



Challenges for human rights treaty monitoring in a devolved UK: a case study

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ABSTRACT

This article is one of the first of its kind to undertake empirical research into the engagement of a devolved government in a United Nations (UN) human rights treaty-monitoring process. There is a lack of studies on this topic, even though the devolved nations of the United Kingdom (UK) have legislative competence and responsibilities to implement many obligations arising from several international human rights treaties, such as the UN Convention on the Rights of the Child. The article provides a case study to evaluate and compare how regional governments are accommodated in the treaty body system so that future monitoring processes accurately reflect the differences in implementation of UN treaties, or lack thereof, across different regions within the state. The potential impact of ‘under-representative’ state reporting is also examined. The article highlights that State Reports and the monitoring process should ensure accurate and reliable information on implementation in each nation of the UK and, more specifically, should ensure that the state delegation is composed of a balanced number of representatives from each nation, that delegation responses to questions from the Committee on the Rights of the Child clearly indicate whether the reply relates to law, policy and practice in the UK as a whole or solely to a specific nation, and that delegation representatives have a full understanding of the division of responsibilities between the UK Government and the devolved governments.

Keywords: devolution; international law; human rights; treaty monitoring.

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INTRODUCTION

The United Nations (UN) human rights treaty-monitoring system has been subject to considerable scrutiny virtually since its inception.¹ Concerns have long been raised about a ‘substantial gap’ between the human rights treaty bodies’ capacity for holding states to account and enhancing human rights implementation at the national level,² leading to general agreement that the treaty body system does not work as well as it could.³ The literature identifies several issues such as the under-resourcing of treaty bodies, considerable duplication of work for states, increasing workloads for both treaty bodies and states, and non-submission of State Reports,⁴ all of which have led to radical proposals for reforming the monitoring system.⁵ These challenges are likely to be magnified for multilevel governance states as the implementation of treaty obligations will diverge across their jurisdictions, and inconsistencies in implementation can lead to a lack of accountability and the ‘dilution’ of central government responsibilities

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- 1 See eg Felice Morgenstern, ‘International legislation at the crossroads’ (1978) 49 *British Yearbook of International Law* 101; Theodor Meron, ‘Norm-making and supervision in international human rights: reflections on institutional order’ (1982) 76 *American Journal of International Law* 754; Philip Alston, ‘Conjuring up new human rights: a proposal for quality control’ (1984) 78 *American Journal of International Law* 607; UN GAOR, 44th Session, Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights, UN Doc A/44/668 (8 November 1989).
 - 2 Michael O’Flaherty and Claire O’Brien, ‘Reform of UN human rights treaty monitoring bodies: a critique of the Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body’ (2007) 7(1) *Human Rights Law Review* 141, 142.
 - 3 See eg Michael O’Flaherty, ‘Reform of the UN human rights treaty body system: locating the Dublin statement’ (2010) 10(2) *Human Rights Law Review* 319; Jasper Krommendijk, ‘Less is more: proposals for how UN human rights treaty bodies can be more selective’ (2020) 38(1) *Netherlands Quarterly of Human Rights* 5; UN Office of the High Commissioner for Human Rights, ‘Strengthening the United Nations human rights treaty body system: a report by the United Nations High Commissioner for Human Rights’ (June 2012).
 - 4 Morten Kjærum, ‘State Reports’ in Gudmundur Alfredsson et al (eds), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th Möller* 2nd edn (Martinus Nijhoff 2009) 17–25; see also Lutz Oette, ‘The UN human rights treaty bodies: impact and future’ in Gerd Oberleitner (ed), *International Human Rights Institutions, Tribunals, and Courts* (Springer 2018).
 - 5 Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body, Eighteenth meeting of chairpersons of the human rights treaty bodies 22–23 June 2006 (HRI/MC/2006/2 22 March 2006).

in monitoring and compiling State Reports.⁶ This creates additional pressure for these states around the need for consolidated, concise and accurate reporting and ascribing sufficient resources to facilitate authentic participation in treaty-monitoring processes.

Despite this, there has been little scrutiny of the extent to which these issues impact multi-governance states, the robustness of state party reporting in light of these challenges, and the effect this may have on the eventual implementation of rights in the state. In the United Kingdom (UK), ‘little attention’ has been paid in the literature to regional government beneath the level of the state party.⁷ The UK’s system of devolution means that the competence and responsibility to implement many human rights obligations lie with the devolved nations – Northern Ireland, Scotland and Wales – so accurate and complete reporting on implementation should include sufficient information on the devolved nations. However, evidence suggests that UK state reporting has tended towards England-centricity.⁸

While the already established systemic issues at the international level could be the root cause of this, or at least a significant contributing factor, they could also be obfuscating problems at the domestic level that impact the extent to which state party reporting takes account of information on implementation in the devolved nations. Understanding how and why devolved nations have been under-represented in reporting could not only facilitate improvement of the UK’s participation in treaty-monitoring processes, but could also contribute to the ongoing debate on reforming the treaty body system by considering how multilevel governance states can be better accommodated. This article aims to fill this lacuna.

In this special issue, Professor Brice Dickson analyses 17 different monitoring mechanisms to give broad oversight of the role of devolved governments in treaty-monitoring processes for the first time. This

6 Particularly in federal case studies, see Laura Lundy et al, *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries* (UNICEF & Queen’s University Belfast November 2012) 5; Christof Heyns and Frans Viljoen, ‘The impact of the UN human rights treaties at domestic level’ (2001) 23(3) *Human Rights Quarterly* 483, 508. Heyns and Viljoen say that ‘federal states find it more difficult to report (Canada) and at times also to take decisions to ratify treaties (Australia)’ 520.

7 Jane Williams, ‘Multi-level governance and CRC implementation’ in Antonella Invernizzi and Jane Williams (eds), *The Human Rights of Children: From Visions to Implementation* (Routledge 2016) 240; also see Simon Hoffman, ‘The UN Convention on the Rights of the Child, decentralisation and legislative integration: a case study from Wales’ (2019) 23(3) *International Journal of Human Rights* 374, 374–275. Heyns and Viljoen (n 6 above) say this is also true in federal states, where ‘awareness and impact are the least at the lower levels of government, such as in the local government sphere (eg in South Africa)’ 520.

8 See case study in this article.

article complements Dickson's comprehensive research by conducting a detailed exploration of UK state party reporting in a single treaty-monitoring 'cycle' to examine the representation of the devolved nations and identify challenges or barriers to effectual reporting. A 'case study' approach has been taken as it enables an 'in-depth, multi-faceted understanding of a complex issue in its real-life context',⁹ which can develop a broader understanding of a particular issue and facilitate an explanation of how or why the issue exists.¹⁰ After setting out the relevant context in the second and third sections of the article, the monitoring-cycle case study interrogates the extent of non-representative reporting in UK state party reporting and the underlying reasons for it. The article goes on to identify the wider implications that such reporting may have and sets out recommendations to improve the reporting process at the domestic level in the UK. The article also reflects on how these findings could supplement discussions for reform at the international level.

The UK's Fifth Periodic Reporting Cycle (2016) for the UN Convention on the Rights of the Child (UNCRC)¹¹ was selected as the case study due to a significant number of Convention rights that cut across devolved competences, such as education, health and social care. This means that there is substantial divergence across the UK in respect of how these obligations are implemented, and one might expect that state party reports would comprehensively take account of these differences. The case study also has a specific focus on Wales, given that it was the only country in the UK to have incorporated the UNCRC into law at the time of the reporting cycle.¹² It should be noted that the article does not aim to scrutinise implementation or incorporation of the UNCRC across the UK, for which there is already

9 Sarah Crowe et al, 'The case study approach' (2011) 11 *BMC Medical Research Methodology* 100.

10 See generally Robert Yin, *Case Study Research and Applications: Design and Methods* 6th edn (Sage 2018).

11 UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC). The UK's Fifth Periodic Report was examined in 2014–2016 and is the most recently completed monitoring and reporting cycle at the time of writing. In this article, the Convention is referred to as the UNCRC, while the treaty body, the Committee on the Rights of the Child, is referred to as the CRC or the Committee.

12 The Rights of Children and Young People (Wales) Measure 2011 gives further effect to the rights and obligations set out in the UNCRC in Wales by requiring that Welsh Ministers have 'due regard' to UNCRC when exercising any of their functions.

a robust body of literature,¹³ rather the focus is on how the devolved nations were represented in State Party Reports to the treaty body. A new, simplified reporting procedure has since been introduced for the UNCRC, and the UK is currently participating in its first cycle under this new system. This means that the findings of this study will also provide a valuable basis of comparison for future research, enabling a more comprehensive evaluation of the 2022/2023 UNCRC reporting cycle.

