

The right to adequate housing in Wales: Feasibility Report

Executive Summary

“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.

Authorised by: Dr Simon Hoffman (Swansea University) for Tai Pawb, the Chartered Institute of Housing Cymru and Shelter Cymru

Published June 2019

Context

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.

Grenfell came 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.

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.

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

a national commitment to the fundamental principle that every one of us should have a human right, underpinned by law, to access adequate and sustainable housing. We need a vision and a legal framework that would help us shift the paradigm of the way housing is understood – namely as being central to the dignity of every person.

A big part of that process should be, in our view, embedding into Welsh legislation, the Right to Adequate Housing as outlined in ICESCR (International Covenant on Economic, Social and Cultural Rights).

We believe that the report makes for a compelling case for the incorporation of the Right to Adequate Housing 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.

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)



Key points from the Report

Human rights, incorporation and enforcement

Human rights protect individuals and social groups from unjustifiable interference from the state and guarantee everyone a basic level of entitlement in vital areas of public service provision – including housing.

The United Kingdom (UK) is party to seven United Nations (UN) human rights treaties.¹ These include the Covenant on Economic, Social and Cultural Rights (CESCR)² which guarantees rights to social conditions such as employment and decent working conditions, health and social care, social insurance, education, and an adequate standard of living. The CESCR also guarantees **the right to adequate housing**.

A number of UN-established treaty monitoring bodies, which monitor international compliance with human rights treaties, made recommendations to incorporate human rights treaties in national laws.³

Incorporation can be direct, indirect or sectoral.

Direct incorporation means transforming the human rights treaty into domestic law, as in the case of the

Human Rights Act. Direct incorporation usually means that individuals can use human rights to seek justice in a British court.

Indirect incorporation usually means that governments and authorities have to take some account of human rights treaties but are not fully bound by them. An example of indirect incorporation in the UK is the Rights of Children and Young Persons (Wales) Measure 2011 (the Child Rights Measure) where Welsh ministers have to pay due regard to an international treaty. Governments can still be challenged in court, but the remedies will not be as strong as in the case of direct incorporation.

Sectoral incorporation usually means that rights set out in the human rights treaty are referred to and encapsulated in legislation in a specific policy area, e.g. education, or housing. The courts may be given a role to enforce the right(s) concerned. An example of such incorporation is the Social Services (Wales) Act 2013 which requires ministers and authorities to pay due regard to specific human rights.

Incorporation matters because without it, human rights treaties which the state has ratified are no more than **aspirational standards or 'dead letters'**. Incorporation brings human rights into a **national legal framework**,

1. 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>
2. <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

3. For example: 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>

insulating them from a political whim and **embedding them into policy** and law-making. Incorporation helps address the **accountability gap** between a government's human rights commitments and its actions. For example, although the UK government is considered to be breaching people's right to adequate housing (according to the UN), the UN has no power to enforce action.

Incorporation means governments and public authorities can be held **accountable** for their actions through a number of **mechanisms** including informal ones: public debate, complaints, human rights institutions, commissions and commissioners, National Assembly for Wales; and formal mechanisms: court-based accountability and judicial enforcement.

Incorporation may need to strike a **balance** between the **role of the courts** to protect rights, and the democratic **mandate of politicians** to make law and policy.

Judicial remedies are usually more accessible and likely to be more effective for individuals where there is **direct incorporation**, but it can have its limitations. Where there is **indirect incorporation** there is also scope for court-based accountability and judicial oversight, usually in the form of judicial review albeit that this is unlikely to be as strong as under direct incorporation.

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 recognise 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.)'

The right to housing is accompanied by a general obligation to **respect, protect and fulfil** the right.

The right to housing may be fulfilled progressively, over time. This means that the **government is required to make progress** towards the fullest possible realisation of the right through the application of **maximum available resources**. This is called progressive realisation. ICESCR also immediately **prohibits discrimination** and requires the provision of at least a minimum core level of enjoyment of the right to housing, avoiding homelessness, destitution and degrading treatment via provision of shelter.

