

The right to adequate housing in Wales: Feasibility Report

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the Chartered Institute of Housing Cymru and Shelter Cymru

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Contents

The Right to Adequate Housing: An introduction	1
The case for incorporation in Wales	3
Abbreviations	5
How to use this report.....	6
Part A: Framework Issues - General.....	7
<i>International human rights</i>	8
<i>Incorporation</i>	8
Direct incorporation.....	8
Indirect incorporation.....	9
Sectoral incorporation	9
<i>Why incorporation matters: Priority and accountability</i> .	10
Addressing the implementation gap	10
Accountability in the UK.....	10
<i>Accountability on a spectrum</i>	11
Complaints	11
Strengthening the role of National Human Rights Institutions	11
Parliamentary accountability: The National Assembly for Wales	12
<i>Enforcement</i>	12
Enforcement and direct incorporation.....	13
Limitations on judicial enforcement: A self-imposed restraint.....	13
Enforcement and indirect incorporation.....	14

Part B: Framework Issues – The Right to Adequate Housing	15
The right to adequate housing	16
<i>General obligations of the right to adequate housing</i>	16
Respect, protect and fulfil.....	16
Progressive realisation.....	16
Non-discrimination	17
Minimum core	17
<i>Other obligations of the right to adequate housing</i>	17
Legal security of tenure.....	18
Availability of services, materials, facilities and infrastructure	18
Affordability.....	18
Habitability.....	18
Accessibility	18
Location	18
Cultural adequacy.....	19
Part C: Framework Issues – Wales	20
<i>The right to adequate housing: UK context</i>	21
<i>The right to adequate housing: Wales context</i>	21
<i>Incorporation of human rights in Wales</i>	22
<i>Incorporation of the right to adequate housing in Wales</i> ...	23
<i>Competence and models of incorporation</i>	24
Human rights competence.....	24
The Welsh approach to incorporation.....	24
What to incorporate: Wholesale incorporation of social rights?	25
What to incorporate: The right to adequate housing? ..	25
Human rights incorporation: Model A, indirect incorporation	25

Human rights: Model B, direct incorporation	26
A dual approach.....	26
<i>Accountability on a spectrum</i>	27
Judicial review: Model A.....	27
Judicial review: Model B.....	28
<i>The right to adequate housing and current Welsh legislation</i>	28
The Human Rights Act 1998.....	28
The Rights of Children and Young Persons (Wales) Measure 2011.....	28
The Social Services and Well-being (Wales) Act 2014....	29
The Well-being of Future Generations (Wales) Act 2015.....	29
The socio-economic duty under section 1 of the Equality Act 2010.....	29
Part D: Some Insights into the Impact Of Incorporation	31
Incorporation and government action	32
Incorporation and enforcement	33
Finland: A focus on the right to adequate housing.....	35
Ireland: A rights-based approach to housing regeneration.....	35
The impact of incorporation of the CRC in Wales.....	36
Part E: Impact Analysis	37
Case study: Homelessness and intentionality.....	38
Case study: Security of tenure.....	39
Case study: Security of tenure and eviction into homelessness.....	40
Case study: Accessible housing for disabled people....	41
Case study: Young people.....	42
Case study: Tenant voice	44

The Right to Adequate Housing – an introduction

'If there had been a right to adequate housing in the United Kingdom, the Government and the local authority would have had a legal duty to consider seriously and in a timely manner, the safety concerns raised by the Grenfell Tower residents, before the conditions became life-threatening.' Geraldine Van Bueren QC, Professor of International Human Rights Law in Queen Mary, University of London and Visiting Fellow, Kellogg College, Oxford.

"The law failed to protect the residents of Grenfell Tower. Even if legal aid had been available, the fact is that there was no legislation that would have given the court the power to intervene and stop the process that ultimately led to such dreadful loss of life. Only an enforceable right to adequate housing would have guaranteed the residents the ability to take their concerns to court, have their questions answered and the dangerous cladding removed before it was too late. It is time that the right to housing, long recognised in international law, is protected in law" – Jamie Burton, Doughty Street Chambers lawyer who acted for various bereaved, survivors and residents in Phase 1 of the Grenfell Tower Inquiry.

In the early hours of 14 June, 2017, a fire engulfed the 24-storey Grenfell Tower block of flats in North Kensington, West London.

It claimed the lives of 72 people.

As we mark the second anniversary of this harrowing tragedy, the image of the burnt out shell, towering high over one of the richest boroughs, of one of the richest cities in the world, must continue to act as a catalyst; a call to action for us all to fundamentally re-think the value we place on social and all housing, and the role that simple bricks and mortar must play in acting as a starting point for any form of community, economic and social regeneration.

Grenfell has come to symbolise something much more deep-rooted than questions about fire safety and building regulations.

For every high-rise tenant living in fear that this could happen to them, there are many more who simply cannot find a home in their community. There are those who are battling to keep a roof over their heads or are sleeping rough on our streets every night.

Grenfell has come to represent how we have failed those in most need in our society – those in need of that most basic of human requirements: that of access to shelter, a place where they feel safe, a place to call home.

This terrible tragedy, if nothing else, should commit us to doing everything we can to ensure it never happens again. A big part of that process should be, in our view, embedding into Welsh legislation, the Right to Adequate Housing as outlined in ICESCR¹ (International Covenant on Economic, Social and Cultural Rights).

¹ https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch_IV_03.pdf

The Housing Crisis in Wales



60,589

households on social housing waiting list

(Shelter Cymru - March 2018)

Over

21,000

households faced or experienced homelessness in 2018

(Statistics Wales)

1 out of 22

local authorities has accessible housing building target

(Statistics Wales)



2,139

households in temporary accommodation - of which 837 are families with children.

(Statistics Wales - March 2019)

347

people sleeping rough on our streets

(Statistics Wales - Feb 2019)



1/3

Only one third of us happy living near social housing

(Tyfu Tai Public Perceptions Survey April 2018)

42%

of private tenants do not have a fixed term tenancy in Wales

(Shelter Cymru - Feb 2018)



The case for incorporation in Wales

The case for fully incorporating the Right to Adequate Housing into Welsh law should not be informed by the tragedy of Grenfell alone – although that tragedy is reason enough for consideration of what a rights-based approach could deliver.

Wales, as the rest of the UK, is in the midst of one of the deepest and far-reaching housing crises that we have seen in modern times. A crisis which is having a profound impact on the very fabric of our society.

A report by homelessness charity Crisis in 2017, revealed that core homelessness in Wales – defined as rough sleepers, sofa surfers, people squatting and living in hostels and unsuitable accommodation – was at just over 5,000. Welsh Government reports that in 2018 over 10,000 households faced homelessness with over 11,000 actually experiencing it.

We have seen news report after news report highlighting the numbers sleeping rough on our streets; the number of families with young children being forced to live in temporary accommodation such as B&B for long periods because there aren't enough houses at social rent available; and how the crisis is adversely affecting the young and failing a whole generation.

This is the basis for the fundamental conversation that we need to have as a nation. Not only as a result of the tragic

loss of human life at Grenfell, but also because it cannot be acceptable in a forward-thinking and progressive Wales that people don't have anywhere to live.

As a society, therefore, how much of a priority do we want to place on housing in order to ensure universal access to that most basic of human rights - a safe, secure and affordable place that we can call home.

We believe that at the core of any solution to the housing crisis must be nationwide commitment to the fundamental principle that everyone of us should have a human right, underpinned by law, to access adequate and sustainable housing.

This paper sets out in detail the legal and legislative route to full incorporation of the Right to Adequate Housing in Wales (**see Parts A to B**)

It provides case studies (**see Part E**) which we believe evidence the impact that incorporation could have, including how a rights-based approach could have afforded the residents of Grenfell more protection.

It is by no means an exhaustive document but we are confident that it can be a catalyst in igniting a serious discussion about getting the basics right in terms of reaching our shared goal – providing a sustainable housing option for everyone in Wales.

The political consensus on the right to housing already exists in Wales. Almost every political group represented in the Senedd, has said that they believe housing is a right – now is the time to turn that consensus into law.

We would like to take this opportunity to thank Dr Simon Hoffman, Associate Professor at Swansea University, for authoring this report and Professor Geraldine Van Bueren QC for inspiring us to start on this journey in 2018.

Dr Hoffman has an impressive academic background rooted in rights-based approaches to the delivery of public services. Since 2012, he has been a co-coordinator of the Observatory on Human Rights of Children and is currently a member of the Welsh Government's Children's Rights Advisory Group and was involved in the development of the Rights of Children and Young Persons (Wales) Measure 2011 which imposed a duty on Welsh Ministers to have due regard to

the rights and obligations in the United Nations Convention on the Rights of the Child (CRC). He also chairs the Welsh Civil Society Human Rights Stakeholder Group.

We believe that this report makes for a compelling case for the incorporation of the Right to Adequate Housing as set out in ICESCR (International Covenant on Economic, Social and Cultural Rights) into Welsh law, whilst also clearly setting out the route map for how we get there.

We believe that the dual approach option set out in Section C is the best way forward but it's now over to you, our representatives in Wales' Parliament. Only you can deliver on that promise to ensure that all of us in Wales, no matter what our background or our personal and financial circumstance, have a legal right to a place to call home.



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Abbreviations

CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
EHRC Wales	Equality and Human Rights Commission in Wales
GWA	Government of Wales Act 2006
HA 2014	Housing (Wales) Act 2014
HRA 1998	Human Rights Act 1998
HRBA	Human Rights Based Approach
ICESCR	International Covenant on Economic Social and Cultural Rights
CCfW	Children's Commissioner for Wales
Child Rights Measure	Rights of Children and Young Persons (Wales) Measure 2011
NAW	National Assembly for Wales
LHA	Local Housing Authority
NHRI	National Human Rights Institution
PAC	Public Accounts Committee
RBW	Regulatory Board for Wales
RHA 2016	Renting Homes (Wales) Act 2016
SDG	Sustainable Development Goals
SSWBA	Social Services and Well-being (Wales) Act 2014
TMB	Treaty Monitoring Body
UK	United Kingdom
UN	United Nations
UN Committee	Committee on Economic Social and Cultural Rights
UNPOP	UN Principles for Older Persons
WBFGA	Wellbeing of Future Generations (Wales) Act 2015

How to use this report

This report on incorporation of the right to adequate housing in Wales is intended to be used by a range of readers with a diversity of interests in the right. It will be useful for those wishing to know more about social rights and the right to adequate housing in international law, its implications for government, and how the right is currently given effect in the UK and Wales. The report is particularly intended to be used by those seeking to understand how the right to adequate housing might be given better effect in Wales through devolved law, and what difference this would make to Welsh housing policy.

The report is in four parts, covering a range of topics. Each part can be read on its own or alongside other parts to enable the reader to develop a comprehensive understanding of the issues.

Part A: Framework Issues – General: this introduces international human rights, with a focus on social rights. It explains incorporation and what this means and outlines different approaches that may be taken to incorporating (or embedding) international human rights in national law. Part A also discusses why incorporation matters, with a focus on government accountability for social policy.

Part B: Framework Issues – The Right to Adequate Housing: introduces the right to adequate housing. It explains the different obligations that accompany human rights generally before turning to specific obligations arising from the right to adequate housing. All of these obligations are relevant to housing policy, including housing policy in Wales.