UN HUMAN RIGHTS TREATY MONITORING: SYSTEMIC CHALLENGES FOR MULTILEVEL GOVERNANCE STATES

State party compliance with the core international human rights treaties is monitored by treaty bodies. These are committees of independent experts, elected by state parties, that scrutinise how state parties are implementing their obligations under the treaties and assess whether there is full enjoyment of the Conventions' rights in the states' jurisdictions. These assessments happen periodically with a reporting cycle usually taking place over a five-year period, and, although each treaty body's monitoring process varies, they tend to follow a similar structure. The state submits a self-assessment report to the treaty body detailing how it has implemented its obligations. The treaty body examines this report and conducts a dialogue session with the state party, but also invites input from non-governmental organisations (NGOs), civil society and other stakeholders, and can decide to hold country visits. Most treaty bodies, including the Committee on the Rights of the Child (CRC), now also offer simplified reporting procedures, where the treaty body prepares a List of Issues Prior to Reporting (LoIPR), which allows states to prepare a more focused report in response.¹⁴ Treaty bodies issue recommendations to improve compliance following the review, but as the bodies have a non-judicial character, these 'Concluding Observations' are non-binding.

Treaty bodies have undoubtedly added value to the interpretation and implementation of human rights treaties. They can issue general comments or recommendations that seek to comprehensively interpret

13 See eg Invernizzi and Williams (eds) (n 7 above); Jane Williams, 'General legislative measures of implementation: individual claims, "public officer's law" and a case study on the UNCRC in Wales' (2012) 20(2) *International Journal of Children's Rights* 224; Simon Hoffman and Rebecca Thorburn Stern, 'Incorporation of the UN Convention on the Rights of the Child in national law' (2020) 28(1) *International Journal of Children's Rights* 133; Ursula Kilkelly, Laura Lundy and Bronagh Byrne (eds), *Incorporating the UN Convention on the Rights of the Child into National Law* (Intersentia 2021).

14 The LoIPR is informed by a document review, including reports from UN agencies, NGOs, children and other stakeholders.

substantive provisions or address cross-cutting and thematic issues. Most treaty bodies can also receive individual complaints from persons who claim to be the victim of a rights violation. However, practitioners and academics have identified significant challenges with the treaty-monitoring system which has long been under-resourced with inadequate administrative and financial support.¹⁵ This has become a greater problem in recent years due to the exponential growth of the treaty body system, in respect of the number of treaties, increased ratification, and the number of individual petitions and inquiries. This has led to an increased workload and considerable backlog, or a 'system overload', for the treaty bodies,¹⁶ particularly considering that members work part-time and are unremunerated.

This also affects state parties, which have substantial reporting requirements and spend considerable human and financial resources to participate in complex and diverse monitoring procedures. This often leads to duplication, given the overlap in treaty provisions and the lack of integration and information exchange between treaty bodies, and may lead to late and non-reporting.¹⁷ It may also lead to recommendations being ignored or inadequately complied with by states,¹⁸ particularly if treaty bodies have recommended different approaches to identical human rights challenges.¹⁹ Statistics have shown that treaty bodies typically adopt between 200 and 400 recommendations for each state party per reporting cycle.²⁰ There have been several calls for reform of the treaty-monitoring system,²¹ including unification of the treaty bodies,²² and it is clear to see why.

These are high-level issues that exist at the international level and the national level for every state party. However, these issues create

15 Concept Paper (n 5 above) [18]; James Crawford, 'The UN human rights treaty system: a system in crisis?' in Philip Alston and James Crawford, *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000) 4–5; Jaap Doek, 'The CRC: dynamic and directions of monitoring its implementation' in Invernizzi and Williams (eds) (n 7 above) 107.

16 O'Flaherty and O'Brien (n 2 above) 146.

17 Geneva Academy, 'Fundamental challenges of the UN human rights treaty body system: background paper for expert meeting on 14–15 December 2015' (15 October 2015) [1].

18 O'Flaherty and O'Brien (n 2 above) 143.

19 Geneva Academy (n 17 above) [2].

20 Ibid.

21 See nn 3 and 5 above. See also UN High Commissioner for Human Rights, 'Strengthening the United Nations Human rights treaty body system' UN Doc A/66/860 (2012); UN GAOR, 68th Session, Resolution Adopted by the General Assembly on 9 April 2014, Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System (UN Doc A/RES/68/268 21 April 2014).

22 Concept Paper (n 5 above).

distinct challenges for federal and decentralised states, such as the UK, which the monitoring system does not take into consideration. The treaty-monitoring system tends towards state-centricity, and the response to decentralisation has simply been to emphasise state responsibility. For example, under article 4 UNCRC it is the state party who should ‘undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized’ in the Convention. While the state certainly has the ultimate responsibility for compliance, this approach does not reflect the day-to-day reality of how human rights are implemented, as discussed further below. The CRC has a set of non-binding, treaty-specific guidelines that states are expected to consider when reporting.²³ These reporting guidelines for the UNCRC suggest that states will have a ‘comprehensive national strategy’ to protect children’s rights,²⁴ which contradicts the autonomy of the devolved governments. There is some acceptance of this reality in the Concluding Observations of the UK’s Fifth Periodic Reporting Cycle, though it is emphasised that it is the state party who is responsible for the coordination of the implementation of the Convention throughout the state and for putting in place a high-level body or mechanism to coordinate activities related to implementation.²⁵

It should also be noted that there are tensions as a result of the reporting requirements imposed by the treaty bodies.²⁶ Resource pressures on the treaty-monitoring system mean that all state parties have the same strict word limits on reports and are allocated the same short time for the dialogue sessions, adhering to the principle of equality rather than equity. This lacks consideration for states where implementation of obligations is decentralised and divergent across jurisdictions. The CRC’s reporting guidelines say that treaty-specific reports should examine implementation of the Convention in the

23 UN Committee on the Rights of the Child, Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States Parties under article 44, paragraph 1(b), of the Convention on the Rights of the Child, CRC/C/58/Rev3 (3 March 2015) (CRC Reporting Guidelines). See also Compilation of Rules of Procedure Adopted by Human Rights Treaty Bodies (28 April 2003, HRI/GEN/3/Rev 1).

24 CRC Reporting Guidelines (n 23 above) [19(b)].

25 UN Committee on the Rights of the Child, *Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland* (CRC/C/GBR/CO/5 12 July 2016) [11]; UN Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland* (CRC/C/GBR/CO/4 20 October 2008) [12]; See also Roberta Ruggiero, ‘Article 4: states parties’ obligations’ in Ziba Vaghri et al (eds), *Monitoring State Compliance with the UN Convention on the Rights of the Child* (Springer 2022).

26 Milka Sormunen, ‘A focus on domestic structures: best interests of the child in the Concluding Observations of the UN Committee on the Rights of the Child’ (2020) 38(2) *Nordic Journal of Human Rights* 100, 104.

reporting state and should not exceed 21,200 words.²⁷ States should also reflect on which government authority has overall responsibility for coordinating the implementation of the UNCRC and with what level of authority.²⁸ This means that the UK has to report on the implementation of a wide breadth of rights across four countries with divergent law and policies in a relatively short word limit, the same word limit afforded to monocentric governance states. There is little room to both clarify nuance in devolved law and cover all issues. A common core document was introduced to provide general information about the state to all monitoring bodies, with a limit of 42,400 words.²⁹ The CRC's new simplified reporting procedure, explained further below, may facilitate more focused reporting, given that states that choose this option are provided with up to 30 questions in a LoIPR, although states should write no more than 10,000 words.

The treaty reporting guidelines do not expand on the extent of the state's obligation to report what constitutes 'sufficient' information and enables a 'comprehensive' understanding, as required by the UNCRC.³⁰ Presumably, this is subjective, and it is up to the CRC to decide if it has been furnished with sufficient information by the state party. The CRC itself can indicate the form and content of reports or information to be supplied by the state parties,³¹ and can also request the state to provide an additional report or information where the CRC does not consider a report to contain sufficient information.³² However, there have been incidences where it is clear from the Concluding Observations that sufficient information has not been provided.³³ Even so, if the guidelines were to include such detail, they are non-binding, and the treaty bodies have little power to enforce states to comply with the procedures.³⁴

Sormunen suggests that, due to the restriction imposed by the word count, states 'may create an illusion of progress' that can emphasise legislative reform over practice.³⁵ Likewise, Lundy identifies an

27 CRC Reporting Guidelines (n 23 above) [10].

28 Ibid [19(c)].

29 In accordance with UNGA Res 68/268 (9 April 2014) UN Doc A/RES/G8/268 [16].

30 UNCRC, art 44(2).

31 Human Rights Treaty Bodies Rules of Procedure (n 23 above); Rules of Procedure of the Committee on the Rights of the Child (CRC/C/4/Rev5 1 March 2019) r 70(3).

32 CRC Rules of Procedure (n 31 above) r 73.

33 See note on the Committee for Economic, Social and Cultural Rights (CESCR) in the discussion of findings (n 141 below).

34 Concept Paper (n 5 above) [16]. During 2004 and 2005, committees noted that only 39% of reports were compliant with reporting guidelines and in 18% of cases, non-compliance was specifically noted in Concluding Observations [24].

35 Sormunen (n 26 above) 104.

inherent lack of reliability in state-party reporting as the states will be conscious of how they ‘present themselves as making meaningful progress in the implementation’ of the UNCRC.³⁶ Despite these limitations, Lundy argues that analysing UN reports can still yield ‘valuable insight’.³⁷ We believe that the same can be true when looking at the representation of sub-state governments in the reporting process.

