

I see this opportunity to embed the principles of the UNCRC in law as an opportunity we cannot afford to lose. There are many worthwhile policies and strategies relating to children and young people in Wales which are underpinned by the principles of the UNCRC. I believe, however, that these high level aspirations are not always being translated into tangible outcomes which positively impact on the lives of children and young people in Wales. We need to build constructively on the Welsh Government's aspiration, providing a mainstreaming of the UNCRC into service delivery in Wales based on experiences of children and young people. I hope that by outlining my suggestions as to how the current proposal could be improved that collectively we are able to develop a Measure that would lead to positive and long lasting changes in the lives of children in Wales.

There are a number of fundamental issues that I feel need to be discussed in relation to the Proposal. These are the soft law approach and the duty to have due regard; the non pervasive nature of the identification of relevant function; whether individual citizens are able to interface with the proposal and the role and remit of the Children's Commissioner for Wales in the context of the proposal.

Background

Article 4 of the UNCRC requires States Parties to take *all appropriate legislative, administrative and other measures* for the realisation of the rights of the child. Ensuring that all domestic legislation is fully compatible with the UNCRC and that the UNCRC's principles and provisions are effectively enforced, is a fundamental step.

The United Kingdom Government is the State Party to the UNCRC however the Welsh Government has adopted the UNCRC as the basis for all policy making for children and young people since 2004.

As the Committee on the Rights of the Child underlines in its General Comment No. 5, *for rights to have meaning, effective remedies must be available to redress violations*. The Committee rightfully notes that children have vulnerable and dependent status, which *creates real difficulties for them in pursuing remedies for breaches of their rights*.⁴

United Kingdom Of Great Britain And Northern Ireland

<http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>

⁴United Nations Committee on the Rights of the Child (2003) General Comment 5 General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, Para. 6),

[http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/3bba808e47bf25a8c1256db400308b9e/\\$FILE/G0345514.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/3bba808e47bf25a8c1256db400308b9e/$FILE/G0345514.pdf)

In July 2009, the Welsh Government clearly signalled its intention to explore the possibilities of embedding the principles of the United Nations Convention on the Rights of the Child (UNCRC) into law for children and young people. The four UK Commissioners recommended in their joint report to the Committee on the Rights of the Child in 2008, that:

“R9 The UK Government and devolved administrations should incorporate the UNCRC into the domestic law of all four nations in the UK.

R11 The UK Government, devolved administrations and local authorities should carry out children’s rights impact assessments of all legislative and policy developments that affect children at national and local levels.

R12 While we acknowledge that the Children’s Commissioners have a role to play in disseminating the UNCRC, the responsibility for doing so lies primarily with the State Party. The UK Government and devolved administrations must take steps to raise awareness of the Convention and produce accessible information about children’s rights.”⁵

The recommendations of the UN Committee and the UK Commissioners are still live and valid. Any proposal of a CRC Measure has the potential to initiate a process of reviewing legislation; ensure the development of laws which reflect the CRC principles and provisions; respond to “new” issues related to children’s rights; and consider effective remedies for children and their representatives if children’s rights are violated.

It is within the context of the provisions of the UNCRC and the recommendations made by the Committee on the UNCRC within their Concluding Observations and General Comments along with the constitutional settlement within which the Welsh Government and the National Assembly for Wales (NAfW) operates that I have developed my initial response and comments.

Key Issues

Soft law approach | duty to have due regard

1 Duty to have due regard to Convention on Rights of the Child

(1) 5 The Welsh Ministers must, in exercising any relevant function, have due regard to the requirements of -

(a) Part I of the Convention,

(b) articles 1 to 7 of the Optional Protocol to the Convention on the Rights of the

⁵ www.childcomwales.org.uk/publications/uploads/publications/61.pdf

Child on the involvement of children in armed conflict, except article 6(2), and 10 (c) articles 1 to 10 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

(2) A relevant function is any function which is specified in a scheme made by the Welsh Ministers under section 2.

(3) This section applies to the First Minister as to the Welsh Ministers

(Extract from the Proposed Rights of Children and Young Persons (Wales) Measure)

If adopted the Draft Proposed Measure would place Welsh Ministers under a general duty to have “due regard” to Part 1 of the UNCRC and specified articles of its related Optional Protocols when exercising specified functions. This would effectively require them to take account of the UNCRC and not ignore it in relevant cases.

