



NSPCC CYMRU/WALES RESPONSE TO:

NATIONAL ASSEMBLY FOR WALES LEGISLATION COMMITTEE NO5'S CONSULTATION ON THE PROPOSED RIGHTS OF CHILDREN AND YOUNG PERSONS (WALES) MEASURE

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1. Introduction

- 1.1 NSPCC Cymru/Wales was pleased to respond to the pre-legislation consultation on the Proposed Rights of Children and Young Persons (Wales) Measure, and we welcome the opportunity to contribute to Legislation Committee no5's Stage 1 consideration of the general principles of the Measure.
- 1.2 The NSPCC aims to end cruelty to children in the UK over future generations. In pursuit of our vision, we will:
 - Create and deliver services for children which are innovative, distinctive and demonstrate how to enhance child protection most effectively.
 - Provide advice and support to ensure that every child is listened to and protected.
 - Provide advice and support for adults and professionals concerned about a child and if necessary take action to protect the child.
 - Work with organisations which work with children to ensure they effectively protect children and challenge those who do not.
 - Campaign for changes to legislation, policy and practice to ensure they best protect children.
 - Persuade everyone to take personal responsibility for preventing cruelty to children.
 - Inform and educate the public to change behaviours and attitudes to protect children.
- 1.3 NSPCC Cymru/Wales is a member of the Wales NGO Monitoring Group for the UNCRC.

2. General Comments

- 2.1 The UNCRC was adopted unanimously by the United Nations in 1989 and has achieved the highest level of acceptance of any human rights instrument.
- 2.2 Although the Convention is legally binding in international law following its ratification by the UK in 1991, it only has limited legal effect, as it has not been incorporated into domestic law. This means that children and young people cannot hold the government to account over the implementation of the provisions of the Convention.
- 2.3 The UN Committee on the Rights of the Child has noted this, and expressed concern in 2008 that

...” the principles of the Convention are not duly taken into account in all pieces of legislation throughout the country and that the State party has not incorporated the Convention into domestic law nor has ensured the compliance of all legislation affecting children with it.”¹

- 2.4 The Welsh Assembly Government’s approach to the UNCRC is unique in the UK, and we welcome this further endeavour to embed the Convention into domestic law. We consider that the UNCRC should become another legally-prescribed duty on Ministers. It would then be necessary for Welsh Ministers to explicitly acknowledge and address their obligations under the UNCRC as part of the legal framework within which policy is developed and government decisions are made.
- 2.5 We believe that the Measure in its current form does not allow for full embedment of the UNCRC within the legal framework in Wales. Some changes are necessary in order to avoid missing the opportunity to follow through in to Welsh law the consistent policy approach adopted by Welsh Ministers and endorsed by the Assembly. We will further expand on this in the body of our response.
- 2.6 Furthermore, for the incorporation of the UNCRC to have real meaning for children and their families in Wales, the rights and principles of the Convention must be directly enforceable in the UK courts. However, we acknowledge that it may not be appropriate to legislate for this within Wales alone at this particular stage of devolution. NSPCC supports the incorporation of the Convention into domestic law on a UK-wide basis. We believe that this would make children’s rights undeniable, creating a real change for the better. Consequently, NSPCC Cymru/Wales urges the Welsh Assembly Government to work closely with their UK Government counterparts to encourage this change on a UK-wide basis.

¹ Concluding Observations 2008, paragraph 10 Legislation CRC Committee

3. Question 1: Is there a need (by means of an Assembly Measure) to impose a duty upon Welsh Ministers and the First Minister to have due regard to the rights and obligations of the UNCRC and its Optional Protocols, when making decisions of a strategic nature about how to exercise any functions that are exercisable by them? If not, what alternatives do you propose?

