

Making Rights a Reality: Do we need incorporation of the UNCRDP in Welsh Law?

SPEAKING NOTES (unedited)

Disability Wales Annual Conference, 12th November 2020. These notes may differ slightly from the words spoken at the conference.

Thank you for the invitation to speak at your conference – / Some of you may recall that I spoke at your 2018 conference - and I'm going begin my talk by repeating what I said at the start of my presentation in 2018 – which is that my focus today will be the human rights of disabled people , but I do not speak as someone with lived experience of disability – nor would I describe myself as an expert on disability rights - / My expertise is on human rights more broadly , and the different ways in which they can be given effect – especially in Wales - / What I hope to offer you today are some insights into whether incorporation of the UN Convention on the Human Rights of Disabled People will help make those rights a reality in Wales - //

I am unsure of the level of knowledge of incorporation amongst participants today – so I will just remind you that incorporation of the Convention would mean making it part of Welsh law - // There are different ways of achieving this – which is something I'll come back to later – but all forms of incorporation would mean that the Convention would become part of domestic law here in Wales

What I want to do over the next 20 minutes or so is reflect on the question I have asked in the title of my presentation - **Do we need incorporation of the UNCRDP¹ in Welsh Law?** – / To answer this question I first want to think about some of the reasons why Wales needs to incorporate the Convention – // Then I want to think about the likely impact of incorporation and some of its strengths and weakness – and in particular whether or not it will make a meaningful contribution to making rights a reality for disabled people
So , let's begin with why we need to incorporate the Convention –// As a non-disabled person I have tried to keep myself informed about disability issues and human rights – and what strikes me , is that when it comes human rights , disabled people are amongst the

¹ I am aware that the correct acronym is UNCRPD. I have used UNCRDP to reflect the use of the term 'Disabled People' in preference to 'Persons with Disabilities'.

most discriminated against - / I am fully aware that I am speaking to people with lived experience of this discrimination – so I will not attempt to catalogue the human rights breaches you encounter every day – but I feel it is important for me to acknowledge the fact – fully evidenced by research – that disabled people are regularly subject to violation of their human rights - // As part of preparing for today I revisited some of the commentary published by the United Nations on the UK’s human rights record – I looked in particular at comments from the Committee Against Torture – the Committee on the Rights of Disabled People – and the Committee on the Rights of the Child

These comments raise numerous concerns about the human rights record of the UK when it comes to disabled people - // Something that I find striking about these reports is they include human rights abuses which lead to the most severe indignities – and the loss of life - / I am struck by the reference in the comment by the Committee on the Rights of Disabled People , that a disabled person is often seen as living a ‘life less valued’ - //

This is a shocking statement , and it says something extremely unpleasant about our society – but it is statement that is now supported by the emerging evidence on the impact of Covid-19 - / For example – a recent report from the EHRC shows that disabled people are more likely to die of the virus – // The report also shows that disabled people are more likely to suffer financial hardship and poverty because of the pandemic - // Poverty , as we know , is associated with poor health and reduced life expectancy – placing a long-term and disproportionate burden of the pandemic on disabled people

All of this leads to the inevitable conclusion that more needs to be done to protect the human rights of disabled people here in Wales - / This , of course , is a responsibility of government - / At this stage I think it is worth reminding ourselves just how strong this obligation is on government to protect human rights

I am often saddened by how often the UK government seems to forget its responsibilities for human rights – // While the Welsh Government is much more supportive of rights here in Wales – we are still far from being a society in which we can say that human rights are guaranteed for everyone – and especially for disabled people

It is therefore vitally important that we constantly remind our Ministers of the agreement reached in Vienna in 1993 following the World Conference on Human Rights – // The conference agreed that **“Human rights and fundamental freedoms are the birthright of all human beings , their protection and promotion is the first responsibility of Governments.”**

We should also take every opportunity to remind Ministers that international law is binding here in Wales – this is despite the conduct of the UK government - // On this basis Welsh Ministers are duty-bound to **RESPECT** human rights – which means they should do everything in their power not to breach rights – / this of course includes the human rights of disabled people – // Ministers are also required to **PROTECT** disabled people from interference with their human rights , and to take action to **FULFIL** rights – including by providing resources to enable disabled people to experience social and other benefits

These obligations on Welsh Ministers mean that they should do everything within their power to make rights a reality for disabled people - // **One of the steps Ministers could take in Wales is to incorporate the Convention into Welsh Law** - // It is certainly arguable that incorporation is not only desirable – but is in fact a necessity if disabled people’s human rights are to be fully acknowledged - / This is certainly the view of the UN Committee on the Rights of Disabled People – as my next slide will show

