

## **Consultation Response:**

### **Local Government and Elections (Wales) Bill 2019**

*Equality, Local Government and Communities  
Committee, National Assembly for Wales*

January 2019

On behalf of CIH Cymru, Shelter Cymru and Tai  
Pawb



## 1. 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.

In June 2019 the Chartered Institute of Housing (CIH) Cymru, Tai Pawb and Shelter Cymru, in partnership with Dr Simon Hoffman of Swansea University, published a report entitled, “The Right to Adequate Housing in Wales: Feasibility Study”<sup>1</sup>, which outlined why and how the right could be fully incorporated into Welsh law.

We, the three housing organisations involved in this campaign, believe that our feasibility study makes 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) (“**the Covenant**”) into Welsh law, whilst also clearly setting out the route map for how we get there.

Later this year (2020), we will mark the third anniversary of Grenfell Tower 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 people 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 people 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 ICESCR<sup>2</sup> (International Covenant on Economic, Social and Cultural Rights).

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.

- 60,589 households are on social housing waiting lists
- Over 21,000 households faced or experienced homelessness in 2018
- 2,307 households in temporary accommodation – of which 945 are families with children

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<sup>1</sup> <https://sheltercymru.org.uk/wp-content/uploads/2019/07/RightToHousing-Full-ENG.pdf>

<sup>2</sup> <https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/international-covenant-economic-social>

- 347 people sleeping rough on our streets
- At least 42% of private tenants do not have a fixed term tenancy in Wales  
(Source - The Right to Adequate Housing In Wales: Feasibility Study (June 2019))

This bleak portrait of the housing crisis is the basis for the fundamental conversation that we need to have as a nation.

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

That's why we commissioned an independent feasibility report on the right to adequate housing in Wales, which was prepared by Dr Simon Hoffman of Swansea University.

In the report Dr Hoffman sets out the case for a 'dual approach' to incorporation of the right to adequate housing in Wales. We have accepted the report, and we support its recommendations in full. We therefore argue for a dual approach to legislation which would:

- Embed the right to adequate housing in the discharge of public housing functions by requiring 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 Housing Act (Wales) 2014<sup>3</sup>(HA). This is sometimes called indirect incorporation.
- Incorporate the right to adequate housing by requiring 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, which mirrors the approach taken in the Human Rights Act 1998<sup>4</sup> (HRA). The HRA gives any person who claims an authority has acted unlawfully a right of action against the authority concerned. This is sometimes called direct incorporation.

The report refers to this as a dual approach because it introduces proactive consideration of the right to adequate housing as an aspect of housing services planning and delivery (the due regard duty), while at the same time introducing the possibility of remedial action as a safeguard where relevant authorities act in manner which is not compliant with the right to adequate housing (the compliance duty).

Our strong preference would be the dual approach outlined above (due regard duty plus enforceable compatibility duty) although we recognise the Minister's analysis in terms of the work that will need to be done before we get to the point where legislation can fully embrace both a due regard and a compliance duty in the context of the legislative time remaining in this Assembly term. In this respect, we welcome the Welsh Government's commitment to the incorporation of the "due regard" aspect of the right into the Local Government & Elections (Wales) Bill.

We welcome the Minister for Housing & Local Government's response to the Equalities, Local Government and Communities Committee on 17 October, 2019, when she was asked about incorporation of the Right to Adequate Housing:

She said:

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<sup>3</sup> <http://www.legislation.gov.uk/anaw/2014/7/contents/enacted>

<sup>4</sup> <https://www.legislation.gov.uk/ukpga/1998/42/contents>

*"If we put a duty on every Local Authority... absolutely the accommodation they need they would not be able to fulfil that at this point in time.*

*"So what we are looking at is a slide towards that. [Welsh Government is] Interested in a due regard to adequate housing.*

*"Local Government Bill, hopefully introduced on Nov 19th. That has a change in the way we monitor LAs.*

*"[Welsh Government is] Looking to put a due regard to housing, in the same way as we have done with children's rights.*

*"We are not in a position at this point in time to be able to fund or comply with a personal individual right to adequate housing in the sense that you can present yourself to the local authority and say I have that right and I will judicial review you if you don't provide it. And that's just the pragmatic truth. They will not be able to do that.*

*"(...) But what we can do is put a due regard in so that they, in putting their prudential borrowing requirements together, have the right scale of build in sorting out their tenant policies and their housing options policies—they have the due regard duty in there, they work with their private rented sector to get that to the standards that we've been pushing for from the other side (...)"*

*"I wish with all my heart that I could just say that we would do that. But we would not be able to comply with it. That's the honest truth. But we can move in that direction."*

