

Consultation Response to the Independent Commission on the Constitutional Future of Wales

July 2022

Background

This consultation response was drafted following a meeting of the Cross-Party Group on Women, which considered constitutional reform and received a presentation from Professor Laura McAllister. It reflects the points raised by a number of third sector representatives, academics and MSs at that meeting. The draft response was also circulated to our Gender Network, an intersectional policy forum of 47 organisations, activists and academics working across Wales, who added further comments.

While the meeting did not discuss the merits of different governance models in detail, there was a strong feeling that Wales' current constitutional set-up does not readily support or reflect the democratic will of Wales. Our efforts to protect and strengthen gender equality and women's right in Wales – including the rights of women experiencing intersecting discrimination – are often hampered by a lack of devolved powers, most notably with regard to equality/equal opportunities, justice, welfare, employment, policing and immigration. It is important that the powers of the Welsh Government and the capacities of the Senedd are considered simultaneously to ensure good scrutiny and accountability, which are crucial for effective governance that delivers for the people of Wales.

Equality/equal opportunities

As organisations and individuals working in the equalities sector, our aspirations for progressive policies in Wales are bound by the reserved power for equal opportunities and relevant UK legislation such as the Equality Act 2010. This has complicated or limited our work on many occasions:

- *Equity vs equal opportunities:* As an overarching point, current UK legislation is based around delivering equal opportunities, an approach which is focussed on eliminating discrimination and treating everyone equally. This is at odds with the reality of deeply embedded structural inequalities, and as long as these remain unaddressed, treating everyone the same will only reproduce entrenched inequalities. The [Gender Equality Review](#) recommended a more far-reaching equity or equalities mainstreaming approach to equality and the Welsh Government accepted this recommendation, but Wales needs the regulatory power to introduce this.

- *Diversity and gender quotas:* Concerns around devolved competency were a major obstacle in securing Senedd and Welsh Government support for legislative gender quotas, despite wide support among the Welsh public and sound international evidence that quotas are the best way to fast-track women's representation. Globally, [intersectionally embedded quotas](#) are emerging as best practice to ensure diverse representation across different protected characteristics and ultimately the Welsh Government should work towards these as the gold standard. But a distinction in the Equality Act between sex/gender and other protected characteristics and the resulting legal complications meant that regrettably legislative quotas for other protected characteristics could not be pursued at the same time even though they were much needed, as can be seen, for instance, from the fact that it took 20 years for the first woman from a racialised background to be elected to the Senedd. The limitation in the Equality Act also means that parties are unable to use voluntary initiatives that could boost diverse representation, such as All Black Shortlists while they can use All Women Shortlists.
- *Job-sharing in the Senedd:* [Recent research by WEN](#) shows that introducing job-sharing could be an important lever to improve diversity in Welsh politics. The Expert Panel recommended that candidates should be allowed to stand for election on the basis of job-sharing, but concerns about the devolved competence to legislate on executive (Minister/Cabinet) job-sharing were a key factor in the [Assembly Commission's decision](#) to not implement this recommendation.
- *Diversity data:* Also on the point of representation, we currently lack robust data on how well candidates with different protected characteristics are represented in Welsh elections and in elected office at all levels of government. Mandatory collection and publication of diversity data would be an important mechanism to ensure transparency and accountability. The Equality Act 2010 contains a provision to introduce such a duty. The power to commence this section resides with the UK Government but despite calls from both the Expert Panel and the Bowden Committee the UK Government has not brought it into force. The [Special Purpose Committee](#) has now recommended that the Welsh Government take the initiative on this by placing a requirement on returning officers to collect and publish this data. Again this will require careful drafting to ensure legislation is within devolved competence and it is regrettable that we have lost many years waiting in vain for the UK Government to commence this legislation due to a lack of devolved power over equality legislation.
- *Disabled people's rights:* Gathering robust diversity data about disability poses particular challenges because many people living with invisible/long-term health conditions or impairments are not aware that they might be justified in describing themselves as 'disabled' because there remains an entrenched view of what disability 'looks like.' Again, lack of devolved power over equality

