

Edinburgh – 13th November 2024 - Speaking Notes

Observatory of Children's Human Rights Scotland: Research Network Event

While these speaking notes are a near verbatim reminder of what was said at the above event, they may depart slightly from what was actually said. They are not fully annotated.

Professor Simon Hoffman

thank you for inviting me to give this lecture - it's always a great pleasure to visit Scotland to speak about children's rights - // - even more so now – since your UN Convention on the Rights of the Child Incorporation Act came into effect - // - a great achievement for and by children in Scotland

when I received the invitation to speak I was asked to provide some insights on our experience of incorporation in Wales – // - as you may be aware – Wales embedded the Convention in our legal framework in 2011 - // - under the Rights of Children and Young Persons Measure – which I will refer to simply as the Measure - // - and I am sure many of you will know – the Measure places a duty on Welsh Ministers to have due regard to Convention rights in the exercise of all their functions - // - this means there is over a decade of incorporation to look back on – so where to begin?

I think a logical place to start is what is often suggested as the reason for incorporation – which is that it gives children - or their representatives - a means to enforce their rights – // - It's a view of incorporation which emphasises legal accountability – and a role for the courts - // - and I am conscious that this was a strong motivation for incorporation in Scotland – // - so I feel it might be helpful if I

say something about our experience of this dimension of incorporation in Wales - // - it is in fact something which I examined in 2018 – in a study carried out with Sean O’Neill from Children in Wales – for the [Equality and Human Rights Commission](#) – // - our study found that incorporation had resulted in several positives for children’s rights – these included - raising the profile of the Convention in policy development at the highest level in Wales – and providing a strong platform for policy advocacy by civil society - // - the study also found that the Measure had helped foster a culture of children’s rights within Welsh Government - // - a key factor here being the introduction of a Children’s Rights Scheme – which I will talk about later in this lecture

A further finding from our research was that the Measure had to some extent strengthened legal accountability for children’s rights through the addition of a new public law duty – one which provides a basis to challenge the lawfulness of Ministerial decision-making affecting children in Wales - // - however – our study found that fully six years after incorporation there had not been a single legal challenge in reliance on the due regard duty - // - we therefore concluded that incorporation had not made a significant contribution to legal accountability – // - and I can confirm that this remained the position until very recently – something I will speak about shortly

It may be suggested that the reason for the lack of a legal challenge in Wales is the way the Convention has been incorporated into Welsh law – // – the due regard duty has been described as ‘indirect incorporation’ – // - and it is often pointed out that this is a weak form of incorporation – // - and so it might be assumed that this inherent weakness is behind the lack of a legal cases - // - However - I would be inclined to disagree – // - and I’ll give my reasons - // - firstly – as I have mentioned - the due regard duty provides a sound basis for public law review - and in my experience – a number of decisions taken by Welsh Ministers since the duty came into effect have been amendable to challenge – // - but despite this – challenges have not materialised - // - and so to my second reason – which is that other factors are likely to come into play to disempower children – or their representatives – from bringing a

claim under the Measure

So what other factors am I referring to? - // - at this point I think it worthwhile mentioning findings from 2020 research by [Bangor and Cardiff universities](#) on access to justice in Wales – // - this research identifies several factors which limit access to justice – these include – a lack of awareness of legal options amongst the general public – limited personal resources to bring claims - and a general lack of advice services – with some areas of Wales being described as ‘advice deserts’ - // - all this is consistent with other literature on the challenges marginalised communities face to secure justice via the courts - // - you will also be aware that these issues are particularly relevant for children - // - on this theme - my colleague Professor Jane Williams has observed that there are many factors which prevent children accessing justice in Wales – these include - their marginalisation within the justice system - limited resources – and the fact that they often rely on others to take action on their behalf - // - an assessment which is again consistent with the general literature on children’s access to justice

Now – from what I have said so far you may feel I am sceptical about the value of incorporation to promote legal accountability – // - but on the contrary – I see great value in this area - // - not least – because as Professor Leifhaard – the UNICEF Chair at Leiden University put its - without incorporation there is no prospect of legal accountability or redress where there are violations of children’s rights - // - and with this in mind I feel the first insight I can offer based on our experience in Wales is that introducing a legal duty as a gateway to legal accountability is just a first step to access children to justice – // - a further crucial element is the need to support and empower children to take advantage of the opportunity provided – // - and here I think I can offer some further learning based on our experience in Wales

