

# **Proposed Rights of Children and Young Persons (Wales) Measure**

## **Explanatory Memorandum**

This Explanatory Memorandum has been prepared by the Department for Children, Education, Lifelong Learning and Skills and is laid before the National Assembly for Wales.

It has been prepared and laid in accordance with Standing Order 23.18. The Explanatory Memorandum sets out the background to the policy objectives, the provisions and the scope of the proposed Rights of Children and Young Persons (Wales) Measure (“the proposed Measure”).

## **Member’s Declaration**

In my view the provisions of the proposed Rights of Children and Young Persons (Wales) Measure introduced by me on 14 June 2010 would be within the legislative competence of the National Assembly for Wales.

## **Huw Lewis AM**

Deputy Minister for Children

Assembly Member in charge of the proposed Measure.

14 June 2010

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## PART 1: Background and Purpose of the Proposed Measure

### 1. Description

1.1 The proposed Measure imposes a duty upon the Welsh Ministers and the First Minister to have *due* regard to the rights and obligations in the United Nations Convention on the Rights of the Child (UNCRC) and its Optional Protocols, when making decisions of a strategic nature about how to exercise functions which are exercisable by them. “Children” for the purposes of the UNCRC means those who are under 18.

1.2 The proposed Measure also makes related provision about:

- the preparation of a children’s scheme;
- reports about compliance with the duty to have due regard to the UNCRC and its Optional Protocols;
- promoting knowledge and understanding of the UNCRC and its Optional Protocols;
- amending legislation to give further or better effect to the UNCRC and its Optional Protocols; and
- consultation on the possible application of the proposed Measure to persons who have reached 18, but are not yet 25.

## 2. Legislative background

2.1. The provisions of the proposed Measure relate to Matter 15.6 in Part 1 of Schedule 5 to the Government of Wales Act 2006. The National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008 (S.I. 2008/3131) inserted that Matter into Field 15 (Social Welfare) in Schedule 5. The matter came into force on 11 December 2008:

### Matter 15.6

*Co-operation and arrangements to safeguard and promote the well-being of children or young persons.*

*This matter applies to co-operation by, and arrangements made by:-*

*(a) public authorities whose principal functions relate to any one or more of the fields in this part;*

*(b) police authorities and chief officers of police for police areas in Wales;*

*(c) the British Transport Police Authority;*

*(d) local probation boards for areas in Wales;*

*(e) the Secretary of State, in relation to the Secretary of State's functions under sections 2 and 3 of the Offender Management Act 2007, or any provider of probation services under arrangements made under section 3(2) of that Act;*

*(f) youth offending teams for areas in Wales;*

*(g) the governors of prisons, young offender institutions or secure training centres in Wales (or, in the case of contracted out prisons, young offender institutions or secure training centres or contracted out parts of such institutions, their directors);*

*(h) persons other than public authorities who are engaged in activities relating to the well-being of children or young persons.*

2.2. For the purposes of Matter 15.6 “child” means a person who has not attained the age of 18, and “young person” means a person who has attained the age of 18, but not the age of 25.

2.3 “Well-being” in Field 15, in relation to individual children and young persons, means well-being so far as relating to:

- a. health and emotional well-being,
- b. protection from harm and neglect,
- c. education, training and recreation,
- d. the contribution made by them to society,
- e. social and economic well-being,
- f. securing their rights.

2.4. The Welsh Ministers and the First Minister are public authorities falling within paragraph (a) of the Matter.

2.5 At the core of the proposed Measure are provisions that will require the Welsh Ministers to put in place arrangements so that when they and the First Minister make strategic decisions about how to exercise their functions, they will comply with a duty to have due regard to the United Nations Convention on the Rights of the Child (UNCRC)<sup>1</sup> and its Optional Protocols<sup>2</sup>.

2.6 The UNCRC (including its Optional Protocols) is an international agreement setting out rights of children and obligations which the State Parties to the agreement, owe towards them. The rights and obligations in the UNCRC all fall into one or more of the categories of well-being in Field 15. The purpose of the duty in the proposed Measure to have due regard to the UNCRC, necessitating the making of arrangements by the Welsh Ministers, to safeguard and promote the well-being of children as defined in Field 15.

2.7 The proposed Measure will require the Welsh Ministers to make a children's scheme, setting out their arrangements for complying with the due regard duty and for identifying those decisions which are decisions of a strategic nature about how to exercise functions. The scheme can also contain other matters and can require the Welsh Ministers to report on those other matters. The Welsh Ministers must obtain approval from the Assembly for the scheme before they can make it. The purpose of these provisions is to ensure that the arrangements in place to achieve compliance with the duty to have due regard to the UNCRC and its Optional Protocols are robust.

2.8 The proposed Measure will require the Welsh Ministers to report periodically on compliance with the duty to have due regard to the UNCRC and its Optional Protocols. The children's scheme may require them to also publish reports on the operation of the scheme or other matters mentioned in it.

2.9 Such reports may highlight circumstances which make it appropriate to amend legislation in ways which fall within devolved legislative competence, in order to give further and better effect to the UNCRC and its Optional Protocols. The proposed Measure will give the Welsh Ministers a power to make such amendments. The purpose of these provisions is so that if, as a result of applying their arrangements to comply with duty to have due regard to the UNCRC and its Optional Protocols, the Welsh Ministers identify that particular legislation should be amended in order to give further and better effect to the UNCRC and its Optional Protocols, that can be done. However, amendments can only be made if they are ones which would be within the Assembly's legislative competence.

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<sup>1</sup> <http://www2.ohchr.org/english/law/crc.htm>

<sup>2</sup> <http://www2.ohchr.org/english/law/crc-sale.htm> and <http://www2.ohchr.org/english/law/crc-conflict.htm>

2.10 Section 5 of the proposed Measure will in essence require the Welsh Ministers to make arrangements to promote knowledge and understanding of the UNCRC and its Optional Protocols amongst the public, including children. Knowledge and understanding among children, adults and organisations, of the UNCRC and its Optional Protocols, has a very important part to play in ensuring that the rights and obligations they contain are respected. The ultimate purpose of this provision is therefore to safeguard and promote the well-being of children.

2.11 The purpose of section 7 is to enable the arrangements put in place under this proposed Measure, to safeguard and promote the well-being of children, to be extended and/or adapted, should the Welsh Ministers conclude that it is appropriate to do so, so that they can also safeguard and promote the well-being of young persons (those aged 18 to 24). The Welsh Ministers will be required to consider and consult on the relevance of the UNCRC and its Optional Protocols to young people, and on the potential application of the Measure to them.

2.12 The provisions of the proposed Measure are within the legislative competence of the National Assembly for Wales.



- VII. Improving opportunities for all children and young people to play in safety;
- VIII. Increasing opportunities for all children and young people in Wales to participate in decision-making on issues which affect them;
- IX. Working to eliminate discrimination against children and young people with disabilities; improving their access to services & support;
- X. Working to make physical punishment of children and young people illegal in all situations;
- XI. Working to eliminate bullying including homophobic bullying;
- XII. Working to ensure that refugee and asylum seeking children and young people in Wales can claim their UNCRC and human rights;
- XIII. Working to eliminate discrimination/inequality against children and young people;
- XIV. Working to ensure that children and young people in the most deprived areas of Wales (e.g. Communities First areas) can enjoy all of their UNCRC and human rights;
- XV. Improving the transparency of budgeting for children and young people at Welsh Assembly Government level; and
- XVI. Working to ensure that children and young people from Wales in the Criminal Justice System can claim their UNCRC and human rights.