- 3.1 As previously stated, the UNCRC has limited effect in the UK, as it has not been incorporated into domestic law. It is therefore not directly enforceable in UK courts by children and young people. This loophole has been identified as one which the UK must address.
- 3.2 The Welsh Assembly Government has already adopted a unique approach to the Convention, by using it as the basis of policy-making when dealing with issues relating to children and young people. This is done through the seven Core Aims which are the tool for translating the Convention into policy. However, the seven Core Aims are not a legally binding instrument, and for this reason, NSPCC Cymru/Wales welcomes the Welsh Assembly Government's further commitment to build on the good work which has already been done, and formally embed the Convention into law.
- 3.3 Furthermore, child abuse statistics show that it is vital to ensure that children are given robust protection. The NSPCC's Child Maltreatment study (Cawson et al, 2000) on the prevalence of maltreatment and harm that children experience provides an essential starting point in defining the scale of maltreatment. It is the first such study of the general population, involving nearly 3,000 young adults (aged 18-24), to be carried out in the UK. Results of this study show that 7% of children suffered serious physical abuse at the hands of their parents or carers during childhood. 6% of children experienced frequent and severe emotional maltreatment during childhood. At present, nearly 32,000 in the UK are known to be at risk of abuse.² In Wales, 2,150 children were on the Child Protection Register at the end of March 2009. The biggest category was neglect. In addition, recent legislative developments in the UK, such as the Equality Act 2010, do not include children. This clearly shows the need for specific children's rights legislation.
- 3.4 NSPCC Cymru/Wales therefore supports the creation of a due regard duty in relation to the Convention for Welsh Ministers and the First Minister and acknowledges the Welsh Assembly Government's commitment to the children's rights agenda.
- 3.5 However, we feel that the Measure in its current form does not allow for the full embedment of the Convention within the legal framework in Wales. This is because the due regard duty currently only applies to *"decisions of a strategic nature about how to exercise any functions"*

² Based on child protection register statistics as of 31st March 2006

which are exercisable by (Welsh Ministers)". Despite the change from "relevant functions" in the draft Measure to "decisions of a strategic nature" in the proposed Measure currently in front of Legislation Committee no5, NSPCC Cymru/Wales remains concerned that the remit of the Measure is not wide enough. Any sectoral approach, if adopted, will limit the positive impact that the Measure would otherwise have in facilitating the progressive realisation of the UNCRC in Wales. It would be a missed opportunity for the Welsh Assembly Government to show a real commitment to the UNCRC by enabling children in Wales to have their rights realised in *all* aspects of their lives. NSPCC Cymru/Wales is of the view that the duty to have due regard should apply across all Ministerial functions. The message to Ministers and officials would then be clear, straightforward and avoid unnecessary confusion: in all their actions, they would need to ensure that activity is planned and undertaken in a way that fully supports the implementation of the UNCRC, thus putting a children's rights approach at the heart of all that they do.

- 3.6 This would ensure that the impact of policy-making on children is always recognised and taken into account. One successful example of this approach is domestic abuse. The definition of domestic abuse used by the Welsh Assembly Government clearly includes children and young people as victims of domestic abuse, either directly or indirectly. Tackling Domestic Abuse: The All Wales National Strategy also clearly makes reference to the Welsh Assembly Government's position that domestic abuse is a child protection matter. This has been a great lever for ensuring that domestic abuse in Wales is not just viewed as a crime between two adults, but that the impact of domestic abuse is recognised on children and young people. The recently published 'The Right to be Safe' integrated strategic framework for Wales acknowledges that protecting children must be part of this. It also makes reference to the UNCRC and its role "as the basis" for all of the Welsh Assembly Government's work. A more pervasive Measure would ensure that all policy areas reflect the UNCRC accurately and that the rights of children in Wales are better protected.
- 3.7 Recent inspection evidence of the importance of widening the scope of the duty to have due regard is provided by both Care and Social Services Inspectorate Wales (CSSIW) and Healthcare Inspectorate Wales (HIW) reports of October 2009. CSSIW reviewed safeguarding and protecting children arrangements of local authority social services and local safeguarding children boards in Wales³. Paragraph 2.14 details the following finding:

Many children who suffer abuse or neglect also experience problems associated with parental mental health, substance misuse or domestic violence. Local authorities and LSCBs had introduced policies and

³ <http://wales.gov.uk/docs/cssiw/publications/091019overviewen.pdf>

protocols to improve the way children's and adult services work together with these problems but there were substantial barriers. Some of the barriers were organisational but others were part of a tendency for practitioners to focus on individual needs without examining their impact on others in the family.

