

Cynulliad Cenedlaethol Cymru / National Assembly for Wales

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol a'r Pwyllgor Materion Allanol a Deddfwriaeth Ychwanegol / The Constitutional and Legislative Affairs Committee and the External Affairs and Additional Legislation Committee

Ymgynghoriad ar Fil yr Undeb Ewropeaidd (Ymadael) a'i oblygiadau i Gymru / The European Union (Withdrawal) Bill and its implications for Wales

EUWB 05

Ymateb gan Dr Simon Hoffman / Evidence from Dr Simon Hoffman

Submitted by: Dr Simon Hoffman, Associate Professor, Swansea University, Law and Criminology, Co-coordinator Wales Observatory on Human Rights of Children and Young People. **Expertise:** Human rights, children's rights, rights of older people; human rights and devolution. **Membership:** Welsh Government Children's Rights Advisory Group and Human Rights Stakeholder Group; Wales UNCRC Monitoring Group. **All opinions are my own.**

Introduction

1. Human rights are a constitutional bedrock of advanced nations and are integral to the UK's constitutional arrangements. The Government of Wales Act 2006 (GWA 2006) requires the Welsh Government (WG) and the National Assembly for Wales (NAW) to act in compliance with the UK's EU obligations, its international human rights obligations, and the European Convention on Human Rights (ECHR). The EU context is significant as human rights have become embedded in EU framework legislation, and regulation.¹ Non-violation of human rights is one obligation of government, another is promoting rights. The latter has been progressed by the WG and the NAW through policy and legislation: e.g. Wales has taken a lead in the UK by incorporating children's rights in Welsh law through the Rights of Children and Young Persons (Wales) Measure 2011; and, the Well-being of Future Generations (Wales) Act 2015 promotes core human rights values (equality, non-discrimination, dignity, social-cohesion, well-being).²

¹ Consolidated Treaty on the Functioning of European Union.

² Other examples of legislation influenced by or promoting human rights are: the Social Services and Well-being (Wales) Act 2014, which imposes a duty on social services authorities to have due regard to children's rights and older people's rights; and the Housing (Wales) Act 2014 provisions on homelessness, which go

The Measure has imposed new duties on the WG but has also provided enhanced opportunities for scrutiny by the NAW, the Children's Commissioner for Wales, and civil society stakeholders.

2. Responsibility for entering into or withdrawing from international human rights treaties is vested in the UK Government. Whilst this is a limitation on government powers in Wales, my recent evidence to the Equality, Local Government and Communities Committee Inquiry into Human Rights included, at paragraph 14:

'When the revised Schedule 7A [*of the Wales Act 2017*] is in force 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 ... and to observe and implement treaties, including human rights treaties to which the UK is a State party, and the ECHR. ... The Wales Act enlarges human rights powers and competences in Wales.'

3. I am concerned that the UK government's proposals for exiting the EU have the potential to undermine progress on human rights in Wales. I am particularly concerned about the issue of delegation of powers and their control.

The Delegation of Powers and their Control

4. The UK government, in *Legislating for the UK withdrawal from the EU*, has suggested that 'EU common frameworks' which presently support regulatory coherence across the UK will need to be replaced by 'common UK frameworks' and new rules governing the operation of the UK's 'single market'.³ It is telling that the UK government has identified the need for common frameworks to protect business freedom and trade, but makes no mention of frameworks to protect social rights or human rights. This omission is, in my view, lamentable and indicative of a failure by the UK government to recognise the value of social protections provided by EU regulation.

further than UK legislation to promote the right to housing for vulnerable groups, and to protect a child's right to an adequate standard of living.

³ UK Government, 2017, *Legislating for the UKs withdrawal from the EU*, Part 4 generally and 4.3.

5. The WG, in *Brexit and Devolution: Securing Wales Future*, suggests a 'shared governance approach' to the development of common policy across the UK when we exit the EU (*Brexit and Devolution*, p.14). The difference in terminology between the UK government and the WG is significant. 'Common UK frameworks' suggests a focus on outcomes, whilst 'a shared governance approach' recognises the importance of process and participation. The WG, and the NAW need to be fully engaged in the development of common UK frameworks and the exercise of powers under the EU (Withdrawal) Bill; therefore, a focus on process is essential. The WG has noted the potential that 'Whitehall and Westminster' will have 'exclusive responsibilities in respect of UK-wide policy frameworks required after EU exit' (ibid, p.10). There is a lack of clarity about how responsibility for policy in areas previously regulated by the EU will be allocated when we leave the EU. The EU (Withdrawal) Bill does not resolve this issue and confirms the WG's concern. In my view, the UK government has signalled a centralising agenda through the EU (Withdrawal) Bill and statements before and since the Bill was published, and through its lack of attention to process. A 'land grab' of powers is a real possibility. This would be disastrous for human rights in Wales given the UK government's attitude on the topic.

