

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Plant, Pobl Ifanc ac
Addysg
Ymchwiliad i Hawliau plant yng
Nghymru
CRW 04
Ymateb gan: Arsyllfa ar Hawliau Dynol
Plant

National Assembly for Wales
Children, Young People and Education
Committee
Inquiry into Children's rights in
Wales
CRW 04
Response from: The Observatory on Human
Rights of Children

About the Observatory

1. The Observatory is based at Swansea University and Bangor University. Our work supports implementation of children's human rights through research, working with organisations to develop and put in practice ways of embedding the UN Convention on the Rights of the Child (CRC) in law and policy in Wales, providing information on children's rights, and supporting child rights advocacy. We are an interdisciplinary project with partners in academia and practice in the UK, Europe and globally.

Introduction

2. The Rights of Children and Young Persons (Wales) Measure 2011 (the Measure) came into full effect in May 2014 to incorporate the CRC in Welsh law. It provides for indirect incorporation by requiring the Welsh Ministers to have due regard to the CRC and specified articles from its first and second optional protocols when exercising any of their functions.ⁱ
3. The Measure adds to legal accountability for children's rights as the due regard duty establishes a public law obligation. The Welsh Ministers may be subject to judicial review if they fail to have due regard to the CRC when exercising their functions. The Measure introduces opportunities for enhanced political scrutiny by the National Assembly for Wales (NAW) as well as by commissioners and wider civil society. The Measure does not provide for direct legal accountability to individual children whose rights are breached through the acts or omissions of Welsh Ministers.

Research on the Measure

4. In 2018 Dr Simon Hoffman, a Coordinator of the Observatory based at the Hillary Rodham Clinton School of Law at Swansea University carried out relevant research on the Measure for the Equality and Human Rights Commission (EHRC), in collaboration with Sean O'Neill, Senior Policy Officer at Children in Wales (the 2018 study).ⁱⁱ This research focuses on the impact of the Measure, in particular on policy development, policy advocacy, and accountability as areas where the Measure was intended to have an impact when it was introduced.

5. The 2018 study found that the Measure is a general legislative measure of implementation consistent with several recommendations made by the UN Committee on the Rights of the Child (the UN Committee) on the domestic application of the CRC.ⁱⁱⁱ The evaluation also found that the Measure has increased the visibility of the CRC in policy development, introduced new opportunities for policy advocacy on behalf of children in Wales, and legitimised the language of the CRC in policy discourse. The study concludes that the Measure provides a foundation for stakeholders to engage with the Welsh Government in dialogue about how to give effect to children's rights through policy, simultaneously introducing an expectation of compliance with the CRC which contributes a strong underpinning for advocacy on behalf of children.
6. On accountability the 2018 study confirms that the due regard duty has enhanced legal accountability but notes that judicial review has not emerged as a significant accountability mechanism for children's rights compliance in Wales. Instead, the study concludes that the Measure has established the CRC as an audit framework for Welsh Government policy. It also notes that the Measure has enhanced accountability through a statutory requirement imposed on Ministers to publish a periodic Compliance Report on how they have complied with their due regard duty.^{iv} The Compliance Report gives opportunity for public debate and scrutiny, and to hold Ministers to account.
7. The 2018 study notes that with some exceptions the opportunity to hold Ministers to account for compliance with the CRC has not been fully exploited by the NAW. It draws attention to the use of the due regard duty to influence policy and scrutinise Ministers by the CYPE Committee, e.g. scrutiny of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (ALNETA), as an example of effective use of the Measure. However, it also noted that Assembly Members, other committees and on occasion the CYPE Committee, have not made the most effective use of the due regard duty during debates and scrutiny processes. The study notes that non-governmental organisations and the Children's Commissioner for Wales (CCfW) are more adept at using the Measure as an accountability device.
8. This submission will refer to the 2018 study further below in response to issues raised by the CYPE Committee.

Issues Raised by the CYPE Committee

The extent to which the Rights of Children and Young Persons (Wales) Measure 2011 has influenced the Welsh Government's decision making, including its financial allocations and whether it has fulfilled the Convention's 'general measures' of implementation;

9. The 2018 study notes that the Measure is a general legislative measure of implementation consistent with recommendations by the UN Committee on

general measures of implementation (GMI) of the CRC. The 2018 study also points out that the due regard duty led directly to the introduction of Children's Rights Impact Assessment (CRIA). CRIA is consistent with recommendations on general administrative measures of implementation of the CRC by the UN Committee.^v The study concludes that the introduction of CRIA has helped raise the profile (visibility) of children's rights in policy development in Wales.

