

ROCK Conference – Edinburgh, February 2015

Commentary on progress on children's rights in Wales

This is an unedited version of the talk. Some elements may differ from the actual presentation.

Abstract:

The presentation will introduce and discuss the *Rights of Children and Young Persons (Wales) Measure 2011*. It will explain how the Measure works, outlining the mechanisms for legal, parliamentary and administrative accountability. Simon will relate the experience of the Measure to since its introduction in May 2012 and will discuss how it has contributed toward incorporation of the Convention into Welsh Law; examining whether the Measure and its consequences for law-making processes at the devolved level have been effective to ensure that Welsh Law reflects the principles of the Convention. The presentation will also provide insights into some consequential developments arising from the introduction of the Measure and how these might contribute to implementation of the Convention in Wales.

ROCK presentation

Thank you – pleased to be here to discuss progress on incorporation of Convention in Welsh Law – before discussing what has taken place I will explain what I mean by Welsh Law

For my purposes Welsh Law is any legislation that can apply solely to Wales – so will include Statute enacted by the National Assembly for Wales – or secondary legislation introduced by Welsh Ministers

Assembly and Ministers exercise of powers conferred on the Assembly and Welsh Ministers by Government of Wales Act 2006

Assembly is able to make law in 20 subject areas that include – education – health – social welfare – housing – transport – and local authorities – all law making competences of the Assembly touch upon the lives of children – some more directly than others

Ministers can introduce legislation or make regulations that apply to Wales under devolved powers – again in areas that directly or indirectly affect children in Wales

Assembly has a scrutiny function but ultimately majority of Welsh Law will be determined by Ministers – Ministers will either be guided by or led by their officials – depending whether you take generous view or cynical view of influence of civil servants in these matters

Conduct of Ministers is a key factor relevant to incorporation of the principles of the Convention into Welsh Law

This realisation was significant when it was decided to introduce the Rights of Children and Young Persons (Wales) Measure 2011 – enacted in 2011 but in full effect only from May 2014

Long title of the Measure states- to make provision for and in connection with giving further effect in Wales to the rights and obligations set out in the United Nations Convention on the Rights of the Child

Legal mechanism for achieving this objective focuses on exercise of functions by the Welsh Ministers – it is uniquely concerned with the role of key law and policy makers at government level

Primary mechanism employed by the Measure is set out in section 1 – section 1 requires Welsh Ministers to have due regard to Convention provisions when exercising any of their functions – the provisions are specified as Part 1 of the Convention and listed articles of the optional protocols

May be familiar with due regard in the context of equalities legislation – the courts have elaborated on the concept – yet to be worked out in context of Wales and the Measure – will briefly outline

In context of equalities the courts have interpreted due regard as imposing a requirement on the decision-maker to be properly informed and aware of what must be considered before and at the time of making a decision – to exercise the duty ‘must be exercised in substance, with rigour and an open mind’ – courts have also stated that the duty must be ‘integrated within the discharge of the public functions’ – (*R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158

Interesting to note that Measure substantive provisions to which Ministers must have due regard are set out in the Schedule to the Measure – they are part of Welsh law – a consequence of this is that if the courts are asked at judicial review to decide whether a Minister has exercised their functions without due regard to relevant substantive provisions of the Convention this will require the courts to decide whether Ministers have properly attended to the substance of rights – an exercise which will inevitably involve some judicial interpretation of relevant provisions

The requirement of due regard provides legal accountability to the courts via judicial review – the Measure sets up two further mechanisms which provide accountability and which are intended to embed incorporation of the Convention in Welsh Law

The first is the requirement under section 2 of the Measure – the Welsh Ministers are required to make and publish a Children’s Scheme setting out the arrangements they have put in place to secure compliance with the due regard – the Scheme is available and sets out a number of mechanisms for compliance – these include Child Rights Impact Assessment – I will say more about this shortly – first want to mention accountability to the National Assembly

Under Section 4 of the Measure – as well as under the Scheme – the Welsh Ministers are required to publish a report – the Measure requires a report every 5 years – but the Scheme imposes a requirement of a report every 2.5 year – this reporting process gives opportunity for AM’s to hold Ministers to account and for public debate.

That’s how the Measure works – what I’d like to do now is briefly mention Child Rights Impact Assessment – this is now part of the process of introducing law and policy adopted by the Welsh Government

As you know Child Rights Impact Assessment is a tool which draws attention to the impact of legislation proposals for children and on children’s rights – if properly carried out it enables decision-makers to take action to remove or at least mitigate any negative impact on children’s rights arising from proposed legislation – or to design legislation to better promote children’s rights

In Wales the CRIA process is set out in the Children’s Scheme – consultation with children and other interested stakeholders is an aspect of CRIA in Wales – although

the type of depth of consultation varies – and there is some scepticism about whether or not it is effective - it is certainly not consistently effective

It is worth mentioning that the Welsh Government has agreed that all CRIAs should be available to anyone who wishes to see them – this provides opportunity for those outside the Welsh Government to contribute to development of Welsh Government understanding of children's rights through consultation

Now that I have explained the Measure I want to ask the question: Has it made a difference? – in particular – has it made a difference to legislation