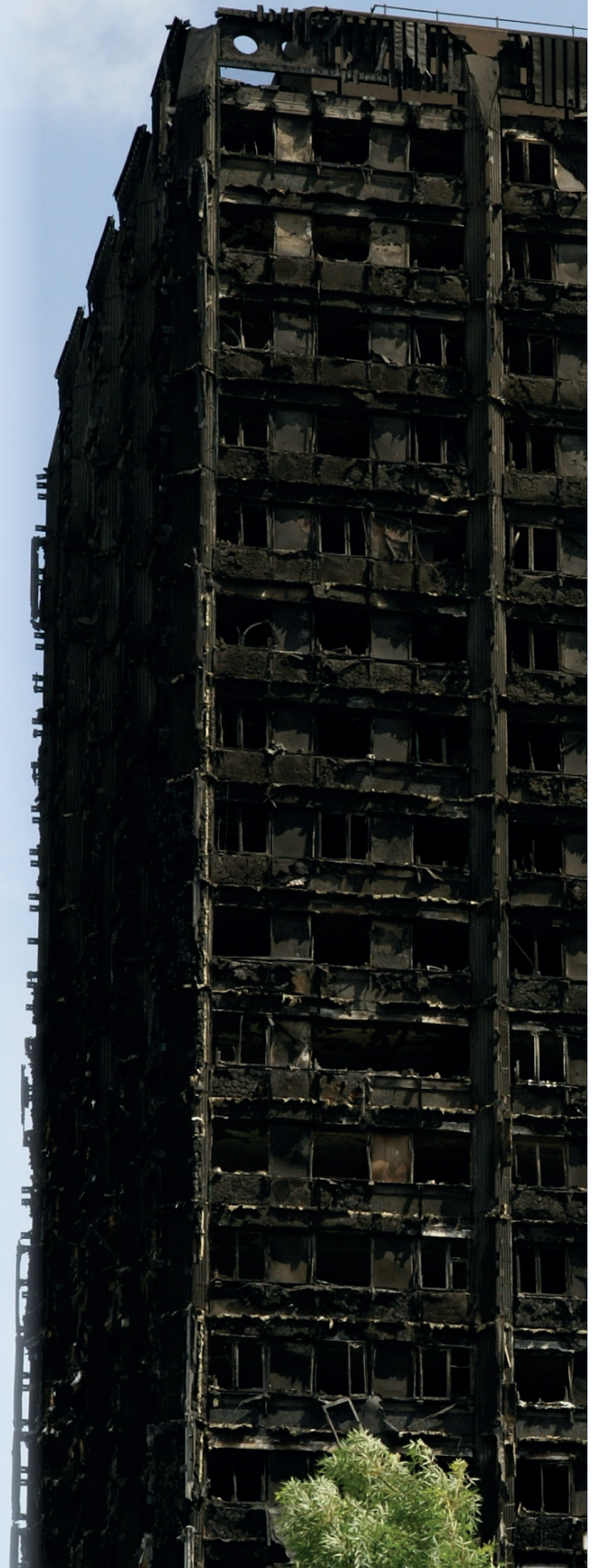
Part C: Framework Issues – Wales: sets the right to adequate housing in UK and Wales contexts. It discusses how housing in Wales meets the expectations of the right to adequate housing, and where there are shortfalls. Part C explains how human rights have been, and may be further incorporated in Wales. It discusses three options for incorporation of the right to adequate housing and explains the implications for accountability, and considers how legislation to enhance housing duties in Wales this would fit with other statutory duties placed on public authorities, including Ministers.

Part D: The Impact of Incorporation – What We Know: this part provides evidence-based insights on the likely impact of incorporation of the right to adequate housing in Wales. It discusses international evidence, as well as evidence on the impact of incorporation of children's human rights that has already taken place through Welsh law.

Part E: Impact Analysis: this part discusses a number of issues for housing policy and legislation in Wales from a perspective which assumes that the right to adequate housing is part of Welsh law. It considers issues relating to homelessness, security of tenure and eviction, accessible housing, housing and young people, and tenant voice. Each of these is discussed in turn to reflect on what might be different if the right to adequate housing were part of Welsh law and made binding on Ministers and local authorities.

Part A: Framework Issues - General

This part discusses general issues relating to incorporation of international human rights at the domestic level.



International human rights

The United Kingdom (UK) is party to seven United Nations (UN) human rights treaties.² These include two 'general covenants':

- The Covenant on Civil and Political Rights³ guarantees rights such as free speech and freedom of assembly, liberty of the person, property rights and access to justice etc.
- The Covenant on Economic, Social and Cultural Rights (ICESCR)⁴ guarantees rights to social arrangements such as access to employment and decent working conditions, health and social care, social insurance, education, and an adequate standard of living etc.

The UK is also bound by a number of UN conventions which guarantee specific rights to groups experiencing disadvantage and discrimination in society, which include women, children, disabled people and racial minorities.⁵

The breadth of coverage of human rights at international level is comprehensive, protecting individuals and groups from unjustifiable interference by the State, and guaranteeing everyone a basic level of entitlement in vital areas of public services provision such as education, health and social care, and housing. In international law the UK Government is under a duty to implement all human rights that are set out in the treaties which the UK has signed and ratified. It is also under a duty to secure the enjoyment of

human rights for all, across the whole of the UK.

In order to monitor whether governments globally comply with their human rights obligations the UN has established a number of Treaty Monitoring Bodies (TMBs). These consist of experts on human rights who monitor compliance with each human rights treaty. TMBs also publish guidance on how government should go about meeting their human rights obligations. Amongst the recommendations made by a number of TMBs is to **incorporate** human rights treaties in national law.⁶ The following sections discuss what this means.

Incorporation

Unfortunately, the meaning of incorporation is far from settled. The sections below explain the most widely accepted classifications of incorporation, but it is emphasised that these are rarely (if ever) encountered in a clear-cut way in practice. This is because incorporation is highly dependent on national arrangements for policy administration, accountability, enforcement and judicial oversight, all of which differ across nations.

Direct incorporation

Direct incorporation involves transforming an international human rights treaty into national law by making it part of a national constitution or national legislation. This approach means human rights become

² For a list of treaties signed and ratified by the UK see: <https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties>

³ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

⁴ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>

⁵ See footnote 3.

⁶ For example: Committee on the Rights of the Child, General Comment No.5, 2003, General Measures of Implementation of the Convention on the Rights of the Child; and, Committee on Economic, Social and Cultural Rights, General Comment No.9, 1998, The Domestic Application of the Covenant. Both are available from the treaty body section of the website of the office of the High Commissioner for Human Rights: <https://www.ohchr.org/EN/HRBodies/CESCR/pages/cescrindex.aspx>

binding on governments and public authorities in law, and individuals are able to rely on their rights before domestic tribunals or courts.

An example of direct incorporation in the UK is the Human Rights Act 1998 (HRA 1998), which incorporates the European Convention on Human Rights (ECHR) into the UK legal system.

Direct incorporation may be in full or in part. Direct and full incorporation means that a treaty as a whole is directly incorporated into national law. Direct and partial incorporation means a particular right (or rights) is selected from a treaty, and only this right (or rights) is directly incorporated into national law.

It is assumed that direct incorporation means human rights are enforceable by the courts. However, this assumption is not necessarily correct. Whether individuals are provided with an effective remedy for violation of their rights will very much depend on how a legal system functions, and the powers given to judges to enforce human rights. (Discussed further below: 'Enforcement'.)

Indirect incorporation

Indirect incorporation means that a human rights treaty is given some legal effect through national legislation. The key distinction from direct incorporation is that human rights do not bind governments or public authorities, but have some indirect effect, e.g. by requiring government or public authorities to take human rights into account when making policy decisions. As in the case of direct incorporation, indirect incorporation can be in full or in part.

An example of indirect incorporation

in the UK is the *Rights of Children and Young Persons (Wales) Measure 2011* (the Child Rights Measure). This makes the Convention on the Rights of the Child (CRC) part of Welsh law and requires Welsh Ministers to have 'due regard' to children's rights when exercising any of their functions.

It is assumed that indirect incorporation means human rights are not enforceable by the courts. This is not entirely correct. The courts may be able to hold government to account for policy having an impact on human rights where there is indirect incorporation, and may be empowered to provide a remedy where policy is found to contravene rights. However, it is less likely that a remedy under indirect incorporation will be as strong as that available where there is direct incorporation. (Discussed further below: 'Enforcement').

Sectoral incorporation

Sectoral incorporation involves giving some effect to human rights in national legislation in relevant areas of public policy (i.e. sectors). This usually means that a right or rights will be referred to in legislation in a specific policy area, e.g. education, or housing. The right(s) in question may be quoted directly or an attempt may be made to encapsulate the right(s) through the wording of legislation. Depending on how sectoral incorporation takes effect the courts may be given a role to enforce the right(s) concerned.

The UK Government claims that sectoral legislation in the UK is compliant with human rights and is adequate to give effect to its human rights obligations. It points at the enactment of specific legislation (e.g. the Children Act 1989,

safeguarding vulnerable children) as evidence of compliance with its obligation to implement human rights. These claims are contested. (Discussed further below: 'Why incorporation matters: Priority and accountability' and 'The right to adequate housing: UK context'.)

Why incorporation matters: Priority and accountability

An important aspect of incorporation is to move human rights from the international to the national. Without incorporation human rights may be seen as no more than aspirational standards at a distance from the real world of domestic policy. Even worse, without incorporation human rights risk becoming 'dead letters' because they are not taken seriously by government.⁷

An important impact of incorporation, whether direct, indirect or sectoral, is to make human rights relevant to the business of government.⁸ It embeds human rights in the work of government now and in the future, insulating them from political whim by making them part of the national legal framework.

Addressing the implementation gap

A further impact of incorporation is to address the accountability gap between what governments agree as their human rights obligations, and their actions which

often leave individuals and groups without the necessary levels of human rights protection or adequate social provision. In other words, there is 'implementation gap' between human rights rhetoric and people's lived experience.

At international level there is weak State accountability for human rights through a system of reporting to TMBs.⁹ However, while TMBs can report their findings on any implementation gap they have no power to enforce compliance with human rights. Incorporation is therefore a vital step toward more effective national or domestic accountability.

Accountability in the UK

Human rights offer an ethical as well as a practical framework to guide public policy. However, in the UK international human rights are not part of UK law. The operation of the UK's legal system means that unless the UK Government decides to incorporate human rights treaties via national statute they remain set apart from UK law.

Successive UK Governments have refused to incorporate international human rights treaties into UK law. In 1998, the ECHR (a regional human rights treaty) was incorporated via the HRA 1998.¹⁰ Despite this, while international human rights treaties remain unincorporated in UK this means:

- Important human rights standards are not effectively embedded (or mainstreamed) into policy decision-making or government action, whether

⁷ Inter Parliamentary Union and UN Office of the High Commissioner for Human Rights, Human Rights Handbook for Parliamentarians No.26 (Geneva: 2016), p.97, available to download here: <https://www.ohchr.org/Documents/Publications/HandbookParliamentarians.pdf>

⁸ UNICEF-UK, 2012, The impact of legal implementation of the Convention on the Rights of the Child.

⁹ A comprehensive guide to the treaty monitoring mechanisms is available from, Office of the UN High Commissioner for Human Rights, The UN Human Rights Treaty System, Fact Sheet No.30/Rev 1 (New York: 2012, available here:

<https://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf>
¹⁰ Incorporated by the Human Rights Act 1998.

at UK level, at devolved level, or local government level.

- There is an accountability gap in public policy, as there are no effective mechanisms for accountability or enforcement of international human rights in the UK.

The significance of this shortfall in human rights coverage at a domestic level was highlighted during the visit to the UK by the UN Special Rapporteur on Extreme Poverty and Human Rights (November 2018). The Rapporteur raised numerous concerns about the impact of austerity and welfare reform in the UK, and the consequences for human rights. The Rapporteur's statement following his visit, and his subsequent report, describes numerous instances where the UK is in clear breach of social rights guaranteed by the ICESCR, e.g. on adequate housing, social security, health care, and provision for vulnerable groups.¹¹ The Special Rapporteur's concerns are consistent with the Concluding Observations of the UN Committee on Economic Social and Cultural Rights (UN Committee) published when the UK last reported on compliance with the ICESCR in 2016.¹²

Accountability on a Spectrum

Incorporation would help ensure appropriate mechanisms for accountability, although this does not necessarily imply court-based mechanisms. A number of informal (non court-based) accountability mechanisms

¹¹ Access the Special Rapporteur's initial reports here: <https://www.ohchr.org/EN/Issues/Poverty/Pages/CountryVisits.aspx>

¹² Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, 2016, available here: https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=GBR&Lang=EN

might be made available where human rights are incorporated into domestic law.