10. The Executive Summary set out in the 2018 study states:

"The primary impact of the Measure has been to embed the [CRC] as a framework for policy development in Wales, including through the introduction of CRIA. It has provided impetus and confidence to stakeholders to use the [CRC] in policy advocacy and has strengthened Ministerial accountability for the way in which [CRC is] taken into account in policy decision-making."

And:

"The Measure has resulted in greater visibility for children's rights in policy processes undertaken by Ministers and their officials. Although there remain challenges of implementation of the [CRC] in Wales through government policy and action, overall the Measure has had a positive impact on the way policy is undertaken by the Welsh Government."

11. Overall the 2018 concludes that the Measure has been a positive legislative initiative in Wales, consistent with UN Committee recommendations on GMIs, which has underpinned greater attention to children's rights in policy development. In particular, the study notes that the Measure led to the introduction of CRIA but also other processes and structures within Welsh Government to support children's rights, again consistent with the GMIs.
12. However, as will be discussed further below, we have concerns that in some areas there is a risk that the potential of the Measure is not being fully met. This is because of weaknesses in the application of CRIA which were identified in an evaluation 2015 but are yet to be fully mitigated (see further below), and the risk of withdrawal from structures which support delivery of the due regard duty.

Evidence of whether the Measure has led to improved outcomes for children and young people;

13. The 2018 study clearly stated that problems of establishing causation mean it is not possible to confirm a direct link between the due regard duty, and outcomes for children. There are simply too many variables that would need to be taken into account: this is a problem identified in other research on legal measures of implementation of the CRC.^{vi}

14. In addition to problems of causation it should also be noted that the primary objective of the Measure is to ensure that the CRC is taken into account and given appropriate priority in policy development undertaken by Welsh Government and officials acting on behalf of Welsh Ministers. Importantly, the Measure is not intended to prescribe policy outcomes, but is a device to influence the culture of policy-making within Welsh Government with the aim of securing better policy output, and in the long term, influencing better outcomes for children.
15. As noted above, the Measure has raised the profile of children's rights in Welsh Government policy decision-making. Although the 2018 study did not seek direct links between the due regard duty and policy outcomes, it did examine the influence of the duty on policy output. In this respect the study found several examples of policy output improved by the application of the due regard duty and CRIA: improvement in this context means policy output more consistent with children's rights. Examples include: the Child Poverty Action Plan, the content of and guidance on the Well-being of Future Generations (Wales) Act 2015 (WBFGA), and reference to the CRC in the ALNETA.

Whether the duties within the Measure have been embedded effectively across Welsh Government cabinet portfolios and policy;

16. The 2018 study found that there appeared to be an assumption that the due regard duty fell primarily on the Minister with responsibility for children. This assumption undermines the intended pervasive effect of the Measure.
17. The application of CRIA should provide a procedure whereby all Welsh Government departments engage directly with children's rights in policy development. However, a study commissioned by the Welsh Government in 2015 carried out by Hoffman and Morse (the 2015 study) found that the application of CRIA to be inconsistent.^{vii} The 2015 study found examples of CRIA good practice, but concluded this was not uniform across all departments. The 2018 study came to a similar conclusion, citing evidence from stakeholders that the application of CRIA is "patchy and inconsistent",^{viii} sometimes undermining the substantive application of the due regard duty.
18. An example of inconsistent application of CRIA given in the 2018 study is the failure to apply CRIA to the Welsh Government budget.^{ix} Child rights budgeting is identified as a key aspect of GMIs by the UN Committee.^x Failure to apply CRIA to the budget is a significant failure of attention to children's rights. It is also a failure to comply with the Welsh Government's own stated policy on application of CRIA to decisions which affect children. This requirement is set out in the current Children's Rights Scheme, as required under the Measure.^{xi} The Scheme sets out a process which prescribes CRIA for all decisions which affect children. The budget certainly has an impact for

children and failure to apply CRIA is a worrying omission. We deal with the application of CRIA further below.

The extent to which the Welsh Government has sought to ensure that its duties within the Measure are translated into the work of the public bodies it provides funding to, including local authorities and NHS bodies;

19. The Measure has influenced guidance and legislation imposing duties on public bodies more consistent with children's rights. Examples of this include guidance under the Active Travel (Wales) Act 2013^{xii} as well as under the WBFGA.^{xiii} But also, the Social Services and Well-being (Wales) Act 2014 and the ALNETA. Both these statutes impose a duty on public bodies to have due regard to the CRC in the exercise of certain functions.^{xiv}

20. We welcome the Welsh Government's efforts to impose a due regard duty on public bodies in Wales. The work of public bodies is key to how children experience their rights and it is essential (and a requirement under international law) that they take account of the CRC in the exercise of their functions and seek to give effect to children's rights.