Some of you may be aware of our Children’s Legal Centre – which was established at Swansea University in 2016 – // - the Centre’s mission is to promote children’s rights – including through legal accountability - // - until recently we had limited

capacity to pursue this objective – but since 2022 the Esmee Fairburn Foundation has provided funding to support a member of staff whose role includes coordinating legal action - // – we are very fortunate to have Dr Rhian Croke in this role – many of you will know Rhian as a long-time advocate on children’s rights - // - Once in post - Rhian immediately identified that we were neglecting the potential of due regard as a gateway to accountability - // - she also identified a key reason for this as being a lack of capacity amongst civil society to coordinate legal action – // - so as an example – Rhian - through her contact with NGOs became aware that children’s rights were not being properly taken into account in several areas where Welsh Ministers have a leading role in coordinating children’s services - // - and through the Children’s Legal Centre - we were also aware that some legal professionals in Wales were seeing clients experiencing these issues - // - however – the NGOs lacked capacity to support litigation – and the legal professionals lacked knowledge of relevant rights – or were unaware that they were dealing with an issue which might be more pervasive than a single client – // - in addition – and crucially – there were fragile lines of communication between those with access to intelligence on the lived experience of children – and those with legal expertise - // - this created something of a perfect storm – with the unfortunate impact of disempowering children from using the due regard duty to hold Welsh Ministers fully to account for children’s rights in practice

To address this deficit Rhian established a network to bridge the gaps between experts on rights – the law - and litigation – // - and experts through experience – in the case of the Convention – children themselves - // – the network is a hub for sharing intelligence on gaps in provision – and for discussion on how to respond - // - whether through legal routes – or policy advocacy - // – and once this is decided – the network provides a forum for coordinating action – // - Rhian’s work in this area has been bolstered by an extension of the Public Law Project into Wales – // - taken together - these developments have added significant capacity to support children – or their families - to challenge potential breaches of their rights - // - An example of this more coordinated approach came earlier this year in response to the Welsh Government’s decision to end Free School Meal provision for all children during the school holidays – // - the Public Law Project challenged this decision on the basis

that it had been taken without due regard to children's rights - // - the challenge resulted in an order by consent - in which the High Court declared that Welsh Ministers had failed to follow their own procedures when making their decision – specifically by failing to carry out a proper Children's Rights Impact Assessment - // - This case – the first under the Measure – demonstrates the role of incorporation to underpin legal accountability – but it is also a clear example of the value of a coordinated and strategic approach – as it brought together the disparate strands of intelligence and expertise which are necessary to underpin successful litigation - // I should also note that Rhian's work on developing a strategic approach to litigation has brought additional benefits – the most obvious being that potential violations of children's rights are identified sooner – meaning issues can be raised at an earlier stage with officials - using the due regard duty as leverage – //- and seeking to avoid the need for litigation

With all this in mind – I suggest a second insight from Wales is the need for civil society to act collectively in a strategic way – to gather intelligence and select suitable routes to accountability – which may or may not be via the courts - // - in Wales we have struggled with capacity in this area – but we now benefit from charitable funding in this space – // - however - as you will all be aware –charitable funding is always precarious – and in my experience the need for sustainable advice and advocacy services suggests a role for government - // - on this point – I recently led a 12 month collaborative research project for the Welsh Government to examine how to strengthen human rights in Wales – a key finding was on the need for the Welsh Government to prioritise funding for advice and advocacy services - // - something which Ministers have accepted - // - this leads me to observe that your Incorporation Act requires your Ministers to set out arrangements to ensure children have access to justice – something which our experience in Wales suggests will require careful consideration of how the independent advice sector might be sustainably resourced – // - and I will leave that for further reflection

