

Proposed Rights of Children and Young Persons (Wales) Measure National Assembly for Wales' Legislation Committee 5



In preparation for Evidence Session 8 July 2010

Introduction

The United Nations Convention on the Rights of the Child (UNCRC) was developed in recognition of the additional protection that children, as a result of their age, require. It is not merely a list of rights that can be ticked off within an administrative process. The full realisation of children's rights would lead to children being better protected, having their voices heard in all decisions that affect their lives, that all services and adults consider and act in the best interests of the child and that every child was guaranteed the right to life and development.

1. Is there a need for legislation (by means of an Assembly Measure) to impose a duty upon the Welsh Ministers and the First Minister to have due regard to the rights and obligations in the United Nations Convention on the Rights of the Child (UNCRC) and its Optional Protocols, when making decisions of a strategic nature about how to exercise any functions which are exercisable by them? If not, what alternatives, if any do you propose?

Yes. The need for legislation in relation to the UNCRC stems from the ratification of the Convention by the UK Government. In 2003, the Committee on the Rights of the Child (the Committee) in its General Comment Number 5 on General Measures of Implementation of the Convention stated that:

*"The development of a children's rights perspective throughout Government, parliament and the judiciary is required for effective implementation of the whole Convention."*¹

In correspondence with me, the vice Chair of the Committee, Dr Kamel Filali, has made it clear that all functions of government:

"...should always be determined within the framework of UNCRC. The obligations which should be respected by the State Party are consequently obligations for Devolved Administration and as such the Welsh Government is to apply the rights which are in the Convention and in the Optional Protocols. This is why the interpretation of Government of Wales 2006 should be in

¹ United Nations Committee on the Rights of the Child (2003) GENERAL COMMENT NO. 5 (2003) General Measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)

conformity with UNCRC and all other relevant CRC documents such as Concluding Observations and General Comments and Recommendations.”

In the Explanatory Memorandum the Government recognises that if no Measure was introduced then:

“... the existing ad hoc and, to a certain extent, piecemeal approach to progressing implementation of the Convention would continue. There would be no demonstrable consistent approach to the uniform progressive realisation of Convention rights for children and young people in Wales.”

By requiring consideration of UNCRC at the strategic level across government, the Measure should in theory bring an end to the ad hoc approach, because all Ministers will be bound by the duty to have due regard. The scheme will, however, set out what is and is not a strategic decision. Until we see a draft Scheme, it will be difficult to tell the extent to which the definition of “strategic” will leave some important areas of decision-making untouched by the duty to have due regard. The Deputy Minister has helpfully suggested that the areas covered will be policy and law-making, and has excluded quasi-judicial and everyday-functional decision making. There are however areas of decision making between these extremes (e.g. the allocation of funds and, in my view crucially, decisions about how a policy is to be implemented) which may or may not be strategic in nature.

Were it the case that every Ministerial decision report was to be assessed against the UNCRC, I would be greatly encouraged.

I believe it would be useful and appropriate that the Measure should set out certain core types of decision that must be considered as strategic in any Scheme, and that this were to be included on the face of the Measure.

It is clear in my work with children and young people that there is a need for a Measure which would ensure that as a nation we move beyond an ad hoc and piecemeal approach to a robust and comprehensive approach which would lead to the realisation of children’s rights in Wales. In the past two years there have been occasions where policy and legislative developments have appeared not to consider the impact on children’s rights from the outset and my office has worked to rectify these matters when they have occurred - recent examples include Mental Health Measure, Paediatric Audiology Standards. A robust internal process within Government should lessen the occasions when policies are developed without due regard to the provisions of the UNCRC and its optional protocols and would thus lead to more uniform progressive realisation of all rights within the UNCRC and its optional protocols for children in Wales.

