



Comisiynydd Plant Cymru Children's Commissioner for Wales

Keith Towler

Ymateb i Ymgynghoriad / Consultation Response

Date/Dyddiad

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Subject/Subject

National Assembly for Wales (NAfW) Children and Young People (CYP) Committee scrutiny of the application of the Rights of Children and Young Persons (Wales) Measure 2011 ('the Measure') and the Welsh Government's report on the compliance (the compliance report) with the duty under section 1 of the Measure.

1 The Children's Commissioner for Wales is an independent children's rights institution established in 2001. The Commissioner's principal aim is to safeguard and promote the rights and welfare of children.¹ In exercising his functions, the Commissioner must have regard to the United Nations Convention on the Rights of the Child (UNCRC).² The Commissioner's remit covers all areas of the devolved powers of the National Assembly for Wales insofar as they affect children's rights and welfare and they may also make representations to the Welsh Ministers about any matter affecting the rights and welfare of children in Wales.³

1.1 The UNCRC is an international human rights treaty that applies to all children and young people up to the age of 18. It is the most widely ratified international human rights instrument and gives children and young people a wide range of civil, political, economic, social and cultural rights⁴ which State Parties to the Convention are expected to implement. In 2004, the Welsh Assembly Government adopted the UNCRC as the basis of all policy making for children and young people and in 2011, Welsh Government passed the Rights of Children and Young Persons (Wales) Measure.

¹ Section 72A Care Standards Act 2000

² Regulation 22 Children's Commissioner for Wales Regulations 2001

³ Section 75A (1) Care Standards Act 2000

⁴ <http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-measures/business-legislationmeasuresrightsofchildren.htm>

1.2 My comments in this paper are aimed at informing the Committee's scrutiny of Welsh Government compliance report and to constructively contribute to the development of the revised Children's Scheme for 2014.

1.3 Key recommendations / suggestions by the CCfW

1. The CYP Committee should consider how to formalise the scrutiny of the Children's Rights Scheme and the wider application of children's rights in Wales within the legislature.
2. Welsh Government should formalise the Child Right Impact Assessment (CRIA) process and ensure transparency.
3. Welsh Government should consider reviewing its update of 'Getting it Right' Action Plan, the national UNCRC action plan.

1.4 It is important to note that Welsh Government has raised the bar in the promotion of the UNCRC and I acknowledge the progress made during the short period from when the Measure was introduced. The efforts and activity are to be commended and my focus in this submission is on how to secure a strategic approach which sustains, and indeed progresses, Welsh Government's existing commitment to the UNCRC.

1.5 Bearing in mind the importance of the groundbreaking Measure I believe it would have been appropriate for the Minister, at the very least, to make a statement in plenary, if not allocate further Government plenary time and for a press release to be issued regarding the publication of the first compliance report. This would have been appropriate, particularly given the statement that Welsh Ministers '*are accountable to the NAFW, and to the public*' (p5 of the compliance report).

2 The role of the legislature, amending the Children's Rights Scheme and reporting cycles

2.1 The Committee may wish to consider how best to ensure that the application of the Measure is given the appropriate level of scrutiny within the legislature. The Committee has a role to play and may wish to consider securing a set amount of time per year to scrutinise the Measure and the general application of the UNCRC by Welsh Government corporately. The Committee's conclusion from the scrutiny could then be considered within the deliberation of the possible need to amend the Children's Rights Scheme.

One current issue is that there is no clarity on the basis on which a revision of the Scheme would be considered and perhaps a Committee recommendation to this end following a scrutiny session may be

worth considering as a critical leverage mechanism. It could also be possible then to incorporate the role of the legislature into the amended Children's Rights Scheme.

2.2 It is clear that Welsh Government is open to discussions regarding the reporting timescales and there is room for negotiation in identifying appropriate timescales which is afforded under section 4 (1)b. Welsh Government should consider identifying the timescales and publishing this in the next Children's Scheme. This is particularly important bearing in mind that the only statutory obligation is to report every 5 years. I would urge this discussion to be initiated to offer clarity on this point.

3 Comments on the Report as set out

Section 1 – Putting the arrangements in the Children's Rights Scheme into place

3.1 The original scheme referred to the role of the Implementation Steering Group. This group has now evolved into the Child Rights Scheme Monitoring Group. It would be useful to clarify the membership and seniority of the officials representing their departments on this group.