Moving on – our experience in Wales suggests legal challenges to enforce children's rights may be burdensome for those involved - // - and this may – of itself –

provide a good reason for not placing too much reliance on legal forms of redress for violations of children's rights – // - but there is another – and I think equally important reason for avoiding over-reliance on court-based remedies – and it is summed up by Professor John Tobin - who has commented that litigation is 'reactive rather than preventive' – // - in other words 'if you need redress – you already have a violation of children's rights' – which is something we all want to avoid - // - and this leads me to speak about another aspect of incorporation in Wales – namely - how it has supported a culture which encourages attention to children's rights in policy development by the Welsh Government – something which I refer to as getting upstream in policy development - // - A key contribution here is our Children's Scheme - // - Under the Measure Welsh Ministers are required to publish a Scheme setting out how they intend to have due regard to children's rights - // - the research I carried out in 2018 confirmed that the Scheme had contributed toward raising the profile of children's rights in policy development – and to a culture of children's rights - // - key mechanisms set out in the Scheme to achieve this include - training for all officials on children's rights – a leadership structure to oversee implementation of the due regard duty - and most significant of all - the introduction of a Children's Rights Impact Assessment - or CRIA

As many will know – when done properly - CRIA is a procedure which helps ensure attention to children's rights as legislation and policy is developed – and which encourages a proactive approach to the realisation of Convention rights - // - you will have noticed that I said - CRIA helps ensure attention to children's rights 'when done properly' – // - and this brings me to another insight from Wales – which is that even where CRIA is required – there is no guarantee that it will be done properly - // - I carried out research on CRIA in Wales in 2015 – // - this confirmed that the procedure can have a positive impact on policy development – contributing to better policy output – by which is meant - policy more consistent with children's rights - // - however – it also identified a number of deficits in the procedure – these included - inconsistent application across government departments – with a tendency for CRIA to be seen as primarily the preserve of departments directly linked to children's services - for example – education - // - another deficit was that CRIA was commenced too late in the policy cycle for the outcome to make any difference to the

policy - // - added to this- was that CRIA was sometimes undermined by a lack of expertise amongst those carrying out the procedure – particularly in departments with little experience of children’s issues – and an issue linked to this was a failure to engage with children or their representatives to provide evidence on the likely impact of policy choices on their own lives - // - all of these issues were also apparent in international literature on CRIA which I examined in 2020

Since my research in 2015 there have been a number of developments which have led to improvement in Wales – these include – the embedding of CRIA as part of an Integrated Impact Assessment – a development which helps ensure CRIA are completed – // - another innovation is Welsh Government funding for Young Wales – which is a project to support children to engage in policy development – // - the Welsh Government has also established a Children’s Rights Advisory Group – with members from leading children’s rights organisations – // - in my view this is a key development as the Group provides a forum for civil society to give feedback on CRIAs being prepared by officials working on policy within the Welsh Government – // - crucially this helps overcome capacity and knowledge deficit issues among officials working on policy - by accessing them to external expertise - // - all of this has helped improve CRIA in Wales – // -but of course the Free School Meals case I spoke earlier about confirms the ongoing challenge of ensuring officials properly apply CRIA to all relevant policy

CRIA is amongst the innovations introduced by our Children’s Scheme – as is the Advisory Group - // - at this point I want to say a bit more about the Scheme generally - // - the first Scheme was introduced in 2014 – and while it included some innovative mechanisms it could also be seen as largely a statement of general intent – offering little by way of detailed actions to further children’s rights - // - the Scheme was remade in 2021 and is an improvement on its predecessor – and I think there is a clear reason for this - // - in my view the remade Scheme is better because it expressly adopts a Children’s Rights Approach

For those who are not familiar with our Children's Rights Approach in Wales – this is was developed by myself and Dr Rhian Croke in 2016 - with support from the Children's Commissioner for Wales - // - put simply – it is a way of working with children's rights - and is recognition of the fact that it can be extremely confusing for relevant authorities to navigate the range and complexities of implementation of children's rights – // - it provides a principled framework for public bodies to think about how they can give effect to the Convention in different ways - // - in Wales the principles are – // - embedding the Convention – equality and non-discrimination – empowering children – enabling children's participation – and ensuring accountability for rights - // - time does not permit me to go into these in detail – but I hope you can see that the principles establish overarching objectives for practices relating to children - // - in addition to the principles - work is ongoing to collate examples from different organisations of how each of them might be put into practice – this is coordinated by our Children's Commissioner who is collating a bank of good practice examples under each principle