The extent of the obligation imposed on decision makers required to have due regard to specified considerations when exercising their statutory functions has recently been considered by the High Court in the cases of R (Boyejo and others) v Barnet London Borough Council and R (Smith) v Portsmouth City Council [2009] EWHC 3261 Admin.

In reaching this conclusion, the Court advanced the following paraphrased general principles in relation to the scope of the duty to have “due regard” for the purpose of section 49A(1) of the DDA:

1. Having an awareness and appreciation of the duty.
2. A requirement to pay due regard before and during policy and decision making process – an active consideration.
3. The duty must be exercised in substance, with rigour and an open mind. It is not a question of simply ‘ticking boxes’ and having a general awareness.
4. It is good practice to make reference to the duty.
5. It is a non-delegable duty.
6. The duty is a continuing one.
7. There should be proper record keeping the interests of transparency.

I would expect Welsh Ministers to be mindful of the principles set out by the court in relation to the obligations of due regard in the context of the Rights Measure.

The effectiveness of the *due regard* principle in relation to the capacity of the proposed Measure’s ability to promote interface between Government and the citizen, as identified above, is highly dependant on the nature of the functions which would populate the children’s scheme. I will provide further detail in response to Section 2(1) (a).

Preparation of schemes

Preparation and publication of the scheme

- (1) In preparing, remaking or revising the children's scheme, the Welsh Ministers must have regard to -*
- (4) Before making, remaking or revising the children's scheme, the Welsh Ministers must consult the following persons on the draft published under subsection (3)-*
- (a) children and young persons,*
 - (b) the Children's Commissioner for Wales, and*
- 5 (c) such other persons or bodies as the Welsh Ministers consider appropriate.*
- (Extract from the Proposed Rights of Children and Young Persons (Wales) Measure)

Clearly it is important that the processes leading to the population of the children's scheme should be as robust and open as possible. Section 3(4) imposes a duty on Welsh Ministers to consult with relevant parties including the Commissioner. There is however no obligation to have regard to the Commissioner's views or those of the other consultees. There is equally no obligation on the Welsh Ministers to share with the Assembly the results of consultation conducted pursuant to section 3(4). Whilst the Assembly might reasonably require sight of any consultation responses held by the Ministers, it would certainly enhance the extent to which the input of interested parties including the Children's Commissioner will be taken into account in devising the children's scheme, if the Ministers were required to have regard to consultation responses submitted pursuant to section 3(4).

The nature of this consultation would again be affected by Section 2 (1) (a). I believe there is a need for the consultation process to be less procedural and administrative with a clear shift towards the reporting and monitoring procedures. For this to happen, there would be a need for a more pervasive model of relevant functions. Please see relevant section of response.

Compliance

- 2 (1)(b) setting out the arrangements they have made, or propose to make, for the purpose of securing compliance with the duty under section 1*
- (Extract from the Proposed Rights of Children and Young Persons (Wales) Measure)

The Proposed Draft Measure is not prescriptive in terms of setting out mechanisms according to which compliance with section 1 might be measured. There is for example no requirement that the Welsh Ministers should certify in any relevant case that in discharging relevant functions regard has been paid to the Convention and to the relevant parts of the Optional Protocols. This contrasts with the requirement under the Human Rights Act that all legislation is subject to ministerial certification confirming consistency with the convention rights incorporated by the Human Rights Act.

The extent to which section 1 compliance will in practice be secured is highly dependent on the nature of the arrangements advocated by the Welsh Ministers in the children's scheme for ensuring compliance.

The nature of that which Welsh Ministers will be expected to comply with is also a key consideration when assessing the impact the Measure will have on the citizen. Again, I refer you to my response to Section 2(1) (a).

