

Domesticating the UNCRC through the *Rights of Children and Young Persons (Wales) Measure 2011* and its impact on the status of children's rights in Wales.

Dr Rhian Croke, Children's Legal Centre Wales, Swansea University, May 14th 2024
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Introduction

Hello and thank you so much for inviting me to speak today. My name is Dr Rhian Croke and I am the Children's Rights Strategic Litigation and Policy Advocacy Lead for the Children's Legal Centre Wales and I also carry out research and advisory work for the Observatory on Human Rights of Children also based at Swansea University. I have been a passionate advocate for children's rights for over 20 years in Wales. I am not a lawyer, but a socio-legal academic activist that uses the law strategically to affect change for children. In my presentation I am going to take us on a whistle stop tour of how the UNCRC is contributing to protecting children's rights in Wales and consider along this journey what are the best mechanisms for compliance.

Early commitment on children's rights

Firstly, it is important to acknowledge that the political commitment of early devolved administrations to the UNCRC was striking. The National Assembly for Wales enacted the first legislative reference to the UNCRC in the UK, when the [Children's Commissioner for Wales, established in 2001](#), was to 'have regard to' the UNCRC in exercising their functions.

In 2004, the [National Assembly for Wales](#) determined that the UNCRC would be the overarching set of principles for all devolved policies on children. Key strategy documents emerged for example on partnerships for local child services, child poverty, child health services and on young offenders all making express reference to the UNCRC. Wales was also quick to establish mechanisms to support children's participation in decision-making. From the onset of devolution, Wales pursued an agenda that was supportive of children's rights.¹

Civil society driving change on children's rights

Alongside political commitment to the UNCRC, a strong civil society coalition of NGOs and academic organisations, emerged, tasked with monitoring and promoting the UNCRC in Wales. From 2004, I had the privilege of leading the Wales UNCRC Monitoring Group. We successfully pushed for commitments to monitoring children's rights from all the main duty bearers on the deficits in children's rights, and to present this evidence to the UN Committee on the Rights of the Child. The dynamic of the UNCRC reporting process, anchored in the authority of the international

human rights treaty system became a strong tool for stimulating a constructive dialogue on children's rights in Wales. And in exerting pressure on Welsh Government to recognise what rights were being violated, and to make changes to both legislation and policy.ⁱⁱ

For example, after the UN Committee released their recommendations in 2008, we influenced the Welsh Government to develop a National Action Plan on Children's Rights. At the time an advisory group of organisations was also established, to meet regularly to advise Welsh Government on the National Plan's development. Today this Group still continues and is named the Welsh Government's Children's Rights Advisory Group, which we are members of.

General Measures of Implementation – UN Committee on the Rights of the Child General Comment No.5

As well as a National Action Plan, we worked proactively to promote other significant changes, using the [UN Committee on the Rights of the Child's General Comment No. 5](#) as our guide, on [General Measures of Implementation on the UNCRC](#). We pushed for further incorporation of the UNCRC, and to further embed children's rights into the national machinery of Welsh Government, calling for continued monitoring on children's rights, raising awareness of children's rights, children's rights budgeting and to introduce children's rights impact assessments, to proof policy and legislation for their compliance with children's rights. This framework provided the architecture for children's rights developments and the touchstone for advocacy, prior to children's rights being later indirectly incorporated. Driven by the context of established dynamics, with all acknowledging the importance of children's rights, involving politicians, officials, academics and NGOs, with the Monitoring Group having a central role inspiring this constant interaction.ⁱⁱⁱ

Legislative change on children's rights – The Rights of Children and Young Persons (Wales) Measure 2011

This commitment to children's rights culminated in the First Minister, Rhodri Morgan, in 2009, deciding to take advantage of the extension of legislative power permitted by the Government of Wales Act 2006, to 'explore the possibility of introducing a Measure to embed the principles of the UNCRC into law on behalf of Welsh children'.^{iv} A Measure is primary legislation in Wales, this is what Welsh enactments were called before the change took place later to call them Acts.

Capitalising on this momentum, working with my wonderful colleagues, Professor Jane Williams and Professor Simon Hoffman, academic lawyers from Swansea University, we gave expert advice on the development of a legislative Measure, a model at that time for more comprehensive incorporation of the UNCRC, and the first of its kind in the United Kingdom. In 2011, the [Rights of Children and Young Persons \(Wales\) Measure](#) was passed into law.