The UN committee further defines the right to adequate housing as a right to live in **'peace, security and dignity'**. It recognises housing as going beyond a provision of shelter, often viewed as a commodity. It sees **housing as being of fundamental importance to humanity**.

There is a separate UN appointed Special Rapporteur on the Right to Adequate Housing⁴.

The UN Committee has identified several aspects of the right to adequate housing which ought to be addressed by law and policy, including: **legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy**. The committee further requires focus on those living in the most **unfavourable conditions**. It also requires that governments develop a rights based **national housing strategy**. Guidance on all of the above, based on international good practice, has been issued by the UN Committee and Special Rapporteur. 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.

4. <https://www.ohchr.org/en/issues/housing/pages/housingindex.aspx>



Why and how should Wales incorporate the right to adequate housing

The UN Committee on Economic Social and Cultural Rights, responsible for monitoring the right to housing internationally, commented on the **'persistent critical situation'** of housing in the UK and consistently recommended incorporation of international social rights including housing.⁵

Wales, as other devolved nations, is experiencing high levels of homelessness, an increase in rough sleeping, a shortage of affordable housing, severe lack of suitably adapted and accessible accommodation for disabled people, lack of security of tenure and issues with substandard accommodation.

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 **and 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. Welsh Government **has already taken action** that is **consistent with the right** to adequate housing, for example, through increased homelessness prevention duties, duties to provide Gypsy and Traveller accommodation and promotion of Housing First approaches to tackle homelessness. Our report demonstrates that **this is not sufficient however to meet the**

standards required by the right to adequate housing.

The loss of rights guaranteed by the Charter of Fundamental Rights of the European Union **following Brexit** has given new impetus to calls for further incorporation of human rights in Wales.

Social rights are the human rights that relate most closely to the competences of the NAFW and the Welsh Government, with potential to provide a **guiding framework** for the conduct of policy and legislation in devolved areas.

Importantly, although the National Assembly for Wales doesn't have competency to enter international human rights treaties (this is done at a UK level), **it DOES have the power to observe and implement them, including the ICESCR and the right to adequate housing.** It is an option available to Ministers to introduce legislation for enactment by the NAFW 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.

When considering how best to implement human rights in Wales, the report considers **three options of incorporation** – indirect (Option A), direct (Option B) or the adoption of a dual approach. Option A and B both offer distinct advantages but also challenges. Combining both into a **dual approach would offer both advantages** – a strong proactive framework for policy making and strong enforcement if the right to

5. Concluding Observations on the UK State Party, 2016, para. 49

6. 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>

housing is breached. **Model A** can 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**.

It's also important to recognise that any future legislation on the right to housing wouldn't sit in isolation from other policy platforms. Indeed, **it would serve to enhance** and widen **existing provisions** under, for example, the Human Rights Act 1998 **and legislation** such as the Rights of Children and Young Persons (Wales) Measure, Equality Act 2010, Social Services and Well-being Act and **the Well-being of Future Generations Act**.

Internationally, there is evidence as to the **impact of incorporation** of social and housing rights, although it is difficult to source evidence of direct impact. This is because the extent to which the right is realised depends on numerous factors, including the resources available to government, social attitudes, historical disadvantage, political prioritisation etc.

International and Wales-based evidence quoted by this report however, concludes that **incorporation is accompanied by significant benefits**. These include: opportunities for strategic and structural litigation to ensure better compliance with rights, as well as increase in the status of rights and subsequent recognition of rights in policy and legislation. In Finland, where housing is a human right guaranteed in constitution, homelessness is defined and perceived as a violation of a fundamental right. This lead to the development of highly successful 'housing first' model (and significant reduction in homelessness).

To further support the principle of incorporating the right to housing into Welsh law, this report also **analyses the potential positive impact** that incorporating the right to adequate housing could have on some of the **key housing issues of the day**. Apart from greater consideration of housing at a cross-policy level, **incorporation could help us tackle issues** such as homelessness, increasing the security of tenure, increasing the provision of accessible housing, enabling young people to access affordable housing and ensuring tenants' voices are heard.

7. 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/>