

Commission on Justice in Wales

Submitted by: Dr Simon Hoffman, Associate Professor in Law, Co-coordinator Observatory on Human Rights of Children, Hillary Rodham Clinton School of Law, Swansea University. Member: Welsh Government Children’s Rights Advisory Group; Wales UNCRC monitoring Group; Coordinator Wales Human Rights Stakeholder Group; Older People’s Commissioner for Wales, Make Rights Real Working Group.

My work is on human rights and public policy in areas covered by social rights such as: the right to an adequate standard of living, housing, health, education etc.ⁱ My evidence focuses on social rights and social justice, and its implications for administrative justice, social accountability and legal education. All views expressed below are personal.

Devolution, Social Justice and Social Rights

1. The contours of devolution in Wales mean there is close alignment between social justice objectives encapsulated by international human rights, in particular social rights, and public governance in areas such as health, education, social welfare and housing. People’s experience of their social rights in Wales is influenced by access to, and the quality of public services. Realisation of social rights is key to meeting the public services needs of marginalised and disadvantaged communities. This is especially significant to tackle both the causes and consequences of poverty, a chronic problem in Wales.ⁱⁱ Living in poverty affects who offends and who is a victim of crime, is linked to mental and physical ill-health, adversely affects educational attainment, leads to problems of debt, and limits the life chances of children.ⁱⁱⁱ
2. Wales has been the most pro-active of the UK jurisdictions to introduce legislation on social rights to deliver social justice. International human rights and human rights principles have been integrated in Welsh law.
 - *The Rights of Children and Young Persons (Wales) Measure 2011*: requires Welsh Ministers to have due regard to Part 1 of the Convention on the Rights of the Child (CRC) and specified articles of its 1st and 2nd Optional Protocols in the exercise of any of their functions.
 - *The Social Services and Well-being (Wales) Act 2014*: requires any person exercising functions under the act to have due regard to Part 1 of the CRC, as well as the UN Principles for Older Persons.
 - *The Additional Learning Needs and Education Tribunal (Wales) Act 2018*: requires any authority exercising functions under the act to have due regard to Part 1 of the CRC and the Convention on the Rights of Persons with Disabilities.
 - *The Well-being of Future Generations (Wales) Act 2015* establishes ‘well-being goals’ for public bodies which reflect human rights principles.
3. The Welsh approach to regulation of public governance is distinctive; introducing new and unique duties on Welsh Ministers and public bodies. Welsh legislation has established new rules of engagement between governance institutions and citizens; and therefore, for administrative justice in Wales.^{iv} Social rights have been woven to the framework of public governance, with potential to ensure good governance, fairness and accountability.

Administrative Justice and the Courts

4. In the context of a fused legal system the emergence of Welsh social rights law is challenging for formal administrative justice. Traditionally judges in England and Wales are reluctant to engage in the substantive adjudication of social rights.^v But this is against a backdrop of inadvertence to social

rights in legislation, where international human rights are at a distance from domestic law. The situation is different in Wales. Welsh legislation makes international social rights directly relevant to the conduct of public bodies through the device of 'due regard'. While this is familiar in the context of equality enactments applicable to England and Wales, the integration of social rights will present different considerations for courts called upon to adjudicate on Welsh due regard duties. Baroness Hale noted in 2013 that the due regard duty under the Child Rights Measure goes further than the English duty (under equality enactments), because it covers the 'broad sweep of the Convention rights.'^{vi} The same may be said of other due regard duties introduced since the Measure.

