

Legislation Committee No 5

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UNICEF UK Submission

8 July 2010

Consultation on Proposed Rights of Children and Young Persons (Wales) Measure

Summary:

1. UNICEF UK welcomes the proposed Measure introducing a general duty on Welsh ministers to have due regard to the UN Convention on the Rights of the Child (UNCRC).

2. UNICEF UK supports the intention by the Welsh Assembly Government that the UNCRC become part of domestic law as that will lead, through review of legislation and child rights impact assessment, to harmonisation of Welsh legislation with the UNCRC.

Introduction

UNICEF UK is very pleased to be invited to give evidence to the Legislation Committee No.5 of the National Assembly for Wales and would like to thank the Committee for this opportunity.

The United Nations Children's Fund (UNICEF) works in 190 countries through country programmes and National Committees.

UNICEF is mandated by the United Nations General Assembly to advocate for the protection of children's rights, to help meet their basic needs and to expand their opportunities to reach their full potential.

UNICEF is guided by the Convention on the Rights of the Child and strives to establish children's rights as enduring ethical principles and international standards of behaviour towards children.

UNICEF works with all its partners towards the attainment of the sustainable human development goals adopted by the world community and the realization of the vision of peace and social progress enshrined in the Charter of the United Nations.

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?

UNICEF UK supports the concept of a 'duty to have due regard' to the UNCRC and its two Optional Protocols and welcomes the proposed Measure. Such a Measure would be an essential action to ensure the realisation of all rights in the UNCRC for all children in Wales.

On the normative level, the Measure is based on and complies with Article 4 of the UNCRC which requires States parties to take "all appropriate legislative, administrative and other measures" for implementation of the rights contained therein.

On a practical level, the Measure would enable full implementation of the UNCRC as it would ensure that all domestic legislation and policy is fully compatible with the UNCRC and that the UNCRC's principles and provisions are directly applied and appropriately enforced in policy and practice. UNICEF UK believes this measure is needed for effective implementation at all levels.

In 2008 The UN Committee on the Rights of the Child expressed its concern that the principles of the UNCRC were not duly taken into account in all pieces of legislation throughout the UK "and that the latter had not incorporated the UNCRC into domestic law nor had ensured the compliance of all legislation affecting children with it". The Committee recommended that the UK continued to take measures to bring its legislation into line with the UNCRC.

(<http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf> , paragraph 11).

In UNICEF UK's view the proposed legislation does amount to what the UN Committee calls a "general measure of implementation". General Implementation Measures, law reform being one of them, is a term used precisely because of the effect they have on "all" the rights recognised by the Convention. They form the foundation for efforts to protect the rights and principles stipulated in the UN CRC and therefore deserve special attention. Law reform is one of the most effective entry points and strategies to advance children's rights. Law reform is an ongoing process and the proposed law will be one, albeit very important, step in what we hope will be a comprehensive and holistic legislative reform on behalf of children's rights.

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?

We see a decision of a strategic nature to mean a decision that sets the direction, course of action and parameters for how to exercise ministerial functions. The term is certainly wide and broadly clear, however concerted effort will have to be made to achieve consistent

interpretation, understanding and practice by all those who will be involved in the implementation process.

The scope of the duty is limited in terms of functions and the range of duty-bearers. This is not a problem as long as it is recognised that the obligation to comply with the UNCRC refers to all functions and all duty bearers.

We would like to see the proposed measure go much further than the mere objective of 'putting the law in place'; we expect it to eventually achieve both harmonisation of Welsh legislation with the UNCRC and effective implementation of children's rights. In other words, the due regard duty should by means of 'decisions of strategic nature' create a new legal framework for all aspects of the Welsh Government's dealings with children.

Although the due regard duty applies directly only to 'decisions of a strategic nature' it will be still impacting on all Ministerial functions as it will be about how ministers exercise functions, so in our view, it will, rightly so, influence the exercise of every Ministerial function, not just certain categories.

Our view is based on the core human rights principles and the nature of the UNCRC which should guide this legislative reform initiative by the Welsh Assembly Government (WAG). These principles and qualities of the UNCRC are: a/ universality of rights; b/ interdependence and inter-connectedness of rights (holistic vision with emphasis on priorities and strategies to secure rights in the context of available resources); c/ non-discrimination and equality; d/ indivisibility of the UNCRC rights; and e/ accountability of all duty bearers for child rights obligations and the rule of law.