There needs to be a real and clear impact in terms of change of accountability, policy and practice as a result of this Proposed Measure. While a statement of intent

(depending on how it is phrased) may be enough of a commitment to bind the present administration in public law for the time being, such a statement can be withdrawn or modified, and would not necessarily survive an election. The advantage of a Measure is that it contains a basic commitment that can only be watered down by another Measure or an Act of Parliament, which are much more difficult to achieve than a change of policy.

It is fair to say that this Proposed Measure does not fully implant what is stated in General Comment 5 of the UN Committee (see Annex 2). To a degree this is a result of the restrictions placed on the National Assembly's legislative competency.

The General Comment notes:

"The development of a children's rights perspective throughout Government, parliament and the judiciary is required for effective implementation of the whole Convention."

The crucial phrase is *"The development of a children's rights perspective throughout Government"*. This is the element of the Committee's observations that can be said to be addressed by the proposed Measure. Whether it is achieved "throughout Government" however depends, as does so much else, on what the Scheme says.

2. The Welsh Ministers must make a Children Scheme as required under section 2(1), which will set out criteria for determining which decisions are decisions of a strategic nature. What do you consider is meant by 'a decision of a strategic nature' as identified in section 1(2)? Is this sufficiently clear and or sufficiently wide?

There is a need to ensure that Ministers, officials, wider society and children clearly understand what the terms 'strategic nature' means so that there is complete clarity about which issues will be subject to this duty. The response to question 1 refers to the 'decision reports' (these would include decisions on legislation, policy, and any other decision likely to impact upon children) which may provide the level of criteria at which I would find acceptable and deliverable.

The only legal precedents in terms of decisions of a strategic nature of which I am aware can be found in the Equality Act 2010, section 1, namely the Public Sector Socio-Economic Duty. The explanatory memorandum to the Act gives examples of circumstances which could be caught by this duty.

The ambit of what is and is not strategic will, in the case of the Measure be determined by the Ministers themselves through the Scheme. The above example may however be helpful to the extent that it gives an indication of what strategic matters may be and indeed indicate the degree of impact on operational matters.

The term strategic decisions should not be used as a way of meaning that government consideration of the UNCRC and its protocols is obscured from children and adults alike. As noted in my response to question 1, setting out core standards on the face of the Proposed Measure would be useful.

3. Section 7 of the proposed Measure includes provision about consulting on the possible application of the proposed Measure to persons who have reached 18 years, but are not yet 25 years. Do you think this it is appropriate to apply a convention agreed for the benefit of children to adults between 18 and 25 years? What might be the issues to be addressed?

I believe it is inappropriate to apply an international convention for children under the age of 18 to those age 18-24. It must be reiterated that the UNCRC was developed to apply to those aged under 18. The introduction to the Convention states clearly that:

"in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance and that as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."

Whilst the policy intention of the Welsh Government has been to extend the principles of the UNCRC to 18-24 year olds, I do not support the possible extension of the Measure to the 18-24 age range. This proposal would arguably in my view have the effect, in relation to the Welsh Minister's exercise of functions, of extending the impact of UNCRC beyond the scope for which it was intended.

The intention when the UNCRC was drafted was to address the legal vulnerability of children. So, issues around protection of children, the provision of services and the participation of children and young people in our democracy as far as the UN Committee is concerned are about children and young people under the age of 18. The possible extension of the Measure to those aged over 18 who have other remedies available to them could also potentially take away necessary effort from delivering an effective Measure for children which is what the UN Committee have called for on two separate occasions.

It is also unclear which of the provisions within the Measure as currently drafted could be applied to those aged 18-24. The two optional protocols are clearly age limited and the Convention itself is provided for those aged under the age of 18. Section 5, which is the duty to promote knowledge and understanding of the Convention, would not be applicable to young people aged 18-24.

Additionally, a further argument is that the Measure-making powers are more extensive in relation to Children than they are to Young Persons, so that making certain CRC provisions applicable to Young Persons may be beyond the Assembly's legislative competence in any event.

It is therefore unclear to me the benefits that would be gained from applying parts of the measure to those age 18 to 24.

