

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Plant, Pobl Ifanc ac
Addysg
Ymchwiliad i Hawliau plant yng Nghymru
CRW 26
Ymateb gan: Comisiwn Cydraddoldeb a
Hawliau Dynol

National Assembly for Wales
Children, Young People and Education
Committee
Inquiry into Children's rights in Wales
CRW 26
Response from: Equality and Human Rights
Commission

Consultation response

The Equality and Human Rights Commission (the Commission) welcomes the opportunity to respond to the Committee's inquiry into children's rights in Wales. In December 2017 the Commission procured research to examine the impact to date of the Rights of Children and Young Persons (Wales) Measure 2011 (the 'Measure'). The research aimed to assess the impact of the Measure and how (if at all) it has made a difference to children's rights in Wales. Questions pertaining to the Measure in this response are primarily informed by this report. The research was carried out by the Wales Observatory on the Human Rights of Children and Young People, and Children in Wales between 1 January and 31st March 2018. The research adopted a mixed methodology including a literature review, a review of National Assembly for Wales (NAW) proceedings, surveys to obtain the views of civil society and legal professionals, case studies and consultations with children and young people.

The full research report can be accessed here:

https://www.equalityhumanrights.com/sites/default/files/the_impact_of_legal_integration_of_the_un_convention_on_the_rights_of_the_child_in_wales_eng.pdf

- 1. 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;**

Background

In 2011, NAW enacted Wales-only legislation to give effect to the Convention on the Rights of the Child (the Convention) in policy development in Wales: the Rights of Children and Young Persons (Wales) Measure 2011 (the 'Measure'). The Measure came into full effect in May 2014. It is primary legislation that requires the Welsh Ministers to have due regard to the Convention when carrying out any of their functions.

The Measure embeds the Convention in Welsh Government policy processes. It introduces legal devices to strengthen accountability for the way in which children's rights are considered in policy in Wales, and to promote awareness of the Convention.

General Measures of implementation

When a State ratifies the Convention on the Rights of the Child, it takes on obligations under international law to implement it. Implementation is the process whereby State parties take action to ensure the realization of all rights in the Convention for all children in their jurisdiction. Article 4 requires States parties to take "all appropriate legislative, administrative and other measures" for implementation of the rights contained therein.

Whilst it can be argued that the Measure meets the expectations of the UN Committee on integration of the Convention into domestic law as a general legislative measure of implementation, the research authors state that it does not meet in full the prescription for incorporation as set out by the UN Committee¹

Our research concludes,

"The UN Committee recommends incorporation of the Convention in national legal systems. This means that the Convention should be capable of being directly invoked before national courts and will prevail when in conflict with domestic law, and that a remedy is provided for violation.... The Measure has added a new basis for judicial review and the Convention may be relied on before a UK court to challenge a decision taken by a Welsh Minister. Arguably this meets the UN Committee's first requirement

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https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2003%2f5&Lang=en

for incorporation. However, incorporation as contemplated by the UN Committee also requires a remedy and suitable reparation where Convention rights are violated, including compensation. Remedies on judicial review do not usually include damages. In any event, the due regard formula falls short of incorporation as it does not give the Convention superior status over policy determined by the Welsh Government. While the Welsh Government has gone further than the UK Government and any other devolved authority in the UK to integrate the Convention in domestic law, it cannot be said to have incorporated the Convention as anticipated by the UN Committee. Rather, the Measure is a legislative measure of implementation to integrate the Convention into Welsh law” (Hoffman & O’Neill 2018, pg 48)

The Commission believes that all the relevant rights contained in UN human rights treaties should be made part of domestic law so individuals can effectively challenge rights violations using the domestic legal system and access a domestic remedy for alleged breaches of human rights. For example, the rights in the European Convention on Human Rights are incorporated into domestic law by the Human Rights Act (HRA). We believe that the HRA is well crafted in allowing people to enforce their rights and the Committee should explore how a HRA model of incorporation could be applied in Wales.

Recommendation: The Commission recommends that measures to protect children’s rights in Wales should be further strengthened by making these rights (and other UN treaty rights) legally enforceable. How has the measure influenced Welsh Government’s decision-making?

Our report states that the Measure has had a significant impact on the way policy *is undertaken* by the Welsh Government. Stakeholders interviewed as part of the research were generally in agreement about the impact of the Measure to ensure the Convention is ‘on the radar’ of officials working on policy. An example of this examined the Well-being of Future Generations (Wales) Act 2015 and found that draft legislation was amended during legislative scrutiny to allow local Public Service Boards to make specific reference to children in their well-being assessments. The Welsh Government attributed the amendment to the due regard duty, discussions between Welsh Government departments and direct engagement with children’s and young people’s organisations (Hoffman & O’Neill, pg27).

However, there was some ambivalence and difference in opinion with stakeholders about its impact on the *quality* of decision-making. Comments included:

“...the quality of consideration and analysis given to children’s rights in Welsh Government policy development is often patchy and inconsistent”.