CONTEXTUALISING HUMAN RIGHTS TREATY MONITORING IN A DEVOLVED UK

Before starting to interrogate these issues from a UK perspective, it is necessary to understand and appreciate the constitutional landscape in which treaty monitoring operates. Devolution is a key feature of the UK’s Constitution, which means that power and competence is transferred from the central government to nations and regions, primarily the legislatures and executives in Northern Ireland, Scotland and Wales. This system of devolution is asymmetric, meaning that the transfer of power is not equal for all nations and regions, and different matters are reserved or excepted for the UK Parliament and Government in relation to each devolved institution. Important areas for the implementation of the UNCRC, such as health, social care and education are non-reserved matters where devolved governments and parliaments have control. On the other hand, important levers for full implementation of the Convention, such as most aspects of state welfare and immigration, are reserved to the UK Government and Parliament. Devolution is complicated further by the fact that England does not have a devolved parliament at all. This means that UK Government and Parliament also make decisions on all matters relating to England. This highly asymmetric approach to devolution requires careful attention to understand what is within the scope of each devolved government for the purposes of state reporting. For example, criminal justice is devolved to Northern Ireland and Scotland, but reserved in Wales.³⁸ This can be challenging as the responsibilities of Welsh institutions over several social policy areas means that the criminal justice system in Wales operates across a ‘jagged edge’ of devolved and reserved powers and responsibilities.³⁹

36 Laura Lundy, ‘Children’s rights and educational policy in Europe: the implementation of the United Nations Convention on the Rights of the Child’ (2012) 38(4) *Oxford Review of Education* 393, 398.

37 Ibid.

38 Government of Wales Act 2006, schs 7A and 7B (para 4).

39 See eg Robert Jones and Richard Wyn Jones, *The Welsh Criminal Justice System: On the Jagged Edge* (University of Wales Press 2022).

International relations, including relations with international organisations, are a reserved competence for UK Government⁴⁰ and extend to treaty-making and the transformation of treaties into domestic law.⁴¹ Arrangements regarding this competence are captured in a Concordat on International Relations (Concordat), part of the 2012 Memorandum of Understanding agreed between the UK Government and the devolved governments.⁴² However, the Concordat also recognises that devolved governments have an active interest in implementing and observing international obligations. This reflects that the day-to-day responsibility for meeting treaty standards often lies with the devolved governments.⁴³ Devolved parliaments can and have legislated to give further effect and incorporate international treaties that the UK has ratified, and which is within their legislative competence. Likewise, devolved governments can use international treaties to underpin policy and decision-making.⁴⁴ The devolved nations have also demonstrated a firm commitment to progress human rights in a way that differs from the approach of UK Government,⁴⁵ meaning that they also have an active interest in receiving specific meaningful recommendations on how to progress rights.

Even so, as the state party, the UK bears the ultimate responsibility for compliance with its treaty obligations, a fact explicitly recognised by treaty-monitoring bodies.⁴⁶ A state also has a general duty in international law to ensure that its domestic law is in conformity

40 Under the Government of Wales Act 2006, as amended by the Wales Act 2017; Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee (October 2013) [18], Supplementary Agreement D: Concordat on International Relations, D1.3, D2.3, D3.3.

41 Nicola McEwen et al, 'Intergovernmental relations in the UK: time for a radical overhaul?' 91(3) Political Quarterly 632, 633.

42 Memorandum of Understanding (n 40 above).

43 Ibid [21].

44 The development of the Rights of Children and Young Persons (Wales) Measure 2011, which gives further effect to the UNCRC in Wales, is a prime example of this.

45 Welsh Government, *Action to Strengthen Human Rights in Wales: 2018 to 2022* (17 October 2022).

46 UN Committee on the Rights of the Child, *General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child* (arts 4, 42 and 44, para 6) (CRC/GC/2003/5 27 November 2003) [40]–[41]. The Committee on the Elimination of Discrimination Against Women noted in its *Concluding Observations on the UK's Eighth Periodic Report* in 2019 that 'the devolution of government powers does not negate the direct responsibility of the State Party to fulfil its obligations to all women and girls within its jurisdiction' (CEDAW/C/GBR/CO/8 14 March 2019) [10].

with its international obligations,⁴⁷ and it is a generally accepted principle of international law that a state cannot use its domestic law or constitutional arrangements to justify breaching its international obligations.⁴⁸ This has been quite controversial in recent years, with the UK criticised for breaching international law on several occasions, including the Withdrawal Agreement⁴⁹ and the Trade and Cooperation Agreement between the European Union (EU) and the UK.⁵⁰ The UK's responsibility over internal compliance also extends to devolved law. For example, in February 2022, Northern Ireland's Agriculture Minister was accused of breaching the Withdrawal Agreement by attempting to stop checks on goods travelling from England, Wales and Scotland.⁵¹

The Concordat also stipulates the UK Government's duties in respect of treaty-monitoring and reporting, namely that it 'will invite' devolved ministers to contribute to reports to international organisations and 'will consider' the representation of devolved nations when such organisations discuss the reports.⁵² As the state party, the UK assumes responsibility for providing adequate information in the assessment of its compliance with treaty obligations. However, while the Concordat states that the devolved nations should be invited to contribute to reports, and that their representation will be considered when international organisations discuss such reports, it lacks detail on how this should be done and what the level of contribution should be. Further, the Concordat is part of a 'non-statutory machinery

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- 47 Failing to bring domestic law into conformity is not usually a breach of international law *per se*; the breach occurs when the state breaches its international obligations on a specific occasion.
 - 48 UN Human Rights Committee, General Comment No 31 [80], *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (CCPR/C/21/Rev1/Add13 26 May 2004) [14]; CRC, *General Comment No 5* (n 46 above) [40]–[41]; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), art 27 stipulates that, 'a Party may not invoke the provision of its internal law as justification for its failure to perform a treaty'. See also, *Greco-Bulgarian Communities Case* (1930) PCIJ Ser B, No 17 [32].
 - 49 The Withdrawal Agreement sets out the terms of the UK's exit from the EU. See eg Welsh Parliament, Legislation, Justice and Constitution Committee, *The Welsh Government's Legislative Consent Memorandum on the United Kingdom Internal Market Bill* (November 2020) [55]–[61]; Jonathan Jones, 'The Northern Ireland Protocol Bill is one of the most extraordinary pieces of legislation I have ever seen' (*The House* 15 June 2022).
 - 50 The EU–UK Trade and Cooperation Agreement makes provision for free trade, market access and other cooperation mechanisms. See eg European Parliament's UK Contact Group, 'Press release: serious breach of international law: MEPs call on UK not to adopt new Bill' (14 June 2022).
 - 51 Lisa O'Carroll, 'Northern Ireland minister orders halt to Brexit agri-food checks' (*The Guardian* 2 February 2022).
 - 52 Memorandum of Understanding (n 40 above), Concordat D1.4, D2.4, D3.4.

of cooperation' with no legislative footing,⁵³ meaning that the UK Government is not legally bound by these undertakings. Ultimately, the extent of this engagement relies on good intergovernmental relations, and it has long been established that without good communication systems between the governments, devolution would be less effective.⁵⁴ The tension in the intergovernmental arrangements became ever more apparent with the end of Labour government at UK level, continued Labour dominance in Wales and, more recently, with the challenges of Brexit and Covid-19.⁵⁵

STATE REPORTING IN THE UK'S FIFTH PERIODIC CYCLE FOR THE UNCRC: SUMMARY OF FINDINGS

It is clear in setting out the context above that the UK's participation in treat-monitoring processes takes place in a complicated setting given the international systemic challenges and domestic constitutional complexities. The intricacies of such a multifaceted environment mean that any deficiencies in UK state reporting could go unchecked. It also creates a lack of certainty as to the cause(s) of any problems, making their resolution more difficult. One such issue, as noted in the introduction, is that UK state reporting may be under-representative of the devolved nations. A case study facilitates a narrow, yet in-depth approach to exploring this issue, enabling key questions to be addressed:

- a. to what extent are there problems with the representation of devolved nations in UK state party reporting;
- b. why do these problems exist; and
- c. what is the potential impact on the implementation of obligations in the UK.

This also sets out important groundwork to consider to what extent these issues could be mitigated at the domestic level to ensure accurate and robust reporting, and how a greater understanding of the challenges faced by multi-governance states could factor into discussions about reform of the treaty-monitoring system.

53 HL Deb 17 June 1998, vol 590, col 1573.

54 Ibid.

55 See eg Select Committee on the Constitution, *Inter-Governmental Relations in the United Kingdom* (HL 2014–2015 146) [1]–[6]; Select Committee on the Constitution, *Parliamentary Scrutiny of Treaties* (HL 2017–2019 345) 'Summary' [9]; see also European Union Committee, *Scrutiny of International Agreements: Lessons Learned* (HL 2017–2019 387); European Union Committee, *Treaty Scrutiny: Working Practices* (HL 2019–2021 97); Nicola McEwen, 'Intergovernmental relations review: worth the wait?' (*UK in a Changing Europe* 17 January 2022).