This legislation could confuse redress for adults and should not be used as a way of overcoming the flaws in other legal provisions which should protect the rights of 18-24 year olds. There have also been calls to consolidate legislation in Wales and the possibility that extension of the measure to 18-24 year olds could lead to greater confusion rather than clarity.

4. The proposed Measure includes a schedule, which is the Part I of the Convention and Optional Protocol 1-7 on the rights of children involved in armed conflict (except article 6(2)) and articles 1-10 on the rights of the child on the sale of children, child prostitution and child pornography. Do you think that the text of these treaties needs to be included on the face of the Proposed Measure? The Assembly does not have powers relating to armed conflict and has limited powers relevant to the second protocol. Do you think it is necessary for these protocols to be included in the Proposed Measure?

I believe that the protocols should be included in the Proposed Measure as it makes clear to people with what the legislation is concerning. It can also be amended on the basis of changes in the Convention and Protocols.

The fact that the National Assembly for Wales does not have powers in certain areas does not mean that CRC provisions relating to that area may not be relevant to the Welsh Ministers' decision making.

Furthermore, while certain matters may not now be devolved, they may become so. Incorporating the entire CRC and protocols has the effect of future-proofing the legislation.

By including the protocols, it does not necessarily give anybody any rights, but in a situation where it is alleged that the Welsh Ministers have failed to have due regard to the CRC, where they argue that they have, based on a particular interpretation of the CRC, then the courts will be able to adjudicate as to whether that is the correct meaning of the CRC.

5. Are the sections of the proposed Measure appropriate in terms of meeting the stated objectives as detailed on page 10 of the Explanatory Memorandum? If not, how does the proposed Measure need to change?

I believe I have covered many of these issues in my response to the previous questions.

If the Measure is aimed at overcoming what has been recognised as a piecemeal and ad-hoc approach to implementation of the UNCRC in Wales then the definition of decisions of a strategic nature is central to the effectiveness of the measure in achieving its stated objectives. I welcome Section 5 of the Measure which will place a duty on the Welsh Ministers to promote knowledge and understanding of the Convention. Without knowledge and understanding it will be difficult | challenging for children and adults working with them to understand what they are entitled under the provisions of the UNCRC.

As outlined previously I have reservations about Section 7 of the Measure and whether that will strengthen the rights of children under the age of 18.

The major test for me as Commissioner will be whether the duty to pay due regard to the UNCRC and its optional protocols will have an impact on the day to day lives of children and that the Convention rights are better understood by children in Wales.

6. How will the measure impact on improving and strengthening the rights of the child?

The Measure will not necessarily improve children's rights as these are international standards which by ratifying the Conventions we have agreed to implement. Therefore the impact of the Measure needs to be on improving services and outcomes for children.

I hope that the Measure will have a number of impacts on children's rights including a considerable increase in the knowledge and understanding of children's rights by both children and adults. The Committee on the Rights of the Child in their General Comment No5 welcomes:

"... the inclusion of sections on the rights of the child in national constitutions, reflecting key principles in the Convention, which helps to underline the key message of the Convention - that children alongside adults are holders of human rights. But this inclusion does not automatically ensure respect for the rights of children. In order to promote the full implementation of these rights, including, where appropriate, the exercise of rights by children themselves, additional legislative and other measures may be necessary."

Through increasing knowledge and understanding of children's rights I would hope that the language of rights will be better understood and children will better understand the positive obligations that the Convention places on all adults to deliver their rights. In that respect I would hope that the Measure will continue to lead to a change in the way that services are designed and delivered to children and young people.

In a recent article, the Chair of the General Teaching Council for Wales, Mal Davies reflected on how pupil participation has developed in his school in recent years, reflecting the implementation of article 12 of the UNCRC in schools. That implementation has been supported by the development of policy and regulation by the Welsh Government so that frontline services have changed their practice in such a way as to realise children's rights.