3.6 The subsequent Concluding Observations report from the UN Committee for the state party in 2008<sup>5</sup> highlighted a number of areas for further implementation of the Convention:

*“The Committee welcomes the fact that the Convention has been referred in the Seven Core Aims for children and young people in Wales.....however the Committee remains concerned that the Convention is not regularly used as a framework for the development of strategies.....and at the lack of an overarching policy to ensure the full realisation of principles, values and goals of the Convention”*  
(Concluding Observation no 14),

3.7 The UN Committee also made the following Concluding Observations:

*“the Committee remains concerned that the principles of the Convention are not duly taken into account in all pieces of legislation”*  
(Concluding Observation no 10),

*“and*

*recommends that steps are taken across the UK State Party including in the devolved administrations to incorporate the Convention into domestic law”* (Concluding Observation no 11).

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<sup>5</sup> <sup>1</sup> Concluding Observations from the UNCRC committee 2008  
<http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>

*“The Committee recommends that the State party continue to take measures to bring its legislation in line with the Convention. To this aim, the State party could take the opportunity given in this regard by the development of a Bill of Rights in Northern Ireland and a British Bill of Rights, and incorporate into them the principles and provisions of the Convention, e.g. by having a special section in these Bills devoted to child rights”*

Further Concluding Observations emphasise the importance of ensuring effective implementation of rights-based policy for children and young people.

*“The Committee encourages the State party to adopt comprehensive plans of action for the implementation of the Convention in all parts of the State party, in cooperation with the public and private sectors involved in the promotion and protection of children’s rights and based on a child right approach. In doing so, the State party should take into account the outcome document of the 2002 Special Session of the General Assembly of the United Nations “A world fit for children” and its Mid-Term Review in 2007. The Committee also recommends that the State party ensure adequate budget allocations and follow-up and evaluation mechanisms for the full implementation of the plans of action to regularly assess progress achieved and identify possible deficiencies. These plans should pay special attention to children belonging to the most vulnerable groups”.*

(Concluding Observations 15)

*“The Committee recommends that the State party encourage the active and systematic involvement of civil society, including NGOs and associations of children, in the promotion and implementation of children’s rights, including, inter alia, their participation in the planning stage of policies and cooperation projects, as well as in the follow-up to the concluding observations of the Committee and the preparation of the next periodic report”* (Concluding Observation 23 )

*“The Committee recommends that the State party further strengthen its efforts, to ensure that all of the provisions of the Convention are widely known and understood by adults and children alike ....”*(Concluding Observation 21)

3.8 In light of these recommendations, the Assembly Government is keen to build further on this progress and strengthen its commitment to the UNCRC requirements and its rights-based policy in respect of children and young people. The devolution of further powers to the National Assembly for Wales under the Government of Wales Act 2006<sup>6</sup> has enabled the Assembly Government to consider a legislative enshrinement of its approach to policy making for children and young people that has not previously been possible.

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<sup>6</sup> [http://www.opsi.gov.uk/acts/acts2006/en/ukpgaen\\_20060032\\_en\\_1](http://www.opsi.gov.uk/acts/acts2006/en/ukpgaen_20060032_en_1)

3.9 Recognising the potential of the new powers to further this policy approach and the legislative opportunities available, in July 2009 the First Minister's legislative statement to the Assembly, made the following commitment "*we intend to explore further the possibility of introducing a Measure to embed the principles of the United Nations Convention on the Rights of the Child into law on behalf of Welsh children. Those principles, which are expressed in our seven core aims, already form the basis of children's policy in Wales, and it is my intention that they should also provide the basis for further work to consolidate and reform the law affecting children and young people.*"

3.10 In addition, in response to the findings/comments of the UN Committee the Assembly Government's developed a 5 year rolling action plan "*Getting it Right 2009*"<sup>7</sup>. This was published in November 2009 and identifies 90 actions that the Welsh Assembly Government is undertaking or proposes to take to meet the Concluding Observations within devolved competence. In the first instance work will be taken forward in 16 key areas which have been agreed as priorities for Wales (see paragraphs 3.5 above).

3.11 Given that Assembly Government policy on the UNCRC and its Seven Core Aims has been in place for a number of years, a lot of work has already been done and the proposed Measure will provide further impetus to drive further forward in this area as part of its strategic approach to safeguarding and promoting the well-being of children and young people.

3.12 The Assembly Government considers the proposed Measure to be the central plank of its on-going commitment to progressive realisation of the UNCRC and its rights-based approach to policy development in respect of children and young people. The Regulatory Impact Assessment contained in Part 2 of this Explanatory Memorandum sets out options which were considered by the Assembly Government for maintaining or building on these commitments. The proposed Measure is Option 2 in the Regulatory Impact Assessment.

## **Objectives**

### ***The intended effect of the proposed Measure.***

3.13 Given the strength of the Assembly Government's commitment to the UNCRC and the most recent concluding observations of the UN Committee, it considers that this Measure presents an excellent opportunity for Wales to use its devolved legislative powers to strengthen its rights-based policy approaches for children and young persons, using the substantive rights contained within the UNCRC as a framework for future developments.

3.14 The proposed Measure will embed consideration of the requirements of the UNCRC and its Optional Protocols into strategic decision making by the

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<sup>7</sup> <http://new.wales.gov.uk/topics/childreneyoungpeople/publications/gettingitright2009/?lang=en>

Welsh Ministers and the First Minister across all areas of the Welsh Assembly Government's work. The objective is to ensure that those requirements will have an even greater prominence in respect of devolved matters in Wales than has so far been the case.

### **Section 1 - Duty to have due regard to the UNCRC and its Optional Protocols**

3.15 As the central mechanism for embedding this consideration, the proposed Measure will impose a duty upon the Welsh Ministers and the First Minister to have due regard to the rights and obligations in the UNCRC and its Optional Protocols, when making decisions of a strategic nature about how to exercise functions which are exercisable by them. The rights in the UNCRC and its Optional Protocols apply to persons who are under 18.

3.16. This central duty is coupled with a duty on the Welsh Ministers to make a children's scheme which must set out:

- the criteria which will be applied for identifying decisions which are decisions of a strategic nature, and
- the Welsh Ministers' arrangements for securing compliance with the central "due regard" duty.

3.17 The intended effect of the central duty is that whenever the Welsh Ministers or the First Minister are engaged in strategic planning about how to use their functions, they must have due regard to the requirements of the UNCRC and its Optional Protocols. The intention is that the duty will have the effect of enshrining the UNCRC and its Optional Protocols as part of the framework for developing the strategies (including strategies which make use of subordinate legislation powers or proposals for Assembly Measures) and policies of the Welsh Ministers and the First Minister.

3.18 The duty will mean that the Welsh Ministers and the First Minister will have to consider which rights and duties in the UNCRC and its Optional Protocols are relevant to the area or areas of strategic planning they are looking at, and consider whether and how they can use functions which are exercisable by them to give better effect to the rights and duties in the UNCRC. They will have to weigh up these considerations alongside other relevant factors.

3.19 The proposed Measure will impose duties on Assembly Government Ministers only, and no duties are imposed on other bodies. However, in the making of strategic decisions about, for example, making use of particular direction or guidance issuing powers, or particular subordinate legislation making powers, Ministers will be required to have due regard to the UNCRC and its Optional Protocols. Those powers may be ones which are exercisable in relation to the work of other bodies.