*We have to get authorities to obey the spirit of the law and not the letter. (...) we're asking authorities to look at the 56-day limit for homelessness as a backstop (...) not as a target. So, the point of that is that that is for somebody who is desperate. So, the local authority should be working with people long, long upstream from there, and it should be regarded as a failure to ever get to that point, rather than the target that you must act on at this point. **So, if we put a due regard into the performance measurements, then you upstream that so that the authorities that are regarding that as a target are not seen as remotely best in class for what they're doing. So, there's a system change coming. And I'm working really hard across all parts of the portfolio to produce that system change.***

The Minister re-iterated that commitment during her statement in Plenary on 19 November, when she introduced the Local Government & Elections (Wales) Bill into the National Assembly for Wales:

*"We will be putting that due regard right into the statutory guidance and local authorities will have to abide by it, just for the avoidance of doubt."*



Matt Dicks



John Puzey



Alicja Zalesinska

## 2. Progressive realisation

Whilst we welcome the above commitments, in our view it is important to consider minister's statements on the difficulties with introducing a direct right to adequate housing due to lack of supply. In the context of the due regard duty being, in minister's own words a "slide towards" the introduction of a full direct duty, it is important to consider that direct incorporation with individual rights to redress does not require the governments to have the "correct" supply of housing available at the point of introduction. It does require the use of "maximum available resources" and a "progressive realisation" amongst other principles of the right to adequate housing for everyone with particular focus on marginalised groups.

The UN Special Rapporteur on Adequate Housing's Guidelines on the implementation of the right to adequate housing<sup>5</sup> (amongst others) provide a comprehensive explanation of how an individual and enforceable right can be achieved, in the context of limited finance, resources and capacity.

It is our view therefore that lack of supply of housing should act as a catalyst for, rather than a barrier against, the introduction of a **direct right to adequate housing in the future**. We believe that the adoption of the dual approach outlined above, can act as a catalyst and would be a driver of positive change in so much as encouraging further supply and attracting additional resources.

To support this argument, we provide key principles behind the concept of progressive realisation below, whereby the level of rights so far as compliance and enforcement are concerned are commensurate with the supply and resources available, definitively increasing over time. The draft guidance produced by the UN Special Rapporteur (November 2019) states that *"The Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights clarifies that compliance with progressive realization under Article 2.1 of the Covenant should be assessed based on "the reasonableness of the steps taken by the State Party",<sup>6</sup> recognizing that there may be a range of possible measures for the implementation of the right.<sup>7</sup> The CESCR has clarified that reasonable measures must be deliberate, concrete and targeted towards the fulfilment of the right; be implemented within a reasonable time frame; allocate resources in accordance with international human rights standards; address the precarious situation of disadvantaged and marginalized individuals or groups; and ensure transparent and participatory decision-making.<sup>8</sup> States must require that laws and programs related to housing comply with the reasonableness standard, and that rights-holders are able to hold governments accountable to it."*

The guidance further sets out the implementation measures as such:

- a) *"States should implement the reasonableness standard into domestic law and policy related to housing so that governments and decision-makers are accountable to this standard.*
- b) *Governments should resolve institutional shortcomings and structural causes of the lack of housing to comply with the reasonableness standard.<sup>9</sup>*

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<sup>5</sup> <https://www.ohchr.org/EN/Issues/Housing/Pages/GuidelinesImplementation.aspx>

<sup>6</sup> OP, Art.8.4.

<sup>7</sup> CESCR, Communication No. 5/2015 para 15.1. See also Sandra Liebenberg, "Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights under the Optional Protocol," forthcoming, *Human Rights Quarterly* 42:1 (Jan-Feb) 2020.

<sup>8</sup> See CESCR, general comments nos. 3 and 4. CESCR, "Statement by the Committee: An evaluation of the obligation to take steps to the "Maximum of available resources" under an optional protocol to the Covenant U.N. Doc. E/C.12/2007/1, 10 May 2007, para. 3

<sup>9</sup> See, for example, CESCR, Communication No. 5/2015, paras. 15.3 and 21 (c).

