

Communities, Equality and Local Government Committee

Inquiry into : The future of equality and human rights in Wales

Response from : Dr Simon Hoffman - **Co-director Wales Observatory on Human Rights of Children and Young People, Swansea University School of Law**

I welcome the opportunity to make this submission and will be pleased to expand on any of the points made below during oral evidence.

The Wales Observatory is a collaborative project based at Swansea University working with international, national and local partners as a forum for research, advocacy and expertise on human rights of children and young people, and for realisation of human rights through public policy, practice, advocacy and law reform. Simon Hoffman is a researcher in children and young person's rights, socio-economic rights and equalities issues.

Welsh Human Rights Law

1. The inquiry comes at a particularly auspicious time for equalities and human rights in Wales: 'Welsh Human Rights Law' is an emergent possibility. Section 81 of the Government of Wales Act 2006 (GWA 2006) provides that the Welsh Ministers have no power to do anything which is incompatible with the European Convention on Human Rights (ECHR); similarly, ECHR incompatible legislation is beyond the competence of the NAW.¹ Human rights compliance therefore goes to the *legality* of action by WG and the NAW in a way that does not apply to the UK Government or UK Parliament.
2. Significant to the development of a distinctively Welsh human rights law is the willingness of successive Welsh administrations to articulate policy in terms which reflect notions inherent in human rights: dignity, humanity, equality and social justice.² An exemplar is in the field of children and young people where policy has been explicitly informed by the United Nations Convention on the Rights of the Child (UNCRC). The WG has made connections with the UNCRC in a number of strategy documents on children and young people, notably those concerning its approach to service provision, child poverty and youth offending. In legislation the Children's Commissioner for Wales Regulations 2001 was the first legislation in the UK to make express reference to the UNCRC. More recently the Rights of Children and Young Persons (Wales) Measure 2011 implements the UNCRC into Welsh domestic law and the policy-making processes of the WG.³ These post-devolution developments mark Wales out as having a particular view of human rights in law and policy.

¹ S.108(6)(c), Government of Wales Act 2006.

² A distinctively Welsh approach to human rights was noted by the Commission on a Bill of Rights: *A UK Bill of Rights? - The Choice before us*, December 2012.

³ The statutory framework for the Welsh Commissioner for Older People is a further example of this pattern: the Commissioner is required to have regard to the United Nations Principles for Older People 1991 (section 25, the Commissioner for Older People (Wales) Act 2006).

Welsh Equality Law

3. The GWA 2006 provides for 'inclusive' governance, something unique to Wales.⁴ Welsh Ministers are required to engage with stakeholders (local authorities, voluntary sector, business⁵) and to exercise their functions having '*due regard*' to the principle of '*equality of opportunity for all people*'⁶- the 'Welsh equality duty'. The NAW exercises a scrutiny role in relation to the Welsh equality duty as Welsh Ministers are required to report to the NAW annually on how they have shown due regard to this principle.⁷ There is common ground between the GWA 2006 Welsh equality duty and the Public Sector Equality Duty (PSED) under s.149 of the Equality Act 2010 (EA 2010). The latter requires the Welsh Ministers and other public authorities, in the exercise of their functions, to have due regard to the need to (in summary): eliminate discriminatory behaviour; advance equality of opportunity; foster good relations between those who share and do not share a protected characteristic.⁸

• How well the specific public sector equality duties are functioning in Wales

4. To support implementation of the PSED the Welsh Ministers have powers to impose specific duties on relevant Welsh authorities, after consultation with the EHRC.⁹ The Welsh Ministers have power to add to the list of relevant Welsh authorities, but only after consulting with the EHRC and obtaining the consent of the UK minister.¹⁰ Scrutiny of the exercise of these powers is carried out by the NAW, not the UK Parliament.¹¹ In the context of Welsh devolution, the exercise by Welsh Ministers of their powers under the EA 2010 by-passes the NAW's legislative function to legislate on issues of 'equal opportunities in relation to equal opportunities public authorities'.¹² Perhaps more significantly, the NAW's scrutiny function in relation to the GWA 2006 inclusivity objectives may be seen as secondary to its similar function in relation to the exercise of Ministerial powers under the EA 2010.