3.2 I note the different dynamic for the Children's Rights Scheme Monitoring Group presented in the compliance report (the group was called the Implementation Steering Group in the Scheme). There appears less of an emphasis on a 'championing' role as referred to in the Children's Rights Scheme and more of a 'monitoring and steering' role. It would be useful for the role and function undertaken by the Implementation Group to be clarified as well as more fully reflecting the inter-link between the Monitoring Group and the Implementation Team which would enable an examination of how each function reinforces the other.

Measure Implementation Team

3.3 It is clear that the implementation team has a key role in effective implementation of the Measure and it is positive that there is a discreet group with a clear role in raising awareness and understanding of the UNCRC and the Measure.

3.4 It would be useful for further information regarding the training provided for Welsh Government staff. It is clear that there has been a significant amount of activity during the first nine months of the implementation

of the Measure with training being a critical element of the activity. Bearing in mind the considerable commitment in this regard, it would be good to be able to reflect this with specific numbers of staff, staff grades, departmental breakdown and the nature and level of the training provision.

3.5 Whilst evaluation of the effectiveness of training will ultimately be based on a longer term assessment of the degree to which legislation, policies and initiatives have been considered against the requirements of the UNCRC, this element of the children's scheme will enable Welsh Government to outline some statistical outputs including numbers of staff, which departments etc. which may be utilised for reporting purposes in the short term.

Welsh Government staff

3.6 The report mentions sampling of Child Rights Impact Assessments (CRIAs) and that data and evidence from the assessments have been analysed. It is not clear how this analysis has informed the compliance report. It would be useful if the report was explicit in identifying which sections of the report are based on the analysis of the CRIA process.

3.7 In the very early days of the CRIA process, I believe it is imperative that the CRIA process is given close attention and this would require structured evaluation and analysis. I welcome Welsh Government activity in this area, however feel that access to further information on this process would be constructive, for instance the numbers of CRIAs that have been undertaken, the policy areas to which they relate, the evaluation method and any recommendations and outcomes from those evaluations. Whilst examples of impact are provided in annex 1, these may be deemed to be anecdotal rather than being samples based on methodology. I expand on my comments regarding the CRIA process later on in the paper.

3.8 This section emphasises the role of the Measure Implementation Team in raising awareness and understanding. It would be useful to afford further clarity in relation to what activity relates to which objective. For instance the report could outline activity in relation to:

- Awareness of the UNCRC
- Understanding of the UNCRC which enables application of the due regard duty (this would require a substantive appreciation of the UNCRC which goes beyond awareness of the UNCRC)

3.9 The scale of activity within Welsh Government has been significant over the last 9 months. Due to the variety of activity, (training sessions, email, face to face, e-learning, Q &A etc.) being able to categorise these different forms of awareness raising work may offer further clarity on which areas may or may not need further resource and assist in the strategic approach required to capitalise on progress made.

Welsh Government Working in Partnership

3.10 The report refers to the pre-conference to the 5th World Congress on the Rights of Children and Adolescents and how arrangements for compliance with section 1 of the Measure were examined in detail. It also refers to an Academic seminar. It would be worthwhile for Welsh Government to publish further information on the subjects discussed, the points raised and any recommendations made that could be considered further which may inform the development of future Children's Schemes.

3.11 The report states the role of the 'Getting it Right Implementation Support Network'⁵. It may be worth considering whether there is a need to explicitly identify a role for the network in evaluating the application of the Measure in the group's terms of reference.

3.12 My office has observer status on the Getting it Right Implementation Support Network and strongly believe that the stakeholder members have a valuable contribution to make. It may however be worth formalising the practical arrangements so that there is clarity regarding the exact role and remit and more importantly what this means in practice. Whilst there are terms of reference, it is unclear how the group has facilitated specific outcomes of benefit for Welsh Government officials and the child rights agenda in Wales.

3.13 There also appear to have been changes in relation to how Welsh Government utilises the expertise from the network (and changes to the original Welsh Government structures envisaged at the inception of the Measure as mentioned previously). Therefore it may be useful to ascertain whether this has changed the dynamic from the network perspective. Consideration should therefore be given to assessing the terms of reference as well as the nature of the membership of the implementation network so that the engagement process is formalised.

3.14 The partnership working and cooperation agenda in relation to the progression of the UNCRC agenda in Wales has always been a positive facet of post devolution governance in Wales. The 2008 UNCRC reporting

⁵ The Getting it Right Implementation Group is an opportunity for key strategic partners to contribute to and assist officials in developing and maintaining a strategic overview of progress in implementing the Getting it Right action plan for Wales.

process and development of *Getting it Right*⁶ are examples of good practice in this regard. However, as organisations and relationships evolve, it may be timely to examine the nature of the links between various groups and institutions e.g. the relationship between Welsh Government and the UNCRC monitoring group or the Getting it Right Implementation steering group and the UNCRC monitoring group, in order that there are appropriate checks and balances but without losing the effective working relationships that have been established over the years.