- c) *Whereas the State has discretion to choose among a variety of approaches to progressively realize the right to housing, measures chosen must fulfil the right to housing as swiftly and efficiently as possible.*<sup>10</sup>
- d) *Reasonable housing policies and programs must ensure that rights holders have the opportunity to be heard regarding both their individual circumstances, such as being unable to afford the rent, and the structural causes that gave rise to these, such as the privatization of social housing.*<sup>11</sup> *To comply with the reasonableness standard, the State’s response to particular circumstances should be commensurate with what is at stake for rights holders.*<sup>12</sup>
- e) *In the adjudication of right to housing related claims, the burden rests with the State to demonstrate that it has utilized the maximum of available resources and all appropriate means to uphold the rights of the person or group concerned.*
- f) *States must ensure that all relevant authorities and decision-makers, including courts, are familiarized with the reasonableness standard and able to apply it to hold governments accountable to the right to housing.”*

### **3. The means of incorporating due regard**

Whilst we welcome the ministerial commitment to the incorporation of a due regard duty, we make the case for the duty to be **incorporated into the face of the Bill itself**, in order to give it statutory effect. We explain the need for this as follows.

Due regard is recognition of the fact that not enough is being done to properly take account of the right to adequate housing in Welsh housing law, policy and service delivery. Due regard to the right to adequate housing under article 11 of the ICESCR is the minimum requirement on all levels of government as a consequence of the UK’s ratification of the international treaty. Making due regard to the Article 11 obligatory would ensure that Welsh public bodies pay proper attention to relevant aspects of housing rights when discharging their housing functions.

We understand the minister’s statement that the due regard duty would be included in the Welsh Government statutory guidance and that “local authorities will have to abide by it, just for the avoidance of doubt”.

We asked Dr Simon Hoffman (the author of the feasibility report above) for an initial analysis of this proposal in the context of the structure and effect of the Bill.

The minister’s suggestion to include the duty in the guidance would be covered in s.88(3):

**88 Duty of principal council to keep its performance under review**

(1) A principal council must keep under review the extent to which—

- (a) it is exercising its functions effectively,
- (b) it is using its resources economically, efficiently and effectively, and
- (c) its governance is effective for securing the matters set out in paragraphs (a) and (b).

(2) In this Chapter, the matters set out in paragraphs (a) to (c) of subsection (1) are referred to as “the performance requirements”

<sup>10</sup> Ibid., para. 15.3

<sup>11</sup> See, for example, CESCR, communication no. 5/2015.

<sup>12</sup> See, CESCR, Communication No. 5/2015, paras. 15.3 and 15.5.

(3) A principal council must have regard to any guidance issued by the Welsh Ministers about—

- (a) the performance requirements;
- (b) the exercise of its functions under this Chapter.

Dr Hoffman, in his initial thoughts, stated:

*“Any duty referring to due regard under the proposed s.88(3) is likely to be very confusing and therefore difficult to envisage in operation. Confusing because the requirement would in effect be ‘to have regard to any guidance’ and the guidance itself would require ‘due regard’. A duty therefore to have regard to due regard. I would suggest that the duty needs to go **on the face of the Bill**. This would be best inserted as a **new free-standing provision**. Any alternative would not impose a duty to have due regard and would constitute a considerable **weakening of the commitment** to introduce such a duty as well as representing a **regressive step**. **Regressive because** merely having regard to guidance does not meet the international obligation to give effect to the right to housing.”*

### **Incorporating due regard**

Having due regard means a decision maker must attend to the substance of a decision by being properly informed and aware of what must be considered before and at the time of making the decision, paying attention to any relevant objective. The decision-maker must take account of relevant evidence and exercise the due regard duty with rigour, and an open mind.

The due regard duty should be **integrated into** the discharge of the public functions. We outline the primary mechanisms for embedding the right into the policy-making framework in the forthcoming section.

The due regard duty strengthens accountability for rights-based housing policy in Wales by adding a new basis for judicial review of local authority decision-making. While it does not give citizens the right to individual redress, citizens will be able to look to the courts to hold local authorities to account for compliance with the due regard duty, in terms of how they have taken the right to adequate housing into account in policy decision-making.

The due regard duty also presents new opportunities for policy advocacy. Local authority elected members, as well as stakeholders, are able to rely on the due regard duty as a foundation for argument in favour of preferred policy choices consistent with Article 11 of the United Nations Covenant on Economic, Social and Cultural Rights as referred to above.

#### **4. Primary mechanisms for incorporating due regard to the right to adequate housing in the policy-making framework for Local Authorities**

We recognise that introducing the duty will have practical implications for local authorities.

In draft guidance for the implementation of the right to adequate housing<sup>13</sup>, dated November 2019, the UN Special Rapporteur, Leilani Farha, acknowledges (1) the role that local government has in recognising the housing rights of citizens; (2) the challenges faced by local authorities, including finance, resources and capacity and (3) the need for coordination between national and local government on respective accountability.