21. We are however concerned that the application of the due regard duty to public bodies is piecemeal, with a degree of reluctance on the part of Ministers to extend the due regard duty. An example of this is the debate surrounding the inclusion of a due regard duty in the ALNETA. This had to be pressed for by the CYPE Committee.^{xv} In our view the Welsh Government's hesitation in applying the due regard duty to all public bodies is unjustified and a brake on further progress on children's rights implementation in Wales. There is no good reason why all public bodies should not be statutorily required to have due regard to the CRC in the exercise of all their functions. This would be consistent with the duty imposed on Ministers, and would enhance the promotion of children's rights in Wales.

22. We respectfully suggest that the CYPE Committee give consideration to recommending legislation to impose a pervasive duty on all public bodies in Wales to have due regard to the CRC when carrying out any and all of their functions.

The extent to which the Welsh Government has implemented its duty to promote knowledge and understanding of the UNCRC amongst the public, including children and young people;

23. We adopt the submission made by the Wales UNCRC Monitoring Group.

How the duty to have 'due regard' to the Convention on the Rights of the Child is being implemented in practice and whether Child Rights Impact Assessments are being used as a meaningful tool;

24. We are concerned that recommendations made in the 2015 study on early implementation of CRIA, on seeking the views of children, and on maintaining and strengthening support for officials engaged in CRIA have not been effectively implemented.

25. The 2015 study noted the importance of the Measure Implementation Team (MIT) to support knowledge and expertise on children's rights in the conduct of CRIA. The 2015 study noted a lack of expertise generally amongst officials conducting CRIA, and a lack of capacity to develop appropriate expertise on an individual basis. The MIT was identified as a valuable resource to mitigate a general lack of awareness and appropriate knowledge of children's rights amongst Welsh Government officials working on CRIA. We note changes in personnel engaged in the MIT since the 2015 study, with dissipation of expertise. We also note that the MIT appears to have lost its identity, and is no longer held out as a referral body for those working on CRIA within the Welsh Government. To some extent this is mitigated by the work of the Children's Branch within Welsh Government, and the opportunity provided by the Children's Rights Advisory Group (CRAG) to gain external insight into child rights issues that arise in relation to policy proposals. CRAG is established by the Welsh Government as an Advisory Group to engage officials in the Children and Families branch with external organisations (UNICEF, CCfW, CiW and the Observatory). However, while the Terms of Reference of CRAG mean that it can provide input on policy proposals, it is not a substitute for visible and accessible internal expertise on children's rights within Welsh Government as a centralised resource for guidance and support, in particular on CRIA: as was intended to be provided by the MIT.^{xvi} We fully recognise the hard work and commitment of officials in the Children's Branch, but the expertise of branch officials, while comprehensive, is often particular to policy areas and not children's rights under the CRC. We are concerned that any weakening of internal support for children's rights via a dedicated team such as the MIT is a stepping away from the commitment given in the Children's Scheme.^{xvii}

26. We note that the Welsh Government intends to move to integrated impact assessment (IIA) but are unclear about the extent to which this has been implemented. Along with other members of CRAG we raised with the Welsh Government the need to maintain a focus on CRIA as part of IIA. The template which has been presented for use as a 'gateway' for IIA is heavily focussed on well-being as an aspect of the screening process which determines the application of more specific impact assessment templates later in the process.

27. We are pleased that CRIA has been retained intact as an aspect of IIA. We are however concerned the focus on children's rights will be diluted as a result of a move to IIA. It is yet to be established how the weaknesses in CRIA identified in the 2015 and 2018 studies will be addressed by IIA. This could be in the form of stronger guidance either in the IIA gateway template, or

accompanying guidance. At this stage we are not convinced that appropriate guidance has been issued.

28. We also wonder how IIA will ensure an appropriate level of expertise where several impact assessments are being carried out at the same time. This may be addressed through the maintenance of a central resource such as the MIT (see above for discussion).

29. Finally on CRIA, we note that the 2015 study in particular, but also the 2018 study, concluded that CRIA does not sufficiently engage with children. This is both a failure in CRIA good practice, but also a breach of children's rights under the CRC (Article 12). We see nothing in the proposed IIA that adequately addresses this issue.

30. We respectfully suggest that the CYPE Committee give consideration to recommendations which will ensure that CRIA is properly prioritised, for example: strengthening the requirement to undertake CRIA (see below, Moving Forward), requiring Ministers to provide clear guidance to officials on completing CRIA as part of IIA including mechanisms for engaging children, and, ensuring support for officials working on children's rights, and in particular on CRIA, which is accessible and sustainable to all Welsh Government officials.