5. The Welsh Ministers *have* sought to develop a Welsh approach to equalities which is mindful of equalities, the inclusivity agenda, and human rights. The first Welsh Single Equality Scheme (to March 2012) addressed the Welsh Ministers' duties under anti-discrimination legislation, as well as human rights issues falling beyond that legislation. The Welsh Strategic Equality Plan (2012-1016) explicitly addresses Welsh Ministers' discharge of the PSED and Welsh specific duties. The Scheme and the Strategy include language reflecting the wider legal

⁴ P.Chaney and R.Fevre, 2002, *An Absolute Duty, Equal Opportunities and the National Assembly for Wales* IWA, Cardiff.

⁵ Ss.72 to 79, Government of Wales Act 2006.

⁶ Ibid, s.77.

⁷ Ibid.

⁸ S.149, Equality Act 2010.

⁹ S.153, Equality Act 2010.

¹⁰ Ss. 151 and 152, Equality Act 2010.

¹¹ S.209, Equality Act 2010.

¹² Paragraph 14, Schedule 7, Government of Wales Act 2006, equal opportunities public authorities are listed in paragraph 14.

background of the GWA 2006, referring to human rights standards as reference points for Welsh Ministers.

6. It would be preferable for there to be stronger and more coherent articulation of the relationship between the PSED, and the inclusivity objectives inherent in Welsh devolution, as well as the legislative function of the NAW. The NAW needs to be clearly established as the institution having the primary scrutiny role in relation to the exercise of Welsh Ministers' powers in the totality of equalities and human rights.

- **The Equality and Human Rights Commission in Wales**

7. The EHRC has identified three key aspects to its work: 'guiding', 'encouraging' and 'monitoring'.¹³ These appear equally suitable to support the Welsh equality duty and inclusivity in Wales as much as implementation of the PSED. In pursuing these objectives the EHRC is able to exercise powers to: carry out inquiries, advise; issue codes of practice; and, pursue enforcement.¹⁴ The EHRC, and the Wales Committee in particular, is a valuable resource and source of expertise on equalities and human rights. The contribution of the EHRC Wales Committee to the equalities and human rights agenda in Wales may be seen as advantageous. But the formal position is potentially problematic.
8. EHRC members are appointed by a Minister of the UK government; it is a requirement that one EHRC Commissioner must know about conditions in Wales; and, there must be a Wales Committee.¹⁵ The EHRC's functions in relation to Wales include: to advise the EHRC about the exercise of its functions in so far as they affect Wales; the EHRC must consult with the Wales Committee before exercising a function it thinks may affect persons in Wales; and, if the EHRC considers that legislation or any proposed change in the law affects only Wales, then the EHRC's power to advise government is delegated to the Wales Committee.¹⁶ Whilst these arrangements establish a basis for engagement between the EHRC and the WG, in the exercise of its functions the EHRC is accountable to the UK minister and UK parliament, not the WG or NAW.¹⁷
9. In addition to the above, there is no formal basis for the EHRC to engage with the WG or the NAW on the Welsh equality duty and inclusivity agenda (i.e. under the GWA 2006). Whilst the EHRC may contribute to these agendas through the exercise of its general functions,¹⁸ the EHRC should be supported to better engage with Welsh Ministers in the context of devolution and the Welsh equality agenda. This could be achieved by formalising and strengthening the relationship between the WG and the EHRC Wales Committee.

¹³ EHRCs website on its work in Wales.

¹⁴ Ss.13-32, Equality Act 2006.

¹⁵ Part 1 and Schedule 1, Equality Act 2006.

¹⁶ Ibid, but not covering any matter delegated EHRC's Disability Committee under EA 2006, paragraph 52, Schedule 1).

¹⁷ Paragraph 32(5), Schedule 1, Equality Act 2006.

¹⁸ Under s.3 or s.13, Equality Act 2006.

- **The link between poverty and equality and the socio-economic duty**

10. Correlation between poverty, inequality and disadvantage is established.¹⁹ Different strategies may be required to tackle socio-economic disadvantage and to redress inequality. The WG has set targets to eradicate poverty, but progress is difficult and is likely to be further impeded by welfare reform.