The UNCRC 1989 and its reporting procedure

The UNCRC was chosen as a case study to examine UK state party reporting due to the substantial number of provisions that cut across devolved competences. Further, although the UK has ratified the UNCRC, it is yet to fully become part of the UK's domestic law. The case study primarily focuses on scrutinising the UK's Periodic Report, the UK delegation's oral evidence, and the CRC's Concluding Observations in the Fifth Periodic Reporting Cycle in order to answer the questions set out above. Although other stakeholders, such as NGOs, civil society and National Human Rights Institutions (NHRIs), can and do make important contributions to the process, this study aims to interrogate issues in state party reporting. There is also particular focus on Wales when considering issues relating to the devolved nations, given that it was the only country in the UK to have incorporated the UNCRC into law at the time of the reporting cycle⁵⁶ and that the UNCRC had been established as 'a foundation of principle' for the National Assembly for Wales, now Welsh Government, since November 2000.⁵⁷ The UNCRC sets out the economic, social, cultural, political and civil rights of children, and its 54 articles determine that, *inter alia*, children have a right to life, to education, freedom of expression, health, social security and play. Under article 44 UNCRC, state parties are required to periodically report to the CRC on how they have implemented the Convention and the progress on the enjoyment of children's rights in their territories.⁵⁸

Historically, a new reporting cycle has been initiated by the submission of a state party report.⁵⁹ The state report contains both a common core document and a treaty-specific report, which 'shall contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned'.⁶⁰ There is also an expectation that the state will indicate

56 Rights of Children and Young Persons (Wales) Measure 2011; a duty to have 'due regard' to the UNCRC is also contained in the Social Services and Well-being (Wales) Act 2014 (s 7) and the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (s 7).

57 See further Ian Butler and Mark Drakeford, 'Children's rights as a policy framework in Wales' in Jane Williams (ed), *The United Nations Convention on the Rights of the Child in Wales* (University of Wales Press 2013) 11–12; Jane Williams, 'Seven threads in policy on children and young people: rights and well-being' in Jane Williams and Aled Eirug (eds), *The Impact of Devolution in Wales: Social Democracy with a Welsh Stripe?* (University of Wales Press 2022) 179–203; Simon Hoffman, 'Incorporating the CRC in Wales' in Kilkelly et al (n 13 above) 101–103.

58 UNCRC, art 44(1).

59 As happened during the 2016 cycle examined in this case study.

60 UNCRC, art 44(2).

factors and difficulties affecting the degree of fulfilment of the UNCRC obligations in the reports.⁶¹ A pre-sessional working group is scheduled following the report's submission, enabling advance identification and notification of the most important issues to be discussed with the state party.⁶² The Committee presents a list of issues to the state party to which the state responds in writing, allowing the state party to prepare answers to some of the key questions in advance.⁶³ A simplified procedure has been available to parties since September 2019.⁶⁴

The Committee invites input from other stakeholders, may conduct visits to states and can request further information from state parties that is relevant to the implementation of the Convention.⁶⁵ The state party is also invited to send a delegation to a dialogue session, after which the Committee issues recommendations, or Concluding Observations, for identified concerns. The Concluding Observations are based on information received from the state party, however, the Committee can refer to information received from other sources, such as specialised agencies or other competent bodies. The Committee also sent rapporteurs to the UK, and devolved nations, in advance of the oral hearing which gave an opportunity for NGOs in devolved nations and devolved government a chance to engage further. The non-binding nature of Concluding Observations is reflected in article 45(d) UNCRC, which states that 'the Committee may make *suggestions* and *general recommendations* based on information received'.⁶⁶ Even so, the treaty obligations themselves are legally binding, and if the treaty body finds there to be a violation, there may be a legal duty to remedy the breach.⁶⁷

61 Ibid.

62 The Committee appoints either Country Rapporteurs or a Task Force comprising three to four members in advance of a country pre-session, which is a confidential meeting between Committee members, UN agencies and invited children's rights defenders where concerns can be shared in advance of the dialogue session. This Task Force has the mandate to lead the dialogue with the state party. For the sake of brevity, this article hereinafter refers to the 'Committee'.

63 *Implementation Handbook for the Convention on the Rights of the Child* [648].

64 See n 14 above. The UK accepted the simplified procedure on 19 August 2020 and submitted its response to the LoIPR on 16 June 2022 as part of a new reporting cycle. UK State Party report under LoIPR (CRC/C/GBR/6-7 16 June 2022); UK List of issues prior to reporting (LoIPR) 9CRC/C/GBR/QPR/6-7 15 February 2021).

65 UNCRC, art 44(4).

66 Emphasis added.

67 Martin Scheinin, 'International mechanisms and procedures for implementation' in Raija Hanski and Markku Suksi (eds), *An Introduction to the International Protection of Human Rights: A Textbook* (Åbo Akademi University 1997) 369.

UK state reporting on UNCRC: Fifth Periodic Report (2016)

State Party Report

General criticisms about the UK's Fifth Periodic Report⁶⁸ included that it stayed at policy level and did not say whether or how that policy has been implemented in practice,⁶⁹ and that it 'paint[ed] a picture of things all generally moving in a glorious direction towards a rosy sunset',⁷⁰ including the situation in the devolved nations. For example, the Welsh Government funding of Funky Dragon, the Children and Young People's Assembly for Wales, is used twice as a positive example, despite the charity being told prior to the submission of the report that it would have to apply for grant funding to secure its future,⁷¹ thus casting uncertainty over the potential for youth participation in Welsh politics.⁷² It was later announced in July 2014 that the charity had been unsuccessful in its grant bid, leading to its closure.⁷³

In respect of adequately reflecting devolved law and policy in the report, the initial draft focused heavily on matters relating to England, often misrepresenting matters specific to England or England & Wales as being UK-wide. This was also noted by Together, the Scottish Alliance for Children's Rights, when providing evidence to the Joint Committee on Human Rights (JCHR) in its inquiry on the UK's compliance with

68 UN Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Fifth Periodic Reports of States Parties due in 2014: United Kingdom* (CRC/C/GBR/5 25 May 2014) (UK State Report).

69 Joint Committee on Human Rights, *The UK's Compliance with the UN Convention on the Rights of the Child*, Evidence taken on 11 February 2015, 6.

70 Joint Committee on Human Rights, *The UK's Compliance with the UN Convention on the Rights of the Child*, Evidence from Dr Maggie Atkinson and Anne Longfield OBE, 4 February 2015, 6.

71 Welsh Government, *Written Statement – Children and Families Delivery Grant* (16 July 2014). Beneficiaries of the Children and Families Organisation Grant were informed on 4 October 2013 that the programmes would end in September 2014. The application period for the new grant scheme ran between 3 March 2014 and 23 May 2014. The UK's State Report was received on 27 May 2014.

72 The Welsh Government had also not reinstated its support for Wales' Participation Unit and the National Children and Young People's Participation Consortium in Wales since its dissolution in 2013. See further Williams, 'Seven threads in policy' (n 57 above) 188.

73 See further, Rhian Croke and Jane Williams, 'Our Rights, Our Parliament: The Story of the Campaign for the Children and Young People's Assembly for Wales, 2014–2018' (2018) 10–11. Notably, the closure of Funky Dragon became the vehicle for a campaign led by young people for a formal youth parliament in Wales and their efforts were reflected in a specific recommendation in the Concluding Observations.

the UNCRC.⁷⁴ The JCHR described the report as too abstract and patchy and noted that there were some significant omissions from its content, ‘whether because of the process by which it was put together, or whether by intention’.⁷⁵ In giving evidence to the JCHR, a UN Children’s Fund (UNICEF) UK representative agreed that the report was weakened by the contributions from the four countries of the UK not being synthesised comprehensively,⁷⁶ meaning that it lacked a coherent overall view,⁷⁷ and the Northern Ireland Commissioner for Children and Young People also noted her disappointment at the limited information on the implementation of the UNCRC in Northern Ireland.⁷⁸ Although the final version of the State Report was somewhat more robust than earlier drafts and contained evidence that Wales had contributed to it, it continued to be dominated by UK Government policy as it applied to England, and habitually did not clarify that such policies did not apply or had limited effect in the devolved countries.⁷⁹

To provide selected examples, the information provided on children with disabilities in the report does not specify whether the policies mentioned apply to the UK as a whole or just one of the four nations. The report outlines a new statutory framework introduced by the 2014 Children and Families Act for disabled children and those with special educational needs (SEN),⁸⁰ however, most of the provisions only apply in England.⁸¹ While the report later briefly refers to actions taken in Scotland and Northern Ireland,⁸² one might take the view that these jurisdiction-specific policies *supplement* the Children and Families Act, given the omission of any reference to England specifically when introducing the 2014 Act. Wales is not expressly mentioned. Concerns were also raised that the State Report did not reflect the devolved governments’ ‘clear’ position on the negative impact of welfare reforms

74 [Submission from Together \(Scottish Alliance for Children’s Rights\)](#) to the UK Parliamentary Joint Committee on Human Rights Inquiry into the UK’s compliance with the UNCRC; see also Joint Committee on Human Rights, *The UK’s Compliance with the UN Convention on the Rights of the Child*, Eighth Report of Session 2014–15 (HL 144, HC 1016 24 March 2015) [61].