5. Administrative justice in Wales was examined in research carried out at Bangor University published in 2015 (the 'Bangor report').^{vii} The Bangor report sets out twelve principles of administrative justice, these include: 'administrative justice should...[e]nsure respect for human rights, equality, sustainability and the protection of vulnerable groups including children and older people.'^{viii} There is potential for the Administrative Court in Wales to support realisation of this principle by reviewing the actions of public bodies using relevant social rights standards. The Court has not yet had an opportunity to explore the new frontiers of Welsh public law.^{ix} When called upon to decide a case that engages relevant legislation the Administrative Court in Wales will be in a position to help develop a public service culture informed by social rights. The Court will be able to scrutinise procedural compliance with due regard, and in some cases to adjudicate on the meaning of any right at issue: as an aspect of deciding whether due regard has been had to that right.^x There is potential for locally relevant understandings of social rights to emerge to delineate the responsibilities of Welsh public bodies, offering the possibility of a Welsh human rights jurisprudence.^{xi}
6. If the Administrative Court in Wales is to make a significant contribution to social justice it will need to fully embrace the opportunity of social rights legislation. The implications of this might include:
 - Ensuring that cases which engage Welsh social rights legislation are commenced in Wales, and adjudicated by tribunals that are sensitive to the implications of such legislation in the context of Wales.^{xii}
 - Adjudication which departs from the traditional approach to judicial review in social welfare fields, to allow (encourage) more judicial activism on substantive human rights issues.
 - Procedural incorporation of mechanisms to inform judges about social rights issues. National Human Rights Institutions (NHRIs) in Wales (Equality and Human Rights Commission, Children's Commissioner for Wales (CCfW), Older People's Commissioner for Wales), are ideally placed to help judges navigate the issues and evidence.
 - Judicial training on social rights, as these will be less familiar than human rights set out in the European Convention on Human Rights.
7. The integration of social rights through legislation gives opportunity for strategic litigation to protect and promote rights.^{xiii} The NGO sector and the CCfW have embraced the potential of social rights legislation as a tool for political advocacy and accountability in Wales in the field of children's rights (as broader aspects of administrative justice).^{xiv} However, with some exceptions, legal professionals have seemingly not made use of the legislation to underpin legal accountability.^{xv} This reflects a broader trend which suggests that judicial review may be under-utilised as a redress mechanism in Wales: the Bangor report states that 'Judicial review claims per head of population in Wales remain low compared to claims per head of population in London and South East England.'^{xvi} It also notes that previous research identifies the paucity of specialist public law practitioners in Wales as a reason for this difference.^{xvii} My research in the field of children's rights points at funding restrictions, but also lack of familiarity with the legalisation, and a belief that public law remedies are ineffective or difficult to obtain, as reasons for practitioner reluctance to bring a cases to judicial review using the Child Rights Measure.^{xviii}

8. The problem of funding for judicial review is linked to cuts in legal aid, making it difficult to tackle through action in Wales: although enhanced social accountability may mitigate this to some extent (below). However, the lack of expertise in Welsh public law might be addressed by greater attention to this topic, and social rights legislation in higher education curriculums in Wales, or through Continuing Professional Education (below).

Social Accountability

9. Social rights legislation can enhance social accountability.^{xxix} Communities, and community activists, properly supported, can deploy social rights at a local level to challenge decisions and actions by public bodies at all levels (local accountability).^{xxx} This presupposes the existence of relevant redress mechanisms, and awareness of these mechanisms amongst individuals, community activists and legal representatives. While complaints mechanisms are often in place to raise issues against public authorities in Wales, lack of awareness of, and variation in these procedures, as well as complexity are often barriers to their effective use.^{xxxi} To enhance social justice through social accountability in Wales, public bodies need to do more to raise awareness of redress mechanisms such as complaints procedures, and to ensure that procedures are consistent, clear and transparent, and are not unnecessarily complicated to use.^{xxxi}
10. Public Legal Education (PLE) to educate the public on legal rights could help deliver social justice by ensuring communities, and those who represent them, are able to identify social rights issues and have the understanding and skills to use legal rights to secure accountability. Despite its potential to contribute to social justice, evidence suggests PLE is under-resourced in Wales, and that provision is 'patchy, inconsistent and lacking focus on the Welsh context.'^{xxiii} Social accountability in Wales would be strengthened if public bodies, including the Welsh Government were to examine ways to develop and support PLE, including through programmes delivered in schools and via community groups.^{xxiv} University Law schools could also make an important contribution to PLE through their public engagement and third mission activities.^{xxv}
11. An aspect of PLE should be to enable individuals and communities to recognise when they should seek professional support, and to know how to access resources. When required, suitable advice and advocacy services should be available.^{xxvi} While there is a role for digital advice services on-line, care is needed to avoid further excluding communities with limited access to information technology. There is evidence that poverty hardens digital exclusion.^{xxvii} Where digital advice services are located on-line this should recognise the need to provide suitable opportunities for disadvantaged users to gain access (e.g. publicly available IT access, user support).
12. Social rights are of greatest importance to those from disadvantaged or marginalised social groups. However, these are the groups that often have least access to legal advice and advocacy services. More independent advice and advocacy services accessible to these communities is needed in Wales.^{xxviii} The Welsh Government has given guidance to public bodies on support for advocacy services in some areas covered by social rights legislation,^{xxix} and on a sectoral basis.^{xxx} Despite this, concerns remain about government funding, commitment, implementation and support for delivery of advocacy services in Wales.^{xxxi} In order to strengthen social accountability these services need to be prioritised by the Welsh Government, with appropriate levels of financial support and firm guidance to public bodies as delivery partners, on local provision. (For example, through guidance issued to public bodies and Public Services Boards on local well-being goals under the *Well-being of Future Generations (Wales) Act 2015*. Current guidance is silent on the role of advocacy services to support the delivery of well-being goals and local well-being objectives.^{xxxii}) The Welsh Government also needs to examine ways to support local community groups and NGOs, who are often best placed to act as advocates for disadvantaged communities. This should draw on the experience and expertise of civil society organisations currently engaged in social accountability activities.^{xxxiii}

