

Committee: Equality of Opportunity

Date: 31st October 2001

Venue: Committee room 3

Title: Remit of Equality of Opportunity Committee.

REMIT OF EQUALITY OF OPPORTUNITY COMMITTEE

PURPOSE

To seek the Committee's view on whether its remit should include human rights.

BACKGROUND

The Assembly Review of Procedure Group has sought the view of the Committee on Equality of Opportunity on a proposal to add human rights to the Committee's remit. This is in response to submissions from Professor Richard Rawlings, who recommended that the Committee's remit be expanded to include human rights (extract at Annex A) and from Cardiff Charter88, which recommended that the Assembly introduce an audit procedure to ensure that all relevant aspects of the Assembly's activities comply with the Human Rights Act (Annex B).

RAWLINGS' SUBMISSION

Professor Rawlings' submission may be summarised as follows:

- The Assembly is bound to observe the European Convention on Human Rights in two ways:
 - the Assembly has no power to make legislation or do any other act incompatible with the Convention Rights (s 107 *Government of Wales Act*); and
- it is unlawful for a public authority to act in a way which is incompatible with the Convention Rights (s 6(1) *Human Rights Act*).
- The Convention has considerable potential application to Assembly functions and the Assembly has much to learn on how it applies.
- The political and legal responsibility for the Assembly to secure compliance with the Convention

by ASPBs and regulated bodies is not yet clear.

- Now is the appropriate time to establish a firm institutional or political focus in the field of human rights to ensure the Assembly develops appropriate policy rather than being led by the courts.
- The original rationale for the Equal Opportunity Committee similarly applies to human rights.
- While there are attractions with having a new committee to deal solely with human rights, that may not be practical given the existing committee load for the 60 member Assembly and human rights sits well with equal opportunity.

CHARTER88 SUBMISSION

The Charter88 submission states that the Assembly needs to introduce procedures to ensure compliance with the Human Rights Act. It claims that experience shows that good intentions are not sufficient and that the Assembly should introduce an audit procedure to ensure that all relevant aspects of the Assembly's activities are compliant with the Human Rights Act, including assessing all Assembly legislation, policy and guidance documents.

COMMENT

While there is clearly a significant correspondence between equal opportunity and human rights issues, the Assembly's statutory obligations in these areas differ in that the Assembly's equal opportunity obligation carries a positive duty to promote the equality of opportunity for all people while its human rights obligation is the negative duty to not infringe Convention Rights. It could significantly change the work of the Committee if it was given the role of auditing this negative duty (a policing role) rather than auditing activity to promote human rights (ensuring adequate policy initiatives).

Another issue raised by adding human rights to the Committee's remit is whether the Minister responsible for human rights should become a member and have a role in chairing the Committee. If the Minister was appointed to the Committee, further membership changes may be needed to maintain party balance.

ACTION FOR THE COMMITTEE

To consider how to respond to the Assembly Review of Procedure on whether the Committee's remit should be expanded to include human rights.

Committee Secretariat

WRITTEN EVIDENCE TO THE NATIONAL ASSEMBLY REVIEW OF PROCEDURE

Richard Rawlings*

Introduction

This evidence focuses on three discrete topics: the case for reordering the Assembly committee structure to establish a firm institutional focus for considering issues of human rights policy and practice; the case for deepening and widening the work of the Legislation Committee; and the case for establishing a set of principles to help guide the allocation of powers to the Assembly in primary legislation.

All the items fall squarely within the published terms of reference of the Review Group. The first two are clearly issues of internal architecture and are developments for which provision can be made in standing orders. The third topic obviously is of a different order and requires the support of central government. It falls within the general rubric established by the Review Group of "the Assembly, Wales and beyond", and more specifically of "the Assembly, the UK Government and Westminster". For the avoidance of doubt, the proposals that I make here would not in the words of the Review Group require 'changes to the Welsh devolution settlement and/or the Government of Wales Act 1998'. Instead, they are pinned to, and build on, the design of the devolution statute as a framework for organic development. Perhaps I should add that this part of the evidence is also being submitted to the Welsh Affairs Committee of the UK Parliament, with reference to their inquiry – recently announced – into "the primary legislation process as it affects Wales".

Proposal one: Committee on Equality of Opportunity and Human Rights

A. Introduction

Respect for, and promotion of, human rights should be a major feature of the new Welsh polity. Such matters are too important to be reserved to the lawyers. The proposal is thus made for an Assembly Committee on Equality of Opportunity and Human Rights. That is machinery which would both expand on the work of the existing Equality of Opportunity Committee and provide a firm institutional focus in the Assembly for questions of human rights policy and practice in Wales.

