

UK COVID-19 INQUIRY

OPENING SUBMISSIONS ON BEHALF OF THE CHILDREN'S COMMISSIONER FOR WALES PURSUANT TO MODULE 2B

1. The office of the Children's Commissioner for Wales was established via the Care Standards Act 2000, following the Waterhouse inquiry into historical abuse in children's homes. This judge-led inquiry concluded that children in Wales needed an independent champion, to ensure that their rights are respected and upheld. Wales was the first country of the UK to establish the post of Children's Commissioner.
2. The Children's Commissioner for Wales is a National Human Rights Institution (NHRI), compliant with the Paris Principles, which set out requirements for human rights organisations, including a broad mandate and functions to ensure the NHRI can advise or report on a wide range of areas, adequate powers and resources to initiate inquiries and discharge their responsibilities, and independence from Government. Independence from Government has always been a key tenet of the office's role.
3. The Inquiry will hear evidence about how the working relationship between the Commissioner's office and Welsh Government altered during the pandemic, but the Paris Principles, particularly around independence, remained an important aspect for the Commissioner to maintain in scrutinising and holding the Government to account.
4. This Module will hear evidence from Professor Sally Holland, who was Children's Commissioner for Wales throughout the period with which the Inquiry is concerned. Her statutory 7-year term concluded in April 2022 when the current post holder, Rocio Cifuentes took office. Both Commissioners have informed these submissions.

Human rights in an emergency

5. The Office of the High Commissioner for Human Rights (OHCHR) recognises that in humanitarian crises (including pandemics), human rights concerns will often occur. This is because both the crisis itself, and measures to manage the crisis, are likely to have a greater impact on more vulnerable groups within the population. The Inquiry will hear

across its Modules from a range of differing groups in this regard, but our submissions focus on the needs of children in Wales.

6. During the response to any humanitarian crisis, protecting and upholding human rights should be an overarching and key aim. But it is also essential before any crisis point arises, and also after the event, that human rights are adequately considered and reflected upon, in order to strengthen the nation's resilience against future crises.
7. The Commissioner's legal powers set out in the Care Standards Act 2000, supplemented by the Children's Commissioner for Wales Act and Regulations 2001, include the ability to review how the Welsh Government has exercised its functions. The Commissioner is required to have regard to the United Nations Convention on the Rights of the Child (UNCRC) in doing so. It is through this power that the Commissioner's office advises Government on draft guidance and legislation, through consultation processes and dialogue with officials and Ministers. The urgent nature of decision making in the pandemic necessitated that the office work closely alongside Government to discharge this responsibility and hold the Government to account on behalf of children and young people across Wales and their rights and welfare.
8. In practice, this meant that the Commissioner's office was asked to comment on draft guidance and public messaging at very short notice throughout the pandemic. For the avoidance of doubt, the Commissioner and her officer were not part of the formal decision making processes at any point. Through this document review process though, the Commissioner and her team were able to question to what extent, and how, the potential impact of decisions on children's rights has been considered. The Commissioner and her office were also able to advise on messaging to children, young people and families to ensure there was clarity and transparency. Where this review process didn't result in greater clarity on this issues raised, the Commissioner would follow this up in writing with officials, Ministers or the Chief Medical Officer (CMO) for further clarity, as is seen in the evidence exhibited to the statement of Professor Holland.
9. The Commissioner had decided at the start of the pandemic that the office had an important role to play to ensure children's rights were actively considered in a fast-paced decision making process. At such a crisis point, she wanted to support the Government to get things right for children, rather than potentially get things wrong or miss key considerations, and then be critical from the sidelines.
10. The Commissioner also took the very conscious decision not to play some of this out publicly as this would be an unhelpful distraction. The Commissioner and her team

wanted to ensure sure that any information shared publicly was reliable, accurate and reassuring. The Commissioner and her team were very conscious not to get drawn in to any narratives and competing views playing out through traditional and social media, feeling that this would only add to children and young people and their families' anxieties during this period.