4 Arrangements in place to ensure compliance

4.1 Due to the importance of incorporating structure into the arrangements for compliance, the development of the Welsh Government process regarding CRIA is very much welcomed. The key question for me however, is whether or not the process is leading to robust assessments being undertaken which can evidence the key aspects of due regard. The principles of due regard were considered in details during the scrutiny of the Measure and included references to *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) and comparisons with the application of the due regard duty in relation to Disability Discrimination legislation.

4.2 It is not possible for me to fully conclude either way whether or not the CRIA process is effective or otherwise because there is no formal and consistent arrangement which allows for scrutiny of the CRIAs. Affording this transparency would facilitate improved learning across Welsh Government departments, as well as across Wales more generally, as well as enabling appropriate scrutiny of the application of the due regard duty.

4.3 Stakeholders need to be able to consider whether or not the processes put in place offer the required rigour in considering the substantive rights enshrined in the UNCRC and if they believe the duty is being complied with. It is positive that a central resource is in place to store all CRIAs, however Welsh Government would doubtless benefit from additional scrutiny of these CRIAs. I shall return to the CRIA process in section 9.

5 Challenging Welsh Ministers

5.1 During the scrutiny of the Measure, I, along with others questioned the need to address the unresolved issues of the CCfW statutory remit within the context of the Measure. It is worth examining further whether or not the Commissioner's legislation offers the required provision to effectively challenge Ministers. This is

⁶ <http://wales.gov.uk/docs/dcells/publications/091117gettingitrighten.pdf>

especially relevant given the suggestion in the Children’s Right Scheme that those wanting to challenge Welsh Ministers may seek to do so via the Children’s Commissioner for Wales.

- 5.2 I would also recommend examining further if the other mechanisms outlined are adequately provided for in order to undertake the roles envisaged by Welsh Government. If a young person raised issues in relation to the Measure with the organisation / agencies mentioned, are we sure they would be able to respond appropriately and have sufficient knowledge of either the UNCRC or the Measure?

6 Section 2 of the compliance report

- 6.1 A section outlining the impact of the Measure is a welcome inclusion, however, in future reports there will be a need to evidence more robustly the way in which the Measure makes a difference and consideration required to develop a sophisticated mechanism for doing so. Greater participation of children and young people and development of children and young people friendly documents are welcome and no doubt the Measure assists in promoting this agenda. These developments however, may not necessarily reflect the requirements to address the obligation to examine substantive rights across the articles of the UNCRC.

In crude terms, you could, in theory involve children in discussions and produce child friendly versions of policies and legislation which fundamentally undermines the application of the UNCRC in all other aspects.

7 Children’s budgeting

- 7.1 Whilst I don’t necessarily disagree with its mainstreaming children’s budgeting into the CRIA process, Welsh Government would need to expressly evidence how, in taking decisions regarding policy and law, Welsh Ministers fulfil children’s rights to the maximum extent of their available resources under article 4 of the UNCRC. Ministers may also wish to consider the appropriateness of including such considerations under their regulatory impact assessment process as well as the CRIA.

- 7.2 I would reiterate the point that the report’s assertions regarding ‘influencing policy/legislation’ and ‘influencing delivery’ is difficult to evaluate without being able to fully scrutinise how the Measure has influenced the outcomes of the process.

8 The Report's Annex

- 8.1 The Annex helpfully illustrates the outcomes of a sample of CRIA processes. The annex does not however afford us an insight into the way in which the relevant articles of the UNCRC were considered and applied in order that the conclusions and recommendations noted were reached.
- 8.2 It is also worth noting that I was critical of one example referred in annex 1 during the consultation process of *Together for Mental Health – A Strategy for Mental Health and Wellbeing in Wales* and have also engaged with Welsh Government on another, *the Framework for Action on Independent Living for Disabled People* because of my particular concerns regarding the application of the due regard duty. I will be pleased to expand on specific examples of my concern in committee.
- 8.3 Without access to the CRIAs it was not possible for me to engage as constructively as I would have liked by understanding what considerations had been made as part of the policy making process for the examples above.
- 8.4 This scenario is also true of the proposed Social Services and Wellbeing (Wales) Bill⁷. The lack of transparency has led to a public exchange between me and Welsh Government, which may not necessarily be conducive to effective legislative scrutiny and good law. I cannot be assured that I have fully understood nor 'fundamentally misunderstood' as per Welsh Government's statement, the provisions within the Bill unless greater clarity is afforded to address my concerns that due regard has not been effectively applied. As the Committee has been made aware, I have committed to sharing my own CRIA to assist in the scrutiny process as well as asking Welsh Government for a copy of the CRIA that they have prepared.
- 8.5 My concern is not that all CRIA lack quality. The publishing of the CRIA on the Active Travel (Wales) Bill as part of the Explanatory Memorandum is a case in point where there has been clear consideration of the substantive rights in relation to the specific elements of the Bill. Again, I would be happy to offer a perspective in Committee as to why I believe this to be the case. I have submitted a paper as part of the scrutiny process which I hope will be considered further within the context of the UNCRC and further examined by the legislature and Welsh Government. Whilst I do not fully agree with the conclusions of the Active Travel (Wales) Bill CRIA and believe there to be other issues to examine, I commend the quality of the CRIA as a constructive basis for discussion.

