

Ymgynghoriad ar yr hawl i dai ddigonol
Consultation on the right to adequate housing
Ymateb gan: Yr Athro Simon Hoffman
Response from: Professor Simon Hoffman

Local Government and Housing Committee

The Right to Adequate Housing

Submission: Professor Simon Hoffman, Swansea University

My work focusses on incorporation of international human rights through devolved law-making and policy. I contributed expertise to the civil society campaign to incorporate the UN Convention of the Rights of the Child (UNCRC) in Welsh law via the Rights of Children and Young Persons (Wales) Measure 2011 (Child Rights Measure). More recently I acted in an advisory capacity to organisations working on UNCRC incorporation in Scotland and in Jersey. In 2020-21, I was Principal Investigator and co-author of a report for the Welsh Government on options to strengthen and advance equality and human rights in Wales. I am a member of a Legislative Options Working Group convened to make recommendations on further incorporation of human rights in Wales. In 2019, I authored a Feasibility Report on incorporation of the Right to Adequate Housing (RAH) under article 11 of International Covenant on Economic Social and Cultural Rights (ICESCR) in Welsh law. As part of the 'Back the Bill' campaign, I prepared the draft Bill which is the focus of the campaign.

Initial Points

When discussing incorporation of any international human right into domestic law in Wales it should be recalled:

1. The UK has voluntarily signed and ratified human rights treaties, including ICESCR, under which it is obliged to introduce legislative and other measures to implement the rights guaranteed.¹ This applies to the state at all levels, including devolved government.
2. The Committee on Economic Social and Cultural Right (CommESC), as well, human rights experts and civil society organisations have confirmed that a key step toward effective implementation of ICESCR is incorporation into domestic law.²
3. The Senedd has competence to incorporate the RAH in Welsh law. Particular reference may be made to the Government of Wales Act 2006, Schedule 7A, which lists reserved matters. Paragraph 10 refers to 'Foreign Affairs etc' as reserved; however, paragraph 10(3) expressly excludes 'observing and

¹ Article 2(1) ICESCR.

² Committee on Economic, Social and Cultural Rights, General Comment no.9, 1998, [The Domestic Application of the Covenant](#), Part B. Aoife Daly, Joshua Curtis, and Yvonne McDermott Rees, 2018, [Enhancing the Status of UN Treaty Rights in Domestic Settings](#), EHRC. See also, JustFair submission to current inquiry and references therein.

implementing international obligations' from this reservation. These obligations include human rights.

4. There is no single model of incorporation of international human rights into domestic law. Different approaches are often summarised as:
 - **Direct incorporation** – rights are made part of domestic law in a way which makes them enforceable by a court or tribunal (e.g. the Human Rights Act 1998 (HRA 1998) which incorporates the European Convention on Human Rights).
 - **Indirect incorporation** - rights are made part of domestic law in a way which means decision-makers have to take specified rights into account when exercising their functions. The formulation used in Welsh law is 'due regard' (e.g. the Child Rights Measure requiring Welsh Ministers to have due regard to the UNCRC when exercising their functions). Rights are not directly enforceable but decision-makers are subject to judicial review if they fail to have due regard.
 - **Sectoral or piecemeal incorporation** - rights are given some legal effect in specific fields of public policy, e.g. education, or housing. Sectoral incorporation may be direct or indirect (e.g. section 7 of the Social Services and Well-being (Wales) Act 2014, requires persons exercising functions under the Act to have due regard to the UNCRC and the UN Principles for Older Persons).
5. Research suggests that direct incorporation leads to stronger recognition of human rights than other forms of incorporation.³ Wales-based research confirms a strong desire amongst stakeholders in Wales to move beyond indirect incorporation, to direct incorporation of human rights.⁴ This research also confirms a desire to see human rights obligations imposed not only on Welsh Ministers, but on relevant public authorities whose decisions and actions impact on individuals and communities.

How would incorporating the right to adequate housing into Welsh law work in practice?

I will focus on the approach that might be taken to incorporation of the RAH.

6. Welsh Ministers and the Senedd can determine how incorporation of the RAH may be achieved through devolved legislation. Legislation could make provision for Ministers to issue guidance for housing authorities in Wales on implementation of the RAH. There are therefore numerous mechanisms by which Ministers and the Senedd can shape how an incorporated RAH would work in practice.
7. There is no 'one size fits all' approach to incorporation. JustFair and the Back the Bill partners have given examples of incorporation of the RAH

³ See above Daly et al. See also: Laura Lundy, Ursula Kilkelly, Bronagh Byrne and Jason Kang, 2012, [The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries](#), UNICEF-UK.