Complaints

Complaints mechanisms are informal procedures which enable an individual aggrieved by some decision or action of government to bring their grievance to the attention of the decision-maker. Incorporation would make it easier for individuals to complain about decisions which fall below human rights standards established by human rights treaties: as these would be part of the domestic legal framework. Complaints mechanisms for human rights might include existing mechanisms (commissioners, ombudsman, formal complaints procedures etc), or new mechanisms established specifically to receive human rights complaints.

In order for complaints mechanisms to be effective they should be accessible, especially to those from disadvantaged communities, and should include the opportunity for a relevant authority to reconsider or review a decision which is claimed is not human rights compliant.

Strengthening the role of National Human Rights Institutions

Legislation to incorporate human rights treaties can provide for National Human Rights Institutions (NHRIs) to be given powers to investigate and hold government to account for breaches of human rights.¹³ However, even without this step, incorporation would strengthen the role of NHRIs.

¹³ Consideration of what this might involve is beyond the scope of this briefing.

Relevant NHRIs in Wales are UK-wide (Equality and Human Rights Commission (EHRC)), or Wales-national (Children's Commissioner for Wales (CCfW), Older People's Commissioner for Wales). Incorporation of children's human rights in Wales (above 'Incorporation') has established an accountability framework against which to assess government decisions, and against which NHRIs in Wales can hold Welsh Ministers to account.¹⁴ Incorporation of the right to adequate housing in Wales would enhance the capacity of NHRIs to hold government and other public authorities to account for housing policy and action against human rights standards.

Parliamentary accountability: The National Assembly for Wales

Incorporation of human rights means that national parliaments are better able to hold government to account for compliance with international human rights. In Wales incorporation would mean that meeting the obligations associated with human rights would be a condition of legitimacy of Welsh Government policy. Incorporation of the children's rights in Wales (above 'Incorporation') has given the National Assembly for Wales (NAW) the opportunity to scrutinise proposals for policy or legislation against human rights standards.¹⁵ Incorporation of the right to adequate housing would give opportunity for the NAW to hold Ministers to account for housing policy and action by reference to human rights standards.

¹⁴ Hoffman, S. and O'Neill, S., The Impact of Legal Integration of the UN Convention on the Rights of the Child in Wales, EHRC Wales, 2018, available here:

https://www.swansea.ac.uk/media/The%20Impact%20of%20Legal%20Integration%20of%20the%20UN%20Convention%20on%20the%20Rights%20of%20the%20Child%20in%20Wales_ENG.pdf

¹⁵ Ibid.

Enforcement

Social rights establish targets for public policy. How best to make progress to meet these targets is a matter for public debate, public discussion and public accountability. The informal accountability mechanisms outlined above are appropriate to support these processes. In addition to informal mechanisms for accountability, incorporation can underpin formal court-based accountability and judicial enforcement. This is an additional layer of protection for social rights in cases where informal mechanisms fail to provide adequate safeguards, and rights are violated.

It should be noted that enforcement does not necessarily imply court-based procedures. However, the term enforcement is widely understood as referring to court-based mechanisms, and this is the sense in which the term is used in this section.

When it comes to protection of individual and group rights the courts represent a strong form of accountability, and a potentially powerful mechanism to ensure that social policy is human rights compliant. However, where there is court based enforcement of human rights judges may be seen as interfering with the authority of democratic government if they set aside the decisions of elected representatives, e.g. Welsh Ministers. Incorporation therefore needs to strike a balance between the role of the judiciary to protect rights and the democratic mandate of politicians to make law and policy.

It is often assumed that direct incorporation means human rights are enforceable by the courts, and that indirect incorporation means they are not.

However, while it is generally true that direct incorporation is more likely to lead to court-based enforcement, the extent to which this is effective to protect rights is dependent on the powers given to the courts to remedy violations of rights. This is illustrated by the two examples below.

Enforcement and direct incorporation

The HRA 1998 is often given as an example of direct incorporation of a human rights treaty in UK law, i.e. the ECHR. The HRA 1998 prohibits public authorities from acting in a manner which is incompatible with rights set out in the ECHR.¹⁶ The HRA 1998 makes the ECHR enforceable by UK judges who are empowered to provide redress where an individual's rights are violated. However, the HRA 1998 includes exceptions to this enforceability regime. Parliament is excluded from the requirement to act compatibly with the ECHR, and public authorities compelled by statute to act in a manner which is incompatible with rights under the ECHR are absolved of liability.¹⁷ Instead of being able to enforce rights where statute is in breach of the ECHR, the courts are empowered to issue a 'declaration of incompatibility'.¹⁸ The intention being that once such a declaration is issued Parliament will act quickly to remedy the breach. This exception to full enforceability of the ECHR is an attempt to strike a balance between the democratic authority of Parliament to make law, and the function of the courts to hold politicians to account. This example demonstrates that full enforceability does not necessarily follow as an aspect of direct incorporation but remains dependent on choices made

¹⁶ HRA 1998, section 6.

¹⁷ *Ibid.*

¹⁸ Section 4, HRA 1998.

about the scope and effect of legislation to incorporate rights.

Limitations on judicial enforcement: A self-imposed restraint

The effectiveness of the courts to uphold rights may be further undermined by self-imposed restraint on the part of the judiciary. In the UK, but also in many countries worldwide, judges are prepared to allow elected representatives significant discretion to introduce policies that have economic consequences, or resource implications. These are often policies affecting social rights e.g. housing, health, education, welfare. This deference on the part of the judiciary can mean that human rights are not properly enforced. An example of judicial reluctance to interfere with government policy, even where this means a breach of human rights for vulnerable groups, is the recent UK Supreme Court case on the issue of the 'bedroom tax' or 'housing benefit cap'. The case is *R (on the application of SG) v Secretary of State for Work and Pensions* [2015].¹⁹ The Supreme Court was asked to decide whether welfare reform legislation imposing a cap on housing benefit is lawful taking into account the adverse impact on sole parents and children. It was argued by representatives of the applicants that the cap is discriminatory and in breach of the ECHR as it affects mostly sole parents, who are mostly women. It was also argued that the cap is having an adverse impact on children in breach of their rights under the CRC. The majority of the court (three judges) felt unable to declare the legislation unlawful, for reasons which included a deference to government policy decision-making in the field of

¹⁹ UKSC 16.

welfare policy. A minority of the Supreme Court in the SG case (two judges) were convinced that the government's policy is discriminatory and in breach of children's human rights. However, the court reached its decision by a majority. The case demonstrates that judicial willingness to defer to the will of government may undermine court-based mechanisms for enforcement of human rights.²⁰

Enforcement and indirect incorporation

Although indirect incorporation is often seen as lacking judicial enforcement mechanisms, this does not mean that the courts play no part in holding politicians to account for political decisions that affect human rights. This is illustrated by legislation in Wales to indirectly incorporate the CRC in Welsh law.

The Child Rights Measure makes the CRC part of Welsh law via a schedule to the legislation. The rights set out in the CRC are not directly binding on Welsh Ministers but Ministers are required to have 'due regard' to the CRC when exercising their functions. For this reason, the CRC is said to have indirect effect. Welsh Ministers are not legally accountable for compliance with the CRC, however, any failure to have due regard to children's human rights in the exercise of policy decision-making is grounds for judicial review. Any adverse finding at judicial review could result in Welsh Government policy being set aside with Ministers required to revisit their decision.

Judicial review is only partially satisfactory as a mechanism to enforce human rights. The role of judges is limited to consideration of procedural issues, and whether policy is unreasonable or disproportionate. The nature of judicial review means that judges are restricted in how far they can go to examine the substance of a policy for non-compliance with rights. Instead, judges are limited to examining whether or not the policy at issue has been properly thought about and all relevant considerations taken into account. Indirect incorporation can help ensure that the factors taken into account at judicial review include the extent to which policy reflects the objectives of human rights. (Discussed further below | Part C.)

In short, while judicial remedies are more accessible and likely to be more effective where there is direct incorporation, the availability and effectiveness of court-based accountability mechanisms should not be assumed. As discussed above, there are limitations. Where there is indirect incorporation there is scope for court-based accountability and judicial oversight, albeit that this is unlikely to be as strong as under direct incorporation.

²⁰ South Africa is often lauded as a State which has incorporated social rights and made them enforceable. For a critique of how the courts have approached their responsibility to enforce social rights in South Africa: O'Connell, 'The Death of Socio-Economic Rights', *The Modern Law Review* Vol. 74, No. 4 (JULY 2011), pp. 532-554.

Part B: Framework Issues – The Right to Adequate Housing

This part discusses issues relating to incorporation of the international human right to adequate housing at national level.

The right to adequate housing

The right to adequate housing is an international human right. It is set out in Article 11(1) of the ICESCR which reads as follows:

'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent. (Emphasis added.)'

General obligations of the right to adequate housing

There are a number of obligations which accompany all human rights. These include general requirements to respect, protect and fulfil rights.

Respect, protect and fulfil

At a general level government at all levels is required to respect, protect and fulfil those human rights which are binding on the State, including the right to adequate housing where the State is party to the ICESCR.

- To **respect** the right to adequate housing means refraining from actions that result in violation of the right, for

example: refraining from policy or legislation which undermines access to housing or security of tenure.

- To **protect** the right to adequate housing right means taking action to prevent third-parties from interfering with rights, for example: preventing unlawful evictions or harassment of tenants by their landlord.
- To **fulfil** the right to adequate housing means taking steps to ensure the realisation of the right for everyone, but in particular for those at greatest disadvantage in society, for example: introducing policies which improve housing conditions or access to housing.

Progressive realisation

Under the ICESCR social rights, including the right to adequate housing may be given effect in different ways, and may be fulfilled progressively over time.²¹ This does not mean that government can avoid complying with the duty to fulfil the right to adequate housing altogether. Rather, it means that government is required to make progress toward the fullest possible realisation of the right through the application of resources as they become available.²² Any assessment of the extent to which government has complied with this obligation will need to take account of the resources it has available, the demands made on those resources, and the prioritisation given to the right to adequate housing alongside other pressing policy considerations (including other human rights).

²¹ ICESCR, article 2.

²² UN Committee, General Comment No.9, The nature of States parties' obligations, available here:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fICESCR%2fGEC%2f4758&Lang=en

Non-discrimination

Although all social rights set out in the ICESCR are subject to progressive realisation, some obligations are of immediate effect. One such obligation is non-discrimination.²³ The ICESCR, for example, prohibits discrimination based on 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.²⁴ In the context of the right to adequate housing this means that policies or laws on housing should not discriminate against these social groups in ways that undermine their enjoyment of the right. Another example of an immediate obligation is to ensure at least the minimum level of enjoyment of a right, or a minimum core (below).

Minimum core

While the fulfilment of social rights under the ICESCR may be achieved progressively, all such rights are said to have a 'minimum core' or 'minimum essential level' of achievement.²⁵ The minimum core is not defined but may be understood as the basic level of a right which should be secured consistent with ensuring the dignity of the person.²⁶ This minimum essential level of a right must be provided immediately so that no individual is left to live a life of destitution or to suffer degrading treatment. In application to the right to adequate housing the minimum core is the provision of basic shelter so that no-one is left homeless or without sanitary and habitable accommodation.²⁷

²³ ICESCR, article 2.

²⁴ Ibid.

²⁵ Ibid fn.23.

²⁶ Ibid.

²⁷ See, Maastricht Guidelines on Violation of Economic Social and Cultural Rights (1997), para. 9, available at: http://hrlibrary.umn.edu/instreet/Maastrichtguidelines_.html

It is worth noting that the extent to which government housing policy, including housing policy in Wales, meets the obligations of non-discrimination, progressive realisation and the minimum core as they apply to the right to adequate housing are matters for public debate, discussion and accountability. The best approach to meet the right is not set in stone and may be subject to different interpretations. What is essential is that mechanisms exist to hold politicians, and in particular Ministers to account for the choices they make in relation to housing policy and how this meets the obligations of non-discrimination, progressive realisation and minimum core.