75 JCHR, Eighth Report [11].

76 JCHR, Evidence taken on 11 February 2015 (n 69 above) [6]; see also JCHR, Eighth Report (n 74 above) [58].

77 JCHR, Eighth Report (n 74 above) [169].

78 [Northern Ireland Children’s Commissioner Response to Rt Hon Harriet Harman, Chair of JCHR](#) (5 September 2016).

79 See also Doek (n 15 above) 103.

80 UK State Report (n 68 above) [154]–[158].

81 Pt 3 of the Act (ss 19 to 83) makes provision that reforms the special educational needs system. ‘These provisions extend to England and Wales, but the majority only apply in England’: Children and Families Act 2014, [Explanatory Notes](#), Wales, pt 3 [45].

82 UK State Report (n 68 above) [159].

on children.⁸³ The report's exclusion of the devolved governments' perspectives on this issue became more apparent in the dialogue session, when representatives of the devolved governments sought to clarify their position on the policies, noting the welfare reforms' 'disproportionate and unfair effects' on children in their jurisdictions.⁸⁴

Disproportionate reporting continues in other areas of the report. Appendix 5 provides over 40 examples of consultations or activities with children undertaken by different UK government departments in England, including the Cabinet Office, Department for Communities and Local Government, Department for Education, Department for Health, Ministry of Justice, Department for Transport, Home Office, Department for Work and Pensions and the Ministry of Defence.⁸⁵ However, just 10 examples are given for Northern Ireland, Scotland and Wales combined.⁸⁶ While this was an improvement from the draft report which initially referred to the initiatives in England as 'national' developments,⁸⁷ it remains extremely unbalanced considering that many of the activities listed would clearly not involve the participation of children and young people from the other three nations.

There are other incidences throughout the 2014 report where little to no information on Wales is provided on key issues. In its 2008 Concluding Observations, the Committee recommended that the UK 'take all appropriate measures to ensure that the principle of the best interests of the child ... is adequately integrated in *all legislation and policies* which have an impact on children',⁸⁸ yet the 2014 report only refers to developments in England on this issue.⁸⁹ Similarly, in reporting on violence, abuse and neglect, about which the Committee had been 'alarmed' at its high prevalence in 2008,⁹⁰ there was very little information in the 2014 State Report pertaining to what had been done to improve the situation in Wales.⁹¹ No information was given

83 See, for example, 'Welfare reforms "impacting on children"' *Glasgow Evening Times* (3 June 2014).

84 Committee on the Rights of the Child, 72nd Session, 2115th meeting (24 May 2016) (Session 2). Sessions were fully transcribed as part of this study; summary records are publicly available (CRC/C/SR.2115).

85 UK State Report (n 68 above) app 5, [69]–[73].

86 Ibid [74]–[75].

87 Together Submission to JCHR (n 74 above) 3.

88 CRC, Concluding Observations 2008 (n 25 above) [27] emphasis added.

89 UK State Report (n 68 above) [51]–[52].

90 CRC, Concluding Observations 2008 (n 25 above) [51].

91 It was simply noted that Domestic Homicide Reviews had been established on a statutory basis in England and Wales, and that, following reviews, Wales had established the Welsh Safeguarding Children Forum; UK State Report (n 68 above) [108], [113].

on the placing of children in care in Wales⁹² or on strengthening the voice of children in care in Wales,⁹³ despite an increase of 23 per cent in looked-after children in Wales between 2009 and 2014, and the finding that looked-after children in Wales are not always afforded the right to be heard in decisions that impact their futures.⁹⁴

The Committee had also noted in 2008 concerns about increased numbers of disabled children in alternative care, inadequate monitoring, and the scarce possibility of contact between them and their parents.⁹⁵ Yet in the 2014 report, no Welsh policies were subsequently identified on children with disabilities in long-term care, contact for children separated from parents and siblings, and the monitoring of children in care.⁹⁶ Another 2008 recommendation from the Committee had been to develop early identification programmes to improve the situation of children with disabilities,⁹⁷ though the 2014 report does not comment on any developments in Wales.⁹⁸ The Committee had also identified breastfeeding as an area of concern, recommending that the UK further promote baby-friendly hospitals and encourage breastfeeding to be included in nursery training.⁹⁹ Again, no information on Welsh policies was included in the 2014 report.¹⁰⁰ It could be argued that the 2014 State Report does not 'contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention' in Wales.¹⁰¹

Dialogue session

The 2016 dialogue session took place in Geneva and was attended by a UK delegation consisting of 19 delegates from the UK Government, two from Northern Ireland, one from Scotland and one from Wales.¹⁰² Thirty per cent of delegates came from the UK Government's Department for Education alone, which perhaps reflects where

92 Ibid [114]–[118]; CRC, Concluding Observations 2008 (n 25 above) [44]–[45].

93 UK State Report (n 68 above) [124]–[128]; CRC, Concluding Observations 2008 (n 25 above) [44]–[45].

94 Report of the UK Children's Commissioners, [UN Committee on the Rights of the Child Examination of the Fifth Periodic Report of the United Kingdom](#) (14 August 2015) [7.5].

95 CRC, Concluding Observations 2008 (n 25) [44]–[45].

96 UK State Report (n 68 above) [129]–[131].

97 CRC, Concluding Observations 2008 (n 25) [53(b)].

98 UK State Report (n 68 above) [145]–[151].

99 CRC, Concluding Observations 2008 (n 25) [58]–[59].

100 UK State Report (n 68) [152]–[153].

101 As required by UNCRC, art 44(2).

102 UK Mission to the United Nations in Geneva, Note Verbale 099/16 (13 May 2016).

children's rights fall within the UK Government's portfolio. Even so, Sally Holland, then Children's Commissioner for Wales, noted disappointment that there was only one representative for the Welsh Government and commented that the UN Committee's 'careful treatment of the devolved constitutional arrangement of the UK State Party was not matched with a proportionate delegation against this arrangement'.¹⁰³ Further, when a House of Lords Select Committee reported on parliamentary scrutiny of treaties, it noted the importance of representatives from the devolved governments forming part of the UK Government's delegation in relevant treaty negotiations, which acknowledges the important role devolved nations play in the implementation of international obligations.¹⁰⁴ Presumably, the same logic should also apply to UK reporting on compliance with treaty obligations.

At the start of the dialogue session, the UK delegation gave the Committee a brief breakdown of legislative responsibilities in the UK, noting that powers for legislative changes in education, health services and social care are devolved.¹⁰⁵ In respect of many issues, the study's findings suggest that the Committee was conversant with the UK constitutional arrangements and understood the breakdown of responsibilities between the UK and the devolved nations and so was able to direct specific questions to the delegation where relevant.¹⁰⁶ However, in answering the Committee's general questions, the nature of some of the delegation's responses raised two issues of concern. First, answers to the Committee's questions tended to focus on matters that related to England only, often misrepresenting these as being UK-wide, and second, some delegation responses appeared to be ill-informed as to the breakdown of responsibilities between the UK Government and the devolved governments. Essentially, the problems that beset the State Report became significantly more apparent in the dialogue session.¹⁰⁷

103 [Children's Commissioner for Wales Response to Rt Hon Harriet Harman, Chair of JCHR](#) (6 September 2016).

104 Select Committee on the Constitution (HL 345) (n 55) 'Summary of conclusions and recommendations' [25].

105 Committee on the Rights of the Child, 72nd Session, 2114th meeting (23 May 2016) (Session 1). Sessions were fully transcribed as part of this study; summary records are publicly available: CRC/C/SR.2114.

106 This was undoubtedly supported by contributions from other stakeholders. For example, the Committee was aware of the dissolution of Funky Dragon in Wales, in addition to funding issues relating to S4C, the Welsh language channel. The Committee asked questions on both of these issues: Session 1 (n 105 above).

107 [Children and Young People's Commissioner Scotland's Response to Rt Hon Harriet Harman, Chair of JCHR](#) (30 August 2016).

As noted above, the written State Report revealed ambiguities in reporting on education, particularly for children with disabilities or additional learning needs. This continued in the dialogue session. At the end of the first session, the Committee asked several questions on this issue without specifying that they were directed at a particular jurisdiction.¹⁰⁸ These included questions on how the UK ensures that children with disabilities systematically and actively participate in children's services they receive, how accessible schools are for children with disabilities, and what measures are being taken to treat children with disabilities in schools. In response, the delegation gave an overview of the 'important reform to the system on children with special educational needs and disabilities that were introduced by the Children and Families Act 2014'.¹⁰⁹ It was noted that the new system is 'set out in a statutory code of practice which is jointly issued by the Department for Education and Health'.¹¹⁰ Again, just as the State Report, there was a failure to call the Committee's attention to the fact that part 3 of the 2014 Act, which applies to SEN, mostly applies to England, as education is a devolved matter. The delegation also mentioned the strong framework in place for mainstream schools, set out in the statutory code, to support children with SEN in mainstream schools, which again, would be applicable to England. Very little evidence was given about SEN in Wales generally.