⁴ Simon Hoffman and Sean O'Neill, 2018, [The Impact of Legal Integration of the UNCRC in Wales.](#), EHRC; Simon Hoffman, Sarah Nason, Elli Hicks and Rhian Chamberlain, 2021, [Strengthening and Advancing Equality and Human Rights in Wales](#), Welsh Government.

internationally.⁵ I respectfully adopt the evidence submitted by those organisations.

8. The approach to incorporation in practice in Wales needs to be one that works for Wales, taking account of the particular governance and jurisdictional context.
9. Research confirms a desire amongst civil society stakeholders to prioritise direct incorporation of human rights in Welsh law, primarily because indirect incorporation results in an accountability deficit.⁶ Under the due regard model duty-bearers are not fully accountable if they breach an individual's human rights. Direct incorporation of the RAH would provide strong accountability as there would be scope to appeal to a court or tribunal for a remedy where a relevant public authority (in which I include Welsh Ministers) breaches an individual's RAH. It is for this reason that I support direct incorporation of the RAH.
10. Significantly, research also confirms positive impacts of the due regard approach. In particular: to ensure attention to human rights during policy development, to promote transparency, to underpin a policy culture which recognises human rights, and to provide for some enhanced political and administrative accountability.⁷ It is for this reason that I support an approach to incorporation of the RAH which maintains the benefits of due regard.
11. I favour a model of incorporation which in practice takes the best elements of due regard and allies this to an approach which makes the RAH enforceable to ensure strong accountability. So, for example:
 - Policy decision-makers could be required to take the RAH into account at all stages when devising policy and legislation and to demonstrate this through a Housing Impact Assessment and Housing Rights Scheme.
 - Policy decision-makers could be required to adopt a participative approach to establish housing priorities and local housing strategies.
 - Welsh Ministers could be required to report periodically to the Senedd on progress toward realising the RAH, triggering scrutiny by committee.
 - Relevant authorities could be required to act in compliance with the RAH.
 - Intended beneficiaries could be authorised to bring a claim that a relevant authority has breached their RAH.

Identify any challenges and barriers to taking this policy forward.

12. Challenges and barriers may arise if future duty-bearers are concerned about the implications on strategic planning, resources and delivery. These concerns are best addressed by raising awareness and understanding about the likely impact of the RAH, as well as how the RAH might be enforced. JustFair and the Back the Bill partners have sought to address impact in their submissions to this inquiry. I respectfully adopt that evidence.

⁵ Evidence submitted to the current inquiry.

⁶ Note 4.

⁷ Note 4.

13. I will address another potential challenge which will likely concern the Committee, Welsh Ministers, and the Senedd if Wales chooses to enact a RAH. This is the possibility that the UK Government will object to the Senedd taking this step.
14. Unlike in Wales, successive UK governments and UK Parliaments have not sought to embed human rights through domestic legislation (with the exception of the HRA 1998). There are concerns in Wales (as well as in Scotland and Northern Ireland), about possible reform of the HRA 1998 and its impact on devolution. While these concerns merit ongoing discussion, I will not seek to do this in my submission. Instead, I note that incorporation of the RAH in Welsh Law would further highlight the possibility of divergent approaches to human rights which is a feature of devolution.
15. I urge the Committee, as well as Welsh Ministers and the Senedd to be wary of allowing the possibility of divergence on human rights to create a ‘chilling effect’ on developments in Wales. While the UK Government has raised the possibility for reform of the HRA 1998, it has **not** sought to interfere with progress so far on incorporation of human rights in Wales. **Nor** has it threatened to undermine efforts by Welsh Ministers toward further incorporation. **Nor** has it suggested that Wales has gone too far to provide legal recognition of human rights. Indeed, when the UK Government reports to international Treaty Bodies on progress on meeting its human rights obligations in the UK, it often draws on developments in Wales to evidence progress.⁸
16. The Committee may be familiar with the recent decision in the UK Supreme Court on the Bill to incorporate the UNCRC into Scots law.⁹ The validity of the Bill was challenged by the UK Government; a challenge which was upheld by the UK Supreme Court. This might suggest a willingness on the part of the UK Government to question the conduct of devolved legislation on matters of human rights governance. However, in Wales we should be wary of reaching this conclusion or giving undue weight to the UK Supreme Court decision.
17. This is not the place for a detailed legal analysis. However, it is worth noting that the UK Supreme Court was not asked to rule that incorporation of the UNCRC was outside the scope of devolved competence in Scotland, but instead to focus on provisions in a Bill which sought to give legal effect to a ‘maximalist’ approach to incorporation, so as to apply a duty to comply with the UNCRC to as many authorities and public functions as possible. Although this is a laudable objective for any legislation to incorporate human rights, in this case it resulted in UK Government objecting to certain provisions in the Bill having consequential impacts for any Court which might be asked to interpret and apply legislation enacted by the UK Parliament having effect in relation to Scotland; and, a provision requiring (in terms) the Courts to determine on a case-by-case basis whether a public authority is exercising

⁸ See, for example, the numerous references to Welsh legislation in the 2022 [UK State Party Report CommESCR](#), and children’s rights developments in Wales in its 2022 [UK State Party Report CommCRC](#).