B. Background

In terms of the need for compliance with the human rights obligations now ‘brought home’ or incorporated in UK domestic law, the Assembly would appear to be bound in two ways. First, there is the rule in the devolution statute that Assembly acts or orders incompatible with a Convention right are *ultra vires* (GWA, s. 107). Second, there is the general law: ‘It is unlawful for a public authority to act in a way which is incompatible with a Convention right’ (Human Rights Act, s.6 (1)). And the victim may so ‘rely on the Convention right or rights concerned in any legal proceedings’ (HRA, s. 7 (1) (b)).

A vital consideration obviously is the nature of Assembly competencies, and their match or fit with the Articles of the European Convention now incorporated in domestic law. Some of the rights in question may appear to have little to do with the functions of the Assembly; the relevance of others is more immediately apparent. But such is the expansive interpretation over thirty years, and, further, the cross cutting or horizontal character of certain of the rights, that it is hard to overstate the potential scale of their application. The devolved function that in large measure is education is an excellent illustration. The starting point is Article 2 of the First Protocol to the Convention since this deals directly with the right to education, including in terms of teaching in conformity with the religious and philosophical convictions of parents. Other general provisions, however, may also be relevant, such as Article 3 (freedom from inhuman or degrading treatment), historically important in relation to corporal punishment; and Article 8 (right to respect for private and family life), hugely potent and bearing for example on the language of education. Then there is Article 6 (right to a fair trial), the most frequently invoked provision of the Convention, relevant for example to school exclusions. To this catalogue might be added Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 14 (prohibition of discrimination).

It is worth adding that many of the Articles of prime concern to the Assembly involve qualified rights, which raise the difficult issue of proportionality or test of equivalence of official means and ends. A good example is Article 1 of the First Protocol (right to the peaceful enjoyment of property), which is important in relation to planning powers especially of compulsory purchase. Given the exceptionally low base of legal and administrative development in terms of Wales pre-devolution, it is hard to exaggerate the scale of the learning curve for the new institution in such matters.

Looking forwards, some key areas of human rights challenge can be identified. Wales will no doubt make a major contribution in terms of linguistic issues, for example in relation to the delivery of services or provision of resources, where the Convention jurisprudence is notably weak. Again, as well as education, one would also anticipate significant contests in health provision (including under Article 2 (right to life)); and especially in relation to the treatment of vulnerable people (perhaps Article 3 or 8, together with Article 14). Not least, it may be said, in view of the concentrations of socio-economic deprivation in much of Wales. A leading human rights practitioner has already added to the list, ‘residential care home and nursing registrations, access to public records, Gypsy eviction proceedings, agricultural development issues (particularly if these are environmentally damaging), road

developments, public finance issues, etc’.

Turning to the intricate modalities of multi-layered governance, the great bulk of Assembly spending is indirect, channelled through local government, Assembly Sponsored Public Bodies, and so on. On the one hand, it is only with the general application of the HRA to such service providers, as distinct from Convention Rights constraining the Assembly under the rubric of the GWA, that the full force of the HRA has begun to be felt inside the territory. On the other hand, intriguing and wholly novel questions are raised concerning the political as well as legal responsibility of the Assembly for securing the compliance with Convention rights of those bodies that it funds and in respect of which it commonly has a regulatory function. The general sense of the Assembly as a national or strategic body is clearly important in this context.

Nor should one overlook the potential synergies in this field with the special provisions in the GWA on the cultural heritage of language, sustainable development, and equality of opportunity. Expressed slightly differently, it would be foolish to expect the special legal precepts in the GWA somehow to be pigeon-holed, and so not to lock-up together with developments under general human rights law relating for example to environmental protection, as well as to discrimination (European Convention, Article 14).

All of which raises the question: what is the human rights policy of the Assembly? In the event, behind the scenes, valiant efforts have been made to draw human rights considerations into the mainstream of the new Welsh administrative process, from policy-making to decision taking, and on into service delivery. The approach fits both with the positive obligations that public authorities now have to ensure respect for human rights, and with the declared aim of the (UK) Government that ‘an awareness of the Convention rights permeates our government and legal systems at all levels’. Pride of place goes to the Assembly Action Plan (similar to those devised for central government departments). It has typically involved legal as well as promotional, networking and educational functions. Leading the way has been the Public Administration, Equality and Public Appointments Division of the Welsh Government, together with lawyers from the Office of the Counsel General.