3.20 Therefore, depending on the nature of the powers in question and what Ministers choose to do with them, there is the capacity for compliance with the due regard duty to have an indirect effect on other bodies.

3.21 The UNCRC requirements for the purpose of this Measure are set out in the Schedule to the Measure which draws down the text of the substantive rights and obligations set out in the UNCRC and the Optional Protocols to it. Those rights and obligations are set out in articles 1 to 41 (i.e. Part I) of the UNCRC<sup>8</sup>; articles 1 to 7 of the Optional Protocol on the involvement of children in armed conflict and articles 1 to 10 of the Optional Protocol on the sale of children, child prostitution and child pornography.

3.22 The UK Government signed the Armed Conflict Optional Protocol on the 7 September 2000 and ratified it on 24 June 2003. The UK Government signed the Optional Protocol on Sale of Children etc. on the 7 September 2000 and ratified it on the 20 February 2009.

### **Sections 2 and 3 - The children's scheme**

3.23 The children's scheme referred to in paragraph 3.16 must be laid before and approved by the National Assembly for Wales in draft before the Welsh Ministers can make it. Before the draft is laid before the Assembly, the Welsh Ministers will have to publish the draft and consult publicly upon it. Their consultation must include children and young persons and the Children's Commissioner for Wales.

3.24 The purpose of the children's scheme is to ensure that there is transparency about the processes that are being followed to comply with the due regard duty, and that those processes are robust; they will be tested through consultation and will have to be acceptable to the Assembly. Our intention is that the arrangements will set out the training required across the Assembly Government and how compliance with the duty will be monitored and reported upon. This work will require a cross-Assembly Government approach to take into account the views of all departments in developing the most effective arrangements.

3.25 The scheme will also have to set out criteria so that there is transparency and clarity about the type of decisions which amount to decisions of a strategic nature. As they are part of the children's scheme, those criteria will also be subject to consultation and Assembly approval.

3.26 The Assembly Government is committed to ensuring that its approach to compliance with the due regard duty has wide support. It considers that in this context it is appropriate that the Assembly should have a direct input into this consideration and should be able to withhold its consent if it has legitimate concerns about the approach proposed.

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<sup>8</sup> <http://www2.ohchr.org/english/law/crc.htm>

3.27 The proposed Measure contains provision so that the children's scheme and changes to it are made having regard to reports, recommendations and other documents which emanate from the UN Committee.

3.28 Before the Welsh Ministers make, remake or revise the Scheme they will be required to consider and take into account:

(i) any report of the UN Committee made under article 44(5) of the UNCRC<sup>9</sup> – this means the Committee's bi-annual reports to the UN General Assembly;

(ii) any study undertaken under article 45(c) of the UNCRC<sup>10</sup> – this means studies requested by the Committee in a recommendation from the Committee to the UN General Assembly; and

(iii) any other reports, General Comments etc. issued by the Committee relating to implementations of the UNCRC or the Optional Protocols by the UK.

3.29 Within six months of the UN Committee making any recommendation or suggestion based on one of the UK's periodic reports to the Committee about progress in the UK to give effect to the rights in the UNCRC, the Welsh Ministers must consider whether to change their children's scheme in the light of that suggestion or recommendation.

3.30 Changes to the scheme will have to be published, consulted upon and approved by the Assembly.

3.31 The draft of the first children's scheme must be laid before the Assembly on or before 31 March 2012. The deadline for laying the draft has been chosen so that there is sufficient time to develop the arrangements to be set out in the scheme, publish and consult upon the draft scheme and then take steps to implement the arrangements, so that they can operate from when the Welsh Ministers make the scheme following Assembly approval. The Welsh Ministers have a power to make an order to bring into force the section of the proposed Measure that contains the due regard duty. The order will be made very shortly after the first scheme is made.

#### **Section 4 - Reports about compliance with the due regard duty**

3.32 The proposed Measure places a duty on the Welsh Ministers to report every five years on how they and the First Minister have complied with the due regard duty. The first report must be made no later than 31 January 2013. The deadline for the first report and the subsequent reporting intervals have been chosen to align with the intervals at which the UK reports to the UN

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<sup>9</sup> <http://www2.ohchr.org/english/law/crc.htm>

<sup>10</sup> <http://www2.ohchr.org/english/law/crc.htm>

Committee on progress in the UK. This would allow the contents of the Welsh Ministers' report to be included in the UK report.

3.33 However, the children's scheme may change the reporting interval for the Welsh Ministers' reports. This provision could be utilised if, for example, the intervals for the UK report to the UN Committee changed, or if it were considered that more frequent reports from the Welsh Ministers were appropriate.

3.34 The Welsh Ministers' reports will have to be published and laid before the Assembly.

## **Section 5 - Duty to promote knowledge and understanding of the UNCRC and its Optional Protocols**

3.35 The proposed Measure will place the Welsh Ministers under a duty to take appropriate steps to promote knowledge and understanding amongst the public (including children) of the UNCRC and its Optional Protocols. This duty is intended to give effect to obligations which are in article 42 of the UNCRC and article 6 (2) of the Optional Protocol on the involvement of children in armed conflict.

3.36. However, the duty goes further than those obligations because it requires steps to be taken to promote knowledge *and understanding* of the UNCRC and its Optional Protocols. Knowledge and understanding of the UNCRC and its Optional Protocols amongst children, adults and organisations has a very important part to play in ensuring that the rights and obligations they contain are respected.

3.37 It is clear from the evidence presented and the concluding observations of the UN Committee on the Rights of the Child (2008) that levels of knowledge and awareness of the UNCRC and its optional protocols are at a low baseline in Wales. This specific provision within the proposed Measure aims to address this deficit by placing a duty directly on Welsh Ministers.

## **Section 6 - Power to amend legislation**

3.38 The proposed Measure confers a power on the Welsh Ministers to make an Order amending other legislation or prerogative Instruments, if they conclude in a report which they issue under the proposed Measure, that it would be desirable to do so to give further or better effect to the rights and obligations in the UNCRC or its Optional Protocols. They can only make amendments that the Assembly would have legislative competence to make itself. They must consult such bodies and persons as they consider appropriate before they use the power.

## **Section 7 - Application of the Measure to young persons.**

3.39 The proposed Measure requires the Welsh Ministers to consider, and to set out in their first children's scheme their proposals for consulting on, whether and (if so), to what extent and with what amendments:

- a) the requirements of the UNCRC and its Optional Protocols may be relevant to persons who have reached 18 but are not yet 25; and
- b) the proposed Measure may be applied to that age group.

3.40 The proposed Measure requires the Welsh Ministers to publish a report of their conclusions on the above matters.

3.41 The proposed Measure confers a power on the Welsh Ministers to make an order applying the provisions of the proposed Measure to that age group, with modifications if appropriate. The Welsh Ministers will have to publish and consult on a draft of their order, and it will be subject to affirmative procedure in the Assembly.

3.42 When consulting on the matters mentioned in paragraph 3.39, the Welsh Ministers may also consult on any other matter relating to young persons that they consider appropriate.

3.43 The proposed Measure will underpin and further consolidate the distinct rights based approach to children and young people's policy taken in Wales since 2000 and set out in various Assembly Government policy documents including "Extending Entitlement: services and support for 11-25 year olds in Wales" 2002<sup>11</sup>; "Frameworks for Partnerships"<sup>12</sup> (2000) "Rights to Action"<sup>13</sup> 2004 "Stronger Partnerships for Better Outcomes"<sup>14</sup> (2006) and "Shared Planning for Better Outcomes"<sup>15</sup> (2007).