legislation is a key factor behind this. The Equality Act 2010, uses a [medical model of disability](#) which defines a disability as a “physical or mental impairment that has a 'substantial' and 'long-term' negative effect on a person’s ability to do normal daily activities.” The medical model is rejected by disability organisations in Wales as well as the Welsh Government in favour of a [social model of disability](#), which has been developed by disabled people themselves. The social model recognises that most of the barriers that disabled people experience are not a direct or inevitable consequence of their impairment, but are caused by the way society is organised, including people’s attitudes to disability, and physical and organisational barriers. The medical model is negative, stigmatising and exclusionary and the fact that it is entrenched in society contributes to ableism and disability discrimination, including in employment. The Welsh Government is looking for ways to further embed the social model in policy-making, but the difference causes significant uncertainty regarding what constitutes a “disability” that impacts on people's self-perception. The lack of devolved authority to fully enshrine the social model in equality, employment and social security legislation makes it impossible to fully eradicate the medical model from policy, law and society so that disabled people in Wales can participate equally.

- *Trans and non-binary people’s rights:* We are concerned over an increase in hostile rhetoric towards trans and non-binary people in the UK Government. Despite the Welsh Government’s commitment to LGBTQ+ rights, this is also threatening trans and non-binary people this side of the border, where we are seeing an increase in hate crimes. The UK Government has let trans people down in its decision to not introduce self-determination in the reform of the Gender Recognition Act and its recent U-turn on a ban of conversion therapy for trans and non-binary people. Gender recognition is reserved under the reserved power for justice. The Welsh Government committed to seeking devolved powers in relation to gender recognition and is taking legal advice for unilateral action on a conversion therapy ban. Currently, neither the Equality Act 2010 nor the Gender Recognition Act 2004 explicitly cover non-binary people, limiting Wales’ ability to legally recognise non-binary identities, as already done in countries like Australia, New Zealand, Germany and India. Devolved competence for equality and justice is needed so that Wales can uphold the rights of gender minorities in line with its commitment to being the most LGBTQ+ friendly nation in Europe

Social security and employment

Lack of devolved competence for welfare and employment legislation are major barriers to making progress on women’s equality in Wales.

- Positive legislation like the *public sector equality duty*, the equality impact assessment and new economic impact assessments lack enforcement in workplaces. The duty is meant to require public bodies to have due regard to the need to eliminate discrimination and advance equality through considering actions before they are taken. However, there is strong evidence that the public sector equality duty is not working due to a lack of enforcement and accountability. It needs to be strengthened and have consequences.
- *Poverty and Universal credit*: The UK Government's decision to cut the £20 Universal Credit uplift in autumn 2021 has had disastrous consequences for many people who were already struggling and are now facing the increasing challenges from rising cost of living. Women are more likely to be [in work and claiming social security benefits](#) such as Universal Credit. 55% of Universal Credit claimants in Wales are women, with 43% of women claimants being in work. The fact that Universal Credit is paid to only one household member's bank account makes women vulnerable to financial and domestic abuse and traps many women, especially racialised, disabled and trans women in dangerous situations. Wales already had the highest poverty rates of all the UK nations before the pandemic, including child poverty which is linked to women's inequality. This is a major problem and Wales urgently needs the legislative and fiscal powers to address this effectively. Compared to England, a higher proportion of the Welsh population is disabled. Many of them experience poverty and receive legacy benefits, such as Income Support or Income Based Jobseekers allowance, which were not subject to the Universal Credit Uplift. It also disproportionately impacts women from racialised communities, who face much greater rates of unemployment compared to other groups of women and compared to men from the same communities. Employment rates for white men and women are higher than for racialised men and women, with statistics showing racialised women are most disadvantaged. In 2021, 75% of white men [were in employment](#) compared with 73% racialised men and 70% white women compared with 56% racialised women. Poverty is also a huge issue for trans women who may have to pay for medication and surgeries that the NHS does not always cover. While we lack specific data on Wales or the UK, past reports for Ireland have shown that [51% of trans people were unemployed](#) in 2016. With power, as the saying goes, comes responsibility. The UK Government has power over social security benefits, but it is not living up to its responsibility to provide even the bare minimum to many people who experience poverty. The Welsh Government has called for retaining the £20 uplift, an extension of the uplift to legacy benefits has been recommended by the [Locked Out report](#), whose findings were accepted by the Welsh Government, and both issues have been raised by the [Welsh Affairs Committee](#), all to no avail. The Welsh Government is resorting to devolved powers to try to address the shortfall in Wales through a [range of targeted measures](#), including payments to families in