⁷ <http://wales.gov.uk/topics/health/socialcare/bill/?lang=en>

9 The need to formalise the CRIA processes

9.1 These processes are in their infancy and it is important to consider this, but I also believe the very early learning is that we need to ensure transparency of the CRIA process as well as formalising the process. This is not an easy task because the CRIA process should be seen as a fluid one throughout the process of policy and legislative development, with responses and evidence being reviewed and the CRIA revisited. Currently however, it appears that publishing a CRIAs at all is at the discretion of departments. Publishing CRIAs consistently, enabling responses to the assessments and affording Welsh Ministers the opportunity to address comments and feedback would help provide assurances that Welsh Ministers are operating with an open mind and with rigour in formulating policy and legislation. That is not to say that Ministers would be bound to accept alternative views and amend their intentions, but merely to constructively address the concerns or alternative perspectives.

9.2 A possible starting point may be that CRIAs should form part of the initial consultation on the policy or within an explanatory memorandum in the case of legislation. Facilitating a discussion on child rights implications in this manner can only be a positive development and would, I believe, lead to improved policy and legislative developments.

10 Review of legislation

10.1 Section 6 of the Measure allows the Ministers to make orders changing existing legislation if, following a report on compliance (under section 4), it is decided that it would be desirable to do so with a view to giving greater effect to the UNCRC.

10.2 The scheme states that Welsh Ministers will consider whether to utilise this power following the publication of the first compliance report, however there is no mention of section 6 in the compliance report.

10.3 In preparation for the revision of the Children's Rights Scheme, Welsh Government needs to consider how to offer structure to this statutory provision and consideration is required as to how to assess current legislation in order to ascertain whether there are opportunities to give better effect to the UNCRC. The logical approach would be to undertake a review of legislation, perhaps establishing a schedule for review or incorporating this element into the current internal Government mechanisms. This revision of legislation


within a schedule could then allow for an inclusion in the compliance report regarding assessments made as well as options for amending legislation.

11 Update of the *Getting it Right* action plan

- 11.1 As well as legislative frameworks relating to the UNCRC, an important element of the general measures of implementation of the convention in Wales is the national action plan. There is a clear link in this regard between the Children's Rights Scheme, the due regard obligations and this national action plan.
- 11.2 The Ministerial Statement made on 31 January, 2013 referred to the Welsh Government update on its progress in relation to the recommendations made by the UN Committee on the Rights of the Child in their concluding observations of 2008. The statement refers to the publishing of '*our progress in relation to the recommendations made by the UN Committee on the Rights of the Child in their concluding observations*'. I believe it is questionable whether or not the document does in fact reflect the content of the statement and also whether the UNCRC action plan can be considered fit for purpose in offering a road map for Welsh Government in driving positive change for children and young people in Wales within a rights context.
- 11.3 I would be willing to share the specific concerns I have in committee but on a general level, there are issues regarding the coherence of the revised document and how it complies with UN guidance⁸ on national strategies and also effectively reflects Welsh Government activity in a number of policy areas.
- 11.4 There has been a fundamental change to the format of the action plan, therefore it would have been appropriate to consult widely with the child rights community in Wales and various policy forums and formally requested feedback. I do however, understand that Welsh Government is clear that the action plan is a 'fluid' document and we are hopeful that I can further engage with Welsh Government as well as encouraging others to strengthen the document.

⁸ <http://daccess-ddsny.un.org/doc/UNDOC/GEN/G03/455/14/PDF/G0345514.pdf?OpenElement> & <http://www.ohchr.org/Documents/Publications/training10en.pdf>

Submitted by:

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.

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