- 3.8 Similarly, HIW in their review of the arrangements in place across the Welsh National Health Service identified that there are still areas and staff groups for whom training and support on child protection is required. Paragraph 3.11 states:

We are particularly concerned that some staff working in predominantly adult services such as adult mental health and substance misuse services considered that they did not need to know about child protection. It was clear that very few staff in these areas had received up to date training.

- 3.9 Based on both report findings, we believe that a more pervasive Measure, allowing Ministers in all they do to pay due regard to the UNCRC could, with appropriate rights-based training at a local level, help to address the issues identified in these reports. This would require Article 19 of the UNCRC-the right to protection-to be considered across all Ministerial duties, inclusive of children's and adult's services, as necessary.

4. Question 2: The Welsh Ministers must make a Children Scheme as required under Section 2(1) which will set out criteria for determining which decisions are decisions of a strategic nature. What do you consider is meant by a “decision of a strategic nature” as identified in section 1(2)? Is this sufficiently clear and or sufficiently wide?

4.1 NSPCC Cymru/Wales finds the formula “decisions of a strategic nature about how to exercise functions which are exercisable to them” unnecessarily confusing and complicated.

4.2 From the evidence submitted to the Committee by the Deputy Minister on 24th June, it seems that it is still unclear what the detail of a “decision of a strategic nature” is:

There will be an open and transparent discussion about that, which will hopefully move us towards a robust definition, including examples within the children’s scheme of what a strategic decision consists of.⁴

4.3 The definition given by the Deputy Minister seems to indicate that decisions of a strategic nature relate to high level policy making by Ministers, i.e. strategic writing and planning of the delivery of Welsh Assembly Government business. The duty to have due regard does not attach to the actual decisions and actions of the Welsh Ministers.

4.4 NSPCC Cymru/Wales feels that this is a serious loophole. We continue to argue that the duty to have due regard to the UNCRC should apply to all Welsh Ministers do, that is to the actual exercise of their functions rather than just the decision-making process.

4.5 Applying the due regard duty to strategic decisions also poses serious questions of transparency and accountability. If the due regard duty only applies to the internal mechanisms of the Welsh Assembly Government, how are Welsh Ministers to be held efficiently accountable for upholding it? Also, how are children and young people going to be able to see how the Welsh Ministers discharge their due regard duty, if the decisions affected are not accessible to the public?

4.6 The key point here is whether or not the decision has an impact on children’s rights, not whether it is strategic. Limiting the due regard duty to strategic decisions creates a risk of missing out what appears to be routine decisions, but in fact has an effect on children and young people.

4.7 One argument which has been raised against the extension of the due regard duty to all functions of the Welsh Ministers is that all officials supporting Ministers will have to be appropriately trained to fulfil their obligations to uphold the due regard duty. We do not feel that this

⁴ Record of Proceedings, Children and Young People’s Committee, 24th June 2010

argument is valid, since the Welsh Assembly Government has a duty to promote knowledge of the Convention among the general public under Section 5 of the Measure.

5. Question 3: Section 7 of the proposed Measure includes provision about consulting on the possible application of the proposed Measure to persons who have reached 18 years but are not yet 25 years. Do you think it is appropriate to apply a convention agreed for the benefit of children to adults between 18 and 25 years? What might be the issues to be addressed?