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<sup>13</sup> <https://www.ohchr.org/EN/Issues/Housing/Pages/GuidelinesImplementation.aspx>

The guidance provides for the ways in which the right to adequate housing should be **integrated into** the discharge of public functions. By introducing the duty, Article 11 of the UN ICESCR is embedded as part of the framework for policy decision-making by local authorities. It establishes attention to housing rights, as guaranteed by the UN ICESCR as a condition of legitimacy of policy in Wales.

We would suggest that the primary mechanisms for embedding the right to adequate housing through the Bill should draw upon the mechanisms already set out in:

- the Rights of Children and Young Persons (Wales) Measure 2011
- International standards set out through guidance available from the United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context (UN Special Rapporteur). More specifically:
  - Guidelines on the implementation of the right to adequate housing<sup>14</sup>
  - Designing and implementing effective human rights-based housing strategies<sup>15</sup>
  - CESCR General Comment No. 4<sup>16</sup>

We provide a summary of these suggested mechanisms below.

#### a. Rights Based Housing Strategies

UN Special Rapporteur states that: *According to Articles 2.1 and 11.1 of the International Covenant on Economic, Social and Cultural Rights, States have an obligation to take steps “to the maximum of its available resources, with a view to achieving progressively the full realization” of the right to adequate housing, by “all appropriate means, including particularly the adoption of legislative measures.”*<sup>17</sup> *The Committee on Economic, Social and Cultural Rights has emphasized that this obligation “will almost invariably require the adoption of a national housing strategy”<sup>18</sup> and is of “immediate effect”.<sup>19</sup>*

As the local government in Wales has a statutory strategic housing role and is a key player in the delivery of a national housing strategy, in our view it would be incumbent for local government in Wales to develop rights based housing strategies.

A rights based housing strategy according to the UN rapporteur must embed the following implementation measures:

- i. Recognize the right to housing as a legal right and the progressive realization of the right as a legally binding obligation.
- ii. Establish clearly articulated human rights-based goals and timelines to achieve adequate housing for all in the shortest possible time, identifying both immediate and progressive obligations in keeping with international human rights law and providing for ongoing adjustments to respond to emerging challenges.
- iii. Clearly delineate responsibilities of local, regional and national Governments, and ensure coordination between them and adequate capacity and resources

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<sup>14</sup> <https://www.ohchr.org/EN/Issues/Housing/Pages/GuidelinesImplementation.aspx>

<sup>15</sup> <https://www.undocs.org/A/HRC/37/53>

<sup>16</sup> <https://www.refworld.org/pdfid/47a7079a1.pdf>

<sup>17</sup> ICESCR, article 2(1).

<sup>18</sup> CESCR, General Comment, No. 4, para 12.

<sup>19</sup> CESCR, General comment no.3, para. 1.

- iv. Provide coherence and coordination to interventions and regulation in all relevant policy areas - including those related to urban planning, upgrading of informal settlements or substandard housing, income support, access to employment and services, the provision of water, sanitation, energy, health care and education, climate change mitigation and adaptation, and the protection of the environment.
- v. Identify and address key obstacles to the right to housing, such as financialization, discrimination, land-grabbing, speculation, predatory lending, environmental degradation and vulnerability to natural disasters.
- vi. Promote, protect and strengthen a variety of tenure arrangements, according priority to those which provided security of tenure for the most vulnerable and marginalized should be accorded priority (A/HRC/25/54, para. 5).
- vii. Include measures to regulate financial, housing and real estate markets to ensure that the right to housing is both protected and fulfilled (see guideline no. 8)
- viii. Include mechanisms and necessary support for participation of rights holders and relevant associations in the design, implementation and monitoring of the strategy (see guideline no. 10).
- ix. Include independent monitoring and accountability mechanisms, drawing on existing institutions such as NHRI's or establishing new ones where appropriate, for meeting these obligations and goals (see guideline no. 15).
- x. Provide for budgetary oversight and review and ensure compliance with the standard of allocating "maximum available resources" including to sub-national level governments. Mobilization of available resources includes, for example, reasonable taxation, curbing tax avoidance and corruption, and eliminating preferential tax treatment of residential real estate investment. Resource expenditure must also meet the standards of gender-responsive and participatory budgeting.
- xi. Establish or be supported by effective claiming mechanisms for the right to housing through courts, tribunals and other means, and ensure that rights holders have access to hearings to challenge barriers to housing and obstacles to progressive realization.

It needs to be recognised that many local authorities in Wales will already have housing strategies and all local authorities will have homelessness strategies under the Housing (Wales) Act 2014. A development of rights based housing strategies could therefore consist of a review and re-development of the existing strategies to ensure compliance with the right to adequate housing and international standards which follow.