A reading of Assembly debates suggests that the Members themselves have been slower to engage with questions of human rights policy and practice in Wales, especially at the strategic level. More recently, however, there have been signs of a growing awareness of the opportunities as well as the demands for Assembly policies and actions in this sphere. Mention may be made of official statements in plenary session on the implications of the HRA for Wales. It would also be absurd to overlook the very significant development in this field that is the Children’s Commissioner for Wales. Reference may further be made to the emergent concept of a ‘bill of citizenship rights in Wales’, as signalled in the partnership agreement of the new coalition government, as also to the basic concern, often expressed by Members, for policies founded on or promoting aspects of social justice.

Set in this context, the proposal proceeds on the basis that it is now an appropriate time to establish a firm institutional or political focus in the field of human rights. So doing would help to draw together the various strands of development and to engage Members in the many intricate issues of policy and

resources that are involved. In this sphere it emphatically should not be the case that the Assembly only follows where the courts lead.

C. Extending the range: a standing committee

The basic model obviously is already in place: a standing committee of the Assembly established by standing orders and drawing in members from the subject committees. To quote from Standing Order 14 (which provides for the Committee on Equality of Opportunity):

‘14.1. There shall be a Committee on Equality of Opportunity, which shall audit the Assembly's arrangements for promoting in the exercise of its function and the conduct of its business the principle that there should be equality of opportunity for all people. The Committee shall also have particular regard to the need for the Assembly to avoid discrimination against any person on grounds of race, sex or disability.’

‘14.2. The Committee shall submit an annual report to the Assembly on those arrangements and their effectiveness. It shall also review and report to the Assembly its conclusions on the Annual Reports submitted to the Assembly by public bodies concerned with the promotion of equal opportunities.’

‘14.3. The Assembly shall elect an Assembly Secretary to chair the Committee, together with other Members elected so far as practicable to reflect the balance of political groups in the Assembly and having regard to the desirability of each subject committee being represented on the Committee...’

‘14.4. ... The Committee shall, from time to time, appoint such advisers as it requires to enable the views of minority or disadvantaged groups to be put before it.’

‘14.5. The Committee may report to the Assembly from time to time in addition to submitting its annual report.’

The current proposal essentially involves building on, or extending the range of, the original recommendations for ‘standing "programme" committees’ made by the National Assembly Advisory Group. That is with appropriate adaptation of the twin roles that NAAG identified for such committees: to (a) co-ordinate policy development on issues which cut across subject areas and (b) monitor and evaluate progress with implementing these cross-cutting programmes. Perhaps it is worth adding that NAAG expressly left open the door to further development: ‘the Assembly may wish to establish other standing programme committees’. The current Review of Procedures provides the perfect opportunity to revisit this matter.

To pursue the theme, many of NAAG's arguments, which effectively grounded the case for the existing standing committees on equality of opportunity and European affairs, apply with equal force to human rights policy and practice. Some further extracts from the Group's recommendations convey the flavour:

‘5.13. We recommend that...

- the equal opportunities standing programme committee should develop an initial action programme lasting three or four years, with activities across all subject areas, designed to promote equality of opportunity in Wales.’

‘5.15 The purpose of standing programme committees is to ensure that a coherent strategic approach is adopted in relation to high profile issues which cut across a number of subject areas. Their role is not to take the place of subject committees but to support them and ensure they are not operating in isolation from each other on these topics.’

‘5.18. ... Our attention was drawn to the need to provide mechanisms to enable the Assembly to ensure consistency of approach across the subject committees, and avoid fragmentation and rigidity. A "programme approach" was suggested to cut across subject divides...’

Why, it may be asked, is the proposal not for a separate Human Rights Committee of the Assembly? As an outsider, one is naturally drawn to this idea. But given the small size of the Assembly – 60 Members – and thus the evident problems in staffing all the existing committees, the idea of reinventing an existing committee with an extended range appears the more realistic option. But there may also be positive advantages. Thus the proposal is not intended to dilute the work of the Assembly in the field of equal opportunities: quite the reverse! It is tolerably clear from examination of the role of the existing Committee both that much good work has been done and that there is a continuing problem with ‘mainstreaming’ or lack of high profile. In this respect too, bringing in a human rights jurisdiction would be a useful source of synergies.