The effectiveness of the Children's Right's Scheme and the most recent Welsh Government compliance report, and the extent to which they evidence sufficient action on the part of Welsh Government to ensure full implementation of the Measure;

31. We adopt the submission of the Wales UNCRC Monitoring Group.

How effectively the Welsh Government responds on a strategic basis to the Concluding Observations of the UN Committee on the Rights of the Child.

32. We adopt the submission of the Wales UNCRC Monitoring Group.

Moving Forward

33. The Measure has introduced a number of opportunities to hold the Welsh Government to account for children's rights. However, while political and administrative accountability has certainly been strengthened, judicial review has not emerged as significant for enhanced legal accountability. We believe it is appropriate to reflect on how accountability for children's rights may be strengthened in Wales.

34. When the Measure was introduced the primary objective was to focus on the culture of children's rights governance in Wales. It was also felt that the competences of the NAW at the time meant it was not feasible to seek to introduce a legal duty giving children a right of action where their rights are breached. The position is different in 2019.

35. The competences of the NAW have changed since 2011. Wales is now responsible for “observing and implementing” international obligations, including human rights and therefore children’s rights. The UN Committee has consistently emphasised that this includes incorporation of the CRC in a way which makes it directly enforceable by children or their representatives.^{xviii} The Measure does not make the CRC directly enforceable. The Welsh Ministers could introduce, and the NAW could enact legislation to provide that children whose rights are breached by Welsh Government policy or Ministerial action could bring an action for a remedy.

36. The Children and Young Persons Commissioner in Scotland (CYPC) and Together Scotland (an NGO alliance), has established an Advisory group to comment on legislation to give effect to the Scottish Government’s commitment to incorporate the CRC in Scots Law. The Advisory Group, of which Dr Hoffman is a member, has published a draft bill which includes a due regard duty but also a “compliance duty” establishing a right of action for children where their rights are breached.^{xix} The compliance duty is modelled on the duty “not to act incompatibly” with the European Convention on Human Rights set out in section 6 of the Human Rights Act 1998. The draft bill proposed by the CYPC/Together Advisory Group in Scotland also includes provisions which strengthen the due regard duty by making CRIA a mandatory requirement to be addressed in a Children’s Scheme.

37. Wales has led the way in children’s rights in the UK. The Measure is highly progressive legislation but it has always been recognised that it has limitations. Now is an opportune time to reflect on progress under the Measure but also on how to continue to progress.

38. We respectfully suggest that the CYPE Committee give consideration to recommending that Welsh Ministers work with the Wales UNCRC Monitoring Group and other stakeholders to examine ways of strengthening the Measure to include: options for amendment to add a compliance duty; and, options for strengthening the due regard duty by imposing mandatory requirements under the Children’s Scheme.

19th September 2019

Contact details for enquiries have been provided.

ⁱ Section 1 of the Measure.

ⁱⁱ Hoffman, S. and O’Neill, S., *The Impact of Legal Integration of the UN Convention on the Rights of the Child in Wales* (EHRC, 2018).

ⁱⁱⁱ UN Committee, General Comment No.5, *General Measures of Implementation of the UN Convention on the Rights of the Child* (2003).

^{iv} Section 4 of the Measure.

^v Above n.[iii].

^{vi} See for example: Lundy, L., Kilkelly, U., Byrne, B., and Kang, J., *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries* (UNICEF-UK, 2012).

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- vii Hoffman, S. and Morse, C., *Evaluation of the Welsh Government's Child Rights Impact Assessment procedure under the Children's Rights Scheme pursuant to the Rights of Children and Young Persons (Wales) Measure 2011* (Welsh Government, 2015).
- viii Above n.[ii] p.27.
- ix Above n.[ii] p.40 and Box 6.
- x Above n.[iii] and, UN Committee, General Comment No.19, *On Public Budgeting for the Realization of Children's Rights* (2016).
- xi Welsh Government, *Children's Rights Scheme 2014*, section 7 and Annex 1.
- xii Above n.[ii] Box 4.
- xiii Above n.[ii] Box 1.
- xiv Section 7, Social Services and Well-being (Wales) Act 2014; section 7, Additional Learning Needs and Educational Tribunal (Wales) Act 2018.
- xv Above n.[ii] Box 5.
- xvi Above n.[xi], see generally references to the Measure Implementation Team but in particular pp.19-20.
- xvii Ibid.
- xviii Above n.[iii].
- xix The Children's Rights (Scotland) Bill, available here:
<https://www.togetherscotland.org.uk/media/1200/childrens-rights-scotland-bill-2019.pdf>