You may be wondering about the impact of the Children's Rights Approach in Wales – well this is difficult to gauge – not least because we are seeking to persuade relevant authorities of its value by encouraging them to look first at existing practices - to see how these align with one or more of the five principles – // - we are also encouraging them to look beyond complaint practice - to identify any gaps or areas for improvement – // - and while this is yielding many case studies of practices which reflect each of the five principles – it is not necessarily about authorities expressly adopting a CRA wholesale – rather it is a gradual extension of the approach through ongoing practice - // - as a consequence we have limited empirical evidence from public authorities on the impact of adopting the approach – // - however a small scale evaluation carried out in 2022 by the [Children's Commissioner](#) - based on a survey of 30 organisations – including public authorities – demonstrates that it is seen as having had a number of positive impacts – key amongst these is the potential to provide a consistent and common approach to working with children's rights – and to support collaborative working - it is also seen as helpful in providing guidance on good practice

Alongside this study - my own work with two authorities leading the way on children's rights in Wales – Cardiff and Swansea - has confirmed the value of a CRA to establish common rights-focussed institutional objectives – not only to guide practice – but also to provide a framework for evaluating progress - // - this observation brings me back to our most recent Children's Scheme– and why it's an improvement on its predecessor // - as I have said – the remade Scheme adopts a CRA – it refers to the five principles and sets out actions under each of these – in this way it has generated a more comprehensive set of actions – and provided greater clarity on the actions themselves – and on how they support children's rights implementation in different ways - // - this in turn has improved accountability for delivery - as civil society is now better able to hold Ministers to account for identified actions – // - and this accountability aspect has been further enhanced as Ministers have also adopted a CRA to structure the compliance report they are required to prepare every 2.5 years – explaining how they have complied with the due regard duty - // - this means there is read across of both documents – so we can better trace actions through to delivery

Before I move on from the Scheme I need to acknowledge that there remains room for improvement – I will briefly mention one area of particular significance – // - it is the lack of meaningful engagement with guidance provided by the Committee on the Rights of the Child – in particular the Committee's concluding observations on progress in the UK following a periodic review - // - what we see is that neither the 2014 Scheme - nor the 2021 Scheme takes a lead from the concluding observations to identify actions to deliver on children's rights in Wales - // - this is despite a requirement in the Measure that these should be taken into account - // - something similar may be said of the compliance report - // - and this is significant because - as my colleague Rhian Croke has noted - many of the gaps in provision in Wales correspond to issues identified by the Committee in its concluding observations – // - and so in our view – the failure to address these properly in the Scheme – and later in the compliance report – represents a significant gap in strategic planning and accountability for children's rights in Wales - // - at this point I will note that your

Incorporation Act also requires attention to the jurisprudence of the Committee in the preparation of your Scheme - // – hopefully this will be more robust than is the case in Wales

I have tried to focus on key insights based on our experience of incorporation – but I should say that there is much more that could be said – and I have been selective as time is short - // - But before I finish I want to say something about our ongoing ambition for incorporation in Wales – // - I have already mentioned research I led in 2020 on strengthening human rights - // - a key outcome from this work was a recommendation for more incorporation of human rights treaties in Welsh law - // - the Welsh Government accepted this recommendation and has set up a working group to examine options for legislation - // - I am a member of that group which is led by civil society - // - we are currently adopting a treaty-by-treaty approach to examine which rights might be suitable for incorporation

If – as is sincerely hoped by civil society across Wales – this works results in incorporation of large parts of CEDAW and the CRPD – it will be a very welcome development for children’s human rights in Wales – because as you know – children are entitled to rights beyond the Convention – and paying attention to other treaty guarantees can improve on the rights afforded to children under the Convention - // - a good example of this is the CRPD – which when it comes to education rights – and health rights – provides more extensive guarantees for disabled children than are set out in the Convention - // - This is why the children’s rights community in Wales is supportive of a progressive approach to incorporation of all human rights – // - and it was with great envy that until recently we looked to Scotland as leading the way on human rights incorporation – // - naturally there was disappointment in Wales when it was announced that further incorporation would be delayed here in Scotland - // - I am conscious that reasons have been given for the delay – and there has been a response from civil society – and I don’t intend to comment on this – // - but I think it’s worth reminding ourselves that any delay in giving human rights legal effect will inevitably lead to a delay in accessing rights and justice for some – including children - // - so it is incumbent on government to act as quickly as possible to achieve

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incorporation – which is what I hope will happen in Wales once the work of the
Legislative Options Working Group is finished

I hope I have provided you with some insights of our experience of incorporation in
Wales – and perhaps some of them will be helpful as you continue to strive for the
better realisation of children's rights here in Scotland - Thank you