Legal Education

13. Understanding social rights legislation requires knowledge of both the substance of Welsh law, as well as international human rights sources, materials and jurisprudence. Neither Welsh social rights law, nor its 'international' aspect is taught on standard university Law courses in Wales. Making the most effective use of social rights legislation also requires awareness and understanding of how to best use redress mechanisms, including judicial review, but also statutory complaints procedures or other mechanisms (e.g. ombudsman, review by NHRIs). Administrative law or public law courses taught as part of the Law curriculum in Wales do not equip students with this level of expertise. There is a vacuum in legal education which needs to be filled by closer attention to the human rights and social rights aspects of Welsh public law on the core Law curriculum, but also through the development of specialist modules or CPD courses to provide practitioners with relevant in-depth knowledge.
14. If legal education in Wales is to produce lawyers adept at using Welsh social rights legislation to promote social justice, students need to be given opportunities to acquire an understanding of how rights are relevant to policy when implemented by public bodies, as well as to gain experience of the practice skills necessary to use social rights effectively to hold those bodies to account in Wales. This should include experience of working with community groups, NGOs or local activists. Clinical Legal Education embedded in the curriculum and delivered in the community is an obvious opportunity for students to acquire these skills. This would also enable the Higher Education sector to make a contribution to social accountability.

Dr Simon Hoffman

s.hoffman@swansea.ac.uk

ⁱ As set out in e.g. International Covenant on Economic Social and Cultural Rights.

ⁱⁱ JRF, *Poverty in Wales 2018* (York, Joseph Rowntree Foundation: 2018):

<https://www.jrf.org.uk/report/poverty-wales-2018>

ⁱⁱⁱ Ibid, and, JRF, *Reducing poverty in the UK: a collection of evidence reviews* (York, Joseph Rowntree Foundation: 2014):

https://www.jrf.org.uk/sites/default/files/jrf/migrated/files/Reducing-poverty-reviews-FULL_0.pdf#page=146

Children's Society, *A Good Childhood for Every Child* (London, Children's Society: 2013):

https://www.childrensociety.org.uk/sites/default/files/tcs/2013_child_poverty_briefing_1.pdf

^{iv} Hoffman, S. and Williams, J. 'Accountability', in Jane Williams (ed.), *The UN Convention on the Rights of the Child in Wales*, (Cardiff, University of Wales Press: 2013), chapter 12: referring to the Child Rights Measure. HHJ Jarman QC, noting divergence between Wales and England, identified in particular legislation with 'far reaching consequences for the citizen', including the *Social Services and Well-being (Wales) Act 2014: The Administrative Court in Wales, Challenges and Opportunities*, lecture, Swansea University, 19 November 2014.

^v For a fairly recent example of judicial restraint and reticence to enter into adjudication on the substance of social policy see: *R(SG) v Secretary of State for Work and Pensions* [2015] UKSC 16.

^{vi} Lady Hale, *Who's Afraid of Children's Rights?*, Wales Observatory on the Human Rights of Children and Young People, inaugural lecture, 14 June 2013.

^{vii} Nason, S., *Understanding Administrative Justice in Wales* (Bangor University: 2015).