An example of how the due regard duty should have a pervasive effect is the general principle of the best interests of the child. Article 3.1 of the UNCRC states that."In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

The UN Committee has repeatedly stressed that the UNCRC should be considered as a whole and has emphasized its interrelationships, in particular between those articles it has elevated to the status of general principles (articles 2, 3, 6 and 12). Thus, the principles of non-discrimination, maximum survival and development, and respect for the views of the child must all be relevant to determining what are the best interests of a child in a particular situation, as well as to determining the best interests of children as a group. Moreover consideration of best interests must embrace both short and long-term considerations for the child. Any interpretation of best interests must be consistent with the spirit of the entire Convention - and in particular with its emphasis on the child as an individual with views and feelings of his or her own and the child as the subject of civil and political rights as well as special protections.

The wording of the UNCRC indicates that the best interests of the child will not always be the single, overriding factor to be considered; there may be competing or conflicting human rights interests, for example between individual children, between different groups of children and between children and adults. The child's interests, however, must be the subject of active consideration. It needs to be demonstrated that children's interests have been explored and taken into account as a primary consideration.

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?

The UNCRC applies to persons under the age of 18 so the proposed Measure should also remain clearly focused on children. The extension of the Measure to the 18-24 age range in a blanket way would not be desirable. Nevertheless a targeted use of the UNCRC may be appropriate. This principally refers to situation when long-term planning is required for a child and when transitional arrangements are being considered. One area, for instance, is the consideration of the continuing vulnerability of young people after reaching the age of 18. A specific example is the protection of child victims of trafficking.

UNICEF's Guidelines concern anyone under 18. However, this does not mean that a young person who has been trafficked when younger than 18 no longer requires any protection after reaching the age of 18. Careful consideration needs to be given to a young person's continuing vulnerabilities when she or he reaches adulthood. In one EU country, the procedures currently in force have the effect of providing less protection to children who are trafficked when aged 16 or 17 than to either younger children or slightly older adults. This odd discrimination occurs because trafficked children are required to leave the country when they reach 18 unless they have already been receiving assistance for at least two years. Such procedures have the effect of stopping decisions being taken which are in the child's best interests. Like older children, young adults who have been trafficked need support and help in preparing either to return to their country of origin or to remain and integrate in the country to which they have been trafficked.

There are other special circumstances when a "switch on/switch off" approach would not be desirable, e.g. disabled children, children in care.

Another example is from Belgium where the Flemish authority considers integrating its policy on the rights of the child with its policy on young people to be a major objective. As well as extending the child impact report to become an impact report on children and young people, the annual report also considers the implementation of the Youth Policy Plan. Moreover, the Flemish authority intends to use a new decree on youth policy to provide a legal basis for subsidies relating to the rights of the child, which are currently granted on an annual basis. One aspect of this will be to extend child impact reports to become impact reports on young people and children.

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?

We are delighted to see that the two Optional Protocols to the Convention on the Rights of the Child - on the sale of children, child prostitution and child pornography, and on protection for children in armed conflict - are included in the proposed Measure and fully support this approach. So our response is straightforward - yes, the protocols should remain included in the proposed Measure.

A UN Campaign, led by UNICEF, aimed at getting all countries to ratify and implement the protocols by 2012 was announced by the UN Secretary-General Ban Ki-moon last month. The two protocols provide stronger protections than those already enshrined in the UNCRC. This year the international community commemorates the tenth anniversary of the original adoption of these two Protocols so the timing of the proposed Measure is most appropriate. We know from the situation on the ground that much remains to be done. Violence against children in all its forms remains a challenge for all societies in the world.

The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography is an important tool for tearing through the mantle of invisibility surrounding the sale of children, child prostitution, child pornography and other forms of sexual exploitation, to mobilise societies and to translate political commitment into effective protection of children from all forms of violence. It has led to significant law reforms to criminalise such crimes against children and safeguard the rights of child victims, and has also become the source of international agreements to fight impunity within and across borders. It is therefore important that this Protocol is taken into account when the Welsh ministers consider strategic decisions that could help further protect children who are victims of violence. The Welsh Government could use the proposed Measure to combat child prostitution, child pornography and sexual exploitation of children in travel and tourism.

The Optional Protocol on the rights of children involved in armed conflict is also relevant for the Welsh ministers, though probably to a lesser extent than the other protocol. Some of the recommendations issued by the UN Committee on the UK Government implementation of this optional protocol can be taken forward by the Welsh Government, for instance the recommendation dealing with voluntary recruitment for persons below the age of 18 years.

UNICEF UK calls on the Welsh Government to effectively implement both protocols by incorporating them into national legislation, policy and planning, and providing victim protection and rehabilitation programs. Also to comply with reporting obligations to the UN Committee on the Rights of the Child by contributing to the next UK Government reports on the two protocols.