#### **b. Housing Impact Assessments**

We suggest that the due regard duty introduces the need for local authorities to carry out Housing Impact Assessments on policy proposals, which takes account of any direct or significant impact on housing, and therefore may include other policy areas or functions, for example, health, education, welfare policies or budget setting processes. A Housing Impact Assessment in accordance with this section could be carried out alongside any other impact assessment local authorities carry out.

#### **c. Reporting Mechanisms**

In order to garner the impact of the due regard duty and progress with the realisation of the right to adequate housing, in particular with regard to outcomes, we suggest that a reporting mechanism on compliance with the due regard duty is also introduced. This could be published as part of any report that the local authorities publish on housing or as part of the self-assessment report as specified in the Bill.

## **5. Potential impact**

In enacting a due regard, we believe that it will bring about a significant system change whereby authorities act not just by the letter but by the spirit of the law, with particular emphasis on homelessness. Local authorities currently work to the 56-day limit to support applicants; however, should a due regard duty be put in place, we believe that this limit will instead become more widely viewed as an absolute last resort - a 'backstop' in effect – and not a target. In so doing, people experiencing homelessness can be supported far earlier within that 56-day time limit.

To support our response, we reference three case studies below.

### **A.**

*A man came to Shelter Cymru for help as he was homeless after having to leave his privately rented home due to serious disrepair. His landlord had refused to complete repair work and the council had obtained a Prohibition Order which obliged him to leave the property. When the man approached Shelter Cymru he was sleeping in a tent and sometimes staying with friends.*

*He applied to join the housing register but was excluded from this by his local housing association, a stock transfer RSL. This decision was taken due to former tenant arrears that he had accrued seven years previously in Ireland when he was a young person who'd had a difficult upbringing. Despite his homelessness status the RSL placed his application on hold for 12 months until he had demonstrated that his behaviour had changed by addressing the former debt in Ireland. Although he had successfully held down his last tenancy for years prior to the Prohibition Order, the RSL did not accept this as proof of changed behaviour until they had spoken to the private landlord, which they were unable to do as the landlord did not respond to their attempts to make contact.*

*Eventually with the help of a support worker the man was able to source alternative supported accommodation.*

*A right to adequate housing might have ensured that the man did not become street homeless after the Prohibition Order had been made. Furthermore the local allocations policy might have allowed the man a new tenancy alongside an affordable plan to repay the old arrears, and not required him to demonstrate changed behaviour while he was living in a tent.*

### **B.**

*A couple with a seven-year-old son were imminently threatened with homelessness as their private landlord had obtained a Possession Order due to rent arrears. They were offered a tenancy with the local housing association, a stock transfer RSL. The family was in receipt of Universal Credit and the father was in the process of setting up a self-employed business with the help of a grant from the Jobcentre. Following the offer of the tenancy the RSL carried out an affordability check, and on the basis of this they decided to withdraw the offer.*

*Housing Options then found the family to be intentionally homeless because of the rent arrears in their previous home. Ironically, the authority took the decision that the private tenancy (where the rent was higher than the home with the RSL) had been affordable.*

*The family had to live temporarily with family members while they continued searching for permanent accommodation.*

*Since this time, the Welsh Government has placed some restrictions on authorities' powers to find families intentionally homeless – a move that is in line with the right to adequate housing. However, embedding the right to housing into Welsh law might lead to reform of allocations and rent setting so that families are not deemed too poor for social housing.*

### **C.**

*A man had been sleeping rough for a few months. He was experiencing a range of health issues including post-traumatic stress disorder, anxiety, depression and a chronic skin infection that couldn't be treated effectively while he was on the street due to the strength of his medication.*

*He presented as homeless to the local authority and was placed in a B&B. However he left after one night as the room was very dirty, and he and his support worker witnessed the B&B owner sharing personal information about residents with other residents staying there.*

*The local authority then offered him interim accommodation in a house that was opposite a property where he had experienced a close family bereavement. He refused this offer and no further offers of temporary accommodation were made.*

*The local authority subsequently decided that he was not in priority need and so ended their duties to help him. At this point he approached Shelter Cymru, whose caseworker found that the local authority had not sought any medical evidence. A review was requested, suitable interim accommodation was offered an hour later, and 24 hours later the local authority agreed to re-open the assessment.*

*Suitability of interim and permanent accommodation is a frequent issue in Shelter Cymru casework. A right to adequate housing would stress the adequacy and suitability of accommodation offers, and would also mitigate against the use of the priority need test to keep households homeless.*