^{viii} Ibid, p.9, principle 11.

^{ix} In *Re P-S*, a case in which the right of a child or young person to be heard in proceedings was considered, the Court of Appeal acknowledged that in the future the approach taken by the courts

to cases in Wales may be different because the CRC has become part of Welsh law: [2013] EWCA Civ.223 per the Rt. Hon, per Sir Alan Ward at paragraph 35.

^x Above: Hoffman and Williams.

^{xi} Above: Hoffman and Williams.

^{xii} The report by Bangor University noted: ‘Despite a relevant Practice Direction and judicial precedents, there is still no specific requirement that judicial review claims and other Administrative Court cases pertaining to public bodies operating in Wales must be issued and heard in Wales’; ref. above Nason, p.104, key point 2.

^{xiii} See e.g.: Lundy et al, *The UNCRC, a study of legal implementation in 12 countries* (UNICEF UK: 2013).

^{xiv} Confidential (unpublished research for 3rd party, publication forthcoming 2018).

^{xv} Ibid.

^{xvi} Above: Nason, p.104, key point 4; and, p.111, para. 8.20.

^{xvii} Ibid, pp.20-21.

^{xviii} Confidential (unpublished research for 3rd party, publication forthcoming 2018). NB, this is evidence from relatively small-scale study.

^{xix} An approach towards accountability that relies on civic engagement of ordinary citizens and/or civil society organisations who participate directly or indirectly in holding public bodies to account: Malena et al, *Social accountability: An introduction to emerging practice* (World Bank: 2004).

^{xx} Above, Lundy et al. Koen De Feyter et al (eds), *The Local Relevance of Human Rights* (Cambridge, Cambridge University Press: 2011); Hunt, P. *Social Rights are Human Rights* (Centre for Welfare Reform: 2017). De Feyter et al (ed.s) and Hunt include case studies on social rights in practice.

^{xxi} Above: Nason, generally chpt. 3, and para. 3.23. Lambert, S. *Scoping Study of Complaints Procedures in Wales* (Cardiff, Older People’s Commissioner for Wales: 2010), pp.14-15.

^{xxii} Adopting findings from, *ibid*, both sources.

^{xxiii} See: Bussicott, H. and Williams, J., *The Desert: Public Legal Education in Wales*, Research Report for LERN (Children’s Legal Centre, Swansea University: 2018).

^{xxiv} Ibid: recommendations.

^{xxv} Ibid: pp.5-7, discussing university PLE activities.

^{xxvi} Above: Nason, p.48 key point 6.

^{xxvii} E.g.: Low Incomes Tax Reform Group, *Digital Exclusion* (The Chartered Institute of Taxation: 2012):

https://www.litrg.org.uk/sites/default/files/digital_exclusion_-_litrg_report.pdf

Royal Geographic Society, *Digital Divide in the UK, 21st Century Challenges*:

<https://21stcenturychallenges.org/what-is-the-digital-divide/>

^{xxviii} Studies have confirmed the need for more advocacy services, in particular focussing on particular groups, e.g. children, older people: Children’s Commissioner for Wales, *Missing Voices: A review of independent professional advocacy services for looked after children and young people, care leavers and children in need in Wales* (CCfW: 2010); Older People’s Commissioner for Wales, *A Scoping Study of Advocacy with Older People in Wales* (OPC: 2010).

^{xxix} Welsh Government, *Social Services and Well-being (Wales) Act 2014 Part 10 Code of Practice (Advocacy)*, 2015.

^{xxx} For example, the National Approach to Advocacy Services for Children:

<https://gov.wales/newsroom/people-and-communities/2017/170329-advocacy-services/?lang=en>

^{xxxi} See, for example, Children Young people and Education Committee, *Report of the Inquiry into Statutory Advocacy Provision* (NAW, 2017), in particular paras. 56 and 57. See also, ref. above *Scoping Study of Advocacy with Older People*.

^{xxxii} Guidance available here: <https://gov.wales/topics/people-and-communities/people/future-generations-act/?lang=en>

^{xxiii} This includes NHRIs. Civil society networks involved in rights-based monitoring and advocacy could provide a platform for strengthening social accountability for social rights, for example: Wales UNCRC Monitoring Group; Wales Human Rights Stakeholder Group.