The Committee also asked whether the UK has statutory obligations for schools to have policies on the prevention of bullying of particular groups, and whether there are any sanctions for schools which do not take action when bullying is known to them.¹¹¹ It was noted that schools are held to account by Ofsted (the Office for Standards in Education, Children's Services and Skills), which is responsible for the inspection of education institutions in England. To support this, it was stated that 'the government' had recently changed the law to strengthen teachers' powers to discipline children and that it had given schools guidance on sanctions that should be used proportionately, which include the use of seclusion and isolation rooms. Presumably, the response is referring to the 2011 Education Act, but sections 2 to 6 that set out powers in relation to discipline are only applicable to England.¹¹² The Committee also had to seek clarity as a result of unclear

108 Session 1 (n 105 above).

109 Session 2 (n 84 above).

110 Ibid.

111 Session 1 (n 105 above).

112 The Welsh Ministers have some powers in relation to fees, and some issues fall within a Legislative Consent Motion passed by the Senedd on 14 June 2011. It is noted, however, that seclusion and isolation rooms are used throughout the UK.

evidence on at least one occasion,¹¹³ as to whether information given about a new waiting period target of two weeks for early intervention in mental health was for England only.¹¹⁴ While further information was provided on waiting-time standards in Wales and Scotland, the delegation was unable to make comment on the waiting time for mental health provision in Northern Ireland during the session.¹¹⁵

Although it appears that the UK and devolved officials worked jointly to decide when a devolved matter – or difference in approach between the UK Government and a devolved government – should be highlighted in the dialogue session,¹¹⁶ like the State Report, the responses to the Committee's questions also tended to focus on English matters at times. This concern was expressed by the then Children's Commissioner for Scotland,¹¹⁷ with the Northern Ireland Commissioner for Children and Young People also noting her disappointment at the limited information on the implementation of the UNCRC in Northern Ireland during the examination.¹¹⁸ As one example, Ofsted was mentioned on several occasions during the dialogue session when giving examples of good practice on monitoring policies and holding schools to account, but Estyn in Wales went unmentioned.¹¹⁹ In fact, the former Children's Commissioner for Wales expressed disappointment during the first session that the UK delegation had not referred to Wales at all when discussing education and social care, two major devolved policy areas.¹²⁰ It was reported that the Children's Commissioners had taken steps to remind the Committee of the devolved nature of government in the UK in between the oral evidence sessions,¹²¹ given that NGOs and NHRIs can usefully meet with Committee members informally during the plenary session.¹²² This disproportionality in reporting was also recognised by other observers at the dialogue session. Campaign 4 CYPAW, a Welsh civil society movement campaigning for the establishment of a Welsh Youth Parliament, shared that it had heard 'lots of responses from UK Gov ... including on alt care and family

113 Session 2 (n 84 above).

114 Ibid.

115 Ibid.

116 Children and Young People's Commissioner Scotland Response (n 107 above).

117 Ibid.

118 Northern Ireland Children's Commissioner Response (n 78 above).

119 As did the Education and Training Inspectorate in Northern Ireland and Her Majesty's Inspectorate of Education in Scotland.

120 Children's Commissioner Wales, 'Disappointing that Wales not mentioned at all by UK Govt on two major devolved policy areas – education & social care #UNCRC' (24 May 2016)

121 Children and Young People's Commissioner Scotland Response (n 107 above).

122 Child Rights Connect, 'The Reporting Cycle of the Committee on the Rights of the Child: A Guide for NGOs and NHRIs' 31.

support which referred only to England'¹²³ and that the discussion on transgender and intersex children was limited to NHS England.¹²⁴

On occasion, the delegation also seemed to be ill-informed about the breakdown of devolved competences. In the first session, the Committee posed a question on budgetary cuts of more than 25 per cent to S4C,¹²⁵ a Welsh language channel, and expressed concern at the negative impact this may have on the rights of children in Wales to enjoy access to information and express themselves in their own language.¹²⁶ The Committee specifically asked how the UK planned to ensure the continuity and quality of programmes on S4C with these cuts. Given that broadcasting is a non-devolved matter, the proposals for broadcasting cuts came from the Department for Culture, Media and Sport (DCMS), situated in the UK Government. Therefore, in responding to the Committee, an official with knowledge of DCMS policy should have addressed the question. However, the chair of the UK delegation directed the question to the sole representative for the Welsh Government, who noted that funding for S4C was the responsibility of UK Government and gave a general response about the Welsh Government's support for S4C and the Welsh language. The response thus failed to address the question and allowed the delegation to avoid offering an explanation for how UK Government intends to ensure protection for the rights of children in Wales in this key area. In a similar vein, the Committee posed a question about progress on a Bill of Rights for Northern Ireland, given the commitment in the 1998 Belfast Agreement to introduce one. While this was answered by one of the two Northern Ireland representatives, who noted that a Bill of Rights has been identified as an outstanding commitment in the 2014 Stormont House Agreement between the UK Government and Northern Ireland Executive,¹²⁷ it could be argued that a UK Government representative may have been better placed to advise on

123 Campaign 4 CYPAN, 'Hearing lots of responses from UK Gov this morn including on alt care and family support which referred only to England. #UNCRC #UNCRCWales' (24 May 2016).

124 Campaign 4 CYPAN, 'Still lots of talk just about @NHSEngland rather than all areas based on transgender, intersex children #UNCRC #UNCRCWales' (24 May 2016).

125 Session 1 (n 105 above).

126 'S4C cuts could breach child rights, academics warn' (*BBC News* 24 May 2016); Alison Mawhinney and Carys Aaron, 'Cyllido S4C -Hawliau Plant yn y Fantol' (*Barn* March 2017).

127 Session 1 (n 105 above); *The Stormont House Agreement* (23 December 2014) [69].

progress given the expectation under the Belfast Agreement to draft a Bill of Rights in Westminster legislation.¹²⁸

DISCUSSION OF FINDINGS

The above summary of findings provides a case study to begin to view the extent to which the devolved nations are represented in state party reporting. The case study found that reporting tends to be rather general, largely focusing on Westminster policy (which is mainly applicable to England) but with some select examples of positive variance in devolved approaches where those exist. Given that decision-making on how the UK drafted its reports and gave evidence was not well publicised or transparent, it is important to explore the experience of the UK's Fifth Periodic Reporting Cycle; thus looking in more detail at why problems exist and what is the potential impact on the implementation of obligations in the UK.

It appears that information is prepared at the devolved level and then collated at the UK level, where the report is then drafted.¹²⁹ The Former UK Parliamentary Under Secretary of State for Children and Families notes that, 'when we pulled together the response to the UNCRC last year, clearly that meant that we had to have quite detailed discussions about what each [counterparts in other nations] were doing and had achieved during our period in office'.¹³⁰ The UK Government clearly makes the final decision on what it will include in its report, though the process of preparing the State Party Report should be broad and participatory.¹³¹

However, the process that was in place did not seem to facilitate full and robust reporting of the progress made to meet international human rights obligations across the UK, and the method of compiling the information also left little time for meaningful engagement with civil society in practice.¹³² The four Children's Commissioners encouraged the Committee to hear from the devolved governments during the examination 'since it can be difficult for them to feed into the reporting process'.¹³³ The findings indicate that the written State

128 Belfast Agreement 1998, 'Rights, Safeguards and Equality of Opportunity' [4]—upon which the Northern Ireland Human Rights Commission would be invited to consult and to advise on the scope for defining rights.

129 Northern Ireland Children's Commissioner Response (n 78 above).

130 Joint Committee on Human Rights, 'The UK's Compliance with the UN Convention on the Rights of the Child, Edward Timpson MP' (25 February 2015) 21.

131 Child Rights Connect (n 122 above) [7].

132 Northern Ireland Children's Commissioner Response (n 78 above).

133 Report of the UK Children's Commissioners (n 94 above) [1.3].

Party Report had somewhat improved from the draft to the final version, which suggests that there is some scope for issues such as under-representation of devolved governments to be addressed at state level, and this could be done by reviewing how State Reports are compiled.

The importance of political will has been emphasised in the literature on incorporation of the UNCRC.¹³⁴ Key stakeholders in the monitoring process also suggest that political will heavily influences how devolved nations are represented in state reporting, which could explain the England-centric approach taken in the report and oral evidence session and the lack of devolved representation in the delegation. In giving evidence to the JCHR, Together (Scottish Alliance for Children's Rights) noted that the 'extent to which Scotland is involved in reporting – and held to scrutiny at a UN level – can be patchy and is very dependent on the will to involve the devolved nations at a UK level'.¹³⁵ Koulla Yiasouma, Northern Ireland Commissioner for Children and Young People, also commented that 'while there appeared to have been meaningful engagement in some areas in relation to this process, this was not uniform across all jurisdictions'.¹³⁶

This seemed to extend beyond the reporting cycle to Parliament's 2015 scrutiny of the UK's compliance with the UNCRC. A letter written jointly by the Northern Irish, Scottish and Welsh Children's Commissioners expressed disappointment that none of them had been given the opportunity to provide either written or oral evidence into the JCHR's short inquiry.¹³⁷ Both the outgoing and incoming Children's Commissioners for England were invited to give oral evidence.¹³⁸ Similarly, in the JCHR's 2016/2017 inquiry into the UK's record on children's rights, oral evidence was given by the Children's Commissioner for England and the Equality and Human Rights Commission, with the Children's Commissioners for the devolved nations and the Equality Commission for Northern Ireland being invited to give written evidence. There also seemed to be a lack of clarity surrounding applicability of UK Government policies in the devolved nations, with the Northern Ireland Children's Commissioner noting that she had been asked by the JCHR to raise any implications for children in Northern Ireland of the Children and Social Work Bill,

134 Lundy et al (n 6 above) 19; Heyns and Viljoen (n 6 above) 483; Ursula Kilkelly, 'The UN Convention on the Rights of the Child: incremental and transformative approaches to legal implementation' (2019) 23(3) *International Journal of Human Rights* 323.