Other obligations of the right to adequate housing

In addition to the general obligations discussed above there are particular obligations which apply to the right adequate housing. These are set out in guidance issued by the UN Committee in its General Comment No.4, The Right to Adequate Housing (1991).²⁸

It has already been noted that as a minimum the right to adequate housing includes the right to access basic shelter (above 'Minimum Core'). The guidance issued by the UN Committee however encourages a broader understanding of what the right involves. The UN Committee states:

²⁸ Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4759&Lang=en

'In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity.'

General Comment No.4, para.7

The reference to the right to adequate housing as a right to live in 'peace, security and dignity' reflects the view that housing is of fundamental importance to humanity, to individuals and households. The right to adequate housing reflects the need of everyone to have somewhere to call a home, to use as a base for living, for employment, education or retirement, or to raise a family. The right to adequate housing is therefore essential for personal dignity and well-being.

The UN Committee has identified several aspects of the right to adequate housing which ought to be addressed by law and policy.²⁹ These are:

Legal security of tenure

Irrespective of the type of tenure everyone should possess a degree of security of tenure which guarantees legal protection against arbitrary eviction, harassment and other threats.

Availability of services, materials, facilities and infrastructure

An adequate house must contain facilities essential for health, security, comfort

²⁹ Un Committee, General Comment No.4, para.8.

and nutrition. These include access to safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal and drainage.

Affordability

Individual or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Tenants should be protected against unreasonable rent levels or rent increases.

Habitability

Adequate housing must be habitable, providing adequate space and protection from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease.

Accessibility

Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources and should be ensured priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups.

Location

Adequate housing must be in a location which allows access to employment, healthcare services, schools, childcare centres and other social facilities. Housing should not be built on polluted sites or in proximity to pollution sources that threaten the right to health of occupiers.

Cultural adequacy

Policies supporting housing construction and modernisation should enable the expression of cultural identity and diversity of housing.

Of crucial importance is that housing policy and legislation should give due priority to social groups living in unfavourable conditions. Policies and legislation should not be designed to benefit already advantaged social groups at the expense of others.³⁰

The UN Committee recognizes that the most appropriate means of achieving the full realization of the right to adequate housing will inevitably vary depending on context, but notes that this will require the adoption of a national housing strategy with defined objectives. This strategy should also identify resources to meet those objectives within a set time frame and should be prepared following 'extensive genuine consultation with, and participation by, all of those affected, including the homeless, the inadequately housed and their representatives'.³¹ The UN Committee empathises the need to ensure coordination between government departments and local authorities. This is in order to ensure that housing and related policies are implemented in such a way as to meet the obligations arising under the right to adequate housing.³²

It is important to state that the right to adequate housing does not require government to provide housing for all. Instead, housing policy should pursue 'enabling strategies' to help realise the right to adequate housing for everyone through a range of housing options. Particular attention should be given to disadvantaged groups who are to be afforded 'some degree of priority consideration in the housing sphere' to ensure 'full and sustainable access' to adequate housing.³³

It can be seen that the international right to adequate housing provides a comprehensive framework for assessing and auditing national housing policy. The right is accompanied by guidance which is sufficiently clear to provide a robust foundation for housing policy, but is also allows room for application to context and local discretion. The next part of this report discuss the right to adequate housing in Wales and options for incorporation.

30 UN Committee, General Comment No.4, para.11.

31 UN Committee, General Comment No.4, para.12.

32 Ibid.

33 Ibid.

Part C: Framework Issues – Wales

This part discusses the reasons why Wales should incorporate the right to adequate housing, and how this might be achieved.



The right to adequate housing: UK context

It has already been noted that the UK has not incorporated international human rights treaties, as well as the shortfall in human rights coverage at domestic level. The housing situation in the UK has attracted adverse comment from the UN Committee, including when the UK last reported on compliance with the ICESCR in 2016.³⁴ The UN Committee commented on the right to adequate housing:

'The Committee is concerned about the persistent critical situation in terms of the availability, affordability and accessibility of adequate housing in the State party, in part as a result of cuts in State benefits. The Committee also notes with concern that the lack of social housing has forced households to move into the private rental sector, which is not adequate in terms of affordability, habitability, accessibility and security of tenure. The Committee reiterates its previous concern that Roma, Gypsies and Travellers continue to face barriers in accessing adequate and culturally appropriate accommodation across the State party, with adequate access to basic services such as water and sanitation.'

*Committee on Economic Social and Cultural Rights
Concluding Observations on the UK State Party, 2016, para. 49*

³⁴ Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, 2016, available here: https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=GBR&Lang=EN

The right to adequate housing: Wales context

UK government welfare policy, which is non-devolved, will have a direct impact on how people experience the right to adequate housing in Wales. However, housing is a devolved matter (discussed further below, this Part), and the Welsh Government has a crucial role to ensure (as far as possible) that the right to adequate housing is respected, protected and fulfilled in Wales.

Recent evidence gathered by the EHRC Wales, and reported in its publication *Is Wales Fairer* (2018),³⁵ draws attention to shortfalls in the right to adequate housing for many in Wales. Reference should be made to the EHRC Wales report for a full account of the issues, however key concerns identified in the report relevant to housing policy in Wales include: high levels of homelessness, an increase in rough sleeping, a shortage of affordable housing, and the frustration felt by disabled people at the lack of suitably adapted accommodation.

Shelter Cymru has reported on a number of housing issues directly relevant to the right to adequate housing in Wales. Issues of concern include an increase in street homelessness,³⁶ a need to increase the supply of affordable housing,³⁷ the insecurity of tenure faced by some private

³⁵ Available at: <https://www.equalityhumanrights.com/sites/default/files/is-britain-fairer-2018-is-wales-fairer.pdf>

³⁶ Shelter Cymru, *Trapped on the Streets* (2018), available at: <https://sheltercymru.org.uk/wp-content/uploads/2018/09/Trapped-on-the-Streets-Full-Report.pdf>

³⁷ Shelter Cymru, *Response to Welsh Government consultation: Review of affordable housing supply in Wales* (2018), available at: <https://sheltercymru.org.uk/wp-content/uploads/2018/09/Affordability-of-social-housing-review-final.pdf>

sector tenants,³⁸ and the need to tackle substandard accommodation.³⁹

While the above represent issues that the Welsh Government needs to address through its housing policy, it would be wrong to suggest that it has not already taken action consistent with the right to adequate housing. Notably, the Welsh Government introduced legislation, the Housing (Wales) Act 2014 (HA 2014) which now requires local housing authorities to do more to prevent homelessness and to do more to ensure gypsies and travellers have adequate places to berth their mobile homes, and there has been action to increase the supply of affordable homes and to raise housing standards.⁴⁰ However, what is apparent from the evidence gathered by the EHRC Wales and by Shelter Cymru, is that in many respects, the HA 2014 has not been sufficiently directive, or has not been accompanied by action sufficient to meet the standards anticipated by the right to adequate housing.

Incorporation of human rights in Wales

Although the UK Government is primarily responsible for implementation of human rights in the UK, the devolved administrations are expected to contribute. Indeed, given the breadth of devolved competences in areas such as education, health and social care, housing and the environment, they may be seen as having a very significant role in the

38 Shelter Cymru, Policy Briefing: Improving the stability of privately rented homes (undated), available at:

<https://sheltercymru.org.uk/what-we-do/policy-and-research/#tab-id-7>

39 Shelter Cymru, Living Home Standard (2017), available at: <https://sheltercymru.org.uk/wp-content/uploads/2015/02/Living-Home-Standard-Wales-FINAL-ENG.pdf>

40 Progress in these areas is noted alongside challenges in the reports and briefings listed immediately above.

realisation of human rights.

The Welsh Government is open to (and indeed supportive of) international human rights as a framework for public policy. Julie James AM when Leader of the House of the NAW wrote in an introduction to the Welsh Government's Enabling Gypsies Roma and Travellers policy published in June 2018: "Equality and Human Rights are central to the work of the Welsh Government and our vision for Wales."⁴¹ This sentiment is echoed in other policy documents and statements issued by Welsh Ministers. In November 2018, Jeremy Miles AM, Counsel General for Wales said about human rights in Wales:

'We have consistently gone beyond seeing rights as a 'parchment guarantee' ... We have sought, collectively, to seep them into the walls of the institution itself, shaping the executive and legislative processes.'

*Eileen Illtyd Memorial Lecture
on Human Rights⁴²
Swansea University, 2018*

In fact, Wales already has legislation to incorporate human rights. As already noted the Child Rights Measure indirectly incorporates the CRC into Welsh law. The loss of rights guaranteed by the Charter of Fundamental Rights of the European Union following Brexit⁴³ has given new impetus to calls for further

41 Available here (words cited are at p.3):

<https://gov.wales/docs/dsjlg/publications/equality/180625-enabling-gypsies-roma-travellers-plan-en.pdf>

42 15 November 2018. Transcript available at: <https://www.swansea.ac.uk/law/news/>

43 For discussion see of the impact of Brexit on human rights see: Liberty UK, Bring Rights Home, What's at Stake for Human Rights in the Incorporation of EU Law After Brexit, available here:

<https://www.libertyhumanrights.org.uk/sites/default/files/Bringing%20human%20rights%20home%20-%20Jan%202018.pdf>

incorporation of human rights in Wales. The NAW Equality, Local Government and Communities Committee and the External Affairs and Additional Legislation Committee have jointly called for legislation to incorporate more human rights in Wales adopting the approach taken in the Child Rights Measure.⁴⁴ There have also been calls from Assembly Members for Wales to incorporate the Convention on the Rights of Persons with Disabilities (CRPD),⁴⁵ and the UN Principles for Older Persons (UNPOP).⁴⁶

Of particular significance in Wales is incorporation of social rights variously set out in the ICESCR or other treaties such as the CRPD (for example, rights to health and social care, education, housing, and employment). Social rights are the human rights that relate most closely to the competences of the NAW and the Welsh Government, with potential to provide a guiding framework for the conduct of policy and legislation in devolved areas.

Incorporation of the right to adequate housing in Wales

Incorporating the right to adequate housing in Wales would provide a bridge between international law and Welsh housing policy, as well as the housing responsibilities of the Welsh government and local authorities. Although the UK government refuses to contemplate this as a step for the UK as a whole, the Welsh Government could act independently to

'bring home' the right to adequate housing in Welsh law. This would be entirely consistent with the Welsh Government's voiced support for human rights as the basis of good government in Wales.

The commitment to human rights in Wales is more than rhetorical. The Child Rights Measure is one example of action going beyond rhetoric. Other progressive steps taken by Welsh Ministers include a Declaration of the Rights of Older People in Wales,⁴⁷ and Welsh statutes on social care, and on education which require public authorities to have due regard variously to the rights of children, older people and disabled people.⁴⁸

Legislation could be introduced in Wales to impose a duty on Welsh Ministers as well as local housing authorities to have due regard to the right to adequate housing in the exercise of their housing functions. This would require relevant authorities to take full account of the various aspects of the right to adequate housing. The due regard duty approach is not the only option for incorporation of the right to adequate housing. The next section provides a guide to different approaches that could be taken to incorporating the right to adequate housing in Wales.

44 Report available here:

<http://senedd.assembly.wales/documents/s80082/Equalities%20and%20Brexit%20Joint%20findings%20by%20the%20Equality%20Local%20Government%20and%20Communities%20Committee%20an.pdf>

45 See Record, 10/10/2018, at from para.256: <http://record.assembly.wales/Plenary/5356>

46 See: <https://www.darrenmillaram.com/news/older-people-have-rights-too>

47 Information available here:

<https://socialcare.wales/research-and-data/research-on-care-finder/declaration-of-rights-for-older-people-in-wales>

48 Social Services and Well-being (Wales) Act 2014; and, Additional Learning Needs and Educational Tribunal (Wales) Act 2018.