3.44 The Assembly Government's overarching policy approach for children and young people has been applied broadly to the 0-25 age group; defining

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<sup>11</sup>

[http://wales.gov.uk/topics/educationandskills/policy\\_strategy\\_and\\_planning/extendingentitlement/eepublications/supportyoungpeople.jsessionid=pMFYLyWQTwtGmHmJYQGwp1pk8VVcWTxjVsxc7B3n3QtP0KTGWWHZI-2044494535?lang=en#](http://wales.gov.uk/topics/educationandskills/policy_strategy_and_planning/extendingentitlement/eepublications/supportyoungpeople.jsessionid=pMFYLyWQTwtGmHmJYQGwp1pk8VVcWTxjVsxc7B3n3QtP0KTGWWHZI-2044494535?lang=en#)

<sup>12</sup>

<http://wales.gov.uk/topics/childrenyoungpeople/publications/childframeworkpartnership?lang=en>

<sup>13</sup> [wales.gov.uk/docs/dcells/publications/090119rightsinactionen.pdf](http://wales.gov.uk/docs/dcells/publications/090119rightsinactionen.pdf)

<sup>14</sup> <http://wales.gov.uk/publications/circular/circulars2006/1552968/?lang=en>

<sup>15</sup>

<http://wales.gov.uk/topics/educationandskills/publications/guidance/sharedplanningforbetteroutcomes?lang=en>

“children “ as 0-10 and “young people” as 11-25 year olds but not having attained the age of 26 (in line with the definition in s. 123(3) of the Learning and Skills Act 2000<sup>16</sup>). For the purpose of the proposed Measure “young person” is defined as those from 18 up to the age of 24 but not including those who are 25, as this is in line with the meaning of “young person” in Matter 15.6 in Part 1 of Schedule 5 to the Government of Wales Act 2006<sup>17</sup>.

3.45 Specific Welsh clauses within the Learning and Skills Act 2000 (sections 123-126) set out a duty relating to the provision of youth support services for young people aged 11-25. Subsequent statutory guidance under Extending Entitlement 2002 set out 10 entitlements for young people in this age range relating to the provision of youth support services. A youth support service is any service which in the opinion of Welsh Ministers directly or indirectly encourages, enables or assists young people aged 11-25 to participate effectively in education and training; take advantage of opportunities for employment and participate effectively and responsibly in the life of their communities. This provision fully recognises that young people have differential development and that young people in this age range may require additional support to assist them in the transition into adulthood.

3.46 Stronger Partnerships for Better Outcomes and Shared Planning for Better Outcomes have set out statutory guidance on Welsh provision in the Children Act 2004<sup>18</sup>. This has taken place in the context of local children and young people’s partnerships and planning for the 0-25 age range. This guidance states that:

*The Assembly Government has adopted the UNCRC as the foundation for all its dealings with children and young people. Local Authorities and their relevant partners should have regard to these rights in providing services<sup>19</sup>*

3.47 Having regard to their age, the nature of entitlements spanning the 11-25 age range in a Welsh policy context and the transition period into adulthood, it is considered appropriate to place a duty on the Welsh Ministers to consult on and consider how these requirements may be linked through this legislation into the current policy and planning context in Wales spanning the 0-25 age range. Following the completion of their consultation and consideration the Welsh Ministers must publish a report on their conclusions and lay the report before the Assembly. Ministers may then decide whether provision in the proposed Measure should be applied in relation to the 18-24 age group or to make any other provision appropriate to give effect in relation to that age group to the requirements of Part 1 of the UNCRC and the optional protocols, to draw the Measure into line with the policy context in Wales.

3.48 The power is a limited power and by taking it such provision can be made more quickly without the need to bring forward another Measure. The

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<sup>16</sup> [http://www.opsi.gov.uk/acts/acts2000/en/ukpgaen\\_20000021\\_en\\_1](http://www.opsi.gov.uk/acts/acts2000/en/ukpgaen_20000021_en_1)

<sup>17</sup> [http://www.opsi.gov.uk/acts/acts2006/en/ukpgaen\\_20060032\\_en\\_1](http://www.opsi.gov.uk/acts/acts2006/en/ukpgaen_20060032_en_1)

<sup>18</sup> [http://www.opsi.gov.uk/acts/acts2004/en/ukpgaen\\_20040031\\_en\\_1](http://www.opsi.gov.uk/acts/acts2004/en/ukpgaen_20040031_en_1)

<sup>19</sup> Shared Planning for Better Outcomes 2007 paragraph 1.16

requirement to consult before making such an order ensures that any Assembly Government proposal can be given full consideration (including by committees of the Assembly) before the order is made.

## **Section 8 – The Convention on the Rights of the Child**

3.49 Section 8(1) and (2) and the Schedule set out the substantive rights of and obligations towards children, which are contained in the UNCRC and its Optional Protocols. There are two reasons for setting these out in the Schedule to the proposed Measure.

3.50 Firstly, it aids transparency because the relevant provisions to which the Welsh Ministers and the First Minister must have due regard are set out in one accessible place. The proposed Measure provides a mechanism (see further below in the section of this Memorandum about powers to make subordinate legislation) to keep the Schedule in line with any change to the UNCRC's application to the UK.

3.51 Secondly, it is because there is an intention that the text of the rights and duties in the Schedule should become part of the domestic law applying in Wales for the purposes of the Measure. There is very little caselaw about the meaning of the obligations in the UNCRC and its Optional Protocols, because the UNCRC and its Optional Protocols are international agreements between states. They are enforceable by states in the International Court of Justice (ICJ), but individuals cannot take cases to the ICJ to enforce rights in the UNCRC or its Optional Protocols. Accordingly, there have been very few cases.

3.52 It is considered that if a court in the UK were interpreting a right or obligation in the UNCRC or its Optional Protocols, it would take into account the small body of ICJ caselaw and would interpret that right or obligation in the UK context no less favourably to a child than the ICJ's interpretation. However, our intention in including the text of the rights and obligations in the proposed Measure, and therefore making them part of domestic law, is to allow the courts to interpret the rights and obligations as part of domestic law in the particular context of the UK.

## 4. Consultation

4.1 The public consultation on the draft Measure began on 17 March 2010 and ran until the 7 May 2010. In addition to being publicly accessible in various formats, the consultation document, including a draft of the proposed Measure, was widely circulated to, or drawn to the attention of, stakeholders and Assembly Members of the National Assembly for Wales.

4.2 The Welsh Assembly Government also funded two consultation events in North and South Wales, on 27 April and 4 May 2010, which were co-ordinated by the Welsh Local Government Partnership Support Unit and involved facilitators from Funky Dragon (the children and young people's Assembly for Wales). These events were attended by over 150 children, young people and adults.

4.3 The consultation document was also made available via the Digital Consultation scheme which is being trialled by the Welsh Assembly Government. This allows members of the public to access the consultation and respond to the consultation document via digital television, mobile broadband and Nintendo Wii. This medium proved to be popular; records show that the website information on the consultation was accessed 2494 times.

4.4 A total of 75 responses were received, including reports from the two events held in North and South Wales. The full set of responses can be viewed at:  
<http://new.wales.gov.uk/consultations/education/rightsofchildrenyoung/?lang=en&status=closed>

4.5 The Children and Young People Committee of the National Assembly for Wales also considered the draft proposed Measure, took evidence and submitted its views to the Welsh Assembly Government.