135 Together Submission to JCHR (n 74 above) 5.

136 Northern Ireland Children's Commissioner Response (n 78 above).

137 Letter from Scottish, Northern Irish and Welsh Children's Commissioners, *Correspondence to the JCHR*, 13 February 2015.

138 JCHR, Evidence from Dr Maggie Atkinson and Anne Longfield OBE (n 70 above).

responding that ‘as this extends only to England and Wales, I have no comments in relation to this’.¹³⁹

While it is right to be circumspect given the limited scope of this study, there is also evidence to suggest that these concerns are not unique to UNCRC reporting. In monitoring the UK’s compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁴⁰ in 2016, the Committee for that Covenant noted that it regretted the lack of involvement and participation of Northern Ireland in the review process and that ‘the absence of representatives of the government of Northern Ireland did not enable it to make a full assessment of the enjoyment of Covenant rights in Northern Ireland’.¹⁴¹ The UK Government was reminded ‘of its ultimate responsibility for implementing the Covenant in all its jurisdictions’ and to take ‘all necessary measures to ensure the full enjoyment of [rights] by all persons under its jurisdiction’.¹⁴² In the reporting procedure on the Convention on the Elimination of All Forms of Discrimination Against Women,¹⁴³ the 2019 Concluding Observations remarked that ‘the Committee once again notes that the State Party’s delegation did not include representatives of the overseas territories or Crown dependencies’.¹⁴⁴ For the most recent Universal Periodic Review in 2017, a process which involves the review of the human rights records of all states, the Cabinet Secretary for Communities, Social Security and Equalities in the Scottish Government had advised that ministerial representation from Scotland would be useful given the different policy approaches but reported that the UK Government did not accept the proposal.¹⁴⁵ Dickson’s paper in this special issue provides a more comprehensive overview of these other mechanisms.

The accuracy and reliability of the Committee’s evaluation and observation depend on the quality of the information supplied. While it is true that other stakeholders can and do submit information to the

139 Northern Ireland Children’s Commissioner Response (n 78 above).

140 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (CESCR).

141 Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Sixth Periodic Report of the United Kingdom* (E/C.12/GBR/CO/6 14 July 2016) [2], [7]–[8].

142 Ibid.

143 Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

144 CEDAW Committee, *Concluding Observations* (n 46 above) [3].

145 Scottish Parliament Equalities and Human Rights Committee, *Getting Rights Right: Human Rights and the Scottish Parliament* (SP Paper 431 26 November 2018) (Session 5) [111].

Committee, including from children themselves,¹⁴⁶ it is the state that has the obligation to provide the Committee with sufficient information to enable a comprehensive understanding of the implementation of the Convention in its territory, as stipulated by article 44 UNCRC. An accurate and reliable response is necessary to make a full assessment on the enjoyment of rights in the state, including in the devolved nations. If factors and difficulties affecting the degree of fulfilment of obligations are not drawn to the attention of the Committee, particularly in areas of concern, this could impact the opportunity for progressive improvements in compliance with those rights. In other words, the quality of reporting could ultimately affect the recommendations and their implementation.

Although the Committee addresses its recommendations towards the Government of the United Kingdom of Great Britain and Northern Ireland, it does qualify this, in paragraph 3 of the Concluding Observations, by noting that recommendations are also addressed to the 'devolved administrations in Wales, Scotland and Northern Ireland' 'where relevant mandates fall under their jurisdiction'.¹⁴⁷ Despite this, Hoffman suggests that the Committee 'may have overlooked ... an opportunity to connect its recommendations to the context of Welsh devolution'.¹⁴⁸

The Committee did make specific recommendations for devolved governments and to deal with regional issues in some contexts.¹⁴⁹ In the 2016 Concluding Observations, the Committee referred directly to relevant policy in Wales on six occasions,¹⁵⁰ with a further two where Wales was identified separately on issues shared with other devolved governments.¹⁵¹ There were only two recommendations that were made explicitly regarding Wales. Firstly, to fully implement the Programme for Children and Young People (2015) and, secondly, to 'strictly implement the legal prohibition of prolonged placement of children in temporary accommodation by public authorities'.¹⁵² However, both recommendations are directed at the state party alone with no reference to the devolved Welsh Government. On six further occasions which could relate to Wales, recommendations do

146 Croke and Williams (n 73 above) 15.

147 CRC, Concluding Observations 2016 (n 25 above) [3].

148 Hoffman (n 7 above) 380.

149 CRC, Concluding Observations 2016 (n 25 above) [3].

150 Ibid, powers of the Children's Commissioner in Wales [15], Youth Parliament [30], collective worship in public schools [36], measures to address child sex exploitation [44], rate of child poverty [70], and the adoption of a right to play by the Welsh Government [74].

151 Ibid, concern regarding increase of children in care [52], improvements to mental health services [60].

152 Ibid [71(e)].

refer explicitly to devolved governments.¹⁵³ Although the State Party Report did highlight the introduction of the 2011 Measure in Wales to incorporate the UNCRC, no mention of this was made in the Concluding Observations.

On some occasions, the Committee seems to place the recommendation with the state party to take the initiative to introduce reforms ‘in each of the devolved administrations’.¹⁵⁴ On other occasions it suggests that the state party and devolved governments work together,¹⁵⁵ or that devolved governments should take action ‘in relation to devolved matters’.¹⁵⁶ On the whole, recommendations are directed towards the state party even where the matters concerned are clearly non-reserved matters, such as education,¹⁵⁷ childcare and social work,¹⁵⁸ and child poverty and adequate housing.¹⁵⁹ While the general nature of the recommendations in terms of decentralisation confirmed by General Comment No 5,¹⁶⁰ as well as the asymmetric and complex delineation of responsibilities within the UK, makes distinguishing who should be responsible for implementing the recommendations difficult, it is not clear why general phrasings on devolved governments are used inconsistently. Appendix 3 of the State Party Report provides a brief overview of devolved and reserved areas but could be argued to be incomplete as it does not show that housing and social care are devolved matters. This, and weaknesses on devolution related to the oral hearing discussed above, may have had an effect on how recommendations were ultimately framed.

Leading on to the issue of wider accountability, it is possible to develop a thicker analysis of the role of reporting on law and policy at the devolved level and to remember that reporting should ‘not become an end in itself’.¹⁶¹ Commentary from the literature shows that the

153 Ibid. There is some inconsistency in the phrasing used to refer to devolved governments. It appears that the following are used interchangeably: ‘devolved governments’ (sex exploitation [45], children rights impact assessment on reduction in child funding and support [51]); ‘devolved administrations’ (voting age [33], air pollution levels [69]); ‘governments of the devolved administrations’ (health and health services [59], rights of children to rest and leisure [75]).

154 Ibid, corporal punishment [41], mental health [61], juvenile justice [79], Optional Protocol to the Convention on the sale of children, child prostitution and child pornography [82]–[83].

155 Ibid, sex exploitation [45], child rights impact assessment of the recent reduction of funding for childcare and family support [51], health and health services [59], rest, leisure and recreation [75].

156 Ibid, environmental health [69].

157 Ibid, collective worship in schools [36], ensuring inclusive education [73].

158 Ibid [53].

159 Ibid [71].

160 General Comment No 5 (n 46 above) [41].

161 Geneva Academy (n 17 above) 5.

monitoring process can provide an important basis and catalyst for sub-state innovation, as was the case in Wales. The National Assembly for Wales, as it then was, could initiate a commitment on policy on children and young people from its inception despite a weak form of executive devolution at the time.¹⁶² The establishment in Wales of the first Children's Commissioner in the UK was indicative of this commitment and the cross-party support for this policy area.¹⁶³ The National Assembly later adopted the UNCRC as a 'foundation of principle for dealing with children' and a basis for policy-making.¹⁶⁴ This evolved into *Rights to Action* (2004) which set out the UNCRC principles in seven core aims for policy-making and was followed with *Rights in Action* (2007) which provided a form for implementation.¹⁶⁵ Butler and Drakeford highlight that *Rights in Action*, was notable as it became the separate 'country report' for Wales to provide a contribution to the periodic reporting of the state party.¹⁶⁶ This was complimented by a separate report submitted to the UN Committee from the UNCRC Wales Monitoring Group, an alliance of non-governmental agencies and academics established in 2002.¹⁶⁷ Further, it has been argued that the Concluding Observations and General Comments from the Committee from 2002 and 2008 were used to underpin the justification for the Rights of Children and Young Persons (Wales) Measure 2011.¹⁶⁸ The Welsh Government was able to build on article 4 of the Convention, and the general recommendations from the Committee, to assist towards the 2011 Measure.¹⁶⁹ The Measure itself is also influenced by the UN monitoring procedure, as it includes a duty to prepare a report on the Welsh Ministers' compliance with the 'due regard' obligation in the Measure, which initially corresponded with the cycles of the UN reporting period but are now set at every two-and-a-half years.¹⁷⁰

162 Butler and Drakeford (n 57 above) 9.

163 Ibid 9–10.

164 As quoted in ibid 12.

165 Ibid 13–14.

166 Ibid.

167 Trudy Aspinall and Rhian Croke, 'Policy advocacy communities: the collective voice of children's NGOs in Wales' in Williams (ed) (n 57 above).