Section 1 of the Rights Measure imposes a legal duty on Welsh Ministers to have 'due regard' to Part 1 of the UNCRC and specified articles of the UNCRC optional protocols, when exercising their functions.

The due regard duty means proper consideration must be given to all UNCRC articles in the making of policy, introducing legislation, making budgetary decisions. Under Section 2 of the Rights Measure, Welsh Ministers must make a [Children's Scheme](#) setting out the arrangements they have made, or propose to make, to secure compliance with the duty under section 1. As part of the Scheme, the Welsh Government has committed to publishing a 'Compliance Report' every 2.5 years on how they have delivered the requirements of the Scheme.

The Welsh Government is also required to consider revisiting and remaking the Scheme following consideration of recommendations made by the UN Committee on the Rights of the Child and must consult with children and the Children's Commissioner for Wales.

As part of the requirement of due regard, a commitment was made in the Scheme, for Welsh Government Ministers to undertake Children's Rights Impact Assessments (CRIA). Consideration must be given to addressing and mitigating any identified negative impact of any proposal for law or policy on children's rights.

CRIA is undertaken as part of the [Welsh Government Integrated Impact Assessment process](#). CRIs are supposed to be [published on the Welsh Government website](#) to promote transparency. If a CRIA has not been undertaken as part of an Integrated Impact Assessment, officials must record why this is the case.

The Rights Measure does not give individuals the right to bring an action against Ministers, to claim their rights under the UNCRC have been violated. The legal duty under the Rights Measure is a 'public law duty', which means that Welsh Government must take proper steps to comply with their duty, including carrying out a CRIA. If they fail to do so they may be subject to judicial review. An alternative route to accountability is the use of complaints mechanisms and also raising the issue with Senedd Members and relevant Senedd Committees.

[Research](#) by Hoffman and O'Neill, has concluded that the due regard duty strengthens accountability for children's rights in policy in Wales by adding the possibility of scrutiny and a new basis for judicial review of Ministerial decision-making. If the Welsh Government does not act in compliance with the duty this will mean they acted unlawfully. It has also given legislative underpinning to the existing policy position on children's rights and helped to ensure children's rights are at the heart of governmental decision making.

The Rights Measure also inspired further statutory implementation of the UNCRC, with the enactment of the [Social Services and Well-being Wales Act 2014](#), which requires any persons exercising functions under the Act to have due regard to Part 1 of the UNCRC, placing public law duties on decision-makers working in the fields of social care. At this time, we also witnessed, further absorption of the UNCRC in guidance documents for public bodies.

Legislation/Policy to Implementation Gap – developing a Children's Rights Approach

Although this legislation is quite radical in its application of the UNCRC into public law functions, we should take care to avoid overstating its impact. In 2016, it became quite clear from reports prepared for the UN Committee on the Rights of the Child that there remained a persistent implementation gap between the ambition of children's rights, as set out in the UNCRC and the lived experiences of children in Wales.

Welsh Government officials, as well as a number of public authorities and the Children's Commissioner for Wales, all identified a need for guidance on steps to be taken to comply with children's rights in the planning and delivery of public policy and public services in Wales. Prof Hoffman and I on behalf of the Observatory, were commissioned in 2016 by the Children's Commissioner to develop a bespoke Children's Rights Approach as a guiding framework for planning and service delivery to respond to this identified need.^v

We developed this as a principled and practical framework suited to drive the implementation of a [Children's Rights Approach](#) by public bodies in Wales. Alongside the development of the principles, we developed key indicators that public bodies should achieve if they are to successfully embed a Children's Rights Approach. The Children's Commissioner named the Children's Rights Approach '[The Right Way](#)' and it is now widely adopted in Wales as the framework for a Children's Rights Approach. The Children's Commissioner's leadership has been significant and has been pivotal to many public authorities, including the Welsh Government, adopting the Children's Rights Approach and working towards making children's rights core to service delivery and practice.

Continued legislative commitment to children's rights in Wales

It is also important to acknowledge that there has been continued legislative commitments to children's rights in Wales via sectoral legislation. The duty of due regard to the UNCRC has been included in [Additional Learning Needs Education and Tribunal \(Wales\) Act 2018](#) placing a duty of due regard to the UNCRC on decision-makers in additional learning needs education. Welsh legislation has also placed a duty on governing bodies and headteachers to promote knowledge and understanding of the UNCRC and the UN Convention on the Rights of Persons with Disabilities via the [Curriculum and Assessment \(Wales\) Act 2021](#).