Competence and models of incorporation

The powers of the Welsh Government to introduce policy and proposals for new or amended legislation, and the competences of the NAW to pass legislation, are set out in the Government of Wales Act 2006 (GWA) (as modified by the Wales Act 2017).

Human rights competence

The competences of the NAW are established by reference to section 108A and schedule 7A and 7B of the GWA. Section 108A confirms that the NAW has competence to enact primary legislation for Wales provided it does not relate to a matter reserved to the UK Parliament to legislate, or a restricted matter. Schedule 7A sets out what is reserved. Schedule 7B sets out what is restricted.

Entering into human rights treaties is a matter dealt with in the conduct of foreign affairs by the UK government on behalf of the UK State. Schedule 7A, paragraph 10 expressly reserves the conduct of foreign affairs to UK governance institutions.

Therefore, the Welsh Government cannot enter into international human rights treaties. However, Schedule 7A, paragraph 10(3)(a) states that 'observing and implementing international obligations' is not reserved. International human rights treaties to which the UK is a State party are part of the UK's international obligations. Observing and

implementing human rights treaties, including the ICESCR and the right to adequate housing, is therefore within the competences of the NAW. It is an option available to Ministers to introduce legislation for enactment by the NAW for the purpose of giving effect to (observing and implementing) human rights treaties to which the UK is already a State party, to include the ICESCR or the right to adequate housing as a distinct right.

The Welsh approach to incorporation

The Child Rights Measure is an example of incorporation of international rights in Welsh law. It incorporates 41 substantive articles of the CRC, as well as select articles of the first and second CRC optional protocols.⁴⁹ Sectoral legislation in Wales in the field of education further incorporates the CRC along with UNPOP, and legislation on health and social care incorporates both the CRC and the CRPD.

All legislation to incorporate human rights in Wales does so using the due regard duty, and is therefore indirect incorporation. The duty under the Child Rights Measure is confined to Ministers. However, sectoral legislation (education and social care) applies the due regard duty more widely to all public authorities exercising functions under the relevant legislation.⁵⁰

⁴⁹ Section 1 of the Child Rights Measure requires Ministers to have due regard to Part One of the CRC and select articles from its first and second optional protocols.

⁵⁰ Above fn.49.

What to incorporate: Wholesale incorporation of social rights?

The right to adequate housing is a component element of the right to an adequate standard of living set out in article 11 of the ICESCR. The right to adequate housing would be incorporated if legislation were introduced in Wales to incorporate the ICESCR in Welsh Law. If there were to be wholesale incorporation of the ICESCR this would represent a significant step to progress human rights in Wales and would have implications beyond the field of housing. Careful consideration would need to be given as to whether such a comprehensive approach would be appropriate taking into account the range of rights in the ICESCR, many of which extend beyond the powers and competences of Welsh devolution. With this in mind it would be necessary to reflect on the rights contained in the ICESCR to determine which should be incorporated, and whether these should be in the form of, for example, a 'Bill of Social, Economic and Cultural Rights for Wales'. This exercise is beyond the remit of this report.⁵¹

What to incorporate: The right to adequate housing?

An alternative to wholesale incorporation of the ICESCR in Wales is incorporation of the right to adequate housing. Although the right is a component element of the right to an adequate standard of living under article 11 of the ICESCR, it is well-defined as a free-standing right with clear and particular obligations (discussed above, Part B). This makes it suitable

⁵¹ The First Minister's Advisory Group on Human Rights has completed an assessment of a Bill of Rights along these lines in Scotland. For information see: <https://humanrightsleadership.scot/>

for incorporation as a discrete right into Welsh law. There are different approaches that could be adopted to achieve this.

Human rights incorporation: Model A, indirect incorporation

Legislation to incorporate the right to adequate housing could require the Welsh Ministers as well as local authorities to have due regard to the right to adequate housing as set out in Article 11 of the ICESCR when exercising their functions under the HA 2014 (Model A). Model A could be achieved by amendment of the HA 2014.

Model A would permit Ministers to strike a balance between competing policy priorities, taking account of local need, available resources and long-term planning.⁵² A due regard duty would ensure close attention in housing policy to the objectives of adequate housing, in particular as these affect the position of the most disadvantaged. However, the duty is not prescriptive of policy choices and would allow space for policy to address other priorities (including rights other than the right to adequate housing).

Adopting mechanisms included in the Child Rights Measure, Model A could require Ministers and local authorities to publish a Housing Rights Scheme setting out how they intend to give effect to the due regard duty, and to publish a periodic report (every 2-3years) on how they have met the duty.⁵³ A requirement for a Housing Rights Scheme would help promote a proactive approach to implementing the due regard duty and therefore the right to adequate housing. Requiring publication of a compliance

⁵² For a fuller account of due regard: S.Hoffman, Due Regard: A Short Briefing, www.swansea.ac.uk/law/wales-observatory/resources/

⁵³ Child Rights Measure, sections 3 and 4.

report would strengthen accountability as this would be in the public domain giving opportunity for scrutiny by the NAW, NHRIs and civil society.⁵⁴

Human rights: Model B, direct incorporation

Legislation to incorporate the right to adequate housing could require Welsh Ministers and local authorities not to act in a manner which is incompatible with the right to adequate housing as set out in Article 11 of the ICESCR when exercising their functions under the HA 2014 (Model B). Model B could be achieved by amendment of the HA 2014.

Model B mirrors the approach taken in the HRA 1998.⁵⁵ The HRA 1998 gives any person who claims an authority has acted unlawfully a right of action against the authority concerned.⁵⁶ If Model B were used to incorporate the right to adequate housing in Wales relevant legislation to amend the HA 2014 would need to introduce a right of action for persons claiming breach of the right, and to specify the remedies available.

A dual approach

Both models discussed above have distinct advantages, but also challenges. Model A focuses on decision making, and seeks to promote the development of housing policy consistent with the right to adequate housing, reducing the possibility that the right will be breached as policy is implemented. However, Model A is not accompanied by a strong enforcement mechanism (above 'Enforcement' (indirect incorporation)). Model B introduces

the possibility of a strong enforcement mechanism (above 'Enforcement', (direct incorporation)). However, Model B is less focused on avoiding violation of the right to adequate housing through good public policy and relies on after-the-fact intervention when it may be too late to provide a satisfactory remedy.

By advancing two possible models for incorporation of the right to adequate housing it is not intended to suggest they are mutually exclusive. They are not. There is nothing to prevent both models being used in combination: a dual approach. Legislation could deploy Model A to promote a proactive approach to the right to adequate housing in policy development (including legislation). Where this is insufficient to ensure right-compliant implementation of housing policy Model B could be deployed to provide redress for individuals or groups adversely affected.⁵⁷

A dual approach, which combines Model A and Model B has the advantage that Ministers and local authorities are encouraged by the due regard duty (Model A) to proactively pursue policies to give effect to the right to adequate housing. However, where the actions of Ministers or local authorities in the housing field unreasonably or disproportionately affect the right to adequate housing as it is experienced by an individual or group there is a route to a remedy (Model B).

⁵⁴ See discussion of impact of Child Rights Measure in Part D.

⁵⁵ HRA, section 6.

⁵⁶ HRA, section 7.

⁵⁷ The Children and Young Persons Commissioner for Scotland and Together for Children in Scotland have proposed a draft Children's Rights Bill to the Scottish Government adopting the dual approach. Information about the Bill is available here:

<https://www.togetherscotland.org.uk/about-childrens-rights/monitoring-the-uncrc/incorporation-of-the-un-convention-on-the-rights-of-the-child/>

Accountability on a Spectrum

Judicial review and court-based enforcement are remedies available against public bodies, including Ministers and local authorities. But they are not the only remedies. If the right to adequate housing were incorporated in Welsh law accountability would be three-fold.

- First, prior to judicial intervention (and partly to ensure that court-based review is a last resort), other accountability mechanisms would be available (discussed above, 'Accountability on a Spectrum').
- Second, civil society, NHRIs in Wales, and the NAW would be able to use their scrutiny powers to examine how Ministers and local authorities take account of the right to adequate housing in proposals for policy and legislation, as well as in local policy and practice.
- Third, there would be judicial oversight by way of the courts. Although courts could not require responsible decision-makers to give effect to the right to adequate housing by any particular means, judicial oversight would help ensure that Ministers and local authorities adopt suitable procedures to take proper account of the right to adequate housing in the exercise of their functions.

How judicial oversight would take effect would depend on whether this was under Model A (due regard) or Model B (compliance enforcement). (Under the dual approach both would be relevant.)

Judicial review: Model A

Any claim that Ministers or a local authority had failed to have due regard to the right to adequate housing in the exercise of any functions would be made by way of judicial review. Judicial oversight would be limited to consideration of whether Ministers determining national housing policy and statute, or a local authority deciding and implementing local policy, had meaningfully taken into account how their decisions and actions might affect the right to adequate housing.⁵⁸ This may be described as weak form judicial review, where judicial oversight is limited to assessing whether proper consideration is given to the right to adequate housing in the decision-making process. This would include confirming that the Minister or local authority concerned had approached the decision with an open-mind and properly informed by relevant evidence (which might require gathering new evidence if this is not already available, and possibly consulting with those affected), and that they were fully aware of the implications of their decision on the right to adequate housing.⁵⁹

If it is established that a Minister or a local authority failed to have due regard the court would be able to order the decision or action set aside, and could require the decision-maker to reconsider.

⁵⁸ See e.g.: *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158

⁵⁹ *Ibid.*

Judicial review: Model B

Any claim that Ministers or a local authority has failed to act in compliance with the right to adequate housing would very likely be made by way of judicial review (as a matter in the realm of public social and welfare policy). Judicial oversight in this instance would extend beyond procedural considerations (as under Model A), and would extend to examination of the impact of any Ministerial or local authority decision or action on the rights and interests affected. The court would be able to consider the impact of any decision or action on the right to adequate housing of individuals or groups affected, and to ask whether any negative impact is disproportionate taking account of all relevant factors (e.g. other policy priorities beyond the right to adequate housing). This may be seen as a strong form of judicial review.

If it is established that a decision or action is disproportionate the court would be able to provide a suitable remedy, which might include damages (if these were provided for in the legislation on incorporation).

The right to adequate housing and current Welsh legislation

Any legislation to incorporate the right to adequate housing in Wales would not sit in isolation. Rather, it would operate alongside other legislation with implications for the rights of individuals and households in Wales, and which places duties on public authorities. This section considers how legislation on the right to adequate housing would fit with and complement existing relevant legislation.

The Human Rights Act 1998

The HRA 1998 incorporates the ECHR into UK law. It protects civil and political rights, and affords little protection for social rights such as the right to adequate housing. The courts, including the UK Supreme Court have developed certain rights under the ECHR so they afford some limited protection to social rights. However, these developments fall far short of providing the sort of guarantees which accompany the international right to adequate housing. Incorporation of the right to adequate housing in Welsh law (using any approach mentioned above) would greatly enhance the promotion and protection of the right to adequate housing in Wales.

The Rights of Children and Young Persons (Wales) Measure 2011

The Child Rights Measure means that Ministers, when exercising their functions, should have due regard to the child's rights to adequate housing under Article 27 of the CRC. Incorporation of the right to adequate housing using any approach mentioned above would replicate this obligation for Ministers when exercising housing functions under the HA 2014, but would enlarge the duty so that it extends not only to children but also their caregiver(s). Incorporation would also move the duty beyond Ministers to local authorities as institutions key to ensuring the right to adequate housing in Wales.

The Social Services and Well-being (Wales) Act 2014

The Social Services and Well-being (Wales) Act 2014 (SSWBA) requires any person or authority exercising functions which may be broadly described as social services functions to have due regard to the CRC and UNPOP. Incorporation using any approach mentioned above, would complement these obligations as it would ensure that Ministers and local authorities not only take account of human rights in the discharge of their social services functions, but also in the discharge of their housing functions.