Scrutiny

4 Reports

- (1) The Welsh Ministers must -
on or before 31 January 2013, and*
 - (b) at or before the end of each succeeding period of five years, or of such other length as may be specified in the children's scheme, publish a report on how they and the First Minister have complied with the duty under section 1.*
 - (2) The Welsh Ministers must publish such other reports as may be required in pursuance of section 2(2)(a).*
 - (3) The Welsh Ministers must lay before the Assembly a copy of each report published Proposed Rights of Children and Young Persons (Wales) Measure 33 under subsection (1) or (2).*
- (Extract from the Proposed Rights of Children and Young Persons (Wales) Measure)

Reporting

The Draft Proposed Measure imposes certain reporting obligations on the Welsh Ministers which appear intended to promote transparency and accountability. In particular there is an obligation under section 4 to publish a report on compliance with the main section 1 duty on or before 31 January 2013 and subsequently on a periodic basis, at least every 5 years and in accordance with the children's scheme.

At present the mechanisms for ongoing scrutiny arrangements by the National Assembly for Wales in relation to the children's scheme are unclear and I will be seeking clarification on this issue within my response to the formal consultation.

A possibility that could be usefully explored could be an extension of my role as the national human rights institution for children to formally scrutinise the Government's scheme at the point of periodic reporting.

I am also currently unclear as to how my reviewing powers may be initiated in regards to the extent to which Welsh Ministers or the First Minister have met their duties in the Measure. I'm particularly referring to whether or not there is a need to amend legislation regarding the Children's Commissioner for Wales if a formal role was

envisaged, as noted in the explanatory memorandum. This is, however, not reflected in the draft measure itself by my reading.

The Draft Proposed Measure makes no specific provision for enforcement of the duties it imposes and contains no mechanism for individuals to seek redress in cases where it is alleged they have suffered harm or loss as a result of the Ministers' failure to comply with section 1. Please see my response to section 2 (1) (a).

There is a danger of this reporting process being purely procedural with a danger that the Measure does not provides for real interface between Government and the citizen.

Age range

In this Measure -

- (a) *“the Assembly” means the National Assembly for Wales;*
- (b) *“child” means a person who has not attained the age of 18;*
- 10 (c) *“young person” means a person who has attained the age of 18 but not the age of 25*

(Extract from the Proposed Rights of Children and Young Persons (Wales) Measure)

The proposals seek to extend the coverage of the Measure to 0-24 year olds. However it must be reiterated that the United Nations Convention on the Rights of the Child applies to those aged under 18. Whilst I recognise the policy intention of the Welsh Government to extend the principles of the UNCRC to 18-24 year old, I do not support the extension of the Measure to the 18-24 age range. This proposal would arguably have the effect, in relation to the Welsh Minister's exercise of relevant functions, of extending the impact of UNCRC beyond the scope for which *it was intended*. The UNCRC was established based on the lack of formal legal capacity of children and to establish a number of key principles crucial for their development, for example protection and the provision of services. The possible extension of the Measure to those aged over 18 who have formal legal capacity could also potentially take away necessary effort from delivering an effective Measure for children which is what the UN Committee have called for.

The non pervasive nature of the identification of relevant functions

2 The children's scheme

- (1) *The Welsh Ministers must make a scheme (“the children's scheme”) -*
 - (a) *specifying which of the functions of the Welsh Ministers and the First Minister are to be relevant functions for the purposes of section 1...*

(Extract from the Proposed Rights of Children and Young Persons (Wales) Measure)

The statement in the consultation document is clear that:

*The Welsh Assembly Government wants to create a law that will allow the rights and duties in the UNCRC to be carefully thought about by the Welsh Ministers and the First Minister in the important decisions that they are making all the time. That may result in new and better ways to support and improve the well-being of children.*⁶

If the current sectoral approach is pursued and only discrete functions of Welsh Ministers were to be specified in the 'children's scheme' then I would be concerned that the pervasive nature of the UNCRC would not be reflected in the application of the legislation. It would also call into question the ability of the Measure to meet the objective as noted above.

The Vice Chair of the UN Committee on the Rights of the Child, Dr Kamel Filali, wrote to me in response to the proposal and noted:

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

...The Children's Scheme should be open and not limited to the existing rights of the child. It is also important to emphasis on the indivisibility and transversality of these rights and their holistic nature."

A sectoral approach which relies on ruling in rather than ruling out a function could create a bureaucratic process where considerable effort is taken to create a list of policies and strategies which could become outdated rapidly and ultimately would have little impact on making long-lasting and positive changes for children and young people.