Government decision making and children's rights

11. The Rights of Children and Young Persons (Wales) Measure 2011 ('the Measure') requires Welsh Ministers to have 'due regard' to children's rights under the UNCRC in exercising all of their functions. The individual articles are incorporated into Welsh law through the Measure for this purpose.
12. The 'Brown principles' set out how due regard should be exercised in practice, requiring decision-makers to be actively aware of their duties, in advance of taking decisions as well as having this in mind when taking the decision. It requires a conscious approach and state of mind. Crucially, a duty bearer cannot satisfy the duty by justifying a decision after it has been taken. Attempts to justify a decision as being consistent with the exercise of the duty, when it was not considered before the decision, are not enough to discharge the duty. Regard to equality generally will not be sufficient to discharge the duty, and it is not a matter of ticking boxes. It is good practice to keep an accurate and timely record of decision making and how relevant questions have been considered, but the record in itself may not satisfy or demonstrate how the duty has been exercised if the principles have not been complied with.
13. The primary way in which due regard is demonstrated in Wales is through a Children's Rights Impact Assessment (CRIA). The Government's Children's Scheme which accompanies the Measure describes CRIA as 'the tool officials are expected to use to support Welsh Ministers in ensuring the due regard duty is fulfilled'. The Scheme also requires the Government to undertake and publish CRIA on the Government website, in order to 'promote transparency' in decision making. The Scheme envisages that members of the public would be able to 'challenge the Welsh Government where they believe Welsh Ministers have failed to comply with the due regard duty', including where a CRIA has not been undertaken. Officials are expected to record their reasons if a CRIA has not been undertaken.
14. The Measure applies to all Governmental actions, including decisions to take a particular

course of action, or decisions to pull back from or stop an action, or omitting to do anything at all. It is clear, therefore, that the duties under the Measure would have applied to all decision making processes and actions/omissions that fall within the scope of this Module of the Inquiry.

15. As is noted in Professor Holland's evidence, such as INQ000191234, CRIA were often completed late; very far removed from the original decisions and reflecting back. For some major decisions such as school operations, no CRIA was completed at the time.
16. For the Commissioner, the importance of CRIA comes in the substance and not the form. She recognised verbally and in writing to the Welsh Government the extreme pressures they were facing, and the necessity to find new ways to consider children's rights in the timeframes of the pandemic. A proactive discussion among key experts at short notice, recorded in bullet points setting out positives and negatives of a particular decision, would ensure the active exercise of the due regard duty, particularly thought was applied to more vulnerable or at risk groups of children through that exercise. It would also be important to note mitigating measures that would be taken to lessen the impact of any decisions that may have negative impact on children's rights. A fully completed template setting out the articles of the UNCRC and available research evidence, completed many, many months after the decision had passed would not advance or uphold children's rights in decision making processes, as this did not feed in to the decisions at the time. Retrofitting CRIA analysis to fit a decision already taken was not a unique phenomenon to the pandemic, but this was exacerbated by the condensed timeframes for decision making. This does not satisfy the Brown principles of due regard, nor does it make decision making compliant with the duties on Welsh Ministers under the Measure.
17. The Commissioner's team gave initial advice to Welsh Government to this effect in April 2020, noted in INQ000329375 and again in May 2020, at INQ000329376.
18. Decisions around the opening or partial opening of schools, and the use of face coverings within schools are examples of where it was sometimes difficult to follow the rationale behind Governmental decision making or even what had actually been decided. INQ000329379 illustrates the concerns of the Commissioner's office in relation to lack of information in what is being shared or contained in public facing documents, which had the potential to cause more queries and inconsistencies in practice.
19. This Commissioner did not and does not contest that scientific evidence should be used to make decisions of this nature. Nonetheless, the Commissioner expected all decisions

to carefully and consistently consider the potential impact on children's rights, and to clearly communicate the rationale behind any measures that may impede children's access to their rights, where this was deemed unavoidable. At times during the pandemic this was done more successfully than others, as is evident in the evidence made available to the Inquiry.

20. While it may often have been possible to understand the link between the concerning scientific evidence of virus spread and impact on the population and measures being put in place to restrict or change the nature of children's usual activities, in some cases this was not clear. It is in those situations that the Commissioner challenged the Government and other public bodies, in writing or in meetings, as reflected in the correspondence to the CMO at INQ000191254. Where the rationale for the restrictions was clear, the Commissioner's role became one of ensuring the impact on different groups of children had been considered, mitigations put in place, where possible, and guidance was clearly communicated to children and those who care for them.