### **Coverage of the Duty to have Due Regard to the UNCRC and its Optional Protocols**

4.6 The majority of respondents were opposed to the proposal that the duty to have due regard to the UNCRC and its Optional Protocols should apply only when the Welsh Ministers or First Minister were exercising (relevant) functions which were to be specified in the children's scheme. The view was that such an approach failed to recognise the "holistic" nature of the UNCRC and its Optional Protocols; that is, the indivisibility and interdependence of the rights and obligations which they contain.

4.7 A number of respondents also made the point that it is often the case that a number of government departments have a role to play in giving effect to any particular right or obligation. If the due regard duty applied only to certain functions, the Welsh Ministers and the First Minister would not be led by the legislation to think about using their functions "holistically".

4.8 A number of respondents also expressed the concern that applying the due regard duty only to the exercise of functions specified in the children's scheme may lead to disregard of children's rights in other areas of the Assembly Government's work.

4.9 The Welsh Assembly Government has recognised these concerns and has revised its proposal as a result. The proposed Measure will place a duty on the Welsh Ministers and the First Minister to have due regard to the UNCRC and its Optional Protocols when making decisions of a strategic nature about how to exercise functions which are exercisable by them.

4.10 This duty will pervade across all areas of the Welsh Assembly Government's work. Whenever the Welsh Ministers or the First Minister are engaged in strategic planning about how to use their functions, they must have due regard to the requirements of the UNCRC and its Optional Protocols. The intention is that the duty will have the effect of enshrining the UNCRC and its Optional Protocols as part of the framework for developing the strategies (including strategies which make use of subordinate legislation powers or proposals for Assembly Measures) and policies of the Welsh Ministers and the First Minister.

4.11 The Welsh Assembly Government has considered whether the due regard duty should apply to everything that the Welsh Assembly Government does. Its conclusion is that that would not be appropriate.

4.12 The Welsh Assembly Government is of the view that it would not be appropriate to have due regard to the UNCRC in decisions such as, for example, those of a quasi-judicial nature (e.g., a decision on a planning appeal), or a decision to dismiss a particular member of staff, or a decision about how to respond to a letter of complaint. The Welsh Assembly Government considers that it is through its strategic decisions that further and better effect can be given to the rights and obligations in the UNCRC and its Optional Protocols.

4.13 That is the reason why the revised proposed duty applies to *decisions of a strategic nature about how to exercise functions*, rather than to *the exercise of functions* (section 1 of the proposed Measure).

### **The Nature of the Due Regard Duty**

4.14 The majority of respondents welcomed the requirement for the Welsh Ministers and the First Minister to have "due regard" to the UNCRC and its Optional Protocols, although there were some respondents who were of the view that the duty should be stronger.

4.15 The Welsh Assembly Government remains of the view that the due regard duty is the most appropriate duty. The duty will mean that the Welsh Ministers and the First Minister will have to consider which rights and duties in the UNCRC and its Optional Protocols are relevant to the area or areas of strategic planning they are looking at, and consider whether and how they can use the functions exercisable by them to give better effect to the rights and obligations in the UNCRC and its Optional Protocols.

4.16 However, due regard requires that they will have to weigh up these considerations alongside other relevant factors. Our view is that giving better effect to the rights and obligations in the UNCRC and its Optional Protocols should not, as a matter of principle, take precedence over other considerations and duties to which the Welsh Ministers and the First Minister are subject. The due regard duty will mean that the Welsh Ministers and the First Minister will have to give them the weight that is appropriate in the particular circumstances before them.

4.17 A number of respondents said that they did not understand what the “due regard” duty required the Welsh Ministers and the First Minister to do. Some said that this should be set out expressly in the proposed Measure. “Due regard” is a concept which appears in other legislation (for example, discrimination and equality law) and has been considered by the courts. We do not consider it appropriate for the proposed Measure to include a definition of its meaning.

4.18 However, as part of their arrangements for securing compliance with the due regard duty, the Welsh Ministers will necessarily have to produce guidance for Welsh Assembly Government staff on how to have “due regard” to the UNCRC and its Optional Protocols. Being part of the Welsh Ministers’ arrangements, this guidance will need to be referred to in the children’s scheme.

### **The children’s scheme**

4.19 In the light of the consultation responses and the resulting change (outlined above), the children’s scheme will no longer set out functions to which the due regard duty will apply. It will however set out the Welsh Ministers’ arrangements for the purpose of securing compliance with the due regard duty and criteria for identifying decisions of a strategic nature about how to exercise functions. As before, it may also require the Welsh Ministers to publish additional reports and specify matters which must be included in reports.

4.20 Many respondents agreed that the Welsh Ministers should have to get agreement from the National Assembly for Wales before the children’s scheme could be made or changed. We have retained this very important requirement in the proposed Measure.

4.21 A number of respondents were of the view that the Welsh Assembly Government should engage with external stakeholders when developing the draft scheme before it went out to public consultation. Some respondents identified particular stakeholders who they thought should be involved.

4.22 The Welsh Assembly Government recognises that there will often be a benefit in engaging with external stakeholders when developing the draft scheme or making changes to it. However, it is of the view that the proposed Measure should not impose requirements about when and how this should take place. This will allow flexibility to make engagement arrangements which are appropriate to the particular circumstances of the time. For example, if the Welsh Ministers were making very minor changes to the arrangements which they had set out in the scheme, it may not be appropriate to spend time and incur expense engaging with external stakeholders.

4.23 The Welsh Ministers will be under a duty in any case to publish and consult on the draft scheme and changes to the draft scheme.

4.24 Some respondents were of the view that, in addition to the requirement in the proposed Measure to consult the Children's Commissioner for Wales, children and young persons and such other persons or bodies as the Welsh Ministers consider appropriate, the Welsh Ministers should be required to consult other specific stakeholders.

4.25 The Welsh Assembly Government is of the view that the proposed Measure should not be more prescriptive than it already is about who the Welsh Ministers should consult on the draft scheme or changes to it. Relevant stakeholders may change over time, and different consultees may be appropriate depending on what changes are proposed to the scheme. The proposed Measure needs to allow flexibility to accommodate this.

4.26 Some respondents were of the view that the proposed Measure should expressly provide that the Welsh Ministers must have regard to consultation responses about the draft children's scheme or changes to it. The view of the Welsh Assembly Government is that it is not necessary to make provision in the proposed Measure about this because the Welsh Ministers will be under a public law duty to consider the responses and have regard to them to decide whether to make changes to their draft scheme in response.

4.27 Some respondents were of the view that the proposed Measure should provide that stakeholders, the National Assembly for Wales or other persons may request revisions to the scheme. Our view is that there is nothing in law which prevents such requests being made as part of the normal business processes of stakeholders or others. Therefore it is not necessary to make express provision in the proposed Measure. For example, the National Assembly's Children and Young People Committee could decide to scrutinise how the arrangements in the scheme were operating and may issue a report recommending changes to the arrangements in the scheme as a result. The Welsh Ministers would in any case have to give proper consideration to recommendations from the Committee.

4.28 Some respondents were of the view that the proposed Measure should provide that particular events, for example the publication of research findings, should trigger consideration by the Welsh Ministers of whether the scheme should be revised. Our view is that the proposed Measure should not make provision about this because it would be very difficult to identify and define all events which might be relevant.