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?

Yes, they are.

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

The proposed Measure clearly spells out children's status as holders of rights, in all aspects of civil, political, economic, social and cultural life. This will now enable the Welsh Government to further develop its approach based on the recognition of the rights of the child, using the principles and provisions of the UNCRC as a fundamental reference point for the process and content of legislative reform. The proposed Measure requires the Welsh Government to examine the whole spectrum of legislation and regulations that affect the realisation of children's rights and adopt legislation which reflects the interconnected nature of the rights guaranteed by the UNCRC. This holistic approach to policy planning and implementation is essential if legislative reform is to result in positive changes for children.

It may be instructive and useful to present an example of important changes of child rights in Norway after the UNCRC became part of domestic law.

Norway ratified the UNCRC on the 8 January 1991 and incorporated the UNCRC into the Norwegian domestic law through the Human Rights Act, 21 May 1999, so the UNCRC is now applied as Norwegian law. The incorporation gives the provisions of the UNCRC additional force under Norwegian law, and the UNCRC will have precedence over the domestic law if any conflicts should arise. The incorporation of the UNCRC into national law led to the amendment of domestic legislation namely, the Civil Procedure Act, the Public Administration Act and the Adoption Act in order to implement and define the child's right to be heard, and to the Child Welfare Act in order to implement and define articles 12 and 20, and the Children Act. For instance, Norway amended main legislation such as the Child Welfare Act and the Children Act to strengthen children's right to express themselves. In case of custody the age of the child to be consulted is lowered from 12 to 7 years old or lower if capable

Furthermore, to strengthen children and young people's participation and influence in the municipalities, approximately three out of four municipalities in Norway have a body where children and young people can exercise their influence, usually a youth council or children and youth's municipal council.

7. What are the potential barriers to implementing the provisions of the proposed Measure (if any) and does the proposed Measure take account of them?

The proposed measure should start the process of harmonising Welsh legislation with the UNCRC. The starting point for such harmonisation is a close examination of the text/substance of Welsh legislation against the backdrop of the UNCRC. This should be followed by meaningful analyses of the gaps and obstacles in legislation that lead to inequality and non-realisation of rights.

We would like to single out here two processes that will be critical for a successful harmonisation process:

- Training and capacity-building

- Monitoring and public information

A child rights based approach to legislative reform depends on building capacities, such as training civil servants and law enforcement officials, among others, which will allow institutions to function effectively

The experience of Belgium in this area is instructive and shows what challenges need to be taken into account by the Welsh Assembly Government.

The Flemish Government has introduced the obligation to draw up a report (similar to annual reports envisaged in the proposed measure) detailing the impact on the child (hereafter: child impact report), on the basis of a decree issued back in 1997. Since then, a child impact report has been required for any draft decree involving a decision that manifestly and directly affects the interest of the child. In April 2001, initial drafting guidelines for child impact reports were distributed. Since August 2004, and following an assessment of the initial guidelines, a new adjusted methodology has been recommended. Unlike the initial guidelines, this methodology requires not only that the decision be checked against the UNCRC but that its effects on the actual situation of the children be evaluated. Child impact reports are drawn up by the authority responsible for the relevant draft decree. Officials who draw up child impact reports must consult organisations working for the rights of children and young people.

Nonetheless, the fact remains that child impact reports continue to be drawn up infrequently in Flanders. There are several reasons for this: their limited scope and the fact that they are not rigorously binding; the lack of expertise in regard to the rights of the child and child impact reports more particularly; and the vague and impenetrable nature of the legislation — even public servants find this to be the case. Since 1 January 2005, in an effort to resolve that problem, the Flemish authority has introduced a legislation impact analysis ("analyse de l'impact de la réglementation" - hereafter: AIR). The AIR provides a structured analysis of the objectives sought by and the positive and negative effects of the proposed legislation, as compared with the alternatives. It provides an opportunity to focus more closely on the effects on children as part of the legislative process. The aim is to incorporate the child impact report into the AIR. The guidelines on drawing up an AIR already refer explicitly to the method employed for child impact reports. In that context, the results of the child impact report are to be incorporated into the AIR. The AIR does not apply merely to preliminary draft decrees but also to draft decrees with regulatory effect.

The Belgian example clearly shows that the Welsh Assembly Government will need to set up a well-resourced mechanism to ensure that all future and existing legislative and administrative measures are systematically reviewed to achieve compatibility with the UNCRC. The UN Committee has also emphasised this approach (Report on the twenty-second session, September/October 1999, CRC/C/90, para 291/f/).