- 5.1 NSPCC Cymru/Wales acknowledges the commitment within the proposals to consider the importance of the UNCRC to young people aged 18 to 24. However, we are concerned about the potential confusion this could cause, as the UNCRC applies only to 0-18 year olds as a consequence of their formal and legal incapacity and the vulnerabilities inherent in this. Whilst NSPCC Cymru/Wales wholeheartedly agrees that special attention needs to be given to determining how young people over 18 years access their rights, we do not believe that the application of the UNCRC to over 18s is possible.
- 5.2 It does not make sense to extend the Convention's provision to young adults who have legal capacity in their own right. Some articles of the Convention (Article 31 on the Right to Play for example) simply cannot be applied to adults.
- 5.3 Giving children's rights to adults also undermines the principle that children need additional protection.
- 5.4 NSPCC Cymru/Wales calls on the Welsh Assembly Government to continue to explore how young adults can access their rights more fully without extending to them an approach which is not appropriate.

6. **Question 4. The proposed Measure includes a schedule, which is the Part I of the Convention and Optional Protocol 1-7 on the rights of children involved in armed conflict (except article 6(2)) and articles 1-10 on the rights of the child on the sale of children, child prostitution and child pornography.**

Do you think that the text of these treaties needs to be included on the face of the proposed Measure?

The Assembly does not have powers relating to armed conflict and has limited powers relevant to the second protocol. Do you think it is necessary for these protocols to be included in the proposed Measure?

- 6.1 NSPCC Cymru/Wales agrees that Part I of the Convention and the Optional Protocols referred to should be included on the face of the Measure. This sends a strong message to the UN that their principles and provisions are being incorporated into domestic law in Wales.
- 6.2 Even though these issues are largely non-devolved, the Welsh Assembly still has a power to make representations to UK and international bodies about protecting and promoting the rights of children in Wales.
- 6.3 A scoping study carried out in 2005⁵ found 184 separate cases of children or young people across Wales were identified as having been sexually exploited. A pilot study carried out in Newport in 2006⁶ identified 67 children and young people at significant risk of sexual exploitation. The data from the pilot study when considered with data gathered from two other Welsh local authorities provided a sample of 1487 cases held by social services including youth offending services⁷. Of these cases, risk assessments indicated that 9% (129) of children and young people were at significant risk of sexual exploitation.
- 6.4 In this context, the Welsh Assembly Government is already taking some action on child sexual exploitation and child trafficking. Following a review of local protocols for child sexual exploitation in 2006, the All Wales Protocol: Safeguarding and Promoting the Welfare of Children who are at Risk of Abuse through Sexual Exploitation was incorporated in the All Wales Child Protection Procedures (part 5).

⁵ Coles, J (2005) *Out of sight, out of mind: Child sexual exploitation*, Cardiff: Barnardo's Cymru <http://www.barnardos.org.uk/outofsightoutofmindreport.pdf>.

⁶ Clutton, S. and Coles, J. (2007) *Sexual Exploitation Risk Assessment Framework: A pilot study*, Cardiff: Barnardo's Cymru http://www.barnardos.org.uk/barnardo_s_cymru_sexual_exploitation_risk_assessment_framework_report_-_english_version-2.pdf.

⁷ Clutton, S. and Coles, J. (2009) *Child Sexual Exploitation in Wales: on 3 years on*, Cardiff: Barnardo's. http://www.barnardos.org.uk/child_sexual_exploitation_in_wales-3_years_on_no_3_policy_and_practice_briefing.