21. It was more apparent for decisions directly affecting children that their rights had been considered *during* the decision making processes (including where the Commissioner's Coronavirus and Me survey findings had been acted upon). This includes decisions to fund free school meal equivalents during the school holiday periods, and the reopening of libraries which many children had said were of great benefit and importance to them. The *Haf o Hwyl* (Summer of Fun) initiative is another such decision as this sought to provide play opportunities for free for children across Wales. Where decisions were in respect of the whole population however, such as decisions to reopen hospitality settings in summer 2020 prior to the reopening of schools, it was less clear how children's rights had been considered.

22. Correspondence with the First Minister (INQ000280327) from October 2020 does demonstrate improvement in how Government officials were undertaking dynamic, 'in the moment' analyses of children's rights, but it is clear from the correspondence that the Commissioner felt obliged to raise concerns at the highest level, about how far this went to consider the particular aspects of decisions like the firebreak lockdown and choices around which pupils would be able to physically attend the school premises during this time.

23. The practice of completing CRIA as part of decision making that is compliant with and proactively takes account of children's rights is of prime importance to the Commissioner,

and it is anticipated this will be explored further during the hearings.

Public Health considerations

24. During the pandemic, public facing guidance was issued from by both Welsh Government and Public Health Wales (PHW).
25. During the period that this Inquiry is concerned with, it was difficult at times to ascertain whether decision making sat with Government or with PHW. Queries would be raised with Government, who would say this was a public health matter. Meetings with Public Health officials however would say that they needed Government to take decisions and direct them in issuing guidance.
26. When seeking to scrutinise or influence decisions and the resulting guidance at this time, it was therefore difficult for the Commissioner to understand or follow who held responsibility for what and therefore where to take the concerns that children and families were bringing forward to the Commissioner and her team.
27. This was particularly the case around children's homes. Government would issue the general guidance pursuant to the legislation around social distancing and other mitigating measures. However, Public Health Wales issued guidance to professionals around their role in managing coronavirus infections. In practice this meant that children's care homes were in receipt of guidance from both institutions that was not worded the same, leading to confusion over the rules that they should be applying. These homes are subject to regulation and inspection from the Care Inspectorate Wales, part of which involves assurance that the home is up to date on and following all applicable guidance, so this understandably caused nervousness in the sector where it was not clear what the rules were. This at times led to a more restrictive interpretation being followed to ensure compliance, but without necessarily actively considering children's rights and experiences. Notably this occurred in relation to the rules around 'outbreaks' and family visits.
28. This a matter that could usefully be clarified through the Inquiry process, to aid communications in future public health crises.

Crossover of reserved and devolved matters

29. Given that Wales has a more limited devolution settlement in comparison to the other UK nations, there were increased areas where the 'jagged edge' of devolution caused practical difficulties when implementing the new legislation and guidance
30. One obvious sector in which this became apparent was youth justice; specifically youth custody settings. In Wales there is one Youth Offending Institution (HMP Parc YOI in Bridgend) and one Secure Children's Home (Hillside SCH, in Neath Port Talbot).
31. Guidance for all justice settings was issued by the UK Government in March 2020, at the outbreak of the pandemic, essentially confining all inmates including young offenders to their cells for at least 23 hours a day. This failed to take into account children's human rights. The Commissioner was involved in discussions with the Youth Custody Service, who instituted a different 'regime' in Parc very swiftly, whereby the boys were grouped into 'family cohorts' to allow them to have exercise, showers and association time in limited and managed groups. This was in March 2020; well before the 'bubbles' concept had arisen for the population at large. It showed what could be done if thought was given to how the health risk profiles might differ in smaller settings of young people, and if primary thought was given as to how to safely manage the public health risks but with children's rights being factored in. The Commissioner remained concerned about continued extreme restrictions placed on Welsh young people in custodial setting in England.
32. More practical difficulties arose and persisted for Hillside SCH. As they provide both youth justice places and secure welfare beds, they straddle the guidelines between justice (under UK Government) and welfare (carried out through Welsh Government and local authorities). Nowhere was this more apparent than in the Covid pandemic, where Hillside would be in receipt of guidance from the UK (Ministry of Justice and associated agencies) and from the Welsh Government, including Care Inspectorate Wales and Public Health Wales. Repeat periods of quarantine and isolation for young people for extended periods up to two weeks were required, even when the general population requirements did not call for such lengthy isolation.
33. Practically this impacted upon staffing in the setting, and also directly upon the welfare of young people being placed in their care. The setting should be commended on the efforts they made to manage these constraints as best they could to support the young people during this time, but the confusion between jurisdictions inevitably caused confusion.