⁹ [Reference by the Attorney General and the Advocate General for Scotland - United Nations Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Bill](#), [2021] UKSC 42.

devolved or non-devolved functions. The Supreme Court held that in these respects, the Bill went beyond the devolved competence of the Scottish Parliament. It is reasonable to infer that had the Bill been drafted so as to avoid these issues, the Supreme Court would not have seen cause to interfere and further, the UK Government would probably not have objected to the Bill.

18. While Welsh Ministers and the Senedd will need to be highly sensitive to the need to remain within the framework of devolved competence if the decision is taken to incorporate the RAH through legislation, the Scottish experience neither negates the competence of the Senedd to enact legislation to achieve this, nor does it prevent a 'maximalist' approach which results in an enforceable RAH: provided that the RAH is only enforceable against authorities exercising devolved functions (e.g. when exercising housing functions introduced by legislation already enacted by the National Assembly for Wales or the Senedd, such as the Housing (Wales) Act 2014).

What impact would a right to adequate housing make across Welsh housing policy?

19. Research based evidence submitted by the Back the Bill partners highlights how the RAH in Wales would generate significant financial benefits over the long-term. Submissions to the current inquiry by JustFair and the Back the Bill partner also suggest that a RAH would underpin investment in social housing; provide better recognition of the rights of tenants to a secure home; ensure closer attention to the specific housing needs of minority and disadvantaged groups; and, deliver greater prioritisation of housing priorities such as the supply of affordable, appropriate and sustainable homes in local housing strategies. I respectfully endorse and adopt these submissions.
20. In my submission I wish to focus on the impact of incorporation of the RAH on strategic planning, and key implications for relevant authorities, as well as on enforcement.
21. The RAH is often misunderstood as a narrow right to immediate provision of a home. This is a fundamental misconception and one which leads to resistance to adopting a human rights approach to housing policy. The proper approach to implementation of the RAH is explained by the CommESCR, in guidance on general obligations with respect to socioeconomic rights, i.e. in General Comment No.3, 1990¹⁰; and specifically with respect to the RAH in General Comment No.4, 1991¹¹.
22. The CommESCR gives detailed guidance on the RAH in General Comment No.4. This guidance would provide an excellent framework for Welsh Government guidance to housing authorities in Wales on implementing the RAH. While the guidance is too detailed to properly summarise in this submission, key points are:

¹⁰ CommESCR, 1990, General Comment No.3, [The Nature of States Parties' Obligations](#).

¹¹ CommESCR, 1991, General Comment No.4, [The Right to Adequate Housing](#).

- The RAH should not be interpreted in a narrow sense which equates it merely with the right to shelter. Instead, the RAH should be seen as right to ‘live somewhere in security, peace and dignity.’¹²
- The RAH should be available on a non-discriminatory basis.¹³
- Housing policy should prioritise those in greatest housing need.¹⁴
- Every effort should be made to avoid retrogression.¹⁵
- The concept of adequacy is particularly significant as it points at different aspects of housing which may contribute to the RAH. The Committee lists these as including:
 - Legal security of tenure.
 - Availability of services, materials, facilities and infrastructure.
 - Affordability.
 - Habitability.
 - Accessibility.
 - Location.
 - Cultural adequacy.¹⁶

23. Two general notions on implementation of RAH emerge from CommESCR guidance which ought to assist relevant authorities to understand how they might address implementation of the RAH, including the different aspects of the RAH identified by the CommESCR. The first is the obligation of **progressive realisation**, the second is the concept of a **minimum core or minimum essential level** of the RAH.

On progressive realisation and the minimum core

24. An obligation that applies to all rights under ICESCR is that of progressive realisation.¹⁷ This means relevant authorities will be required to take ‘concrete’ steps making effective use of their maximum available resources to progressively realise, in full, the RAH. This does not mean that authorities will need allocate *all* their resources to housing, but they will need to demonstrate and justify how they prioritise housing in their strategic planning and how they will progress ‘expeditiously’ toward realising the RAH, and how adequate resources are allocated to support their housing policies. Authorities will also need to demonstrate that they are making the most efficient use of all their resources so as to maximise the amount available to support the RAH. Where an authority argues that it has insufficient resources to prioritise certain aspects of the RAH (e.g. the provision of affordable housing), it will need to transparently and convincingly demonstrate that this is the case.