- 6.5 The Welsh Assembly Government is currently consulting on additional guidance (Safeguarding Children from Sexual Exploitation), to implement the All Wales Protocol.
- 6.6 In 2009, ECPAT UK (End Child Prostitution, Child Pornography and the Trafficking of Children) and the Children's Commissioner for Wales published a report on child trafficking in Wales.⁸The report found that there had been 32 cases of suspected child trafficking in Wales over the last two years. These cases involved children aged three and a half years and upwards, from a variety of countries of origin. More boys than girls were identified. Children were described in situations of sexual exploitation, domestic servitude, cannabis production, street crime and forced labour. The report made a number of recommendations, one of which was the creation of all Wales trafficking group.
- 6.7 Following the publication of the report, the Welsh Assembly Government set up the All Wales Group on Child Trafficking, to consider specifically how national action might help local implementation arrangements around child trafficking by statutory and voluntary organisations. Recent progress includes:
- The compilation by the Welsh Local Government Association and partners of an all Wales audit of trafficking activity by social service departments and Local Safeguarding Children Boards to help inform future work plans.
 - Commissioning of an on-line training resource produced by End Child Prostitution and Trafficking (ECPAT) UK to help raise awareness of child trafficking and to assist practitioners in the identification and safeguarding of children who might have been trafficked. This will be available in the late summer.
 - Discussions with the All Wales Child Protection Procedures Group to produce an all Wales child trafficking protocol to form part of the national child protection procedures. Work on this is in hand and an all Wales protocol should be available by September.
- 6.8 NSPCC Cymru/Wales welcomes the work which has been done on child sexual exploitation and child trafficking, and feels that the inclusion of the relevant Protocols in the Measure will build on the progress which has already been made.
- 6.9 NSPCC Cymru/Wales feels that the Welsh Assembly Government has a role to play in relation to the Protocol on the Rights of Children Involved in Armed Conflict. In particular, it is important to educate and

⁸ Bordering on Concern, Children's Commissioner for Wales, ECPAT UK, 2009
<http://www.childcomwales.org.uk/uploads/publications/130.pdf>

raise awareness to ensure that young people understand what they are signing up to, and that the rights of under 18s are especially protected.

7. Question 5. Are the sections of the proposed Measure appropriate in terms of meeting the stated objectives as detailed on page 10 of the Explanatory Memorandum. If not, how does the proposed Measure need to change?

Sections 1 and 2 should be amended to reflect the change from the “decisions of a strategic nature” wording to a more pervasive requirement to have due regard to the UNCRC in the exercise of all ministerial functions.

8. Question 6: How will the proposed Measure impact on improving and strengthening the rights of the child?

- 8.1 It is unclear how the Measure in its current form will further improve or strengthen the rights of children in Wales, as the Welsh Assembly Government has already adopted the UNCRC as its foundation for policy development in relation to children, young people and families.
- 8.2 As it currently stands, NSPCC Cymru/Wales understands that the due regard duty will apply to developing strategies and planning the business of the Welsh Assembly Government. This may mean that officials will routinely refer to the UNCRC when advising Ministers on how to exercise their duties. We of course welcome this development.
- 8.3 However, as detailed previously, we remain convinced that in order to be effective in strengthening and improving the rights of children, the extent of the due regard duty needs to be widened and simplified so it applies to the exercise of all Ministerial functions. The issue of due regard would then be a criterion used to assess the legality of Ministerial decisions. Limiting the due regard duty to “decisions of a strategic nature” also limits Ministers’ accountability for taking the Convention into account.

9. Question 7. What are the potential barriers to implementing the provisions of the proposed Measure (if any) and does the proposed Measure take account of them?

- 9.1 The term “decision of strategic nature” is in our view unclear and confusing. It is not satisfactory to leave its clarification for a later consultation exercise, as this uncertainty undermines the purpose of the Measure itself.
- 9.2 Because of the lack of real potential to scrutinise and hold Ministers and officials to account over the due regard duty as defined in the current Measure, there is also a danger that a lack of political will to implement these provisions could jeopardise the whole process in the future.