Other pieces of legislation signal ongoing commitment to children's rights for example, 16 and 17-year olds have been given the right to vote in local authority and Senedd elections and it is also very welcome that, in 2021, Welsh legislation removed the defence of '[reasonable chastisement](#)'. These wins are to be celebrated and are evidence of a clear divergence in the approach to children's rights between the government in Wales and the UK Government.

Welsh Government Divergent Approach to UK Government

Divergence in children's rights is also reflected in the different approaches between the Welsh Government and UK Government regarding human rights more broadly. The Welsh Government was consistent in [expressing its concerns](#) regarding the UK Government's [proposal to reform the Human Rights Act](#)

1998 (HRA 1998). Welsh Government has also been strong in their opposition to regression on human rights in relation to immigration, with the Welsh Government opposing many provisions in the UK National and Borders Act 2022, and the [Illegal Migration Act 2023](#).

Observing children's rights developments across the UK

Then you have Scotland trailblazing ahead, in relation to human rights, with their human rights bill and entering into a '[revolution on children's rights](#)', enhancing legal accountability through the [Scottish UNCRC Incorporation Act 2024](#), which Bruce will refer to shortly. Like Wales, they have also given 16 and 17 year olds the vote and removed the defence of reasonable punishment.

Some other significant milestones, which we in the Wales children's rights sector observe with envy, for example, are the introduction of a [Scottish Child Payment](#), that has succeeded in bucking the trend on the steep rise in child destitution, and other successful anti-child poverty measures, such as [free bus transport for children](#). Scotland has also successfully raised the [minimum age of criminal responsibility](#) and introduced legislation to keep children out of youth offender institutions, working towards creating a justice system that treats children as children.

Scotland has optimised the context of their current devolved legal settlement to maximise children's rights, whereas devolved arrangements in Wales, has presented a different level of restrictions, in particular in relation to child poverty and youth justice. Northern Ireland has experienced deep seated challenges with their governance arrangements, and from my own perspective political choice and priorities, espoused by the ruling party in Westminster that does not value, human rights or children's rights has restricted opportunities in England.

There should, however, be no discrimination in the enjoyment of rights by children in different regions and as [Prof Ann Skelton](#), explains, the Committee focuses on equitability rather than exceptionalism. It is completely inadequate, that children due to their geographical location, should experience a difference in their ability to exercise and take advantage of their rights.

So, what are the lessons learned and the opportunities?

Well, I am of the view, if you want to change realities in children's lives, direct and full incorporation of the UNCRC, is the strongest form of incorporation to support legal accountability via the courts and is a welcome component in the repository of general measures of UNCRC implementation. However, it is important to recognise that direct incorporation of the UNCRC will be most successful, if children (and the adults that support them) understand their rights and are empowered to hold duty bearers to account to deliver on their UNCRC legal duties. It is also important to be aware that, as [Prof Williams explains](#), that children with their 'limited resources and reliance on others to take action can undermine the effectiveness of court-based remedies'.

In terms of progression on children's rights in Wales, the 'due regard' duty, under the 'Rights Measure' has demonstrated the potential to expand knowledge and

understanding on children's rights and the embedding of children's rights in legislative and policy development. [Research](#) by Hoffman and O'Neil, has concluded that the Rights Measure, has raised the profile of children's rights in policy development and has empowered children as rights holders. Welsh Ministers must pay attention to the UNCRC and also regularly report on how they have considered and embedded children's rights as well as report against the recommendations of the UN Committee on the Rights of the Child. It has made children's rights training compulsory for Welsh Government officials and Welsh Government have developed a National UNCRC Awareness Raising Strategy.

It has also created unparalleled opportunities for our [Senedd Children and Young People Education Committee](#) to use the UNCRC in ongoing and often powerful scrutiny of Welsh Government and other duty bearers ([E.g. See Senedd Children, National Children's Rights Inquiry 2020](#)). Follow-on sectoral legislation, in areas of education and social care, has embraced the due regard duty. It has also ensured that the new curriculum for Wales, has the UNCRC embedded within it, so we are hoping that children and future generations will grow up learning about their rights across Wales.