The Well-being of Future Generations (Wales) Act 2015

The Wellbeing of Future Generations (Wales) Act 2015 (WBFGA) imposes a 'well-being duty' on relevant authorities which include Ministers, local authorities and health boards. This requires these authorities to carry out sustainable development in 'pursuit of the economic, social, environmental and cultural well-being of Wales', and to do so in a way that accords with the 'sustainable development principle'.⁶⁰ In order to meet its well-being duty a relevant authority must set and publish 'well-being objectives' designed to 'maximise its contribution' to meeting seven 'well-being goals' which are set out in the WBFGA.⁶¹ The well-being goals are intended to further the ambition of the Welsh Government for the social, economic, environmental and cultural well-being of Wales. As such they are necessarily broad and aspirational, and are dependent on further elaboration through guidance and indicators, as well as through practice,

60 WBFGA, Part 2.

61 Ibid.

for clarity as to their reach and affect. Although it is yet to be confirmed by the Higher Courts, it seems unlikely that the well-being goals will be capable of enforcement by the courts.⁶²

The UN Committee has published guidance on the relationship between international Social Development Goals (SDGs) and human rights in the ICESCR.⁶³ This guidance makes it clear that human rights underpin sustainable development, and can provide a framework for working toward achievement of SDGs in practice. Incorporation of the right to adequate housing would be complimentary to the WBFGA. The right would introduce an underpinning for the WBFGA well-being goals in the field of housing, and the obligations that accompany the right to adequate housing would provide a framework for achievement, measurement and accountability for the well-being goals through housing policy.

The socio-economic duty under section 1 of the Equality Act 2010

Section 1 of the Equality Act 2010 includes a duty requiring a public authority, when making decisions of a 'strategic nature', to have due regard to the 'desirability' of exercising their functions in a way that reduces socio-economic inequality. This duty is referred to as the 'socioeconomic duty'. Although not yet in force in the UK, the Welsh Government has committed to bringing the duty into effect in Wales.⁶⁴

62 For an initial insight into what might be the approach of the courts: <https://www.bbc.co.uk/news/uk-wales-48272470>
NB this article is provided for information only. This report takes no view on, and does not adopt the comments made in the article.

63 The Pledge to "Leave No One Behind": The International Covenant on Economic, Social and Cultural Rights and the 2030 Agenda for Sustainable Development, 8 March 2019, E/C.12/2019/1.

64 See, for example, Statement of the Deputy Ministers and Chief Whip on International Women's Day, <http://record.assembly.wales/Plenary/5565#A49303>

While this would be a welcome additional to the equality framework in Wales, the wording of the duty means it does not impose any obligation on relevant authorities to achieve any particular outcome. The socioeconomic duty is not particular to housing, and does not expressly require consideration of any of the obligations which accompany the right to adequate housing.

In much the same way as the Incorporation of the right to adequate housing would be complimentary to the WBFGA, it would provide an underpinning and a framework achievement, measurement and accountability for the broad ambition encapsulated by the socioeconomic duty.



Part D: Some insights into the impact of Incorporation

There are many different approaches to incorporation of human rights worldwide. What emerges from the research is that incorporation (however it takes effect) is not the only factor that influences how individuals and groups experience their international human rights at national level. Numerous factors, including the resources available to government, social attitudes, historical disadvantage, political prioritisation etc will all likely have some causative impact on the realization of human rights. For this reason, evidence on the impact of incorporation is not readily available, and less so on incorporation of the right to adequate housing. This section will therefore seek to draw lessons from leading research on incorporation to highlight a number of consistent themes. While the right to adequate housing does feature in this discussion, inevitably the majority of the evidence is generalized and refers to social rights more broadly.

Incorporation and government action

Some of the most informative research in the impact of incorporation comes from the field of children's rights. The UN Committee on the Rights of the Child,⁶⁵ is perhaps the TMB which has most forcefully urged states to incorporate human rights, i.e. the CRC. A leading study for UNICEF-UK on legal implementation of the CRC discusses incorporation.⁶⁶ While the research notes diversity in how incorporation is achieved in the 12 countries studied it concludes that incorporation is always accompanied by significant benefits for human rights.

65 The TMB which monitors the CRC.

66 Lundy et al, Legal Implementation of the UNCRC in 12 Countries, UNICEF UK, 2012, available here: <https://www.unicef.org.uk/publications/child-rights-convention-2012-report/>

These include opportunities for litigation to ensure better compliance with rights, as well as signifying something about the status and respect accorded to rights, and the subsequent recognition of rights in policy. The UNICEF-UK report notes that the main value of incorporation

'...was thought to be in the strong message it conveyed about the status of children and children's rights, and the knock-on effects for implementation of children's rights principles into domestic law and policy.'⁶⁷

The UNICEF-UK study also shows that incorporation provides significant leverage to ensure that law and policy takes account of human rights.

A comprehensive review of the evidence on incorporation of human rights treaties globally by Daly et al for the EHRC reached many similar conclusions as the UNICEF-UK study.⁶⁸ On incorporation generally the review concludes

'Our research supports consensus in the literature that incorporation through domestic law remains the most effective means of ensuring compliance with human rights treaty obligations.'

Daly et al, p.5

67 Ibid p.4

68 Daly et al, Enhancing the Status of UN Treaty Rights in Domestic Settings, 2018, available here: <https://www.liverpool.ac.uk/media/livacuk/law/2-research/ilhru/EHRC.Enhancing.the.Status.of.UN.Treaty.Rights.pdf>

And on incorporation and social rights

'The research indicates that incorporation of (ICESCR) rights is both possible and desirable. Although politically challenging, there is evidence of popular support in the UK for the incorporation of socioeconomic rights.'

Ibid

Daly et al provide several examples from the available research on the benefits of incorporation. One example concerns the incorporation of children's rights in Norway, which has incorporated the CRC into national law. The review of evidence by Daly et al confirms that this resulted in children's rights and interests being taken into account to a greater extent in the drafting of legislation and in case law.⁶⁹

These important studies confirm the benefits of incorporation as: raising the profile of rights in policy development, confirming the important status of rights at national level, and helping to ensure proper recognition of rights in the political domain. Amongst the benefits of incorporation identified by the UNIECF-UK study, as well by Daly et al is the opportunity it provides for judicial oversight and intervention to protect rights.

69 *Ibid*, p.20

Incorporation and enforcement

In her research examining options for incorporation of economic and social rights in Scotland, Boyle notes that 'adjudication and the legal enforcement of rights can occur through a 'myriad of forms' some of which offer greater protection than others.⁷⁰ In a report for the Scottish Human Rights Commission (SHRC) Boyle identifies Germany as a State where the the right to human dignity is recognised at a constitutional level, and where the courts have interpreted this as requiring a minimum level of social assistance. Boyle notes that the approach taken by the German constitutional court is to assess whether a statutory scheme for social security is provided and describes this as 'weaker' than where the court supervises the level of social security provided.⁷¹ Another country discussed by Boyle in her report for the SHRC, Argentina, demonstrates the impact of stronger forms of review by the courts.

In Argentina, international human rights law has been directly incorporated into the constitution. In a number of cases the courts have enforced social and economic rights, including the right to housing. Boyle cites one case in which the court draws directly on comments by the UN Committee on adequate housing to interpret the right to housing in Argentina. Boyle notes the willingness of courts in Argentina to provide a remedy and to intervene directly to protect occupiers, and to raise standards of habitability

70 Boyle, K, Models of Incorporation and Justiciability for Economic, Social and Cultural Rights, 2018 Scottish Human Rights Commission, available here:

http://www.scottishhumanrights.com/media/1809/models_of_incorporation_escr_vfinal_nov18.pdf p.25

71 *Ibid*.

'... the court in Argentina has also gone so far as to offer structural remedies where the local authority has failed in implementing ESC rights, such as the right to housing.

This has included wide ranging structural remedies for collective cases involving multiple families (like a class action).⁷²

Boyle, p.29

Boyle goes on to note that this structural approach can help ensure budget, policy and outcomes were all reflective of international human rights law.⁷³

In 1996 South Africa made social rights part of the country's constitution, making them individual entitlements enforceable by the courts. These rights correspond to those in the ICESCR, and like ICESCR rights, they are subject to available resources and progressive realisation. The South African context is discussed by Boyle, as well as Daly *et al*.⁷⁴ Daly *et al* note that recent judgments in South Africa suggest a restrictive (deferential) approach to enforcement.⁷⁵ The Constitutional Court of South Africa employs reasonableness as the standard by which compliance with social rights assessed. Daly *et al* and Boyle refer to the well-known case of Grootboom to confirm the deferential approach taken by the South African courts when dealing with issues of public policy and human rights.⁷⁶ That case related to the right to adequate housing under the South African Constitution. The court found that the right to housing was not immediately enforceable. The court refused to

require the authority concerned to meet a minimum standard of provision in its housing policy, but instead required the authority to adopt a policy to ensure measures were in place to realise the right to housing. On the facts of the case the court found that this standard had not been met and ordered the authority to revisit its housing strategy.

Daly *et al* refer to other countries where incorporation of social rights has provided opportunities for litigation, such as in Kenya where the constitution incorporates international treaties including the ICESCR. They note that the ICESCR has been relied on in litigation in those countries to secure compensation for families whose social rights were violated.⁷⁷ They also note that cases brought before the courts on social rights in Kenya are often the result of strategic litigation by civil society actors.⁷⁸ The opportunity for strategic litigation was also noted as a consequence of incorporation of the CRC by Lundy *et al* in research carried out for UNICEF-UK in 2012.⁷⁹

Litigation, and the role of the courts, does not however have to be about requiring government to revisit policy decisions (weak form judicial review), or to introduce policy or take steps to make policy more compliant with human rights (strong form judicial review). Daly *et al* give Ireland and India as examples of law-making directed by certain principles which are not enforceable by the courts.⁸⁰ Some comparison may be made with the Model A approach set out above and the due regard duty. Decision-makers are directed to consider various aspects of social justice when drafting laws. Despite not

⁷² Boyle, p.29

⁷³ Boyle p.29.

⁷⁴ Boyle, p.30; Daly *et al* p.9.

⁷⁵ Daly *et al* p.18.

⁷⁶ Boyle p.30

⁷⁷ Daly *et al* p. 18.

⁷⁸ *Ibid.*

⁷⁹ Lundy *et al*, p.4.

⁸⁰ Daly *et al* pp.18-19

being directly enforceable by the courts the research carried out by Daly *et al* suggests that directive principles can be effective to help develop the meaning and obligations imposed by rights, which in turn can inform law and policy.⁸¹

The evidence discussed in the studies noted in this section confirms that incorporation is key to securing judicial oversight of human rights at national level. While there are variations in the role the courts play in securing compliance with right, judicial oversight as a result of incorporation means that accountability for rights is enhanced.

Finland: A focus on the right to adequate housing

In Finland social rights receive constitutional protection.⁸² The constitutional provisions dealing with social rights in the Finnish model are directed at the legislature and includes an obligation to legislate for the protection and fulfilment social rights (Article 19 of the Constitution). This has led to Finland approaching housing and homelessness 'as a housing problem and a violation of fundamental rights, both solvable, and not as an inevitable social problem resulting from personal issues.'⁸³ Following this recognition of housing as a right the Finnish approach to homelessness begins with the assumption that a homeless person is to be provided with a home. Support services are made available to treat addiction, mental health and other problems, assistance with welfare paperwork and securing a job. This is

81 Ibid.

82 The information in this case study is taken from the FEANTSE web-site. Resources available here:

<https://www.feantsa.org/en/resources/resources-database?-search=Finland&theme=&type=>

83 See: <https://grow-media.co.uk/top-stories/grow-talk-finland-housing-first-solution-homelessness/>

Finland's 'housing first' approach and has been in place for more than a decade. The approach is working. Despite rising homelessness across Europe, in Finland numbers are dropping. In 1987, there were around 18,000 homeless people but in 2017 this had fallen to just over 7,000, with only about 415 living on the streets or in emergency shelters. Between 2008 and 2015 in Finland, the number of people experiencing long-term homelessness dropped by 35 percent. Finland's approach is attributable to the human rights values which underpin its policies.