Mr Davies commented:

"While the "pupil voice" concept might have seemed strange at first to older teachers whose careers were spent in a more traditional culture, younger teachers find the whole idea second nature to them.

*As part of their training and induction year it is ingrained into them to be self-reflective in order to keep improving as professionals. That means being able to handle questioning or objective criticism from pupils, to explain decisions or even to ask the youngsters proactively what they thought of a lesson."*²

I foresee that the Measure could have a similar impact as this across all of the rights contained within the UNCRC if knowledge and understanding is effectively promoted. It will also be vitally important that knowledge and understanding is developed across all sections of the Government so that the duty to pay due regard is effectively operated.

In November 2009 along with the three other Children's Commissioners across the United Kingdom we called on Governments to:

'...play a proactive role in promoting awareness of the UNCRC. Every child and young person across the UK must know what their rights are and how to enjoy and safeguard those, while every adult should understand their role in promoting and safeguarding those rights.'

We also called on Governments across the United Kingdom to:

'...to continue to realize children's and young people's rights despite the current financial pressures. Children and young people are at risk of being affected disproportionately by the current recession. Children's and young people's rights are not a luxury to be enjoyed only during financially affluent times; they are essential throughout childhood. This is not the time to be reducing commitments to children and young people.'

Children's lives are not lived according to departmental boundaries within government and that their lives are affected by all aspects of public policy making. Policy development that seeks to tackle issues such as child poverty, domestic abuse, safeguarding and gypsy traveller children cannot be carried out by just one department within government and this is why the Measure has to bite on all functions of Welsh

² www.walesonline.co.uk/news/wales-news2010/06/22/widespread-pupil-dash-power-a-myth-91466-26696627/

Ministers to ensure that all policy development pays due regard to the UNCRC and its optional protocols.

As I have previously noted in my recent submission to the National Assembly for Wales' Children and Young People's Committee (annex 1):

*'The key impact of the proposed Measure must be to ensure that children's rights are considered in the development and exercise of **all** functions of Welsh Ministers.'*

The Measure if successfully implemented would ensure that the development of policies and/ or ministerial legislation would have to pay due regard to the UNCRC and therefore would help to avoid situations whereby people have felt that children's rights have been marginalised in the development of legislation. A recent example has been the Proposed Mental Health (Wales) Measure where children's issues were not as actively considered in the development of the legislation as might have been expected. If this Measure had been in place and operating robustly then I would expect that such consideration of the UNCRC would have taken place.

I believe that the Measure will lead to a strengthening of consideration of children's rights when strategic policy and legislative proposals are being developed and therefore there will be a greater implementation of children's rights across Wales rather than the ad-hoc implementation that the government has acknowledged takes place now. I also believe that the Measure if passed would ensure the status of children as rights holders within society in Wales.

It is also, I believe appropriate to draw attention to section 6 of the Proposed Measure, which enables Ministers to amend legislation. The powers in the Proposed Measure would help to focus minds on where they can address current failings. In essence it provides explicit opportunities for the Ministers to prove that they are paying due regard to the UNCRC via amendments which lead to positive impacts for children and young people.

It would certainly allow past policies | legislation to be reviewed, and require any strategic decisions relating to or resulting from any such review to be made having due regard to the CRC. Arguably, a decision on *whether or not* to review past policies or legislation is a strategic one.

7. What are the barriers to implementing the provisions of the proposed measure and does the measure take account of them?

I would suggest that the main barriers to implementing the Measure would be lack of awareness and understanding of the Convention and thus the need for training and education of officials. However this has been acknowledged with the Explanatory Memorandum where the government recognise that the knowledge and expertise of

officials would need to be 'higher than generally the case at present'. A further key barrier will be the knowledge and understanding of children and adults of the UNCRC and its optional protocols.

