedure enabling national authorities to secure extradition between EU Member States, which has assisted in bringing to justice perpetrators of crimes against children; and, ECRIS which is the European Criminal Records Information System, an efficient exchange of information on criminal convictions between Member States, including convictions involving offences against children. Withdrawal from the EU and exclusion from these mechanisms could have highly damaging impacts for vulnerable children, including the most serious violation of children's rights through exploitation and abuse.

### ***The impact of the UK Government's proposal to repeal the Human Rights Act 1998 and replace it with a UK Bill of Rights***

13. The Commission on a UK BOR failed to identify shortcomings in the HRA, or its application by the Courts. The Commission's terms of reference included '[to investigate a BOR that] incorporates and builds on all our obligations under the ECHR, [and] ensures that these rights continue to be enshrined in UK law'. However, at this stage there is nothing to confirm that a UK BOR would provide the same guarantees as found in the ECHR, or the same effective mechanism for enforcement set out in the HRA. There should be deep concern about the underlying motivation for a UK BOR. The minority report by

BOR Commissioners drew attention to the possibility that a UK BOR is seen by some as a path towards withdrawal from the ECHR. As I have commented above, withdrawal from the ECHR would have a significant impact on human rights protection in the UK and in Wales.

14. Repeal of the HRA would have particular consequences for the framework of law and policy making in Wales. Section 81 and section 108 of Government of Wales Act 2016 (GOWA 2006) put off-limits any Ministerial action or Welsh legislation incompatible with the 'Convention'. The Convention is not the ECHR but a redacted version included in the HRA by Schedule 1 (GOWA 2006, s.158). If the HRA is repealed its Schedule 1 would fall away meaning that the GOWA 2006 limitations on powers and competences, which are based on a legitimate concern to protect human rights, would have nothing on which to bite.
15. Once enacted the Wales Bill will have consequences for human rights (assuming it is enacted as presently drafted). The Bill substitutes section 108 of the GOWA 2006 with a revised section 108A (section 3, Wales Bill). This puts 'Convention' incompatible legislation beyond the competence of the NAW; and puts beyond the powers of Welsh Ministers any function which would be beyond the competence of the NAW to enact or to approve by enactment (Wales Bill section 19, introducing section 58A GOWA 2006). The definition of the Convention for the purposes of these limitations is as in the existing GOWA 2006 (i.e. linked to the HRA, see immediately above for comments).
16. The Wales Bill also amends Schedule 7 of the GOWA 2006 which establishes the legislative competences of the NAW. The current schedule is substituted by a revised Schedule 7A which specifies competences reserved to the UK Parliament (Wales Bill, Schedule 1). 'Observing and implementing international obligations, [and] obligations under the Human Rights Convention' are expressly stated as not reserved. In this case the Human Rights Convention is defined as the ECHR and its Protocols (ibid). Once the Wales Bill is enacted the Welsh Ministers will have power to introduce legislation, and the NAW will be competent to enact legislation in the field of human rights generally (provided this is not incompatible with the UK's international human rights obligations by treaty). Presently the NAW can only legislate to implement human rights if a competence can be found under Schedule 7 of the GOWA 2006. This is not straightforward in the case of human rights generally, as opposed to human rights for certain groups, e.g. children. The Wales Bill will therefore enlarge human rights powers and competences in Wales.
17. In order to safeguard human rights in Wales against the possibility of regression through repeal of the HRA or withdrawal from the ECHR the Welsh Government should prioritise draft legislation to protect and promote human rights. The Welsh Government should examine options for legislation that protects human rights by placing appropriate limitations on the powers of Ministers, on the competences of the NAW, and on the conduct of public bodies, as well as legislation that promotes better implementation of human rights. Wales already has an established precedent for a legal mechanism to promote human rights. This is the 'due regard' model adopted in the children's rights Measure and section 7 of the SSWBA. This model could readily be used for Wales-only governance legislation, a 'Human Rights (Wales) Act', to promote human rights in Wales.
18. The Committee will be aware of a call by the Older People's Commissioner for Wales (OPC) to enact an Older People's Rights (Wales) Act. This would require the Welsh Ministers to have due regard to the UN Principles for Older Persons. I am pleased to have contributed toward the OPC's work in this regard as a member of an expert group commenting on the options for legislation. The group has concluded that the 'due regard' model would be an appropriate mechanism to promote older people's human rights. The NAW already has competence to enact such legislation. The Welsh Government should introduce draft legislation at the earliest opportunity.

## **Public perceptions about human rights in Wales, in particular how understandable and relevant they are to Welsh people**

19. I am unable to comment authoritatively on public perceptions of human rights in Wales, or on how human rights may be understood by Welsh people. I am in no doubt that awareness and understanding of human rights in Wales would be improved if the Welsh Government were to take a proactive approach to human rights based public education.
20. Human rights are relevant to everyone in Wales. My experience suggests that the concept of 'having rights' is well understood. Where people are given appropriate information about their actual rights these are readily appreciated and understood. Human rights and human rights legislation, unlike a lot of legislation, is almost invariably drafted in plain English, avoiding legal jargon or confusing terminology.
21. There is a body of evidence to confirm that human rights are relevant for people in the UK, including in Wales. Cases on human rights have led to improvements in social care, health care, privacy, the treatment of older people and children in care settings, and have underpinned social advances for lesbian, gay and transgender people, and people with a disability, and have helped clarify the situation of terminally ill patients.
22. Wales has already made significant progress on making children's rights relevant to legislation and policy making. My role involves working with the Welsh Government and the public sector in Wales (e.g. the police, local authorities and health boards), on a children's human rights approach to service planning and delivery. Commitments made by a number of Welsh public sector institutions to take account of the UNCRC are having an impact service planning and delivery for children and young people. Children's rights are therefore very relevant to children in Wales as they inform policy making which in turn underpins the services children rely on.
23. National human rights institutions are key to making human rights relevant. The Equalities and Human Rights Commission (EHRC) is an important institution in this regard. The way the EHRC operates in Wales appears out-of-step with developing devolution. The EHRC is responsible for safeguarding and enforcing equalities and human rights in Great Britain. The Commission in Wales works with a Wales Directorate. The overall purpose of the Commission in Wales is to ensure that policy made by the UK government reflects the needs of Wales. It would be preferable to have an independent Wales EHRC with the objective of promoting and protecting human rights in Wales, in order to make rights more relevant to people in Wales. A Wales EHRC needs to be fully responsible for, and properly empowered to ensure that policy and legislation made in Wales reflects the human rights and equality needs of Wales.

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