4.29 There is nothing in law to prevent anyone drawing a particular relevant event to the attention of the Welsh Ministers or the National Assembly. In the event that there was a very strong case for changing the scheme in the light of that event, the National Assembly for Wales' Children and Young People Committee could consider the matter and make recommendations to the Welsh Ministers.

4.30 The proposed Measure already makes provision so that, within six months of the UN Committee on the Rights of the Child making a suggestion or recommendation in response to one of the UK's periodic reports to the Committee, the Welsh Ministers must consider whether to change the scheme.

4.31 Some respondents were of the view that this provision should require the Welsh Ministers to do something more than just consider whether to change the scheme, such as publish an explanation of what action they were going to take or reasons why they were not going to take action. The Welsh Assembly Government's view is that this would not be an appropriate provision to include in the proposed Measure. It is open to the National Assembly for Wales to scrutinise how the Welsh Ministers have responded to a suggestion or recommendation of the UN Committee and to call for evidence.

4.32 A number of respondents felt that the date by which the draft of the first children's scheme had to be laid before the National Assembly for Wales (1 November 2011) was the right date. Others felt that the deadline was too short and overly optimistic. As the revised proposal is that the due regard duty should apply to decisions of a strategic nature by the Welsh Ministers and the First Minister about how to exercise functions, (therefore pervading across all areas of the Welsh Assembly Government's work), we have changed the date to 31 March 2012, which we feel is a more realistic date (section 3(6) of the proposed Measure).

4.33 The due regard duty will be commenced by order shortly after the date that the children's scheme is made. The deadline of 31 March 2012 for laying the scheme will allow time for the scheme to be developed and consulted upon, and for the arrangements set out in the scheme to be put in place across the Welsh Assembly Government so that the due regard duty can be complied with shortly after the scheme is made.

### **Duty to promote knowledge and understanding of the UNCRC**

4.34 A significant number of respondents agreed that the Welsh Ministers should do more to assist people (including children and young people) to know more about and understand the UNCRC and its Optional Protocols.

4.35 The duty in the proposed Measure has been drafted to give effect to the duty in article 42 of the UNCRC, but to go further than that duty because it requires the Welsh Ministers to take steps to promote *understanding* and knowledge of the UNCRC and its Optional Protocols, rather than just knowledge. A number of respondents were of the view that the provision in section 5 of the proposed Measure should use the wording of article 42.

4.36 The view of the Welsh Assembly Government is that it is not always appropriate to use the wording of international agreements in UK domestic law. UK domestic law is drafted with the aim of being clear and not using words and phrases unnecessarily. For example, article 42 uses the term “*active steps*”. As it is not possible to take an “inactive” step, section 5 refers only to “steps”.

4.37 However, in response to consultation responses, the wording of section 5 has been amended to make it clear that the Welsh Ministers must take steps, which *are appropriate* to promote knowledge and understanding of the UNCRC and its Optional Protocols (section 5 of the proposed Measure).

### **Reports by the Welsh Ministers on compliance with the due regard duty**

4.38 Some respondents were of the view that the Welsh Ministers should be required to report more frequently than every five years on compliance with the due regard duty.

4.39 However, the main purpose in choosing this reporting interval is so it will align with the intervals at which the UK reports to the UN Committee. The children’s scheme is a mechanism through which the Welsh Ministers can be required to produce reports at different intervals. Our view is that no change should be made to the reporting interval set out in the proposed Measure and that additional reporting requirements should be left to the scheme. Furthermore, at any time the National Assembly for Wales can decide to scrutinise the operation of the scheme and call for evidence.

### **Functions of the Children’s Commissioner for Wales and the Public Services Ombudsman for Wales**

4.40 Some respondents were unclear about the role that the Children’s Commissioner for Wales and the Public Services Ombudsman for Wales would have in scrutinising compliance with the due regard duty. Some were of the view that the proposed Measure should make explicit provision about this. The view of the Welsh Assembly Government is that the Children’s Commissioner for Wales is able to use functions which they already have to

consider this matter and that it is not necessary for the proposed Measure to make further provision.

4.41 As the duty will now apply to decisions of a strategic nature about how to exercise functions, the Welsh Assembly Government is of the view that considering compliance with the duty is now outside the remit and purpose of the office of the Public Services Ombudsman for Wales. We do not consider that it would be appropriate for the proposed Measure to confer functions on the Ombudsman in relation to compliance with the due regard duty, as we do not consider that such functions would sit well with the main purpose and remit of their office.

### **Application of the proposed Measure to young persons**

4.42 There were a range of views about the provisions in section 7 of the proposed Measure, which require the Welsh Ministers to consider and consult on the possible application of the Measure to persons aged over 18 but under 25. Some respondents felt that as the UNCRC and its Optional Protocols were designed specifically for the protection of children, it was not appropriate to include the provision in the proposed Measure. Some felt that it might divert focus and effort away from achieving for children the rights and obligations in the UNCRC and its Optional Protocols. They felt that issues relating to this older age group should be dealt with under a separate process and should not delay the proposed Measure.

4.43 However, other respondents felt that the relevance of the UNCRC and its Optional Protocols to those over 18 but under 25 should be considered, particularly as some of that age group required additional support and services linked to their age. Responses also highlighted that failure to consider this issue could fragment the current policy position in Wales and local planning arrangements.

4.44 The view of the Welsh Assembly Government is that the provisions should be retained in the proposed Measure as it will result in consultation on and consideration of the issue in more detail than has been possible in the consultation on the draft proposed Measure. Given that the children's scheme will set out proposals for the consultation on this issue it will in no way delay the proposed Measure.

### **Documents available in formats for children and young people**

4.45 Some respondents were of the view that the children's scheme and the Welsh Ministers' reports about compliance with the due regard duty should be required to be available in language which children and young people can understand.

4.46 The Welsh Assembly Government is of the view that it would be very difficult to make that a legislative requirement, because different age groups and different individuals within those age groups have very different levels of skill in reading and comprehension. It would be very difficult to formulate a duty which made it clear what the Welsh Ministers were required to do.

4.47 The Welsh Ministers are committed to providing versions of documents which are aimed at children and young people wherever appropriate, but we think that the matter is best dealt with as a policy commitment.

4.48 With regard to consultation on the draft children's scheme or changes to it, as the Welsh Ministers are under a duty to consult with children and young people, they necessarily have to undertake that consultation in a way that children and young people can understand.

#### **Power to amend legislation following a Welsh Ministers' report**

4.49 The proposed Measure gives the Welsh Ministers a power to make an order amending legislation if they conclude in one of their reports that it would be desirable to do so, to give further or better effect to the rights and obligations in the UNCRC and its Optional Protocols. The Welsh Ministers can only use the power to make amendments which the National Assembly for Wales would have legislative competence to make itself. Orders made under this power are subject to affirmative procedure in the Assembly, so that the Assembly would have to approve any order in draft before the Welsh Ministers could make it.

4.50 Many respondents were of the view that these provisions were appropriate and would be of benefit, although some thought that the power should not be given to the Welsh Ministers, meaning that it would be left to a future Assembly Measure to make any amendments to legislation. Some respondents were of the view that consideration should be given to making orders under this power subject to an enhanced affirmative procedure.

4.51 The view of the Welsh Assembly Government is that it is appropriate to retain these provisions in the proposed Measure because it will enable amendments to be made to legislation relatively quickly, without having to wait for an appropriate Measure in a future legislative programme. We consider that affirmative procedure is appropriate for orders under this power because it balances the need for Assembly control over what amendments are made, with the ability for amendments to be made relatively quickly if needed. An enhanced procedure would elongate the timescale for making amendments.