Honest answer – we don't know – no concerted or rigorous analysis of legislation to try and gauge the influence of the Measure to embed children's rights – there have been in excess of a 1,000 pieces of legislation since 2012 – Acts and subordinate legislation – some more relevant to children's rights and interests than others – no idea how many have been subjected to CRIA – or what difference it's made – we have not been able to carry out any systematic analysis

Feedback from stakeholders on CRIAs confirms that quality is inconsistent – there are examples of very poor but also very good CRIA

I have just started a small-scale evaluation project to examine CRIA – this will focus on substantive quality of CRIA and their influence on legislation and policy – I hope it will yield some useful data – intend to move to a more comprehensive analysis of legislation after that

At this stage however I can only speak on the basis of my assessment to date based on insights gained for working in the field and with stakeholders – you may be interested in some of the experience of actual legislation – first some positive accounts

Human Transplantation (Wales) Act 2013 – CRIA was comprehensive – the team concerned were assisted by officials allocated to support the implementation of the Measure – it systematically sought to identify relevant articles of the Convention identified children’s consent to organ donation as a significant issue – and a significant rights issue focusing in part on Article 12, Article 14 – the CRIA is not yet in the public domain but from my reading of it the author has carried out a full active and informed analysis - the CRIA analysis eventually influenced the Act’s provisions on consent to organ transplantation – including recognising children’s capacity to consent

Housing (Wales) Act 2014 – I am uncertain as to the outcome of the CRIA in this case as I have not seen it – but I know that in relation to homelessness and intentional homelessness – the drafting of the legislation was influenced by considerations of children’s rights directly attributable to the requirement of the Measure – I know this because the options report for the Welsh Government draws attention to the due regard duty

Active Travel (Wales) Act 2013 – Wonderful definition of walkers as people who walk! – systematically worked through a range of articles of the Convention

There are some positive indications that legislation Wales is perhaps being devised in ways that pay more attention to children’s rights – that Welsh Law is becoming more

rights respecting since the introduction of the Measure – but I am putting this forward very tentatively – and I need to emphasise that my presentation and comments are not based on the outcome of any research – and in this cautious vein I would like to introduce some balance

Social Services and Well-Being (Wales) Act 2014 – section 7 of the Act requires anyone who exercises function under the Act to have due regard to part 1 of the Convention – already spoken about what this means – certainly seems to be the case that the Act is seeking to incorporate Convention principles into the discharge of functions by certain authorities – including local authorities

At first sight you might think this is consistent with the other statutes I've mentioned – in fact it seems to be more explicit about the place of children's rights in the legal framework established by the Act than the others

But the Act seen in the context of other situation re are real issues which suggest that the Measure may struggle in the face of determined resistance - **Insufficient focus on human rights and children's human rights within the Future Generations Bill**

For example, the Wales UNCRC Monitoring Group would have liked to see a much clearer link between the content of the Bill and the realisation of children's human rights in Wales. Even though the Children's Rights Impact Assessment (CRIA) states that the Bill will have a positive impact on children's human rights in Wales, we are concerned that the Bill itself does not make direct reference to the UNCRC. The Social Services and Well-being (Wales) Act includes provision that '*a person exercising*

functions under this Act in relation to a child' ... 'must have due regard to Part 1 of the United Nations Convention on the Rights of the Child'. The Well-being of Future Generations (Wales) Bill would be considerably strengthened if the same provision were to be included on the face of the Bill. Such provision would also ensure the Minister's duty to give due regard to the United Nations Convention on the Rights of the Child was clearly demonstrated. The omission of such provision represents a lost opportunity to promote children's human rights and the UNCRC in Wales in a way that will impact on the lived experiences of children in Wales.

But what I would like to draw to your attention is not what's in the Act – but what's not in it – what's not in it is any provision to remove the defence of reasonable chastisement in Wales – this is an omission which is difficult to understand for so many reasons

Over the last decade successive Welsh Governments have consistently supported giving children 'equal protection' under the law on assault - the Welsh Government has made a commitment over the last decade to removing the defence of reasonable chastisement yet failed to take the legislative opportunity when provided within its own programme of Government – in fact Ministers actually blocked an amendment to the legislation that would have removed the defence during the passage of the Bill

The current Chair of the UN Committee on the Rights of the Child, Kirsten Sandberg, visited the National Assembly in November 2014 and was bewildered at why progress on this issue in Wales had stalled – as are we all

Incidentally Welsh Ministers defend their inaction by claiming removing the reasonable punishment defence was not a manifesto pledge - and therefore cannot be pursued in this Assembly term - it is difficult to understand how complying with an international human rights obligation would need to be sanctioned via a party manifesto pledge

The Welsh Ministers allowed another opportunity to introduce relevant legislation to remove the defence in the Domestic Abuse and Sexual Violence (Wales) Bill which is currently passing through its legislative passages in the National Assembly for Wales

All of this is of course demonstrates a degree of hypocrisy on the part of Welsh Ministers – hypocrisy / Ministers never – but it is also highly unsatisfactory and contrary to children’s rights

What can I say – perhaps it is best said by the Wales UNCRC Monitoring Group who in a bulletin to AMs to mark the 25th Anniversary of the Convention stated that based on recent experience of the development of policy and legislation it is apparent that children’s rights are less visible than might be anticipated given the due regard duty