The Convention itself which confirms that Government at any level in the UK is required to ensure and promote the full realisation of human rights for disabled people – // There is also an extract from commentary by the Committee in 2017 which recommended the UK Government incorporate the Convention into law – including in the devolved jurisdictions - / It is therefore arguable that incorporation of the Convention is something which Welsh Ministers should prioritise and which should happen in Wales sooner rather than later

With this in mind I am pleased to say that Ministers have commissioned research on Advancing and Strengthening Equality and Human Rights in Wales - / I am leading on this research which is a collaboration with Bangor University and Diverse Cymru -// I know that some of you have will have contributed to the evidence we are gathering for our work - // One of the areas we’re examining for the research is whether Wales should incorporate more international human rights treaties into Welsh Law - / Although this is something I am personally supportive of – the research examines the issue from first principles based on the evidence we are gathering together , and without making any assumptions - // The research is due to report in February 2021 and we are still taking evidence - / If you would like to contribute to our work I would encourage you to do so - / Disability Wales will circulate links to surveys after the conference - //

Something which is informing our research is the available evidence on the impact of incorporation of human rights treaties in other jurisdictions - // Here we can draw on a number of insights from research

The available evidence points **at a number of positives of incorporation of human rights** which I will try to summarise - // A key finding that emerges from studies is that incorporation leads to **Stronger recognition of human rights within government** - // The evidence shows that where human rights are made part of domestic law this raises awareness of relevant standards amongst Ministers and their officials - / This is significant as other evidence suggests that ignorance of human rights is often a factor leading to actions which violate rights - // The evidence also confirms that after incorporation Governments pay **More attention to human rights in policy and legislation , and More processes are introduced to give effect to human rights** - // These processes can include – for example – impact assessment of policy proposals – or consultation processes with rights-holders – or better monitoring of human rights - // These findings confirm that incorporation brings with it a number of positive benefits - // Amongst the most significant of these is that it underpins a culture of attention and respect for human rights - / In short – the value of incorporation is that it influences the culture of government – making it more likely that rights will be taken seriously

Something else that the research reveals is that incorporation can take different forms - // Studies confirm that the **Strongest form of incorporation is one that includes judicial remedies for violation of rights** – this leads to **Better recognition of human rights by the judiciary** who will in turn be able enforce rights – // But it also means that rights-holders are **more likely to be able to rely on human rights in cases before the courts.**

All this would suggest that incorporation of the Convention in Wales would make a strong contribution to making rights a reality disabled people - // However – we need to be cautious and avoid seeing incorporation as a complete solution to the problem of human rights disregard and violation - / The evidence clearly warns us against such a conclusion - / There is **limited evidence on the impact of incorporation generally , and no evidence to suggest that incorporation on its own leads to better human rights outcomes** - // In short - human rights violations still happen even where there is incorporation – it is certainly not a ‘silver bullet’ - / And although it is the case that countries that have incorporated human

rights treaties tend to be those with the better human rights records – this may be because human rights are already better protected in those countries in any event

Despite the need for caution , overall the evidence clearly points at incorporation as part of the solution to the problem of how to make human rights real for disabled people – / **But it also strongly suggests that if incorporation of the Convention is something which takes place in Wales , it will be vital that this is accompanied by a raft of measures that support implementation of rights** – for example , impact assessment , legislation on particular topics such as education or health care giving disabled people specific entitlements , or policy and guidance which reflects Convention principles , or training and resourcing for duty bearers – // Of course it is worth noting that if the Convention were incorporated into Welsh law it would provide a framework of obligations which would require Ministers to think about these other measures , and how to better support the implementation of disabled people’s human rights

The evidence from other countries provides good reason to argue that incorporation of the Convention would help make rights a reality for disabled people in Wales – // But we don’t just have to look to other countries for evidence to help us understand what difference incorporation might make for disabled people’s rights in Wales - / We can also learn lessons from our own experience on incorporation of the UNCRC

As many of you will know – in 2011 Wales made the CRC part of Welsh Law - / In 2018 I carried out research jointly with Children in Wales on the impact of this legislation – // What we found was that incorporation of the CRC has had many positive impacts – // These include **raising awareness of children’s rights** across the whole of the Welsh Government , and the introduction of a **Child Rights Impact Assessment** to inform Ministerial decision-making by drawing attention to children’s rights issues as they arise for policy or legislation - // Our research also confirmed that incorporation of the CRC has resulted in more opportunities for NGOs to **engage with government** on policy issues , and that it has Strengthened advocacy , especially for the Children’s Commissioner – this had resulted in , some instances , in **More child rights consistent policy** – as well as **recognition of the CRC in other legislation** such as the Social Services and Well-being Act