Especially important, for the UN Committee and for the promotion and protection of children's rights in general, is the need to ensure that the four general principles are incorporated into and reflected by the Welsh legislation that deals with children. Particular stress is placed on freedom from discrimination, making the best interests of the children a primary consideration, and respecting the views of the child. The Concluding Observations on the Initial Report of the UK are typical:

"The Committee would like to suggest that greater priority be given to incorporating the general principles of the Convention, especially the provisions of its article 3, relating to the best interests of the child, and article 12, concerning the child's right to make their views known and to have those views given due weight, in the legislative and administrative measures and in policies undertaken to implement the rights of the child" (UK Initial Report Concluding Observations, Add.34, para. 27).

Part of the training and capacity-building programme should be dissemination of information and consultations with the widest possible range of people, institutions and groups interested in legislation that affects the rights of children. The analysis and consultation elements of the review process are equally important and require the same level of commitment and preparation to ensure a successful review. When executed properly the process will lead to greater understanding of children's rights and effective legislation which fully respects, protects and promotes those rights.

8. 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 stated intention of the proposed Measure is for the UNCRC to become part of the Welsh legislation. The incorporation of the UNCRC into UK domestic law is something that UNICEF UK has been advocating, as we see it as a basis and a precondition for the full realisation of all UNCRC rights. Our position has been very much informed by views of children. We have gathered their views through various means, e.g. online, but also consulting with them directly on this specific issue. For instance, in 2009 we held a couple of events on the subject of the UK Bill of Rights and Responsibilities where the issue of the UNCRC incorporation was a topic discussed in a separate sub-group. There was a strong consensus in favour of incorporating the UNCRC into the UK law. Children argued that the incorporation was indispensable to raise awareness of child rights and the UNCRC.

For example, children and young people that took part in the consultation on the Bill of Rights and Responsibilities Green Paper with the Ministry of Justice on 19 December 2009 were enthused and excited about the possibility of seeing further civil, political, economic, social and cultural rights enshrined in UK law. The general agreement among all the children and young people present was that the Government should take the opportunity of a Bill of Rights and Responsibilities to incorporate the UNCRC into UK law and ensure that children and young people are more easily able to access justice for any violations of their rights. They felt that having a Bill of Rights and Responsibilities for the UK - building on the rights in the Human Rights Act - would help to raise the status of children and young people and work towards creating a better, fairer and safer society.

Children and young people debated at length the way in which a Bill of Rights and Responsibilities might function in practice, and had

in-depth discussions about the practical implications of any such Bill on the delivery of services, the allocation of resources and the involvement of the courts. They came to the conclusion that, with all these considerations in mind, anything less than an enforceable Bill of Rights and Responsibilities would not provide the respect and protection for human rights that can currently be lacking in British society.

9. Are there any other comments you wish to make about specific sections of the proposed Measure?

Yes, regarding: Subordinate legislation, section 8(5)

We would like to inform you of the work on a proposed optional protocol to the Convention on the Rights of the Child to provide an individual communications procedure as this may have important practical implications for Wales.

On 17 June 2009, the Human Rights Council passed a resolution establishing an inter-governmental working group in relation to a proposed individual communications procedure for the UNCRC. Such a procedure would potentially allow children or their representatives to bring individual complaints to the UN Committee on the Rights of the Child, where they alleged that their rights have been violated, provided that they could demonstrate that all avenues available to them in their country had proved ineffective (exhaustion of domestic remedies). The resolution's main operative paragraph reads as follows:

"The Human Rights Council...Decides to establish an Open-ended Working Group of the Human Rights Council to explore the possibility of elaboration of an optional protocol to the Convention on the Rights of the Child to provide a communications procedure complementary to the reporting procedure under the Convention;" The Working group meeting took place in New York on 14-17 December 2009 and the drafting of the protocol is now under way. The Member States who lead this work argue that:

- 1) this mechanism would strengthen protection under the CRC, and would emphasize that children are rights holders
- 2) the CRC is the only human rights treaty with a mandatory reporting procedure that does not have such a mechanism in place, and
- 3) consideration of individual cases would help in interpreting the provisions of the Convention.

UNICEF is committed to strengthening protection of children's rights and ensuring that they have a complete range of effective remedies at both domestic and international levels. In order to be confident that an individual communication procedure would represent a genuine improvement in the system for the protection and promotion of children's rights, however, UNICEF hopes that the work of the working group will be informed by a broader review of ways of making the treaty body system work better for children and the importance of harmonising domestic legislation with international standards.

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