

HB 59

National Assembly for Wales

Communities, Equality and Local Government Committee

Housing (Wales) Bill: Stage 1

Response from: Dr Simon Hoffman, Swansea University

Communities, Equality and Local Government Committee

The Housing (Wales) Bill

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I very much welcome this opportunity to contribute to the Committee's discussion on the Housing (Wales) Bill.

Introduction

1. In my response to the Welsh Government's consultation on its White Paper, *Homes for Wales* (submitted on behalf of the Wales Observatory on Human Rights of Children and Young People), I noted that many challenges lie in the path of making a reality of human rights in the lives of children and young people in Wales. This observation applies equally to the case of individuals and families facing the blight of homelessness in Wales.
2. As a member of the team of investigators which published a report for the Welsh Government on options for reform of homelessness legislation in Wales¹ I was keen

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to contribute a rights-based perspective. In this context I would refer the Committee to the right to an adequate standard of living, which includes the right to adequate housing, established by the International Covenant on Economic Social and Cultural Rights² (the UK is a State Party). The Committee on the ICESCR has made it abundantly clear that a roof over one's head is a key component of the right to adequate housing³.

3. Housing is a fundamental human right which is recognized by the international community of nations, the UK government and Parliament (by adoption of international treaty), and by implication the Welsh Government, which has often stated its rights-based approach to social justice in Wales.
4. When framing Welsh domestic legislation the Rights of Children and Young Person (Wales) Measure 2011 (the Measure) applies. This requires Welsh Ministers to have due regard to the UNCRC when introducing new law or policy, or when reviewing existing law or policy⁴. Article 27 of the UNCRC provides all children (aged 17 and under) with a right to an adequate standard of living.
5. I have previously argued before the Committee that there exists in Wales a real opportunity to develop a distinctively Welsh approach to legislation, and to cultivate human rights leadership as an aspect of law and policy making in Wales⁵. This reflects the tendency of successive Welsh administrations to articulate policy in terms which incorporate notions inherent in human rights: dignity, humanity, equality, and, social justice⁶.

rights (in particular those set out in the United Nations Convention on the Rights of the Child). He is coordinating a group of Legal Experts which is considering devolution of a socioeconomic equality duty.

¹ *Options for an improved homelessness legislative framework*, 2012, P. Mackie, S.Fitzpatrick, S. Johnson and S.Hoffman.

² Article 11.A similar guarantee is provided by Article 25 of the Universal Declaration on Human Rights.

³ E.g. Committee on ESC, 1992, *The Right to Adequate Housing*, General Comment No.4.

⁴ Section 1.

⁵ Submission and evidence to: Communities, Equality and Local Government Committee, Inquiry into the future of equality and human rights in Wales, August 2013.

⁶ 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. An exemplar is in the field of children and

6. The White Paper, *Homes for Wales* recognised that homelessness legislation should provide a 'rights-based' framework to ensure protection against the hardship caused by homelessness⁷, and emphasised the importance of housing to support human rights ideals such as equality and inclusion⁸. The White Paper also makes reference to the need to take into account children's rights as set out in the UNCRC when formulating law and policy on housing in Wales⁹.
7. The Housing (Wales) Bill covers many areas: it would be impractical and beyond my expertise to attempt to address all the areas covered. I will focus my response on Part 2 of the Bill which deals with homelessness, and the Committee's inquiries in this field, and in particular on question 1 in the consultation letter insofar as it refers to homelessness.
8. I welcome many of the provisions contemplated by Part 2 of the Housing Bill. I believe the Bill will better contribute toward tackling homelessness in Wales than does the existing statutory framework. I do however have a number of reservations. Some of these will be dealt with by others. I have had the opportunity of discussing these issues with Dr Peter Mackie: I am in agreement with his submission, and in particular with his views on prevention and priority need. I will confine my submission to two issues which cause me particular concern: [i] the Bill's failure to provide direction to local government to promote housing as a fundamental right; and [ii] intentionality.