168 Jane Williams, 'The Rights of Children and Young Persons (Wales) Measure 2011 in the context of the international obligations of the UK' in Williams (ed) (n 57 above) 49.

169 Hoffman, 'UNCRC and decentralisation' (n 7 above) 380; Williams (n 39 above) 50.

170 Hoffman (n 57 above) 116.

Concluding Observations can also be used as a tool for parliamentary accountability and scrutiny on a devolved level.¹⁷¹ Although the duty on Welsh Government to have ‘due regard’ to the UNCRC has not always been utilised fully in scrutiny at the Senedd,¹⁷² this has been seen most clearly in the Children, Young People and Education (CYPE) Committee of the Senedd which published a review of Children’s Rights in Wales and used the UNCRC and Concluding Observations from 2016 as a framework to analyse the success of the 2011 Measure.¹⁷³ Specifically, it recommended that the Welsh Government ‘publish a detailed strategic response’ to the UNCRC 2016 Concluding Observations and subsequently, an annual update of progress made against the Concluding Observations to be scrutinised by the CYPE Committee.¹⁷⁴ Both recommendations were accepted by the Welsh Government¹⁷⁵ and led to the publication of an update on progress on the Concluding Observations in March 2021,¹⁷⁶ the Children’s Rights Scheme in December 2021,¹⁷⁷ and the Children and Young People’s Plan in March 2022.¹⁷⁸ The Concluding Observations are not the only evidence that the Senedd uses to scrutinise the Welsh Government’s progress on children’s rights, but, given their prominence in governmental scrutiny, future research should consider how the framing of the Concluding Observations in the next reporting cycle subsequently impacts scrutiny at the devolved level.¹⁷⁹

171 Jane Williams and Simon Hoffman, ‘Accountability’ in Williams (ed) (n 57 above) 117; Children, Young People and Education Committee (Senedd Cymru), *Inquiry into Children’s Rights in Wales, Evidence from Dr Simon Hoffman* (16 October 2019) 140.

172 Simon Hoffman and Sean O’Neill, *The Impact of Legal Integration of the UN Convention on the Rights of the Child in Wales* (EHRC August 2018, published March 2019) 38–40; Hoffman (n 57 above) 16, 116–117.

173 Children, Young People and Education Committee, *Children’s Rights in Wales* (August 2020).

174 Ibid, ch 8 and [344].

175 Letter from Julie Morgan MS, Deputy Minister for Health and Social Services, to the Chair of the Children, Young People and Education Committee (23 September 2020).

176 Welsh Government, *Welsh Government Update on Progress following the Publication of the United Nations Committee on the Rights of the Child Concluding Observations Report into the United Kingdom of Great Britain and Northern Ireland 2016* (WG42282 March 2021).

177 Welsh Government, *Children’s Rights Scheme 2021* (WG44156 December 2021).

178 Welsh Government, *Children and Young People’s Plan* (1 March 2022).

179 Hoffman (n 57 above) 116.

CONCLUSION

The aim of this article has been to fill a critical gap in understanding the role and engagement of devolved governments in the monitoring of UN human rights treaty compliance, using the UNCRC and Wales as a case study. This is important because so far there has been little empirical research into examining the extent to which devolved governments are involved in state reporting. While recognising the treaty-monitoring system's important role in the promotion and protection of human rights, much of this existing literature has focused on highlighting weaknesses in treaty-monitoring bodies that are not conducive to effective reporting¹⁸⁰ and proposals for the system's reform.¹⁸¹ Even so, beyond the introduction of a moderately simplified reporting procedure, the UN monitoring system remains under-resourced and oversubscribed. For the UK, this means that the systematic challenges to reporting in a devolved jurisdiction are likely to remain for some time.

From the experience of the UK's Fifth Periodic Reporting Cycle of the UNCRC, this study confirms that the UK Government could do more to engage the devolved governments in treaty monitoring and to sufficiently incorporate devolved policy when reporting. In doing so, this article identifies an opportunity to improve reporting efficacy at the domestic level in future monitoring cycles. As a result of efforts from a range of actors and stakeholders, treaty bodies are provided with quality information that does highlight issues specific to each of the four countries in the UK, meaning they are conversant of several factors and difficulties affecting the degree of fulfilment of the obligations of the treaties across the UK. Even so, this does not negate the UK's responsibility for ensuring that a treaty body receives sufficient information to enable a comprehensive understanding of the implementation of obligations in the UK. Meaningful engagement with the devolved governments is needed to ensure accuracy and reliability when evaluating the implementation of UN human rights treaties, and it is the responsibility of UK Government to ensure that it has a process that allows this to happen. The study's findings clearly indicate that this is not always the case.

To ensure effective reporting, UK Government should establish a robust and comprehensive procedure that ensures that each country in the UK, and its overseas territories and Crown dependencies, are fully engaged and represented in international human rights reporting mechanisms. As a minimum, such a procedure should aim to ensure closer and obligatory cooperation between Whitehall and the devolved

180 Crawford (n 15 above). See also O'Flaherty and O'Brien (n 2 above).

181 See nn 3 and 5 above.

governments to produce a State Report that appropriately and distinctly reflects law, policy and practice in each nation with respect to the concerns of the treaty under consideration.¹⁸² It should also ensure that the UK delegation is composed of a balanced number of representatives from each country, that delegation responses to Committee questions clearly indicate whether the reply relates to law, policy and practice in the UK as a whole or solely to a specific nation, and that delegation representatives have a full understanding of the division of responsibilities between the UK Government and the devolved governments.

Ultimately, these findings raise key questions and issues that will support the future evaluation of UK state reporting and the role of the devolved nations in treaty-monitoring processes. While this article has focused on the role of the UK Government as the state party, the systemic issues in the reporting process should not be overlooked. In discussing reform to the treaty body system, there must be consideration of how the system can effectively manage multi-governance states. As noted above, the reporting requirements and the general nature of the Concluding Observations should be part of the context of future analysis too.

At the time of writing, the UK is participating in the Sixth Periodic UNCRC Reporting Cycle. The fulfilment of commitments such as establishing a Youth Parliament for Wales and changes resulting from new devolution arrangements in Wales, such as allowing votes at age 16 in Senedd elections, abolishing the defence of reasonable chastisement against children, and bringing the socio-economic duty under the Equality Act 2010 into force in Wales, will further show a differing approach to children's rights in Wales. Different approaches to managing Covid-19 and its impact on children, especially in terms of education, will also be an important context for the sixth cycle.¹⁸³ It is also likely that further divergence will emerge generally regarding human rights between the UK Government and the devolved governments.¹⁸⁴ The Welsh Government has recently established a legislative options group that includes looking at the potential for a

182 These recommendations were previously submitted as written evidence to the JHRC; Hayley Roberts and Alison Mawhinney, *Written Evidence to the Inquiry on the UK's Record on Children's Rights* (19 October 2016) CHR0022.

183 Senedd and Elections (Wales) Act 2020; Children (Abolition of Defence of Reasonable Punishment) (Wales) Act 2020; Williams, 'Seven threads in policy' (n 57 above) 179–203; Hoffman (n 57 above) 101–103.

184 'England, Scotland, Wales and Northern Ireland, NGO briefing to the UN Committee on the Rights of the Child to inform its List of Issues Prior to Reporting United Kingdom of Great Britain and Northern Ireland' (December 2020).

Welsh Human Rights Bill.¹⁸⁵ More advanced work in this regard has taken place in Scotland with a commitment for a new statutory human rights framework.¹⁸⁶

This article will provide a valuable basis of comparison for evaluating the effectiveness of the next reporting cycle, particularly in relation to the role of the devolved nations and portraying a full and accurate picture of children's rights in the UK, in addition to facilitating research on other UN treaty-monitoring processes in the future.

185 Welsh Government, 'Welsh Government Response to the "Strengthening and Advancing Equality and Human Rights in Wales" research report' (2022) 3.

186 Scottish Government, 'New Human Rights Bill' (12 March 2021); National Taskforce for Human Rights, *Leadership Report* (Scottish Government March 2021).