In addition, 'The Right Way', has offered guidance for public bodies on how to translate children's rights into practice that is being increasingly adopted and with some public bodies even developing their own children's schemes based on the national government due regard model. So, in Wales, the embedding of children's rights, is certainly happening, even in the absence of a legislative duty of due regard placed on *all* public authorities. However, we do need to see a stronger emphasis on the need to ensure legal duties, alongside administrative processes.

We have also utilised the due regard duty, most recently in working with our partners on our All Wales Children's Rights Strategic Litigation Group, the [Public Law Project](#) to successfully challenge Welsh Government on their last minute decision to end Free School Meals in the Holidays. Successfully arguing that the Welsh Ministers breached the Rights Measure as they did not give due regard to the UNCRC and follow arrangements set out in their own [Children's Scheme](#) requiring a CRIA of decisions affecting children's rights. This is a landmark case – as it is the first time the court has declared that Welsh Ministers acted in breach of their duty under the Rights Measure, since its introduction in 2011. This will certainly pioneer further legal challenges, if Welsh Government do not take children's rights robustly into consideration.^{vi} However, the limitation of the due regard duty is that it cannot compel the Government to act compatibly, with the provisions of the UNCRC, only to take the UNCRC into consideration (albeit it with substance and rigour). So, in this case once Welsh Government, had proven that they had given due regard via a retrospective CRIA, and argued they had insufficient budget, the Free School provision, was unfortunately not reinstated.

We would like to see a stronger legislative framework, similar to Scotland, whereby all public authorities in Wales, are legally accountable for the implementation of and compliance with the UNCRC. We acknowledge that due regard to the UNCRC has helped to progress a commitment to embedding of children's rights in Wales but, as an example of indirect incorporation, it has done less to enhance legal accountability. On this basis, in addition to a duty of due regard to be placed on all public bodies,

the introduction of a compliance duty should be proposed to strengthen legal enforceability of children's rights in Wales.

We envision direct incorporation as the next stage of our journey, that will bind public authorities to act compatibly with children's rights and crucially that children and their families will have recourse to the law, if for example, their right to access health care, right to education, right to an adequate standard of living, are breached by public authorities. We also believe that then, children's rights are more likely to feature and be influential in cases before judicial tribunals and may provide stronger underpinning for administrative decision-making, as well as greater opportunities for strategic litigation.

And we believe with the work that has already taken place in relation to due regard at national level and guidance on embedding children's rights into practice, that the cultural environment will be ready to embrace this new level of legal accountability. Also, it will move us forward from a patchwork of protections for children, with UNCRC rights currently running across several pieces of legislation. It will instead be positive to be clear in one piece of legislation, that all children's civil, political, social, cultural and economic rights must be respected, protected and fulfilled by all public bodies.

Detailed [research into strengthening and advancing human rights and equalities](#) was carried out by Swansea and Bangor universities for the Welsh Government in 2021. One of the recommendations that has been accepted by Welsh Government is to introduce a Human Rights Act for Wales, to incorporate human rights in addition to the ECHR into Welsh Law. A Legislative Options Group is currently scoping out opportunities for a Human Rights Act for Wales and the direct incorporation of human rights treaties. We anticipate by the next Senedd Term there will be a green paper that will launch this into action, and we will see the UNCRC directly incorporated into Welsh law.

ENDNOTES

ⁱ See Butler I & Drakeford M, Children's rights as a policy framework in Wales, In, Williams J (eds) *The UNCRC in Wales*, (University of Wales Press Cardiff 2013).

ⁱⁱ For further information on the work of the policy advocacy community in relation to the Rights of Children and Young Persons (Wales) Measure, Aspinwall T & Croke R, 'Policy Advocacy Communities: the collective voice of children's NGOs in Wales', In, Williams J (eds) *The UNCRC in Wales*, (University of Wales Press Cardiff 2013)

ⁱⁱⁱ Ibid.

^{iv} For further detail see Williams, Jane, ed. 2013b. *The UNCRC in Wales*. Cardiff: University of Wales Press.

^v For further information on the development of a Children's Rights Approach in Wales see: Croke, R., & Hoffman, S. (2023). A response to decentralised governance of human rights: a Children's Rights Approach in Wales. *The International Journal of Human Rights*, 28(7), 1189–1207. <https://www.tandfonline.com/doi/full/10.1080/13642987.2023.2236030>

^{vi} See [Croke](#) and [Hoffman's](#) Blogs for further analysis of the legal challenge undertaken by the Public Law Project on the decision to end Free School Meals in the Holidays.