10. Question 8. Are there any other comments you wish to make about specific sections of the proposed Measure?

- 10.1 NSPCC Cymru/Wales acknowledges the commitment within the proposals that the Measure reflects the need for children, young people, families and professionals not only to be aware of the Convention but also to understand it. We agree that this is the responsibility of the Welsh Assembly Government to ensure this.
- 10.2 We welcome the fact that Section 5 of the Measure has now been amended so that Ministers must take such steps as are appropriate to promote knowledge and understanding of the Convention.
- 10.3 We are however disappointed that the wording of Article 42 of the Convention has not been entirely replicated in the Measure. In this instance, we disagree with the Welsh Assembly Government's view that "it is not always appropriate to use the wording of international agreements in UK domestic law."⁹ We feel that the duty of Ministers could be more clearly set out.
- 10.4 We would also wish the Measure to acknowledge the role of NGOs and the wider civic society in promoting knowledge and understanding of the UNCRC.

⁹ Explanatory Memorandum, p23

11. Question 9. In responding to this consultation, we would be grateful if you could indicate how you have gathered views of children and young people in forming your response.

11.1 The UNCRC is considerably important for children and young people themselves. In a recent consultation exercise, the NSPCC asked a number of children and young people to rank the articles of the UNCRC in order of most important to least important. Article 42 was the most important for them:

State Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

11.2 The children and young people went on to give their own reasons behind the group's decision. One young person commented:

"Telling everyone-this has got to be top, because if the Government doesn't tell everyone they have rights then we don't have rights in the first place because we don't know about them!!"

11.3 This reinforces the points we have made in response to Question 8.

12.Question 10. What are the expected financial implications of the proposed Measure for your organisation, if any? In answering this question you may want to consider Part 2 of the Explanatory Memorandum (Regulatory Impact Assessment), which estimates the costs and benefits of the proposed Measure.

NSPCC Cymru/Wales does not anticipate any financial implications arising from the proposed Measure.

13. Question 11. What are your views in the proposed Measure for Welsh Ministers to make subordinate legislation? In particular do you consider it appropriate for Ministers to be able to amend the proposed Measure itself by subordinate legislation (by “Order” sections 6 and 8)? Is it appropriate to use subordinate legislation to apply the Convention to adults between 18 and 25 years or should that be done by a further Assembly Measure (section 7)?

13.1 NSPCC Cymru/Wales is happy with the provisions of Section 6, which allows Ministers to amend primary legislation by way of subordinate legislation if it is needed to give better effect to children’s rights. However, this is a significant power and should be subject to extensive scrutiny by the Assembly.

13.2 As it currently stands, Section 6 of the Measure only allows the Assembly to vote for or against an Order laid by Ministers. We feel that the Assembly should have the opportunity to also amend the Order in front of them, as this would allow for enhanced scrutiny.

13.3 Regarding the application of the Convention to 18 to 25 year olds, NSPCC Cymru/Wales would like to reiterate the view that this age group is a separate legal entity from children and should not be dealt with under the same provisions.

14. Question 12. Section 8(5) allows Welsh Ministers to amend the Measure where there has been a change to the Convention or protocols or where an additional protocol has been signed or agreed (but not ratified) by the UK Government. Section 8(7) requires the Welsh Ministers to make similar amendments to the Measure where changes or additions to the Convention or protocols have been ratified by the UK Government. Although these powers are to be exercised by Statutory Instrument (SI), neither the affirmative or negative resolution procedure will apply, Ministers will simply be required to lay the SI before the Assembly. Do you have any views on whether this is a reasonable way for Ministers to update the Measure or should there be more Assembly control over the process?

NSPCC Cymru sees no problem with the requirements of this Section, as Ministers will only be updating the Measure to take into account any new obligations imposed on the UK as a State Party to the Convention and its Protocols. However, there should be potential to give the Assembly the opportunity to consider any impact of these changes on devolved government.

Conclusion

NSPCC Cymru/Wales would welcome the proposed Measure subject to the changes detailed in the above response. If it is not amended, NSPCC Cymru/Wales fails to see how the rights of children in Wales will be better protected.

Although we oppose the principle of applying the Convention to 18 to 25 year olds, should the Measure go through in its current form, we would welcome the opportunity to be involved in future consultation exercises.

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