## 5. Power to make subordinate legislation

5.1 The proposed Measure contains provisions to make subordinate legislation. Table 1 below sets out in relation to each provision:

- the person upon whom, or the body upon which, the power is *conferred*;
- the form in which the power is to be exercised;
- the appropriateness of the delegated power;
- the applied procedure (affirmative, negative, no procedure) if any; and
- an explanation for any Assembly procedures that apply.

**Table 1: Summary of powers to make subordinate legislation**

Section	Power conferred on	Form	Appropriateness	Procedure	Reason for Procedure
6(2)	Welsh Ministers	Order	Allows amendments to be made relatively quickly to legislation to give further or better effect to UNCRC and its Optional Protocols	Affirmative	Achieves balance between ability to make amendments quickly if needed, and giving Assembly control over whether proposed amendments are made
7(6)	Welsh Ministers	Order	Allows provisions of Measure to be applied to young persons (18 to 24 year olds) relatively quickly	Affirmative	Achieves balance between ability to make amendments quickly if needed, and giving Assembly control over whether proposed amendments are made
8(5)	Welsh Ministers	Order	Requirements of UNCRC and its Optional Protocols are set out in Measure - power allows	To be laid before Assembly after being made by Welsh	As Assembly does not have control over how the UNCRC applies to the UK it would not

			amendments to Measure to keep it in line with amendments to UNCRC or Protocols which UK has agreed	Ministers, but Assembly cannot resolve to annul	be appropriate for the Assembly to be able to prevent by resolution the Measure being updated in line with changes to UNCRC
8(7)	Welsh Ministers	Order	Requirements of UNCRC and its Optional Protocols are set out in Measure – duty to make amendments to Measure to keep it in line with amendments to UNCRC or Protocols which UK has ratified	To be laid before Assembly after being made by Welsh Ministers, but Assembly cannot resolve to annul.	As Assembly does not have control over how the UNCRC applies to the UK it would not be appropriate for the Assembly to be able to prevent by resolution the Measure being updated in line with changes to UNCRC
8(8)	Welsh Ministers	Order	Declarations and Reservations to UNCRC and Protocols are to be set out in Measure – duty to keep it in line with amendments to declarations or reservations	To be laid before Assembly after being made by Welsh Ministers, but Assembly cannot resolve to annul.	As Assembly does not have control over how the UNCRC applies to the UK it would not be appropriate for the Assembly to be able to prevent by resolution the Measure being updated in line with changes to UNCRC
11(1)	Welsh Ministers	Order	Power to commence section 1 containing the due regard duty, which should be exercised at the	None	It is usual for commencement orders not to be subject to any procedure

			same time as or shortly after children's scheme is made		
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**Section 6 – Amending legislation to give further or better effect to the UNCRC and its Optional Protocols**

5.2 Section 6 of the Measure contains a provision for Welsh Ministers by subordinate legislation (order) to modify legislation or prerogative Instruments if the amendment would be within the devolved legislative competence of the Assembly.

5.3 This power applies if as a result of any report under the Measure the Welsh Ministers conclude that it would be desirable for the purpose of giving further or better effect to the UNCRC requirements to amend any such enactment or prerogative instrument. This would include Acts of Parliament, Assembly Measures and subordinate legislation. Prerogative Instruments would include such things as Royal Charters and Royal Warrants.

5.4 The Statutory Instrument will be subject to the affirmative procedure in the Assembly. This will mean that the Welsh Ministers will lay a draft of the Statutory Instrument containing the proposed changes before the Assembly and will not be able to make the Instrument unless the Assembly approves the draft. Before laying a draft the Welsh Ministers must consult such persons as they consider appropriate. The Welsh Ministers may conclude that it would be appropriate to consult on a draft of the Instrument itself.

5.5 The power can be seen as part of the package of, or as related to the package of the new arrangements being put in place in the Measure to give further effect to the UNCRC. The intention is to move this agenda forward. It might be considered therefore easier and faster to move such amendments forward by conferring this power on the Welsh Ministers (subject to consultation and approval by the Assembly) rather than, for example, on each occasion there is a need to amend an Act or a Measure to have to bring forward a proposed Measure and take it through all of its Assembly proceedings.

5.6 However, because the power could potentially be used for a wide range of amendments, it is considered appropriate that the Assembly should have the final decision on whether the Welsh Ministers can make the amendments they propose. The affirmative procedure, as opposed to the negative procedure or any enhanced affirmative procedure, is considered to strike the right balance between giving the Assembly control over whether proposed amendments are made and allowing amendments to be made relatively quickly.

## **Section 7 – Applying the Measure to young persons**

5.7 Section 7(6) of the Measure contains a provision for Welsh Ministers by subordinate legislation (order) to apply any provisions of the Measure or the UNCRC requirements in relation to young persons with appropriate modifications. Young persons for this purpose are persons who have reached 18 but are not yet 25. The Statutory Instrument will be subject to the affirmative procedure in the Assembly. This will mean that the Welsh Ministers will lay a draft of the Statutory Instrument containing the proposed changes before the Assembly and will not be able to make the Instrument unless the Assembly approves the draft. Before exercising this power the Welsh Ministers must publish a draft of the order and consult as they consider appropriate on the draft.

5.8 It is considered appropriate to give this power to the Welsh Ministers so that, following consultation, if they conclude it is appropriate to do so, they can extend some or all of the provision in the Measure to young persons, or make alternative provision, without having to wait for an appropriate Assembly Measure.

5.9 However, because the power could potentially be used to do a wide range of different things, including making alternative provision to give better effect to the requirements of the UNCRC and its Optional Protocols in relation to young persons, it is considered appropriate that the Assembly should have the final decision on whether the Welsh Ministers can make the provision they propose. The affirmative procedure, as opposed to the negative procedure or any enhanced affirmative procedure, is considered to strike the right balance between giving the Assembly control over whether proposed amendments are made and allowing amendments to be made relatively quickly.

## **Section 8 - Amending the Measure and Schedule to keep them in line with the UNCRC's application to the UK.**

5.10 Section 8(5) of the Measure contains a power for Welsh Ministers by subordinate legislation (order) to make appropriate amendments to the Measure to reflect any amendment made to the UNCRC or its Optional Protocols, to reflect any additional Optional Protocol that may be made and to reflect any UK declaration or reservation made in respect of any of those matters. This power applies where the UK has signed or otherwise indicated its agreement to those matters but has not, at that point in time, formally ratified those matters. The Welsh Assembly Government is of the view that it should be possible to amend the Measure to reflect those matters once the UK has indicated its agreement to such matters on the international plane. The order will be made by Statutory Instrument. It must be laid before the Assembly once made but is not subject to any Assembly procedure. Therefore, it cannot be annulled by the Assembly. The reason for this is that the order will merely be updating the text of the proposed Measure in the light of changes to UNCRC and Optional Protocols etc. on the international plane. It is therefore a very limited power. A similar power appears in the Human

Rights Act 1998 (section 14 and 15) and the Statutory Instruments in those cases are not subject to any parliamentary procedure. Given that the Welsh Ministers' power to update the Measure (principally the Schedule to the Measure) to reflect such things as amendments to the UNCRC or to its Optional Protocols and to reflect new Protocols is a power that is only triggered once the UK has signed the relevant instrument(s) the Assembly Government considers that it is appropriate that the Instrument amending the Measure needs only be laid before the Assembly once it is made.