The Welsh Government has already identified 16 areas where it has committed to taking positive action on children's rights in the coming years. These proposals have been published within their Action Plan- UNCRC Getting it Right.⁷

Many of the priorities noted in this document would fall outside the remit of the 'functions' listed in the consultation document and therefore shows the difficulties

⁶ Welsh Assembly Government (2010) *Proposals for a Rights of Children and Young Persons (Wales) Measure Consultation Document*

⁷ Welsh Assembly Government (2009) *Getting it Right - UNCRC Action Plan*
<http://wales.gov.uk/docs/dcells/publications/091117gettingitrighten.pdf>

inherent in attempting a coherent approach to the implementing the UNCRC via a list approach.

The list of 'functions' listed in the consultation document contains 47 different policies or strategies, yet 29 of these are education related. Children's rights and interests should be safeguarded in all areas and we should all strive to ensure that this principle is applied to the final Measure if introduced.

It is perhaps worth emphasising that human rights are not a pick and mix assortment of luxury entitlements, but the very foundation of democratic societies. As such, their violation affects not just the individual concerned, but society as a whole; we exclude one person from their enjoyment at the risk of excluding all of us
Gil-Robles (2005)⁸

Alternative options to Section 2 (1) (a)

A far simpler approach in my view would be an all pervasive duty on all functions of Welsh Ministers which could lead to Ministers and officials considering the rights of children in a similar way to the duty to promote equality, sustainable development, Welsh language in their policy development and exercise of their functions under section 72 to 79 of the Government of Wales 2006.

This would aid mainstreaming of children's rights and would be a logical step to ensuring that the 'due regard' principles can be upheld.

It also 'future proofs' the proposal as any new policy or proposed NAFW Measure will have to be CRC impact assessed.

This would move away from the mechanistic and administrative regime, providing greater weight to the monitoring and reporting on outcomes, whilst also securing the potential to empower the citizen and holding Ministers to account for failings in service delivery.

This model could enable children and young people to have redress other than by means of public / administrative law challenges. Such an approach would have the advantage of simplicity and immediacy, enabling children and young people to mount direct challenges. It would incorporate the concept of redress and provide an interface which is lacking for the citizen in the proposed model.

⁸ 2005 REPORT BY MR ALVARO GIL-ROBLES, COMMISSIONER FOR HUMAN RIGHTS, ON HIS VISIT TO THE UNITED KINGDOM
http://www.libertysecurity.org/IMG/doc/CommDH_2005_6_E.doc

The UN Committee on the Rights of the Child rightfully noted that children have vulnerable and dependent status, which *creates real difficulties for them in pursuing remedies for breaches of their rights.*⁹

Closing remarks

The extent to which I am able to comment meaningfully about the value of the Measure is necessarily constrained by the fact that its scope remains uncertain until such time as relevant functions have been designated.

I fully understand the legal tensions and difficulties in that the devolution settlement would not allow a Welsh Government to fully incorporate the UNCRC into law, however, there are exciting opportunities.

The development of proposals for a Rights of Children and Young Persons (Wales) Measure is to be praised as it is a demonstrable commitment to children's rights in Wales. There is potential to create a model which works within the constitutional constraints, is pragmatic and provides for a practical embodiment of what children's rights means, could link the UNCRC process to service delivery, maximising what we can do in responding to our needs here in Wales. It would again show that Wales is leading the way within the UK when it comes to children's rights.

Any alternative options to the model as proposed should look to take a citizen-centred approach to service delivery.

A robust children's rights measure in Wales would provide for a citizen-centred and child rights vision. It would show that children and young people are central to participatory governance in Wales with a place at the heart of Welsh Government. A mature democracy demonstrating that it's hopes and aspirations for all our children and young people are realised in a way which gives its youngest citizens opportunities for redress and opportunities to have their voices heard.



Keith Towler
Children's Commissioner for Wales
20 April 2010

⁹ United Nations Committee on the Rights of the Child (2003) General Comment 5 General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, Para. 6), [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/3bba808e47bf25a8c1256db400308b9e/\\$FILE/G0345514.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/3bba808e47bf25a8c1256db400308b9e/$FILE/G0345514.pdf)