25. An important function of progressive realisation is to focus policy-makers on the longer term impacts of policy decisions. Incorporating the RAH in Welsh Law would ‘hardwire’ a commitment to address housing need not only for the present Welsh Government, Senedd, and housing authorities, but for these

¹² Note 11 paragraph 7.

¹³ Note 11 e.g. paragraph 6.

¹⁴ Note 11 e.g. paragraph 8(e).

¹⁵ This point is made in relation to all rights set out in ICESCR, including the RAH, in General Comment No.3 (note 10) at paragraph 9.

¹⁶ Note 11, these aspects of the RAH are fully discussed in paragraph 8.

¹⁷ Article 2(1) ICESCR. Fully discussed in General Comment No.3, note 10.

institutions in the future. Given that adequate housing for all may take several generations to achieve, it is vital that Wales embeds a policy-framework which extends the vision of decision-makers beyond the immediate policy horizon. This approach is also, of course, consistent with the policy ambition of the Well-being of Future Generations (Wales) Act 2015, and provides a real opportunity to ensure housing policy makes a strong contribution to the sustainable development principle.

On the minimum core

26. While relevant authorities are permitted discretion as to the steps they take to implement the different aspects of the RAH, the CommESCR has emphasized that there is an expectation of a minimum core or minimum essential level of all rights set out in ICESCR, including the RAH.¹⁸ It is not readily apparent what this might be in relation to all facets of the RAH, but a clear example is avoiding homelessness and destitution.¹⁹ Arguably this is already an obligation imposed on Welsh Ministers and local authorities under Article 3 of the ECHR.²⁰ A RAH in Welsh law would concentrate attention on how housing policies and resource allocation contribute to meeting the requirements of ensuring a minimum core of the RAH in Wales.
27. A priority for relevant authorities if Wales were to incorporate a RAH would be to adopt a participative approach to establish what we, as a nation, and as local communities, anticipate as the minimum level of provision when it comes to housing, and what we expect to be the outcomes of progressive realisation of the RAH. This is the approach which is encouraged by the CommESCR.²¹

On enforcement

28. Socioeconomic rights, and the RAH, are not part of UK domestic law. In assessing the conduct of public authorities in pursuit of policies with socioeconomic implications, UK judges tend toward an approach which defers to priority setting and resource allocation by responsible authorities. This manifest in a reasonableness standard of review (which is also the approach now favoured in South Africa where the right to access adequate housing is part of the country's constitution).
29. It is highly likely that if a RAH were incorporate in Welsh Law any legal challenge claiming breach of the right would take place as a judicial review, where the reasonableness standard would be applied. The reasonableness standard achieves some balance between the rights of individuals and the need to permit relevant authorities some discretion in the way limited resources are allocated. However, UK Courts are traditionally shy of scrutinising socioeconomic policy decision-making by government and public authorities. In my view, if an incorporated RAH in Wales is to have real impact

¹⁸ Fully discussed in General Comment No.3, note 10.

¹⁹ CommESCR General Comment No.4 is in part premised on the notion that the RAH seeks to address homelessness, see note 11, paragraphs 4 and 13. Failure to provide basic housing is identified as a violation of the minimum core of rights under ICESCR in the [Maastricht Guidelines on Violations of Economic, Social and Cultural Rights](#), at paragraph 9.

²⁰ The right not to suffer inhuman or degrading treatment.

²¹ Note 11 paragraph 12.

to promote progress on housing in Wales, the requirement of progressive realisation should be included on the face of legislation; and, legislation should authorise the Courts to refer to international interpretive texts (such as CommESCR general commentary) to assist judges to determine whether relevant authorities have complied with the RAH.

30. It should be noted that the notion of a minimum core is not an express requirement in the ICESCR or under the RAH. The concept has been developed primarily through interpretation by the CommESCR²². Application of a minimum core would be a departure from the approach taken to adjudication of socioeconomic rights – and therefore the RAH – by the Courts in Wales and England (see above). In my view, once again if the RAH is to have meaningful effect to protect the interest of those in greatest housing need in Wales (such as people who are experiencing homelessness), the Courts will need to be directed to apply a minimum core as a standard of adjudication. This should be achieved by express reference to the need to apply a minimum core in legislation to incorporate the RAH, and the inclusion of a mechanism to establish what the minimum core means in practice.

16th March 2023

²² Notably in General Comment No.3 (note 10).