All this of course should be of interest to those pushing for incorporation of the Convention on the Rights of Disabled People into Welsh law – // There is no reason to

suppose that the clear benefits that incorporation has brought for children's rights would not be experienced by disabled people if your Convention were now incorporated in Wales. But once again I need to offer a word of caution - // Our research on child rights found that this had resulted in stronger accountability for children's rights in the political arena – but at the same time there was no observable impact on legal accountability for rights - // This a consequence of the way that children's rights have been incorporated in Wales - // The form of incorporation selected for children's rights in Wales is what I would term a weak form of incorporation -// It requires Ministers to pay close attention to children's rights – but it does not require them to comply with children's rights – nor does it provide a route to a remedy for a child who feels their rights have been violated.

It is often suggested that rights without remedies are worth very little – and this is perhaps a lesson we can learn from the experience of children's rights in Wales - // In my view if human rights are to be made meaningful, incorporation needs to be in a form which provides access to remedies where rights are violated or not fulfilled - / There are of course several ways to make rights enforceable – / The first, and the most obvious is to make sure that any legislation which incorporates the Convention into Welsh law includes a right for disabled people, or their representatives, to bring a claim against a Minister or public authority where they feel their human rights are being violated - // There is precedent for this approach in the UK – it is the HRA 1998, which allows a victim to bring a claim against a public authority for breach of rights set out in the ECHR - // This is also the model that is being proposed for incorporation of human rights in Scotland.

But even where there is access to court-based remedies, it would also be important to ensure that incorporation is accompanied by robust enforcement mechanisms which are available before any legal action is contemplated – / This is important because access to justice via the courts can often be costly and time consuming – which may deter actions by some disabled people - / Court enforcement can also come too late to make a difference to a person's life - / This suggests the need for an intermediary mechanism - / Perhaps the most obvious mechanism here would be a Welsh Disabled Persons' Commissioner – similar to what we already have for the Welsh Language – Older People - Children, and indeed Future Generations.

I have no doubt that there is competence in Wales for Ministers and the Senedd to create such an office - the question is – what would a Commissioner achieve? – especially given that we already have the EHRC which is responsible for taking action on disabled people’s human rights

It seems to me that the **value of a dedicated commissioner would be** partly in the **Signal that the creation of such an office would send to society about the current lack of priority given to disabled people’s human rights , as well as the priority to be given to those rights in the future** – // I would also see a **Commissioner** as providing a recognizable and dedicated source of advice and support for disabled people – // A commissioner would be **Independent , focused and able to offer a source of expertise not only for disabled people, but also for the public more generally – for politicians , and for Ministers** - / And of course – a Commissioner would be able to act as a **Strong advocate for the human rights of disabled people** - a role which would be greatly facilitated by incorporation of the Convention

However – a key question that would need to be resolved is , what powers might be available to a Disabled Person’s Commissioner– / This is a difficult question to answer – and I’m not sure I know the answer – but I suspect that given the current powers of the EHRC to investigate and enforce equalities duties , that any powers available to a Disabled Person’s Commissioner would be limited – // This is because neither Ministers nor the Senedd has any competence to amend or intrude into areas covered by the Equality Act 2010 – which is of course the source of the EHRC’s powers - / It seems to me , that in the case of a Disabled Person’s Commissioner established by Welsh institutions - any powers given to the Commissioner would need to be woven around the current powers of the EHRC - // This may lead some to question the value of a dedicated Commissioner – but personally I do not think that such a Commissioner would be a Paper Tiger - //

In this respect I think it’s worth noting the profile of the Children's Commissioner and Commissioner for Older People during Covid-19 in Wales – neither of these Commissioners has powers as extensive as the EHRC – but both have been effective in raising issues of older people’s and children’s rights during the pandemic – / And I know –as concerns the Children’s Commissioner – that incorporation of the CRC in Wales has provided a strong platform from which to argue for better protection of children’s rights in the pandemic than we’ve seen in England – where the CRC is not incorporated

Finally – it seems to me that human rights commissioners should work together – so if there were a Welsh Disabled Person’s Commissioner with limited enforcement powers they would – or they should in my view – be obliged to work closely with the EHRC so that together they make the most effective use of powers available in Wales to protect the human rights of disabled people -//

And that is where I will end my representation