Ireland: A rights-based approach to housing regeneration

In 2014 Hearne and Kenna reported on a project to introduce a human rights-based approach (HRBA) to regeneration on an Irish housing estate, the Dolphin Estate in Dublin,⁸⁴ owned and managed by Dublin City Council. The housing on the estate suffered from damp, overcrowding, sewage problems and poor accessibility. These problems had for decades been neglected by the authority, and were often treated as problems caused by the occupiers. In 2009 a group of activists (tenants, community workers etc), formed an action group to take a HRBA to dealing with housing issues on the estate. This emphasizes the principles and entitlements and that accompany human rights,⁸⁵ and draws attention to the obligations of government at all levels. Although the action group did not focus exclusively on the right to adequate housing, it did use the ICESCR and the obligations arising from the right to

84 Hearne, R. and Kenna, P., Using the Human Rights Based Approach to Tackle Housing Deprivation in an Irish Urban Housing Estate, *Journal of Human Rights Practice*, Volume 6, Issue 1, March 2014, Pages 1–25.

85 For a guide to a Human Rights Approach see: Danish Institute for Human Rights, *Applying a Rights Based Approach; An Inspirational Guide for Civil Society*, available here:

<https://www.humanrights.dk/publications/applying-rights-based-approach>

adequate housing to develop indicators to measure the success of the HRBA. Following an assessment of outcomes on the estate, Hearne and Kenna conclude that adopting a HRBA had contributed to making the local authority and the State government accountable for their human rights obligations on the estate. The authors also conclude the HRBA taken to dealing with issues on the estate had led to a significant improvement in conditions and had empowered tenants to work together to achieve change.

The impact of incorporation of the CRC in Wales

This report has already noted that Wales has incorporated the CRC in Welsh law. The EHRC Wales has published a study on *The Impact of legal integration of the UN Convention on the Rights of the Child in Wales*.⁸⁶ This provides a number of insights into what incorporation of human rights can achieve in Wales. The study found that incorporation of the CRC has raised the profile of children's rights in policy development undertaken by Welsh Ministers, and has increased the opportunities for policy advocacy on behalf of children in Wales, legitimising the language of rights in policy discourse, and providing a foundation for stakeholders to engage with the Welsh Government in dialogue about how to give effect to rights through policy. It has also introduced an expectation of compliance with the CRC, which contributes a strong underpinning for advocacy on behalf of children in Wales.

While the EHRC study concluded that the Child Rights Measure has enhanced legal accountability for compliance with the CRC through the addition of new basis for action in public law, it found that this has not led to any increase in judicial review. Legal accountability has not emerged as a significant accountability mechanism for children's rights compliance in Wales. However, the study concluded that the Child Rights Measure has established the CRC as an audit framework for Welsh Government policy increasing accountability for children's rights.

⁸⁶ Ibid fn.15.

Part E: Impact Analysis

Part D provides insights into the possible implications of incorporation of the right to adequate housing in Wales.

This section aims to contribute to this understanding by analysing selected areas of Welsh housing policy and asking: What might be the impact if the right to adequate housing were part of Welsh law so that it applies to Ministers and local authorities? What difference could incorporation make?⁸⁷

Case study: Homelessness and intentionality

In Wales a person who is homeless or threatened with homelessness may apply to a local housing authority (LHA) for housing assistance. Following an assessment of the applicant's situation the LHA is able to take a number of steps to avoid homelessness or to assist the applicant to find accommodation. In some cases the LHA will be required to determine whether the applicant is in priority need, and if so, whether they are intentionally homeless.⁸⁸ A finding of intentionality has a significant impact on many aspects of the right to adequate housing. Inevitably it results in denial of access to social housing and places limitations on the ongoing support available from the LHA. An applicant found intentionally homeless will often be forced to rely on the private rental sector where tenure is often insecure, rents are often unaffordable, and housing conditions are often poor, especially for those on low income.⁸⁹

The punitive nature of intentionality is inconsistent with realisation of the right to adequate housing, in particular access to housing. It penalises a homeless person for choices they may have made

in the past and disregards the severity of their situation at the time of applying for assistance. In general terms a finding of intentionality makes it more likely that someone will remain homeless or inadequately housed, undermining the essential purpose of the right to adequate housing which is to promote human dignity. Developments post-introduction of the HA 2014 have seen reductions in findings of intentionality by LHAs in Wales.⁹⁰ However, while individual LHAs are given the power to decide not to apply the intentionally test, to date no LHA has taken this step. All LHAs in Wales have decided to retain intentionality as an aspect of their homelessness decision-making, and despite a decline in its use, applicants continue to be stigmatised and burdened by a finding of intentional homelessness.

If the right to adequate housing had been in place in Wales at the time the HA 2014 was drafted Ministers would have been required to carefully take this into account when deciding what to do on the issue of intentionality. A properly conducted impact assessment would have revealed that in practice the intentionality test would remain a barrier to some vulnerable individuals and households receiving housing assistance (as is in fact the case). Ministers would also have had to take into account the impact of any decision by a local authority to rely on intentionality on the equal enjoyment of the right to adequate housing by all those seeking housing assistance.

⁸⁷ The conclusions reached in the case studies are opinion. They are informed by research and have been reached using best endeavours to analyse likely outcomes.

⁸⁸ Housing (Wales) Act 2014.

⁸⁹ <https://commonslibrary.parliament.uk/social-policy/housing/private-rented-housing-what-are-conditions-like/>

⁹⁰ Shelter Cymru, 2016, Reasonable Steps, available at: <https://sheltercymru.org.uk/wp-content/uploads/2015/02/Reasonable-Steps.pdf>

The discretion given to local authorities to apply or not apply the test of intentionality carries with it the possibility that applicants for housing assistance will experience their right to adequate housing differently depending on a decision taken at local authority level. This is contrary to this principle of non-discrimination which is fundamental to human rights. Taking these factors into account would have provided strong reason for abandoning the test of intentionality altogether in Wales.

Should the right to adequate housing be incorporated in Wales in the future this would require Ministers to reconsider the statutory framework on homelessness and the continuance of the intentionality test. It would also require all LHAs to review their decision to continue to deploy intentionality in homelessness decision-making. As noted in the opening paragraphs to this section, a finding of intentionality is inconsistent with the right to adequate housing. While this does not mandate any change in the position taken to date by Ministers and LHAs on the issue, a proper appreciation of the right to adequate does very strongly suggest that Ministers should look for ways to do away with the test of intentionality altogether, and that LHAs should use their discretion not to rely on the test in practice.

Case study: Security of tenure

The Renting Homes (Wales) Act 2016 (RHA 2016) makes several reforms consistent with the right to adequate housing. However, under the RHA 2016 no-fault eviction continues to be available to landlords in the private rented sector. This means that a tenant of a private landlord is only guaranteed six months' occupation. Beyond this their continued occupation is at the discretion of the landlord. This undermines long term security of tenure as an aspect of the right to adequate housing. The Welsh Government has now committed to end no-fault evictions in Wales. The approach taken in the RHA 2016 reflects the view of the Law Commission which examined renting in Wales in 2013. The Commission argued that it is inappropriate to require private landlords to meet the same obligations as social landlords (who, apart from in limited circumstances, do not have the option of no-fault eviction).⁹¹ This argument is likely to arise during public consultation on any Welsh Government proposal to end no-fault evictions.

Tenure reform need not imply that the private rented sector regime should provide the same security as is available to tenants in the social housing sector. Instead, tenants in the private rented sector should enjoy security of tenure so that they can live in 'security, peace and dignity'. A proper appreciation of the right to adequate housing in application to the private rented sector does not mean tenure security equivalent to social housing, but it should – if properly implemented – mean an end to no-fault evictions.

⁹¹ Law Commission 2013, *Renting Homes in Wales*, Cm. 8578, available here: <https://www.lawcom.gov.uk/document/renting-homes-in-wales/>

If the right to adequate housing were incorporated in Wales this would underpin and strengthen the position of Ministers as well as those advocating reform. Ministers would be duty bound to look for ways to progress toward greater security of tenure in Wales, and doing away with no-fault evictions would not only be a political commitment, but also a human rights obligation. Ministers would be able to point to this legal obligation which could enable better balance between the rights of tenants to live in security and those of private sector landlords.

Case study: Security of tenure and eviction into homelessness

In cases where tenants are evicted from social housing or private rented housing they may be made homeless as a result. Where the tenant is part of a larger household this can result in that household, including children, being made homeless as well. Homelessness is a denial of the right to adequate housing and an infringement of human dignity, which human rights are intended to promote and protect. While ending no-fault evictions (above) would mean that all social landlords and private landlords would need to provide grounds (reasons) for eviction, this would not prevent some households being evicted into homelessness. Landlords would still be able to rely on mandatory grounds for possession, usually for serious breaches of tenancy. These mean that a court has no choice but to order eviction where the ground is proved.

Where a landlord relies on discretionary grounds for possession, usually where tenancy breaches are less serious, the court has some discretion to refuse to make a possession order. In deciding whether to make an order the court will consider whether possession is 'reasonable' in all the circumstances having regard to the interests of the landlord, the tenant and any other occupiers who might be evicted, the reason for and the seriousness of the breach, and, the consequence of eviction for this particular tenant and their family (if this is relevant). On the last of these, homelessness is not on its own treated as a good reason to deny a landlord a discretionary possession order.

Homelessness is the most fundamental breach of the right to adequate housing. Eviction into homelessness means that a tenant and their household is made to leave accommodation to a situation where their right to adequate housing is not being met. If the right to adequate housing were incorporated in Wales Ministers would need to consider how they might use their devolved powers to prevent this from happening in both the social housing and private rented sectors. This would not be straightforward as the rights and interests of tenants at risk of being evicted into homelessness would need to be balanced against the rights and interests of others. Especially relevant here might be a landlord's property rights, or the rights of neighbours to live in peace and security and therefore not to suffer antisocial behaviour. In order to balance these competing interests tenure reform

might remove the option of mandatory possession orders where a court deciding a claim for possession in Wales is satisfied that eviction will lead directly to homelessness. Where the court is instead considering a discretionary possession order the court's power to make such an order might be expressly limited by a requirement to treat eviction into homelessness as a compelling reason not to make an order. Where children are involved, the court could be directed to take into account the child's right to adequate housing, and for this to be provided by their caregiver(s).⁹² The court would not be prevented from making an order evicting a tenant (and their household) into⁹³ homelessness, but the presumption would be that this should be avoided without compelling reasons.

Incorporation of the right to adequate housing in Wales would not only raise the issue of how to prevent eviction into homelessness through tenure reform in Wales, but would also help frame thinking about how this might be achieved. Although the suggestions made in the previous paragraph (and there might be others) would not end eviction into homelessness altogether, they would go some considerable way toward securing the right to adequate housing for tenants at risk of this happening.

Case study: Accessible housing for disabled people

A report by the EHRC Wales in 2018 revealed a 'hidden crisis' arising from a lack of accessible housing for disabled people in Wales.⁹⁴ The report concluded that Wales is experiencing a chronic shortage of accessible housing and that one of the many factors contributing to this lack of accessibility is the inequitable system of funding and carrying out housing adaptation. The report revealed inequitable provision. A disabled person needing a particular adaptation to meet their needs might have it installed within three months, whilst their neighbor, with the same requirements might have to wait 12 or more months, purely because they live in a different housing tenure (or with a different type of housing provider).⁹⁵ During this extended wait for adaptation the disabled person health and wellbeing might be deteriorating. While this is not a new issue (it has been known about for at least 10 years), there is no disagreement amongst key providers (Welsh Government and local authorities) about the lack of progress.⁹⁶ Failure to provide an effective mechanisms by which disabled people can access suitably adapted housing, or obtain support to have adaptations made to their existing home, is a breach of the accessibility and suitability obligations as aspects of the right to adequate

⁹² CRC, article 27.