The Committee recognise the important of training and capacity building in their General Comment No 5 but emphasise that this is not only for government officials but also for:

"...parliamentarians and members of the judiciary - and for all those working with and for children. These include, for example, community and religious leaders, teachers, social workers and other professionals, including those working with children in institutions and places of detention, the police and armed forces, including peacekeeping forces, those working in the media and many others. Training needs to be systematic and ongoing - initial training and re-training. The purpose of training is to emphasize the status of the child as a holder of human rights, to increase knowledge and understanding of the Convention and to encourage active respect for all its provisions"

A key part of ensuring the implementation of the Measure will be the reporting cycles attached to the Measure and those bodies external to both Government and the National Assembly who can hold government to account. The Deputy Minister in his evidence on 24 June recognised the role that the National Assembly for Wales will be able to play in its scrutiny role. I am pleased that the Deputy Minister also recognised my independent role in the process of holding government to account. I believe that this should be further examined.

The duties under the CRC Measure do not seem to descend to the level of individual service delivery; however, it can nevertheless be argued that there should be a specific mechanism for independent monitoring of the Welsh Ministers' exercise of their duty.

8. Any specific comments on specific sections of the measure?

There would be merit in discussing the issue of paying regard to the findings of the Consultation on the strategic decisions (Section 3). There is an argument that there should be due regard to the findings of the consultation.

The obligation to do paying regard to the findings of consultation is one of conscientiously taking into account:

'First, that the consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third, that adequate time must be given for

consideration and response, and finally, fourth that the product of consultation must be conscientiously taken into account in finalising any statutory proposals'.³

It is arguable that this may not be as strong as “having due regard to”.

9. In responding to this consultation the Committee would be grateful if you could indicate how you have gathered views of children and young people in forming your response.

The limited amount of time between the publication of the questions and submission of this paper has meant that there has been no opportunity to gather the views of children and young people on the questions posed. For consultation to be effective there is a need for children to be given information in formats that they can understand and the opportunity to ask questions to clarify their understanding. As it was not possible to complete this process prior to the submission of this response, we have used our understanding of working with children over the last nine years to inform our response. Through our direct work with children and their families we are aware that knowledge and understanding of the UNCRC is not as high as I would like to see. This is also the case for some professionals and other adults working with children. I believe that this submission is in line with the views expressed by children over the last 9 years and also in line with the views of the United Nations Committee on the Rights of the Child who are responsible for monitoring the implementation of the Convention globally.

Subordinate Legislation

11. What are your views on powers in the proposed Measure for Welsh Ministers to make subordinate legislation? In particular do you consider it appropriate for Ministers to be able to amend the proposed Measure itself by subordinate legislation (by “Order” -sections 6 and 8)? Is it appropriate to use subordinate legislation to apply the Convention to adults between 18 and 25 years or should that be done by a further Assembly Measure (section 7)?

12. Section 8(5), allows Welsh Ministers to amend the Measure where there has been a change to the Convention or protocols or where an additional protocol has been signed or agreed (but not ratified) by the UK Government. Section 8(7) requires the Welsh Ministers to make similar amendments to the Measure where changes or additions to the Convention and protocols have been ratified by the UK Government.

In respect of section 6, this empowers the Welsh Ministers to amend any legislation in order to give further effect to the convention. This would include, for instance, strengthening the rights of children. This can only be done if it is within the Assembly’s

³ R (on the application of Wainwright) v Richmond upon Thames London Borough Council [2001] EWCA Civ 2062 at [9], [2001] All ER (D) 422 (Dec) at [9] per Clark LJ

legislative competence (i.e. currently within Schedule 5 GOWA 2006). This is similar to the provision in section 10 of the Human Rights Act allowing UK Ministers to make remedial orders amending legislation which is not compatible with the UNCRC. In that case, the power is subject to affirmative resolution by both Houses of Parliament. In my view, the power under Section 6 of the proposed measure should similarly be subject to affirmative resolution of the Assembly. This is because, while the power gives a (theoretically at least) more convenient and speedy way of updating legislation, nevertheless, it is ultimately a legislative function, not an executive one, and of a kind needs proper democratic scrutiny.