34. Previous Modules and witnesses have explored the possibility of reverting control over decision making in public health events like a pandemic to the UK Government to achieve consistency. This risks over simplifying the existing devolution settlement however. This is just one example that illustrates how the approach in Wales to children's health and care is inherently different, guided by a rights based approach, and with youth justice matters in particular subject to a 'child first' approach. It would not be straightforward or desirable to effectively 'row back' on the devolution settlement for children in a pandemic as children's rights are implemented differently in each nation, and more strongly protected in the law in Wales and Scotland. Instead, the existing position needs to be recognised and built upon, into contingency planning for future crises.
35. The issues seen in youth justice settings also come back to the decision making processes (and resultant guidance) not proactively considering or taking into account the differing health risk profiles for children and young people in small group children's homes, as compared to large care or nursing homes accommodating the elderly and vulnerable. A 'one size fits all' approach has been shown through the Covid pandemic not to be suitable or to meet children's individual needs and rights,

Divergence in Governmental approaches

36. Much has been made in the Inquiry's hearings to date about a 'difference for difference sake' approach from the devolved nations. But this fails to take account of the different approaches taken *notwithstanding* the Covid pandemic.
37. Social partnership is a foundational principle of the Welsh Government's approach. It is common for public sector organisations such as the Children's Commissioner and other Commissioners, local authorities and health board leads, third sector representative organisations and other groups such as Trades Unions, to be actively involved and consulted during policy and legislative development. This continued into the pandemic and beyond, and is a key feature of the approach here.
38. The size and scale of the public sector in Wales allows this to be done in a manageable way. The Inquiry may wish to weigh up to what extent this was beneficial and should be preserved, maintained or even extended for future crises.
39. This allowed for the Commissioner to be proactively consulted in response to a range of issues affecting children in Wales. Within days, weekly calls had been set up with senior

Government officials and the Commissioner; this evolved into proactive sharing of 'matters arising' whereby the Commissioner's office were feeding in families' experiences and queries in real time to the Government, allowing for these to be reflected upon and for answers to be issued.

40. This in turn led to changes in the Welsh Government's guidance or even legislation; notably in relation to exercise restrictions on disabled children or those without access to outside space, to 16 and 17 year olds in single households being able to join up with others in a 'bubble', and to provisions to support children educated at home with access to support around the changing qualifications landscape, to name a few.
41. There were also regular direct communications between the Commissioner and the (then) Deputy Minister for health and social services, who was keen to hear directly about the children and families' issues the Commissioner was aware of. The Deputy Minister also communicated key decisions very shortly before they were made public, allowing the Commissioner and her team to prepare advice for children and their families who may contact them and for their website.

Influence of UK Government decisions

42. Notwithstanding the difference in approach here in Wales, it is apparent that many of the primary decisions were taken at the UK Government level, and the Welsh Government were either expected to, or chose to fall into line with those decisions.
43. Clear examples in this regard relate to the proposed suspension of social care protections and safeguards, and support for children with additional learning needs (SEND in England). The Welsh Government initially proposed to follow the decisions in England relating to fostering and adoption medical assessments, and support for ALN, and sought to inform rather than consult the Commissioner's office. To their credit, the Welsh Government pulled back on both of these proposals following constructive challenge and thorough exploration of the necessity of the measures; the only UK nation to resist curtailing these rights and entitlements. The initial decision had only been considered with local authorities, and not with children and families or those who work on their behalf such as the Commissioner's office. Had a CRIA been undertaken as part of this decision making process, this may have prompted consideration of wider view points and children's rights issues.