D. Prompt action

At Westminster a major development is the recent establishment of the Joint Committee on Human Rights. An early agenda item is business left open by the UK Government: the issue of establishing a statutory Human Rights Commission with jurisdiction in Wales. This in turn echoes developments elsewhere in the so-called ‘Atlantic Isles’.

Self-evidently, the precise role of the Assembly Committee that is proposed here would be intimately affected by the conclusion that is reached on establishing such a Commission.

Assuming a positive outcome, one could envisage a relationship akin to that between the Assembly and the Equal Opportunities Commission in Wales. But it does not follow that such reworking of the internal architecture of the Assembly should wait on events at Westminster: quite the reverse! On any view, the issue of, and design for, a Human Rights Commission with jurisdiction in Wales is a matter on which the Assembly - 'A Voice for Wales' - should be strongly heard. The proposal is thus for prompt establishment of the Committee, with a view to securing all-party machinery (and appropriate public consultation) for this to happen.

E. Conclusion

Much has been heard in the context of the devolutionary development of inclusiveness and 'bringing government closer to the people', even of 'a newly textured democratic culture. Amid the very many demands on Assembly Members' time, as also the sharp learning curve that has confronted so many of the actors, the fundamental question of human rights policy and practice in Wales can sometimes be overlooked. Establishing a Committee with a clear mandate to operate in this area would effectively fill a gap in the Assembly's coverage, as well as providing a useful source of democratic legitimacy for the new representative institution. Nothing it may be said could be more appropriate for a body officially charged with being 'a modern, progressive and inclusive democratic institution'.

...

March 1, 2001.

ANNEX B

WRITTEN EVIDENCE TO THE NATIONAL ASSEMBLY REVIEW OF PROCEDURE

Cardiff Charter88

I write on behalf of the Cardiff local group of Cardiff Charter88. We would ask for consideration of the Human Rights Act and its implementation under the Assembly's *Review of Procedure*.

The Assembly has a duty to act in accordance with the HRA in all its processes and decisions, yet the official seem to be taking a minimalist approach – make no changes until challenged in Court – that will give trouble. The recent decision of the Environment, Planning and Transport (EPT) Committee to set up Planning Decision Committees which do not comply with Article 6 of the Human Rights Act (HRA) is an important example. The advice of the Assembly legal officer was to do nothing pending the Appeal Court hearing of the case that the Town & Country Planning Act conflicts with the HRA in requiring the Secretary of State to act as legislator and planning decision-maker. This is not necessarily so in Wales, so setting up PDC's that create the same problem is producing unnecessary conflict and making all PDC decisions readily challengeable. This issue is of sufficient importance for the EPT to have taken independent legal advice through the Office of the Presiding Officer.

The fact that the committee chose to contravene the HRA revealed a weakness in the Assembly's procedures. There is no body charged with scrutinising the activities of the Assembly to ensure compliance with the HRA. The fact that many if not all of the Assembly's members are committed to safeguarding and promoting human rights is no guarantee of their implementation. In the instance highlighted above it appears that bureaucratic expediency can trump human rights.

We believe that there is considerable scope for the National Assembly to lead positively in implementing the HRA within its own procedures. Such action will demonstrate a commitment to promotion and protection of individual and collective citizen rights and be in line with the spirit of the Assembly's creation.

We suggest:

- The Assembly should introduce an audit procedure to ensure that all relevant aspects of the Assembly's activities are compliant with the Human Rights Act.. This should assess all legislation that is passed by the Assembly as well as all policy and guidance documents the Assembly issues.
- The Assembly should publish a booklet that explains to the general public their rights vis a vis the Assembly under the Human Rights Act. It would overlap with the freedom of information and open governance policy already in place. Such a booklet will popularise and concretise the commitment of the Assembly in this area.

Charter 88 supports the creation of a Human Rights Commission or similar to promote the Human Rights Act in all public bodies and services. Northern Ireland is getting such a Commission and Scotland is likely to follow suit. It would be analogous to the Commission for Racial Equality, Disability Rights Commission and the Equal Opportunities Commission. Such a body will provide a point of focus to assist members of the public who believe their rights have been infringed, keep the general public informed of the developments in human rights and keep public and relevant private bodies informed of human rights case law as it develops.

The National Assembly has more than a duty to promote human rights, it has a major opportunity to lead in developing a human rights culture in Wales. We ask the Review group to seize that opportunity.

Christian Gape

Cardiff Charter88