“The [Measure] is an innovation in human rights and child’s rights implementation. But the impact of this law has been very uneven so far”

“Officials take the [Convention] into account, but some do so in quite a superficial way, without fully considering the implications of children’s rights. We cannot be 100% confident that the Measure has led to an improvement in the way policy is decided in every instance, but we are aware of some policies that are certainly better as a result of more detailed thinking about children’s rights brought about by the Measure”.

How has the measure influenced its financial allocations?

Our research provides a case study of Welsh Government’s draft budget for 2017-18 that shows a CRIA was not completed. Instead, a Strategic Integrated Assessment was prepared which includes reference to a number of objectives, including children’s rights. In its General Comment on the General Measures of Implementation, the UN Committee has clearly stated that governments cannot tell whether they are fulfilling children’s economic, social and cultural rights, which are included in the Convention, to the maximum extent of available resources, as Article 4 of the Convention requires, unless they can “identify the proportion of national and other budgets allocated to the social sector and, within that, to children, both directly and indirectly”.

Whilst stakeholders expressed a belief that CRIA is an important tool to hold Welsh Government to account for policy decision making, many expressed concerns that CRIA practice may undermine its use as an accountability mechanism:

“...carrying out or publishing a [CRIA] is not a mandatory process under the Measure. Where [the Welsh Government] has not carried out or published a CRIA, there is a notable lack of visibility for children’s issues and children’s rights, and it is often very difficult to discern how individual policies and decisions might impact children”.

2. evidence of whether the Measure has led to improved outcomes for children and young people;

There is a lack of evidence that the Measure has directly improved outcomes for children and young people in Wales. There is also a lack of clarity on what outcomes Welsh Government want to improve for children and young people as a result of the Measure. However, it is important to bear in mind that the Measure was not designed to prescribe policy outcomes and that the Measure is still relatively new.

Welsh Government could specify strategic outcomes for children and young people that are based on evidence from robust and relevant sources. These outcomes should inform policy decisions made by Welsh Government Ministers. This could then be monitored to provide evidence of progress on improving outcomes for children and young people. This approach has parallels with the Commission's GB-wide position on the potential reform of the PSED to ensure that it focuses public bodies on delivering priority equality outcomes that are informed by *Is Wales Fairer?*, other data as well as stakeholder engagement (or otherwise explain why they have not done so).

Recommendation: The Welsh Government should explore how to strengthen the implementation of the Measure to ensure that it is strategic, through developing outcome-focused objectives that seek to address the areas of greatest need in relation to children's rights, and the key inequalities affecting children. These outcomes can be informed by evidence from *Is Wales Fairer? 2018* and other relevant and robust sources.

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

Our research evidences that whilst the Measure has made a difference to the way children's rights are considered by policy makers, this has not been implemented across government.

The due regard duty, The Children's Scheme and Children's Rights Impact assessments (CRIA)

The primary mechanism for embedding the Convention in policy in Wales is set out in Section 1 of the Measure. This places a duty on the Welsh Ministers

to have due regard to the Convention when exercising any of their functions.

Section 2 of the Measure requires Ministers to make and publish a 'Children's Scheme' setting out the arrangements they have made for securing compliance with the due regard duty. The requirement for a Children's Scheme is intended to promote a proactive approach to compliance with the due regard duty.

The Children's Scheme commits the Welsh Government to undertake a CRIA of all policy proposals. Welsh Government identifies CRIA as a significant innovation to support compliance with the due regard duty stating in their 2018 compliance report:

"CRIA is part of the Welsh Government's procedures for ensuring that due regard is given to children's rights when policies, programmes or legislation are being developed"²

Our research report provided case study examples of CRIA good practice demonstrating how CRIA can be used effectively to draw attention to relevant Convention rights in policy development. For example, in both the Child Poverty Strategy 2015 and the Active Travel (Wales) Act 2013 CRIAs were completed that took account of the Convention and the proposals or draft legislation was amended as a result.

Despite this, the research suggests that in other instances the impact of CRIA, and therefore the due regard duty, is undermined by inconsistent application, as stated by one stakeholder below,

"Because of the due regard duty, the Welsh Government has to conduct a [CRIA], but we know that the quality of these is inconsistent, so while children's rights are being considered as part of the process, I don't think that the full impact of policy development on children's rights is being thoroughly assessed every time".

Policy advocacy

The Measure provides the opportunity to use the due regard duty as a basis for policy advocacy in Wales. Our research included a short examination of

² Welsh Government, Compliance Report 2013-2018

how Assembly Members (AMs) use the duty when challenging or encouraging action on behalf of children and young people. It found that AMs made little reference to the due regard duty when urging Ministers to take action in support of children's interests. The research also found some effective use of the duty by the Children, Young People's and Education (CYPE) Committee. However, when examining six inquiries into issues affecting children carried out by the Committee in 2016, the research established that only one of the committee reports made reference to the due regard duty as an express underpinning for a recommendation to Welsh Government.

This demonstrates that the Measure has not been embedded across Welsh Government cabinet portfolios as well as it could be.

4. **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;**

We do not have the evidence to answer this question

5. **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;**

Section 5 of the Measure includes a duty on Ministers to "take such steps as are appropriate to promote knowledge and understanding amongst the public (including children) of the Convention and the Protocols"³

As part of our research project, workshops were held with young people to examine knowledge and awareness of the UNCRC and knowledge and understanding of the role of children's rights in Welsh Government policy and legislative development.