Convergence of 'care settings' risk profile

44. Module 6 will focus specifically on the care sector, but in relation to decision making as falls within this module to consider, it is important to reflect on generic approaches to risk profiles.
45. Through Modules 1, 2, 3 and 6 this Inquiry will have in mind specific considerations on health and care provision. For the purposes of Module 2B, we wish to highlight how a 'one size fits all' approach to the legislation and guidance fell short of due regard for children's rights.
46. A care or nursing home for the elderly, or for those with disabilities or additional vulnerabilities is a clear risk factor when dealing with a public health emergency. It is not for us or this Module to consider how well that was handled across the UK, but this point is raised here to highlight the differences in the children's sector.
47. The majority of children's homes in Wales are small settings (2-4 beds) usually accommodating teenagers. Larger or group providers may have their own education provision, meaning that the young people are only mixing in limited and consistent groups, much like the bubble systems or the Rule of 6 and other ways of managing face to face contact that emerged across the duration of the pandemic.
48. Requiring children in these settings through official guidance to self-isolate for a minimum of 14 days upon every possible contact with Covid, and to have their contact with their families completely stopped for lengthy (and repeat) periods of up to 28 days following any sort of 'outbreak' (or single case as this was treated), was inconsistent with their human rights and also their risk profiles.
49. Despite many professionals in Government, PHW and other public sector agencies recognising this, the guidance was not changed or amended as things developed and understanding of transmission and risks evolved. Again, we invite the Inquiry to consider whether or not this blanket approach to all residential settings paid due regard to children's specific and unique rights, and whether it was proportionate to continue with this approach throughout the pandemic.
50. For future crises, it will be incumbent upon those in positions of responsibility to reflect upon the experiences of the Covid pandemic and consider how children's health and other needs and rights can be upheld and protected in a proportionate way.

51. Module 2 heard evidence from the former Children's Commissioner for England, Anne Longfield, reflecting her frustrations or disappointment at Number 10 and the UK Government not listening to the need to hear from and speak to children directly. She described Governmental 'indifference' to children and their needs.

52. By contrast, there were a number of ways in which the Welsh Government did actively engage with children and young people in sharing messages and listening to their views.

- a. The Commissioner suggested and facilitated a televised press conference with the then Education Minister Kirsty Williams, addressing messages to children directly. The Minister answered questions submitted by children from across Wales in the same manner as the daily press conferences that we all became accustomed to during this period.
- b. The Commissioner's office, in partnership with the Government, Welsh Youth Parliament and Children in Wales, facilitated two large scale nationwide surveys of children and young people. The first of the 'Coronavirus and Me' surveys ran in May 2020; the second in January 2021 following a return to lockdown in Wales. Issues arising were provided to Government officials during the course of the surveys remaining live, with early results shared after a few thousand responses had been received and analysed. Ministers and officials were eager to hear children's views and experiences in real time so headline results were shared as they emerged. The published reports were sent to and shared with Government Ministers and officials, and subsequently would be referred to in CRIA or guidance documents. The Commissioner's Coronavirus and Us work, including how Welsh Government responded to the findings, has been cited as a particularly good example of children's involvement in decision-making during the Covid pandemic, by the World Health Organisation, in its report 'Third high-level meeting on Schooling during the Covid19 pandemic'
- c. The Commissioner and her team also facilitated Ministerial meetings with children and young people. particular in the education portfolio when considering decisions around return to face-to-face learning, face coverings in education settings and the approach to awarding qualifications. Some of these were proactively requested by Ministers.

53. None of the above would have happened without the direct involvement and support of the Commissioner's office, but it is notable that the Government was open to working in

this way and to listening to children and young people in making their decisions.

54. We would encourage the Inquiry to consider how this practice can be protected and sustained, or even built upon, not just in future crises but in how Governments carry out their functions more generally.

Scientific evidence

55. It is clear that both the UK and Welsh Governments had access to scientific data and advice to inform their decision making processes.
56. As is noted above, the Commissioner and her team were frequently called upon to comment on or advise on decisions and guidance at very short notice. The scientific evidence on which decisions were made was often not available at this point (or at all) which meant the actual decisions themselves could not be adequately scrutinised. The role of the Commissioner then became about seeking clarity and transparency in whatever messaging and guidance was being issued, and ensuring as far as possible children's rights were being proactively considered as part of this decision making.
57. The Commissioner careful to put out clear and reassuring messages to children and young people at every available occasion; at times this was hampered by a lack of clarity around the basis of Government decisions however.
58. This is something that Governments themselves could and should be considering for their own communications. They will hold all of the information and advice that has led to their decisions and they are therefore best placed to provide that transparency.

Summary

59. Children's lives were affected in every way by the decisions of the pandemic. Efforts to reach out to them, to hear their voices and to listen to their needs were made by Welsh Government, often following the encouragement or support of the Commissioner to do so.
60. The Inquiry will weigh up how well this was done, whether this practice has been embedded and sustained, and whether this could or should be done differently in future crises. Module 2B will allow for this to be explored in some level in respect of overarching decisions made in Wales; we anticipate a future Module on Education and

Children will however supplement this consideration and analysis with a greater focus on these issues.

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On behalf of the Children's Commissioner for Wales

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