Also the section 8 power in the proposed Measure is similar to the power of UK Ministers to extend the HRA to cover protocols under section 1(4) of the HRA, which is again subject to affirmative resolution by both Houses of Parliament (See section 20(4) HRA). Once more, democratic control seems appropriate over this exercise by the Executive of a legislative function.

A handwritten signature in black ink that reads "Keith Towler". The signature is written in a cursive style and is underlined with a single horizontal line.

Keith Towler
Children's Commissioner for Wales

2 July 2010

Annex 1

Please access paper here: <http://www.assemblywales.org/bus-home/bus-committees/bus-committees-other-committees/bus-committees-third-cyp-home/bus-committees-third-cyp-agendas.htm?act=dis&id=177454&ds=5/2010>

Annex 2

General Comment No 5

Article 42: Making the Convention known to adults and children

“States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.”

1. Individuals need to know what their rights are. Traditionally in most, if not all, societies children have not been regarded as rights holders. So article 42 acquires a particular importance. If the adults around children, their parents and other family members, teachers and carers do not understand the implications of the Convention, and above all its confirmation of the equal status of children as subjects of rights, it is most unlikely that the rights set out in the Convention will be realized for many children.
2. The Committee proposes that States should develop a comprehensive strategy for disseminating knowledge of the Convention throughout society. This should include information on those bodies - governmental and independent - involved in implementation and monitoring and on how to contact them. At the most basic level, the text of the Convention needs to be made widely available in all languages (and the Committee commends the collection of official and unofficial translations of the Convention made by OHCHR. There needs to be a strategy for dissemination of the Convention among illiterate people. UNICEF and NGOs in many States have developed child-friendly versions of the Convention for children of various ages - a process the Committee welcomes and encourages; these should also inform children of sources of help and advice.
3. Children need to acquire knowledge of their rights and the Committee places special emphasis on incorporating learning about the Convention and human rights in general into the school curriculum at all stages. The Committee's general comment No. 1 (2001) entitled "The aims of education" (art. 29, para. 1), should be read in conjunction with this. Article 29, paragraph 1, requires that the education of the child shall be directed to "... the development of respect for human rights and fundamental freedoms ...". The general comment underlines: "Human rights education should provide information on the content of human rights treaties. But children should also learn about human rights by seeing human rights standards implemented in practice whether at home, in school or within the community. Human rights education should

be a comprehensive, lifelong process and start with the reflection of human rights values in the daily life and experiences of children.”ⁱ

4. Similarly, learning about the Convention needs to be integrated into the initial and in-service training of all those working with and for children (see paragraph 53 above). The Committee reminds States parties of the recommendations it made following its meeting on general measures of implementation held to commemorate the tenth anniversary of adoption of the Convention, in which it recalled that “dissemination and awareness-raising about the rights of the child are most effective when conceived as a process of social change, of interaction and dialogue rather than lecturing. Raising awareness should involve all sectors of society, including children and young people. Children, including adolescents, have the right to participate in raising awareness about their rights to the maximum extent of their evolving capacities”.ⁱⁱ

“The Committee recommends that all efforts to provide training on the rights of the child be practical, systematic and integrated into regular professional training in order to maximize its impact and sustainability. Human rights training should use participatory methods, and equip professionals with skills and attitudes that enable them to interact with children and young people in a manner that respects their rights, dignity and self-respect.”ⁱⁱⁱ

5. The media can play a crucial role in the dissemination of the Convention and knowledge and understanding of it and the Committee encourages their voluntary engagement in the process, which may be stimulated by governments and by NGOs.^{iv}

ⁱ Ibid., para. 15, p. 286.

ⁱⁱ See CRC/C/90, para. 291 (k).

ⁱⁱⁱ Ibid., para. 291 (l).

^{iv} The Committee held a day of general discussion on the theme “The child and the media” in 1996, adopting detailed recommendations (see CRC/C/57, paras. 242 et seq.).