receipt of free school meals, one-off payments to people receiving council tax relief and the discretionary assistance fund. Given that some of the poorest people in Wales, including single mothers, racialised, disabled and trans women, already partly rely on the Welsh Government for the most basic level of social security, devolution of this area and the associated fiscal powers is a natural and necessary step.

Justice and policing

- *Human Rights:* We are very concerned about recent legislative developments at the UK Government level that significantly undermine human rights and access to justice in Wales, such as the Nationality and Borders Act, the Police, Crime, Sentencing and Courts Act, and the Bill of Rights which seeks to replace the Human Rights Act. The Welsh Government refused to give legislative consent to the [Nationality and Borders Bill](#), as it directly contradicts the vision to be a Nation of Sanctuary and due to its impact on devolved areas of competence such as [care for unaccompanied asylum seeking children](#). But the Bill became an Act of Parliament in April 2022, with the UK Government being of the view that the UK-wide measures relate to reserved matters. Despite widespread opposition from the Welsh Government, immigration specialists, human rights law specialists and the third sector in Wales, asylum seekers and refugees in this country are now subject to the damaging implications of this legislation.

The proposed changes set out in the [Bill of Rights](#) raise significant issues regarding accessibility to the courts, the rule of law and the role of the courts in the application of the law relating to human rights. This is because they seek to reduce the expectation that UK courts follow the case law of the European Court of Human Rights in Strasbourg. The proposed legislation could therefore considerably weaken human rights protections in Wales and put the UK at risk of breaching its international obligations if it is not upholding Convention rights to the standard that Strasbourg has deemed necessary.

The Welsh Government opposes the reform of the Human Rights Act, which is in direct conflict with its own efforts to strengthen and advance human rights in Wales. The Bill and the consultation leading up to it have faced immense criticism from human rights law specialists and the third sector in Wales. The consultation did not explicitly state how the specific legislative and socio-economic interests of the devolved governments will be impacted. For instance, the Welsh Government has committed to incorporate the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of Disabled People (CRPD) into Welsh law. These would be key advancements for the rights of women and disabled people in

Wales, and something we have long campaigned for, but it is not clear how the commitments will be affected by the proposed bill of rights.

In light of this friction and the evolving threat to the rights of all people in Wales, the reservation over justice is untenable and powers over justice need to be devolved to Wales as a matter of urgency. As part of that, Wales needs to key into global instruments like CEDAW, CRPD and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). An equality dimension needs to be built into the justice system in Wales if it is devolved and this must ensure the Welsh population in all its diversity is properly represented in every aspect of Wales' judicial system.

- *Policing and immigration:* Wales has its own police forces but has limited discretion over how they are run as the ultimate responsibility lies with the Home Office who are also in charge of immigration and the 'hostile environment' approach. This significantly limits Wales' ability to live up to its commitment as a Nation of Sanctuary and especially impacts women with an insecure immigration status, or whose migration status is dependent on a spouse or employer. These women are at an increased risk of violence and exploitation, yet the perceived or real threat of being detained and deported, together with the policy of 'no recourse to public funds' (NRPF), has a devastating impact on their ability to report abuse and access protection, support and specialist services. The Welsh Government is seeking legal advice on providing a last-resort fund to survivors with NRPF, as recently done by the [Scottish Government](#). Efforts to put in place this desperately needed support are complicated by a legislative landscape that prevents devolved governments from lifting or amending NRPF conditions. The UK Government's recent announcement to ratify the Istanbul Convention with reservations on the rights of migrant women reiterates this hostile approach and demonstrates that Wales needs power over policing and immigration to be able to provide sanctuary and safety for migrant women.

