



Proposed Rights of Children and Young Persons (Wales) Measure Additional Paper for Legislation Committee 5

This paper is submitted following my appearance before the Committee on 8th July 2010 and the request made by Members for additional information.

Within this paper I have sought to provide an overview of options, or models available to governments in applying a rights convention to legislation. It concentrates on two areas for the Committee's consideration, which are accountability and redress.

It is for the Committee to decide which model they believe is the most effective. An important aspect of the deliberations will be regarding the application of the recommended model within a complex constitutional settlement in Wales.

By Statute¹, my principal aim in exercising my functions is "to safeguard and promote the rights and welfare of children". In this context, my focus is on working to achieve practical improvements and beneficial outcomes for children and young people in Wales.

Obviously, my wish is to promote children's rights to the maximum extent possible, and if legislation can help produce such practical improvements and beneficial outcomes, then I will support it.

In an area such as children's rights, the very fact that legislation exists can have a direct social and psychological impact, by grounding the issue in the minds of the public, the authorities and children and young people themselves. The message is sent out by the legislature and government that children's rights are a serious matter. This heightens public awareness and helps to foster a culture which promotes thinking about the impact on children of what goes on in society, and which challenges bad practices. This indeed was the impact of the creation of the office of the Children's Commissioner for Wales by Statute.

For this reason alone, I welcome the Rights of Children and Young Persons (Wales) Measure as further strengthening the foregrounding of children's rights in Welsh society.

¹ Section 72A Care Standards Act 2000

However, concerns have been raised during the Committee scrutiny, and in the session at which I gave evidence, about whether the Measure as drafted could deliver improved outcomes in terms of upholding the rights of children. I acknowledge and also share that concern. It was suggested that I should prepare amendments for the Committee's consideration. I have taken the view that during the deliberations, Members have expressed such concern and fundamental issues with the Measure and what the provisions within should seek to deliver, that currently suggesting amendments would not be conducive to providing clarity and direction to those discussions.

I have taken the view that a more useful contribution from me would be to assist in providing some context of what may be possible solutions to what are seen as current weaknesses in the form of model options.

My wish is to promote children's rights to the maximum extent possible, and I want the most far reaching and impact intensive piece of legislation as possible. I will support any Measure which incorporates the UNCRC into Welsh legislation and produces practical improvements and beneficial outcomes for children and young people.

I also understand that drafting and introducing legislation is often an outcome of political compromise. Whichever model is adopted, political commitment is of paramount importance. Any Measure in relation to children's rights will only be as good as the political will and commitment attached to it; both from the Government in delivering the commitments, but also from the legislature in scrutinising delivery. As the Children's Commissioner for Wales, I also fully understand my role in this context.

If passed in its present form, it will place a duty on Welsh Ministers to have due regard to UNCRC, and the Protocols ratified by the UK, when making decisions of a strategic nature about how to exercise any of their functions. A Children's Scheme will be created by the Welsh Ministers which sets out the criteria by which they will determine whether or not a decision is of a strategic nature, and will also describe what they have done or will do to secure their own compliance with this duty. The Welsh Ministers must publish five-yearly reports on what they have done to comply with the duty. They can amend legislation to bring it into line with the UNCRC (provided that it is within the legislative competence of the National Assembly).

Holding to account

Upholding rights is to a large extent about holding people to account. In the broadest sense, that means some kind of mechanism which investigates what has happened, analyses it and reaches some kind of a decision or outcome. The range of mechanisms for doing this is very broad, ranging from self-monitoring at one end, to enforceable remedies and sanctions on the other. Different types of mechanism can exist at the same time. The following paragraphs provide a brief overview of some of the mechanisms, and relate them to the context of this proposed Measure:

Self-monitoring

This occurs where the accountable person undertakes their own review of what has happened, and produces their own report, which may or may not contain commitments as to their future activities. Such a mechanism is of course routinely used in all sorts of contexts to improve performance. Where the report is by government, and not made public, there is no possibility of independent scrutiny, and no way of holding government to account.

Public Self-monitoring

Where a self-monitoring report is made public, then there is of course more accountability. That is particularly so where the accountable person reports to an independent body. In the case of the draft Measure, the requirement under Clause 4 is to lay the report before the National Assembly for Wales, and the Welsh Ministers will be held publicly accountable at plenary sessions of the Assembly, or in committee.

Simple Independent Monitoring

This occurs where an independent person examines the actions of the accountable person, and produces a report which may contain recommendations. The independent person has no power, however, to compel the accountable person to provide information or documents, nor do the recommendations have any force in law. This is the position, for instance, in the case of my powers to review the exercise of their functions by Welsh Ministers under Section 72B of the Care Standards Act 2000. **I could use this power to review compliance by the Welsh Ministers with their duty under Clause 1 of the Draft Measure.**