The Bill's failure to provide direction to local government to promote housing as a fundamental right

9. The Welsh Government and the National Assembly for Wales has shown a willingness to introduce innovative legislation to establish duties on public bodies which reflect human rights and equalities principles¹⁰. The Housing (Wales) Bill is a

young people where policy has been explicitly informed by the United Nations Convention on the Rights of the Child.

⁷ See: *Homes for Wales*, Welsh Government, 2012 at para. 8.12.

⁸ See: *ibid*, at para. 7.66.

⁹ See: *ibid*, at para. 7.55 *et seq.*

¹⁰ An example is the Rights of Children and Young Persons (Wales) Measure 2011, which makes a direct link between children's human rights and the conduct of government business.

missed opportunity to adopt an approach to housing which would promote rights. It avoids the opportunity to establish a clear rights-based duty, i.e. recognising the fundamental right of all citizens in Wales to adequate housing, and requiring local government to promote access to the right for all citizens.

10. Section 36 of the Bill establishes a requirement for a local authority to formulate and adopt a homelessness strategy. Section 38(1) explains that a homelessness strategy is a strategy for achieving the following objectives: the prevention of homelessness; the availability of suitable accommodation and support for people who are, or may become homeless.
11. These are laudable objectives; however, the Bill does not go far enough to embed these objectives as key priorities for local government, or to make it clear that Part 2 is intended to promote rights. In fact section 38(2) of the Bill expressly permits other objectives to be included in a homelessness strategy, including objectives relating to local authority functions beyond housing. I should emphasise that I do not consider this objectionable on its own (as housing functions will need to be coordinated with other functions), but I do believe there is a risk that unless these objectives are prioritized they will be diluted in the preparation of a homelessness strategy, and may be lost altogether during implementation.
12. In this context it must be recognised that a local authority will not be able always to prevent individual or household homelessness, or to secure accommodation. A mechanism is needed which will achieve the correct balance between requiring local government to tackle homelessness as a key priority, and the need for local authorities to have the discretion to take account of local needs, limited resources, and competing priorities (whether they be priorities which are rights-based, or other lower-order priorities).
13. In my view this would be achieved if Part 2 were to include a duty on local government to have due regard to: the need to prevent homelessness; and, the need for suitable accommodation and support to be available for people who are or may become homeless. Due regard is an effective legal mechanism for prioritising

rights but also for achieving the balance referred to in the preceding paragraph. It is a mechanism already adopted in equalities legislation¹¹ and by Welsh law¹².

14. The Welsh Ministers have accepted due regard as a suitable mechanism to ensure they take children's fundamental rights into account when exercising their functions (including in times of austerity). I see no good reason why local government should not undertake a similar responsibility when delivering a public service which concerns everyone's fundamental human right to adequate housing.

Intentionality

15. Much has been said about the use of 'intentionality' to make access to public housing conditional. It is not my intention to repeat these arguments; suffice to say that many find this type of conditionality objectionable in principle, and punitive in practice. More pragmatically it may be seen as counter-productive when it comes to dealing with homelessness as an individual, family or social issue¹³. In my view intentionality should be abolished.

16. The issue of intentionality has to be seen in the context of other duties established by the Bill, most significantly the duties which are directed at preventing homelessness. These will be engaged earlier as the Bill has extended the period of threatened homelessness from 28 days to 56 days (section 41(4)). This means that local authorities will have more time to work with applicants to prevent homelessness¹⁴.

17. Sections 50-52 require a local authority to take reasonable steps to 'help to secure' that accommodation is available or does not cease to be available to an applicant. Examples of what might constitute reasonable steps are set out in section 50(2). These provisions make it less likely that a person will leave their accommodation under circumstances in which they might be deemed intentionally homeless, and is a welcome innovation.

¹¹ Section 1 (not in force) and section 149, Equality Act 2010.