The young people who participated in the workshops believed that children's rights are still not visible enough in Wales and there is a need for greater awareness raising through mainstreaming information, i.e. not just through school councils or youth forums. Although the young people were able to talk about some of their experiences of accessing their rights, in particular Article 12, they did not link this with Welsh Government and the Children's Rights Measure. However, at the end of the workshop, when they could see the connections, they felt more empowered as they could

³ <http://www.legislation.gov.uk/mwa/2011/2/section/5>

understand that they had a right in Welsh law to access their rights, which was more impactful than only linking it back to the UNCRC, a big international agreement. Some of them thought there were more opportunities now to get their voices heard but only if they were linked to a particular group or youth forum or were a Children's Commissioner Ambassador.

The education system plays a vital role in establishing and reinforcing the shared values that provide the foundation for a society in which all individuals are respected and have the opportunity to flourish and there are good relations between different groups. For that reason, we advocate for a human rights approach to education. The reform of the national curriculum in Wales offers an opportunity for the Welsh Government to fulfil its international and domestic obligations by fully implementing human rights education (HRE) in schools. HRE is any learning that develops the knowledge, skills and values of human rights. It includes education about human rights, through human rights and for human rights. Education about human rights improves individuals' understanding of how they should be treated and how they should treat others as part of an open, democratic society, and the legal protections they can rely on to exercise their rights. Education through human rights is about adopting a rights-based approach to the school environment. Education for human rights encourages individuals to adopt the attitudes and behaviours of respecting, protecting and promoting human rights in their daily lives.

Recommendation: The Commission recommends that in order to comply with the duty to promote knowledge and understanding of the UNCRC amongst the public, including children and young people, the Welsh Government must ensure human rights education is fully implemented into the new curriculum for Wales.

6. 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;

As discussed in questions 1 & 3 above, the Commission believes that, whilst the duty to have due regard to the Convention has resulted in greater visibility for children's rights in policy processes undertaken by Ministers and their officials, there remain challenges of implementation through government policy and action.

The introduction of the due regard duty has led directly to the introduction of CRIAs that is consistent with general administrative measures of implementation of the Convention by the UN Committee. CRIA has helped raise the profile of children's rights in policy development in Wales, however application of CRIA in practice is 'patchy and inconsistent', sometimes undermining the substantive application of the due regard duty.

7. 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;

We do not currently have the evidence to answer this question

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

To our knowledge, there is currently no formal mechanism within the Welsh or UK Government to coordinate and monitor the implementation of UN recommendations. At present, a large number of the UN's recommendations are often not acted upon, and so recommendations are frequently repeated across UN reviews/reporting cycles. Where progress is being made, governments often fail to make links to UN recommendations. A centralised, transparent mechanism would help assess where progress has/has not been made.

The absence of a formal mechanism risks conflicting and piecemeal approaches, particularly where recommendations involve issues that cut across departments, and an incoherent approach to systemic human rights issues. A government owned mechanism would help ensure a coordinated approach to monitoring, reporting and encouraging implementation of UN recommendations.

The Commission has previously made calls in our treaty monitoring reports for governments to develop action plans and strategies to ensure implementation of the government's international human rights obligations, and also called for more coordinated cross-government(s) action on concluding observations.

At international level, there has been an increasing recognition that it is not enough for governments to submit reports to treaty bodies and engage in the Universal Periodic Review mechanism, and that what is needed is a much stronger focus on implementation of international human rights obligations. Similarly, there has been increased interest in more deeply embedding domestic oversight of these obligations.

The UN High Commissioner for Human Rights and UN treaty bodies have repeatedly called for the establishment of National Mechanism for Implementation, Reporting and Follow-up (NMIRFs) to ensure a coordinated approach to reporting to, and engaging with, international and regional human rights mechanisms, and the implementation of the UK's human rights obligations. In 2016, the Committee on the Rights of the Child recommended in its Concluding Observations (COs) on the UK (July 2016) that the coordination and evaluation of the Convention's implementation needs to be strengthened. Recently the Committee on the Elimination of Discrimination against Women, in its COs on the UK (March 2019) called for a national mechanism to oversee implementation, and asked for governments to provide further information on their steps to establish one. In their most recent COs on the UK (May 2019) the Committee against Torture asked governments to include 'plans for implementing some or all of their recommendations' in a follow-up report due within a year. The Women and Equalities Select Committee (WESC), in a letter to the CEDAW Committee, called for a monitoring mechanism to ensure that women's rights are fulfilled between treaty review cycles.

There is no 'one size fits all' approach to such mechanisms, but they should be permanent and include a cross-section of relevant departments. They could also include or consult with representatives from other public bodies, parliaments and the judiciary, as well as national human rights institutions (NHRIs) and civil society.

Recommendation - The Commission recommends that the Welsh Government implement a National Mechanism for Implementation, Reporting and Follow-up (NMIRF) of UN recommendations

Equality and Human Rights Commission

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