⁹³ Although this may change during consultation on the draft.

⁹⁴ EHRC Wales, Housing and disabled people: Wales's hidden crisis, 2018, available here:

<https://www.equalityhumanrights.com/en/publication-download/housing-and-disabled-people-wales-hidden-crisis>

⁹⁵ Housing Adaptations: Report of the Public Accounts Committee, 2018 <https://www.assembly.wales/laid%20documents/cr-ld11703/cr-ld11703-e.pdf>

⁹⁶ Housing Adaptations, Wales audit Office, 2018

<https://www.audit.wales/system/files/publications/housing-adaptations-2018-english.pdf>

housing. Failure to make progress in this respect is a breach of the requirement for progressive realisation, and the impact on disabled people puts at risk their right to the highest attainable standard of health,⁹⁷ and possibly their right to life.⁹⁸

The revised Welsh Government framework on services for disabled people in Wales, 'Action on Disability: the Right to Independent Living'⁹⁹ seeks to address the issue of adapted housing. It includes mention of a review of the aids and adaptations system that supports disabled people to live independently in their own home (expected before the end of 2019). It also recognises that a lack of adapted housing limits disabled people's capacity to live independently. However, within Action on Disability there is very little to indicate concrete actions to remedy the problem beyond the systems review, monitoring and consultation on guidance.¹⁰⁰ Although the review claims to be focussed on the rights of disabled people under the CRPD this hardly features as an underpinning for the draft revised framework.

If the right to adequate housing were incorporated in Welsh law, the passing reference to rights in the draft Action on Disability would be unacceptable. Ministers instead would need to clearly indicate in Action on Disability, or in an accompanying Equality Impact Assessment how they had given proper consideration to meeting the right to

adequate housing in the preparation of the revised framework (something which is not apparent in the current document). Disabled people would be able to point to a right secured in Welsh law to hold Ministers to account for the lack of progress on adapted housing in Wales generally, and in the revised framework. Depending on the model used to incorporate the right to adequate housing, a disabled person adversely affected by failings in the present adaptations system would be able to bring a claim to have their right enforced by a court. Given the delay, and lack of progress signalled by Action on Disability, the person affected would have grounds for arguing that the obligation to progress toward full realisation of right to adequate housing for disabled people in Wales is not being met by Welsh Government policy.

Case study: Young people

The ability to access independent housing is vitally important for young people (18-24 years) making the transition from children to independent adults. However, young people face particular issues in housing, including a lack of accommodation that is suitable and affordable and located close to opportunities for continuing education or employment. Homelessness amongst young people is also a major concern in Wales.¹⁰¹ This problem is compounded by the lack of suitable accommodation and caps on Local Housing Allowances which

97 ICESCR, article 12.

98 International Covenant on Civil and Political Rights, article 6; ECHR, article 2 (right to protection of life by law).

99 <https://gov.wales/sites/default/files/consultations/2018-10/181018-action-on-disability-consultation-v1.pdf>

100 p.4.

101 This case study is informed by the End Youth Homelessness group's submission to the Independent Review of Affordable Housing Supply in Wales, A Youth-Led Response to the Affordable Housing Supply Review. Further information was taken from Llamau and Shelter Cymru on-line resources: <https://www.llamau.org.uk/eyhcymru> and <https://shelter-cymru.org.uk/what-we-do/policy-and-research/>

mean other accommodation, which is bigger than that required by young people, is unaffordable. Young people are more likely to find themselves having to share accommodation which raise issues of privacy, lack of independence and in some cases personal safety.

A report published by the Wales Centre for Public Policy in 2018¹⁰² found that early interventions which stop young people from becoming homeless are key to eradicating youth homelessness. The reports recommended the development and implementation of a national strategy to prevent and end youth homelessness. Any strategy would need to address the issue of supply of suitable and affordable housing for young people, and provide solutions, including ways to increase supply. The Welsh Government's target to build 20,000 new affordable homes is commendable, but it is not enough to meet the demand in Wales.¹⁰³ For young people, there is no indication as to how their need for affordable housing will be assessed, let alone met.

The Welsh Government has made £10m available to help support work to end youth homelessness.¹⁰⁴ About one-third of this directed toward preventing homelessness, which is very welcome. However, the fund will not address the fundamental problem of lack of suitable housing for young people, and the issue of affordability. As a result of the HA 2014 local authorities in Wales are required to produce a strategy on homelessness

in their area, which must address how to prevent homelessness, and how to achieve suitable housing provision for those who are homeless.¹⁰⁵ While a local authority strategy may address the needs of particular groups, including young people leaving local authority care or youth detention, this is not mandatory and there is no requirement to address the needs of young people in general.¹⁰⁶ This is partly because the Equality Act 2010, which requires due regard to be paid to the needs of specific groups,

when policy is made, currently does not prohibit discrimination in housing based on age, or proactive consideration of the needs of different age groups.

A right to adequate housing in Wales would mean that housing policy, including policy at a local level, would need to demonstrate how it meets the needs of particularly disadvantaged social groups. While the requirements in the HA 2014 provide some guidance to LHAs on how to meet this obligation, it fails to require LHAs to develop a strategy to ensure that suitable housing is available for young people, who face particular challenges in gaining access to housing. The right to adequate housing would require recognition of this issue at Ministerial level and a clear signal in housing policy at government level in Wales that ensuring that affordable housing meets the needs of young people will be a priority in Wales. The implication of this would be an obligation on Ministers to address the key issue

102 Stirling, T., Youth homelessness and care leavers: Mapping interventions in Wales, 2018, Wales Centre for Public Policy, available here: <https://www.wcpp.org.uk/wp-content/uploads/2018/10/Youth-homelessness-and-care-leavers-Mapping-interventions-in-Wales.pdf>

103 Shelter Cymru submission to the Independent Review of Affordable Housing Supply in Wales, available here:

<https://sheltercymru.org.uk/wp-content/uploads/2018/09/Affordability-of-social-housing-review-final.pdf>

104 <https://gov.wales/new-projects-prevent-youth-homelessness-announced-first-minister>

105 Housing (Wales) Act 2014, sections 50 and 51-52.

106 Housing (Wales) Act 2014, section 52.

of the supply of affordable housing supply (noted above), and/or to look for ways to support young people to meet unaffordable housing costs. A further implication would be the need for stronger direction to LHAs to examine ways to meet the needs of young people via local housing strategies.

Case study: Tenant voice

A report by the EHRC following the Grenfell Tower tragedy concludes that local authorities and other public services failed in their obligations to protect life and provide safe housing consistent with the right to adequate housing.¹⁰⁷ It highlights how authorities were presented with evidence that the cladding used on the building was unsafe but failed to take action to prevent the loss of 72 lives in a fire on 14th June 2017. The safety of wheelchair users, elderly and disabled people was overlooked when vulnerable residents were housed on the top floors of the high-rise building. The EHRC report illustrates how the voice of tenants was marginalised in the management of social housing in the Royal Borough of Kensington and Chelsea, the borough where the tower was situated. Despite residents complaining about living in 'dire conditions' prior to the fire the EHRC report highlights how these concerns were not listened to. Residents of the Tower have also stated that they raised multiple concerns about the risk of fire in the months before the blaze at the building, but that these were "brushed away" by the council's tenant management organisation.¹⁰⁸

107 <https://www.equalityhumanrights.com/en/following-grenfell>
108 <https://www.theguardian.com/uk-news/2017/jun/14/fire-safety-concerns-raised-by-grenfell-tower-residents-in-2012>

The Grenfell Tower disaster is a particularly horrific illustration of the marginalisation of the voice of the tenant in housing management but it illustrates the importance of listening to the voice of tenants. This is not just about doing everything possible to avoid disasters such as what happened at Grenfell Tower, but also to ensure that the human rights of tenants, including the right to adequate housing, are met in the day-to-day governance of their housing.¹⁰⁹ The UN Committee has stated that the right to adequate housing cannot be viewed in isolation. It is essential to see it in the light of other rights such as the right to freedom of expression, the right to freedom of association, and the right to participate in public decisionmaking.¹¹⁰ The UN Committee also states that these are "indispensable if the right to adequate housing is to be realized and maintained".¹¹¹

A report by the NAW Public Accounts Committee (PAC) in 2017 into how Registered Social Landlords in Wales are governed raised issues of lack of tenant's voice in this process.¹¹² The PAC found that "although the Welsh Government has stated that its intention to place tenants at the heart of regulation, reality does not always reflect this intent."¹¹³ The PAC report notes the importance of tenants being involved in the regulatory process in order to hold their housing associations to account.¹¹⁴

109 Above, fn.29.
110 Ibid, para.9
111 Ibid.
112 PAC, Inquiry into Regulatory oversight of Housing Associations, 2017, available here: <http://www.assembly.wales/laid%20documents/cr-ld11151/cr-ld11151-e.pdf>
113 Ibid, paras.101.
114 PAC, para.102.

While the PAC reports that individual housing associations are expected to engage with tenants as part of the regulatory process in Wales (something emphasised by the Welsh Government) it noted that “it is not always easy for tenants to access information about their landlord, and even more difficult, if not impossible, to judge how well their landlord is performing compared with other landlords.”¹¹⁵

The PAC made a number of recommendations relevant to tenant voice, these included that the Welsh Government should: make provision for the availability of data to assist tenants in determining and challenging the policies of their housing association;¹¹⁶ should provide reassurances that tenants' views will be captured and reflected in the future, and that this will be closely monitored; and, should place a requirement on housing associations to demonstrate how they empower their tenants to scrutinise their performance.¹¹⁷

In response to the PAC report the Regulatory Board for Wales (RBW)¹¹⁸ is undertaking a strategic review seeking to understand the current landscape for tenant participation, and what positive tenant participation looks like. The RBW has indicated its commitment to ensuring tenants are at the heart of regulation: the question of how the voice of tenants is heard is

‘...particularly pertinent in the light of the Grenfell tragedy.’¹¹⁹
The aftermath of Grenfell has highlighted once again the risk of not taking account of tenants' frustrations, but also presents an opportunity for fresh thinking in terms of tenant engagement and realising the benefits of listening to tenants.’¹²⁰

The RBW review is seeking to identify examples of positive practice in order to understand what works in different contexts, in order to develop a tool to support effective approaches to tenant involvement.¹²¹

If the right to adequate housing were incorporated in Wales the work of the review would be framed in human rights terms, something which was recognised as lacking at Grenfell. Reference to the right to adequate housing would strongly suggest that the Welsh Government should give full effect to the PAC recommendations – which are vital to participation – not only by instituting a review, but by ensuring the review focuses on how regulation, and any tool to support tenant participation embraces and gives effect to tenant's rights in practice.

115 PAC, para.105.

116 PAC, recommendation 4.

117 PAC, recommendation 5.

118 The purpose of the board is to examine the regulatory performance and activity of the Welsh Government and the housing sector:

<https://gweddill.gov.wales/topics/housing-and-regeneration/services-and-support/regulation/regulatory-board-for-wales/?lang=en>

119 The independent Hackitt Review, Building a Safer Future argued for greater access to information, greater resident involvement and engagement and improved routes to redress, Building a Safer Future Independent Review of Building Regulations and Fire Safety: Final Report: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/707785/Building_a_Safer_Future_-_web.pdf In particular, chapter 4.

120 Smith, B., <http://chcymru.org.uk/comms/CHC-Cartref/2018/12/14/putting-tenants-at-the-heart/>

121 Above, fn.117.

A focus on the right to adequate housing would suggest strong accountability mechanisms, access to information for tenants, and appropriate forums and support for tenants to engage meaningfully with their landlords. These would need to be established and protected in law, and would need to be mandatory to ensure that all housing associations meet at least a minimum (human rights) standard on participation.

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