¹² Rights of Children and Young Persons (Wales) Measure 2011.

¹³ The Impact of Intentional Homelessness Decisions on Welsh Households' Lives, Shelter Cymru Research Report (2011).

¹⁴ Whilst I welcome the extension of the period of threatened homelessness from 28 to 56 days, I do not see any necessity of a time limit.

18. The increased focus on prevention in the Bill is intended to reduce the number of applicants who are homeless. I take the view that this allows room to consider the issue of intentional homelessness. Two options were presented to the Welsh Government to reform Welsh domestic law on this issue: to give local authorities the power to disregard intentionality; or to abolish intentionality¹⁵. The Bill incorporates a version of the former. Section 61 gives local authorities the power to disregard intentionality but only in respect of categories of persons prescribed by regulations made by the Minister.
19. In my view this two stage process amounts to no more than retention of the intentionality test. My experience (including my reflection on evidence), is that local authorities would not welcome the abolition of the intentionality provisions; as such there is no reason to suppose that they will elect to use their power to disregard intentionality. The power to disregard intentionality is in effect a power to continue to take it into account.
20. Proper discharge of the prevention duties set out in sections 50-52 will lead to a decrease in the role of intentionality. This may suggest that there is no harm in retaining it for some cases. However, the continuance of an intentionality test which enables a local authority to discharge its responsibility to a homeless applicant may have the unintended consequence of undermining prevention work, in particular where under-pressure housing officers are unable to easily identify appropriate housing solutions which either avoid homelessness or provide an alternative. In any event, where reasonable steps (section 51) are taken to help to secure that the applicant does not become homeless, or has alternative accommodation available, a local authority is able to discharge its duty in several ways (sections 53 and 62).
21. If local authorities are to be given power to disregard, i.e. to retain, the intentionality test it would be preferable for this to be an 'opt in' rather than 'opt out' election. Local authorities should be required to disregard the intentionality test for categories of person prescribed by the Minister unless they proactively decide to apply the test.

¹⁵ Above, n.1, pp.20-21.

22. Further, and in any event, local authorities should be required to explain their decision to retain intentionality. This could be achieved as an aspect of conducting a homelessness review, or in a homelessness strategy. In this way local authorities would be properly accountable for any decision to retain intentionality, and will be required to explain why they consider it necessary. In my view, given the fundamental importance of the right to housing, and the impact of intentionality to deny access to this right, a full and proper explanation of why a local authority considers it appropriate to retain its use in its area should be given.
23. The Bill has adopted a mechanism to introduce special provisions on intentionality in relation to children (aged 17 and under) living in a family unit which is homeless or threatened with homelessness, or children who are aged 16 or 17 years. Section 58(2) of the Bill has the effect of requiring local authorities to disregard the intentionality provisions when dealing with households with dependent children, or applicants aged 16 or 17 years who live independently. Notwithstanding that the wording of the Bill is difficult to follow, this is a very welcome recognition of the rights of the child as set out in the UNCRC.
24. What is less welcome is that the intentionality test will only be disregarded once in any five year period (section 58(3(d))). This is unrealistic and contrary to children's rights. It is unrealistic as households that have difficulty maintaining accommodation may become homeless several times in a short period. The difficulties which give rise to homelessness may not be immediately resolved once a family is housed, and homelessness may be a reoccurring problem in the short term. Those aged 16 or 17 years who live independently may require several attempts at independent living before being able to maintain themselves in accommodation. The imposition of a once only disregard fails to recognise this reality of homelessness.
25. The Bill recognises that children should not be penalised by the application of the intentionality test: either because as family members they are at the mercy of adult conduct, or because as 16 or 17 year olds they are permitted to make mistakes as part of their development. However, the Bill totally overlooks these highly persuasive

arguments in cases where homelessness reoccurs within the five year period: there is no good reason why children should be penalised in these circumstances.

Simon Hoffman

17th January 2013