Connection between Senedd Reform and Constitutional Reform

- While the current Senedd and Welsh Government are committed to protecting and advancing equality and human rights in Wales, we recognise that there is no guarantee that this will remain so in the long-term timescales that we need to consider if we are thinking about constitutional reform. Wales' electoral arrangements, that are currently under review as part of the Senedd Reform process, have a crucial role to play in future-proofing any constitutional changes. Only by having diverse and equal representation at the heart of Senedd Reform, through legislative gender quotas and strong measures to encourage the election of people from other underrepresented groups, can we ensure that future elected representatives come from all parts of the Welsh

population and understand the importance of equality and the rights of all people in Wales. This needs to include better support for those for whom financial barriers are often the biggest hindrance to elected office, including disabled and racialised women. We also urgently need appropriate protection from harassment and abuse that disproportionately impacts underrepresented candidates. Abuse and harassment of Senedd Members and candidates must be recognised as a workplace issue that the Senedd as an employer has the responsibility to address.

- It is important to ensure that the processes of constitutional reform and electoral reform feed into and strengthen each other over time. We have seen that a lack of devolved powers over equality currently limits our efforts to improve diverse and equal representation. As further powers are devolved, it will be important to review Senedd electoral arrangements to ensure that we make maximum use of the powers we have at any given point to encourage the election of a more diverse Senedd, as this so crucial to effective scrutiny.
- We know that diversity leads to better scrutiny and decision making, but capacity is also a key factor. It is important that the recommendation to increase the number of MSs is taken forward, to ensure better scrutiny of the powers already in the Welsh Government's remit, as well as those additional powers that we strongly believe need to be devolved in order to progress our work for a fairer and more equal Wales.

The practical examples that we have encountered in seeking positive change in Wales point to a major problem: despite wide support among the Welsh population as well as the Senedd and the Welsh Government, commitments to protect and strengthen equality and human rights in Wales could either not be pursued at all or faced major difficulties due to a lack of devolved competence in critical areas. This is wrong. Intergovernmental arrangements should function as a safeguard to prevent devolved nations from falling below UK and international human rights standards, they should not stand in the way of devolved nations going beyond these standards or prevent Wales from being a trailblazer on equality and human rights.

Our concerns are further aggravated by a deterioration of intergovernmental relations, evident in the recently announced UK Government plans to repeal Welsh law so that agency workers can cover for public workers on strike or the recent £30m cuts to the Welsh Government's budget to finance military aid for Ukraine without appropriate consultation. These developments make our work in Wales increasingly difficult as it suggests we cannot rely on the fact that those powers already devolved will always be respected. We believe that any constitutional reform going forward will need to strongly enshrine scrutiny, cooperation and consultation as principles of good intergovernmental relations and ensure accountability and enforcement of these principles.

For these reasons, we believe that Wales cannot be a feminist nation, an anti-racist nation, a nation where disabled people have equal rights, a nation of sanctuary, the most LGBTQ+ friendly nation in Europe or the safest place in Europe to be a woman until it has autonomy over the policy areas discussed above, and until its powers are duly respected in intergovernmental relations.

Yours sincerely,

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About the Women's Equality Network (WEN) Wales

Our vision is of a Wales free from gender discrimination where all women and men have equal authority and opportunity to shape society and their own lives. We work with our vibrant coalition of organisational and individual members to transform society. Our work sits under three pillars. We will Connect, Campaign and Champion women so our vision is realised.

Thank you for the opportunity to contribute to this consultation. If you have any further comments or queries, please get in touch.

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