11. A number of international human rights instruments include articles which are relevant to the condition of poverty. Most obvious is the right to an adequate standard of living found in general rights instruments such as the Universal Declaration of Human Rights,²⁰ but also in treaties aimed at affording rights to particular groups, such as the UNCRC.²¹ Other rights found in these or other treaties, such as those to education or health care, are also relevant.²² The EHRC has a clear role in relation to *all* human rights.²³ In addition, as an aspect of advancing equality of opportunity under the EA 2010 relevant authorities must have due regard to the need to: remove or minimise disadvantages; take steps to meet needs of persons who share protected characteristic; and, to encourage persons with protected characteristic to participate where participation by such persons is disproportionately low.²⁴ The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 require relevant authorities to assess the impact of policies and practices, including identifying any adverse impacts of a policy or practice on protected groups. These equality concepts may be seen as tools to help understand why people fall into poverty, and to help break cycles of deprivation.²⁵ Introducing equality concepts and tools into policy processes contributes to meeting human rights objectives, including socio-economic objectives, which promote fairness and human dignity.

12. The EA 2010 includes a socio-economic duty which has not to date been implemented.²⁶ The duty requires a relevant authority (e.g. ministers, public authorities), when making decisions of a strategic nature about how to exercise its functions, to have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage. A socio-economic duty of this sort in Wales would facilitate coordination of equalities strategies alongside strategies whose provenance lies in human rights: an example is the Children and Families (Wales) Measure 2010 which requires the WG to publish strategy on eradicating

¹⁹ The literature on poverty and inequality is extensive, see: Mathews et al, 2012, 'Hard-to-Reach' or 'Easy-to-Ignore'? A rapid review of place-based policies and equality', ECHR Scotland; Poverty and Inequality in Scotland, 2009, EHRC Research report 45. See also: WG, *Tackling Poverty Action Plan 2012-16* which confirms that poverty is associated with educational under-attainment amongst certain social groups, these include: disabled children, boys, ethnic minorities and gypsy travellers.

²⁰ Article 25.

²¹ Article 27.

²² E.g. articles 12 and 13 of the International Covenant on Economic Social and Cultural Rights.

²³ S.9, Equality Act 2006.

²⁴ S.149(3), Equality Act 2010.

²⁵ Focusing on equality also carries risk: against a backdrop of scarce resource an equality approach may encourage notions of 'deserving' and 'undeserving' poor by reference to protected characteristics.

²⁶ S.1, Equality Act 2010.

child poverty. As already noted, policies and legislation on children and young people in Wales are expressly linked to the UNCRRC.

13. The introduction of a socio-economic duty in Wales requiring Welsh Ministers to have due regard to specified socio-economic objectives would be a significant contribution to the advancement of equality and human rights. Possibilities here include: giving the NAW the competence to legislate in respect of the socio-economic duty in the EA 2010; or, exercise of an existing competence to introduce a socio-economic duty through Wales only primary legislation.²⁷

- **Accountability for equality and human rights legislation in Wales**

14. Ultimately the aim of equality legislation and human rights is to achieve improved outcomes for persons having less protection or fewer opportunities than others in society. Stronger accountability for and enforcement of equality and human rights obligations will help institutionalise practices to better implement EA 2010 PSED duties, the inclusivity provisions set out in the GWA 2006, and human rights obligations incumbent on government in international law.

15. Accountability structures for equalities are fragmented. As noted above, despite its potential to contribute to holding WG to account the EHRC has no formal role in relation to the inclusivity requirements established by the GWA 2006. Similarly, the scrutiny function of the NAW is diluted by the role of UK ministers. It would be preferable if the NAW scrutiny function in respect of equalities were strengthened. A possibility is to require the Welsh Ministers to report to the NAW on compliance with the Welsh equality duty *and* the PSED (and any future socio-economic duty), and for the EHRC Wales Committee to submit its report directly to the Welsh Minister with any such report being placed before the NAW.

Concluding Remarks

16. It is desirable that there should be stronger and more coherent accountability from Welsh Ministers to the NAW for compliance with the totality of equalities and human rights objectives.

17. The introduction of a socio-economic duty incumbent on the Welsh Ministers would contribute toward efforts to achieve a fairer and more inclusive Wales.

18. A stronger role for the EHRC Wales Committee would better exploit a valuable source of expertise as a contribution to meeting the objectives of a fairer and more inclusive Wales.

Any further enquiry about this submission should be directed to:

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²⁷ The subjects of 'public administration' or 'social welfare' seem the most appropriate: Paragraphs 14 and 15, Government of Wales Act 2006. Previously, under Schedule 5, social welfare extended to 'well-being', including 'securing rights'.