Stronger Independent Monitoring

In this case, the independent person is vested with some degree of authority in the monitoring process. They have powers which may include the power to require information from the accountable person and the power to compel witnesses. Nevertheless, any recommendations or other requirements in the reports which are produced are not legally binding, in the sense that there is no real-world sanction which can be imposed if they are not adhered to, other than “naming and shaming”. There is nevertheless greater accountability, and therefore greater likelihood of beneficial outcomes, because the ability to compel witnesses and evidence can be enforced by a court. My powers of review and monitoring of arrangements and examination of individual cases under sections 73 and 74 respectively of the Care Standards Act are closest to this model. **It is arguable that this type of monitoring might be available to me to review compliance by the Welsh Ministers with their duty under Clause 1 of the Draft Measure, to the extent that this was relevant to a section 73 review or (less likely) a section 74 examination.**

Independent Monitoring with Sanctions

In this case, as well as having strong investigatory powers (which may extend for instance to powers of entry onto premises), the person who carries out the monitoring function is also able to impose sanctions, which can be enforced by a court and which are subject to a right of appeal to an independent body. This kind of monitoring function is not fulfilled by me, rather by other regulators.

International Monitoring

This involves monitoring of the accountable person by a body or group established under international law. This is in one sense a variety of simple independent monitoring, in the sense that, although the obligation to submit to the monitoring process is binding in international law, there is no process for enforcement through the courts. Nevertheless, the international opprobrium which follows on from failing to adhere to international law can be said to be a stronger sanction than domestic "naming and shaming". The UNCRC is of course monitored by such a body, the Committee on the Rights of the Child. While the Committee will, strictly speaking of course, hold the UK accountable, not the Welsh Ministers, nevertheless, they are very likely to comment on the Measure if it becomes law, and on how it is implemented.

Control by the Courts – Judicial Review

If a public authority breaks a duty under public law, it may be amenable to judicial review. In theory, the Welsh Ministers could be held to account through judicial review if they failed to carry out their duty under Clause 1 of the draft Measure. In most cases where compliance with a statutory duty is sought, a mandatory order is made by the Court. Conventionally, however, mandatory orders are not made against Ministers of the Crown in cases such as this; rather the Court will give a declaratory judgment with which the Minister will (conventionally) comply. Judicial review proceedings must be brought by someone who has a "sufficient interest" in the subject matter of the proceedings. The categories of who has a "sufficient interest" are not closed, and in recent years, there has been a tendency to be liberal in determining who has such an interest. There need not be any particular personal interest involved. In recent years, the courts have increasingly allowed pressure groups and NGOs to bring proceedings in suitable cases. Judicial review is however a discretionary remedy, and leave must be sought to bring proceedings.

In practice, however, judicial review in this case may be of limited use as a means of holding ministers to account. First of all it must be shown that a decision of a strategic nature has been made, and secondly that, in making it, due regard was not had to the UNCRC. This is a significant constraint, and means for instance that there would be no right to judicial review for breach of the Measure if any other exercise (i.e a function

which is not of a strategic nature) of a function by the Welsh Ministers were exercised without due regard to the UNCRC. Nevertheless, it is arguable that, in exercising their functions, the Ministers are in any event bound to take account of the UNCRC as an international instrument binding the UK under International Law, and that an exercise of a function *in contravention* of the UNCRC would in any event be amenable to judicial review.

Control by the Courts or other tribunals – civil redress

Where a right has been infringed or a duty broken, it is open to an affected citizen to seek redress from the Courts.

In the context of breach of a public law duty (of the sort envisaged by the draft measure) it is open to the courts in certain limited cases to award compensation or an injunction in judicial review proceedings.

Redress from the courts is usually granted however in civil proceedings, where people can show that they have suffered loss or damage. The right to redress depends on the matter being “justiciable”, that is to say one in respect of which the court recognises as a matter of law, that it has jurisdiction to make a binding judgment. **The question that arises in the context of the measure is whether such a right to redress could be created in respect of a breach of the UNCRC.**


The UNCRC is largely framed as a normative legal instrument. That is, it is addressed to governments, requiring them to take measures to ensure that certain results and outcomes prevail. In some respects it declares the rights of children, but does not always do so in as straightforward a way as say the European Convention on Human Rights (ECHR). **Many articles do not create rights at all. It is therefore difficult to adopt the same approach to the UNCRC as was adopted in the Human Rights Act to the ECHR. The UNCRC does not fit neatly into such an approach.**

Many infractions of the UNCRC which impact on individuals are likely already to lead to justiciable claims. Many will, for instance, be breaches of the ECHR. Some may not. **In order to create a Measure that turns the UNCRC provisions into justiciable rights, it would be necessary first of all to examine each Article of the UNCRC to see how it could be expressed as a right (consistent with the UK’s ratification), and then examine the extent to which it would be within the National Assembly’s legislative competence to create that right by measure. That is a task which will need a good deal of effort and time to complete properly.**

Redress outside the Courts or other tribunals

There are certain methods of holding to account which allow for redress outside the courts or other tribunals. A useful example in the Welsh context is the power of the

Public Services Ombudsman to recommend compensation where there has been maladministration. While this is often described as an “award” of compensation, it is in fact only a recommendation, which is not legally binding on the public body concerned, and cannot be enforced.

A handwritten signature in black ink that reads "Keith Towler". The signature is written in a cursive style. Below the signature is a long, thin horizontal line that ends in a small arrowhead pointing to the right.

Keith Towler
Children's Commissioner for Wales