6. If the UK government appropriates control over the development of common UK frameworks on matters which touch on human rights it is likely that policy outcomes will be less progressive than if the WG were fully engaged, and the NAW were given a scrutiny role. It is not unreasonable to suggest there may be regression in human rights in some areas such as: environmental protections, worker rights, protection of refugees and asylum seekers, and child rights. These are issues where the EU currently plays a leading policy and regulatory function, and where the UK may be seen as a reluctant participant in the current EU policy agendas. In addition, an important function of the EU is to channel funds to support projects which have human rights impacts (e.g. tackling poverty, or education around asylum and migration, notably from the European Social Fund). Were the UK government to impose common UK frameworks which fail to give

priority to social issues currently prioritised in Wales, it is unlikely that funding will be available to deal with these issues.

7. The WG proposal for a shared approach to UK governance is in accordance with the principle of subsidiarity (ibid, p.14), allowing the possibility that Wales could go further than 'framework imposed requirements' (ibid, p.17). The WG has identified 'compliance with international standards' as one area where a shared governance framework might be relevant (ibid, p.15). This would include human rights. The blueprint for common UK frameworks is already established by the UK's international human rights obligations. However, the often hostile rhetoric from key members of the UK government on human rights, the ECHR and the Human Rights Act 1998, and the conduct of Brexit to date, give little confidence that protection or promotion of human rights will be a feature of any common UK framework. The level of debate on immigration, and the UK government's overriding concern for the interests of business and trade, could see backtracking on advances in human rights protection in discrete policy areas presently regulated by the EU (protections for asylum seekers, consumers and workers are obvious examples).
8. In my view, in order to protect human rights in Wales it is vital that the WG be given a meaningful role in establishing common UK frameworks; these need to be developed in a way that prioritises compliance with, and promotion of human rights. I agree with the WG (ibid) that the principle of subsidiarity should govern the development of these frameworks, as well as the development of policy and regulation thereafter. The UK government should not stand in the way of Wales' elected representatives if they seek to go beyond framework requirements. In addition, where there is uncertainty about competence the NAW should be confirmed as the institution responsible for legislation to give effect to, or go beyond, framework requirements. Any interference by the UK government with the exercise of such competences should be limited only as provided for in the devolution statute, and should not be enlarged directly or indirectly by common frameworks or UK legislation. As has been identified by the inquiry, the boundaries of the NAW's competences

under the reserved model are far from clear. It would be contrary to the principle of subsidiarity, and to the underpinning rationale for devolution, if the UK government were to use the imperative of regulatory coherence within the UK to further an agenda of centralisation. In many areas of policy touching on human rights the WG and NAW have demonstrated a more progressive approach than the UK government. Not only would it be consistent with the notion of devolution (as supported by the people of Wales), it would be better for the people of Wales if Welsh institutions were given responsibility for making new policy or regulation consequent on the UK's exit from the EU. The WG and NAW are more likely to pay attention to, and respond positively to issues which touch on the fundamental rights of people in Wales. An example is in the field of children's rights.

On Children's Rights and Scrutiny

9. The Child Rights Measure has provided a new basis for scrutiny of the WG's decisions and actions. Uniquely in the UK the Measure provides the NAW with a basis on which to examine how policy or legalisation prejudices or gives effect to children's human rights. This would provide a foundation for scrutiny of the WG's contribution to development of common UK frameworks (the exercise of a Ministerial function), or any new policy or regulation in Wales consequent on the UK's exit from the EU.

10. By way of example, on 20th July 2017 Llyr Gruffydd AM asked the Cabinet Secretary whether the WG had carried out a Child Rights Impact Assessment (CRIA) on the UK's withdrawal from the EU (Record, 20/7/17 at [92]). This is a highly relevant and probative question, and one which should also be answered by the UK government. Unfortunately, the question would have less traction in Westminster, as CRIA is only embedded as an aspect of legislation and policy in Wales. In any event the answer would be 'no'. To say that children and children's interests have been marginalised in the Brexit process is an understatement: quite simply, children's voices have not been heard, and children's interests have not featured as an issue for the UK government. There is no suggestion that CRIA would be applied by the UK government when developing common UK frameworks, or relevant

UK legislation. The replacement of EU regulatory frameworks with common UK frameworks will affect children in Wales in many areas. It would be in the best interests of children in Wales if the WG and NAW were the institutions responsible for developing and scrutinising new policy and legalisation to apply in Wales consequent on the UK's exit from the EU. The WG would be under a duty to have due regard to children's rights in these processes, CRIA would apply, and the NAW would have a rights-based rationale for scrutiny. In addition, the WG has allocated funding to take the views of children on EU transition issues,⁴ making it more likely that their interests will be taken into account.

⁴ <http://gov.wales/about/cabinet/decisions/2017/jul-sep/plant/cs1767/?lang=en>