5.11 Section 8(7) of the Measure contains provision so that the Welsh Ministers must by subordinate legislation (order) make those amendments e.g. to reflect any amendment made to the UNCRC or its Optional Protocols, to reflect any additional Optional Protocol that may be made and to reflect any UK declaration or reservation made in respect of those matters. This applies where the UK has formally ratified those matters and the Assembly Government is of the view that in such a case the Welsh Ministers should be required, accordingly, to update the Measure. Again, as stated above, the order will be required to be laid before the Assembly once made but will not be subject to any Assembly procedure. Therefore, it cannot be annulled by the Assembly.

5.12 Section 8(8) of the Measure contains a provision that states that Welsh Ministers must by subordinate legislation (order) make amendments to Part 3 of the Schedule (declarations and reservations) as they consider appropriate to reflect any amendment to or withdrawal (in whole or part) of any declaration or reservation for the time being set out in that Part of the Schedule. Part 3 of the Schedule will reflect any declaration or reservation that the UK has made on the international plane in respect of the UNCRC or any Optional Protocol to it. The Assembly Government is of the view that if the UK amends or withdraws any such declaration or reservation that must be reflected in the proposed Measure and hence the requirement on Welsh Ministers in section 8(8). The Statutory Instrument will be laid before the Assembly once made but will not be subject to any procedure in the Assembly. Therefore, it cannot be annulled by the Assembly.

5.13 The powers in section 8 to amend the proposed Measure and the Schedule are limited to making amendments to reflect changes to the way in which the UNCRC and Optional Protocols apply to the UK. It is necessary to be able to make changes to the body of the proposed Measure as well as the Schedule because, for example, section 1 refers specifically to the two current Optional Protocols to the UNCRC. If a new protocol was agreed by the UK, reference to that new protocol would have to be inserted in section 1.

5.14 We consider that the proposed Measure's provision that the Welsh Ministers *may make such amendments as they consider appropriate* to reflect changes to the way in which the UNCRC and Optional Protocols apply to the UK, does not allow the Welsh Ministers to do anything beyond faithfully reflecting those changes.

5.15 The purpose for which these powers may be used is very clear and the appropriate mechanism for challenging an apparent ultra vires use of them would be judicial review. The National Assembly for Wales does not have control over the way in which the UNCRC and its Optional Protocols apply to the UK. Accordingly, we consider that it would not be appropriate for a resolution of the National Assembly to be able to prevent the Measure being changed to reflect changes to the UNCRC application to the UK. Therefore, orders made under section 8 are only to be laid before the Assembly rather than being subject to any Assembly procedure. This means that they cannot be annulled by the Assembly.

### **Section 11 – Commencement**

5.16 The proposed Measure gives the Welsh Ministers a power to commence section 1, which contains the due regard duty. It would be expected that this power would be exercised at the same time or very shortly after the children's scheme is made.

## **PART 2 – REGULATORY IMPACT ASSESSMENT**

### **1. Options**

1.1 This Chapter presents four different options in relation to the policy objectives of the proposed Measure (see chapter 3 of Part 1 of the document) and primarily the main objective to embed the UNCRC in Welsh law. Each of the options is analysed in terms of how far they would achieve the Welsh Assembly Government's objectives, in strengthening its commitment to the UNCRC requirements and its rights-based policy in respect of children and young people, along with the associated risks of each. The costs and benefits of each option are set out in Chapter 2 of this Regulatory Impact Assessment. The proposed Measure is Option 2.

1.2 These options are:

- Option 1 – Do nothing

Three Legislative Options

- Option 2 – Introduce a Measure to place a duty on the Welsh Ministers (and the First Minister) to have due regard to the UNCRC when taking decisions of a strategic nature about how to exercise their functions.
- Option 3 – Introduce a Measure to require the Welsh Ministers and the First Minister to have due regard to the UNCRC when exercising (at least initially) a limited range of Ministerial functions (“the relevant functions approach”).
- Option 4 – Introduce a Measure to apply a general duty to have due regard to the UNCRC to the Welsh Assembly Government and devolved bodies in Wales.

#### **Option 1 – Do nothing**

1.3 Since a Plenary resolution in January 2004 the Welsh Assembly Government's policy has been to underpin all its policy for children and young people with the UN Convention on Rights of the Child. Its mechanism for doing so has been via Seven Core Aims for children and young people, which have been used as the basis for planning and securing delivery of services and support for children and young people aged 0-25 at Wales-wide and local

levels. However the Seven Core Aims are an interpretation and summary of the UNCRC only. This means the focus has been the Seven Core Aims rather than each of the 41 substantive articles individually or the Convention holistically. In their Concluding Observations 2008, the UNCRC Committee commented that an unintended consequence of the Seven Core Aims had been to “mask” the UNCRC itself, resulting in low levels of awareness amongst children, young people, families and professionals who work with them.

1.4 The “Do nothing” option in this context would mean continuing with the Welsh Assembly Government’s existing policy commitment as opposed to enshrining that commitment in legislative form. A continuation of the existing approach to policy would fail to strengthen and build the understanding of the Convention and its articles within a Welsh Assembly Government policy context. It would fail to utilise an opportunity to further a progressive, rights-based approach to policy making (rather than a more traditional welfare/needs-based one) and would not strengthen or maintain momentum for progressing implementation of children and young people’s rights in general. The Welsh Assembly Government now has devolved responsibility in many areas, which have particular relevance to the implementation of rights within the UNCRC, and an opportunity to reinforce their existing policy approach with legislation.

1.5 Doing nothing would mean that the existing ad hoc and, to a certain extent, piecemeal approach to progressing implementation of the Convention would continue. There would be no demonstrable consistent approach to the uniform progressive realisation of Convention rights for children and young people in Wales. The Welsh Assembly Government’s ability to evidence a consistent approach to monitoring and evaluation of implementation of the UNCRC, supported by evidence of the impact of such a policy on children and young people’s wellbeing, would be reduced.

1.6 The Concluding Observations from the UN Committee in 2008 (following their examination of the progress of the UK state party) highlighted that they would like to see the Devolved Administrations within the UK using their new *legislative powers* to progress implementation of the UNCRC by placing it on a legislative footing. A do nothing approach would not respond positively to the Concluding Observations of the UNCRC Committee, because it would mean that further implementation of the rights and obligations in the UNCRC would rely on a policy commitment by the Welsh Assembly Government rather than being placed on a legislative footing.

### **Three Legislative Options**

1.7 The three options, detailed in paragraphs 1.9 to 1.22 below, outline using a legislative approach to underpin this policy and explore how a duty to have due regard the UNCRC may be applied and with whom that duty should lie. In using a legislative vehicle the aim is to ensure that there is legislation that

requires consideration of the UNCRC and that a mandatory approach is adopted.

1.8 In considering the proposal for a Measure the Welsh Ministers must ensure that the provisions of the proposed Measure are within the relevant legislative competence of the Assembly. In addition the breadth and depth of the duty were key considerations bearing in mind the impact of the duty on the Welsh Assembly Government processes and systems. This in turn affects the deliverability of a duty, taking into account who would be involved in the discharge of the duty and the level of expertise required.

1.9 All three legislative options consider a duty of due regard, as defined in section 1 of the Explanatory Memorandum

- Option 2 places that duty on the Welsh Ministers (and the First Minister) in reaching strategic decisions about how to exercise their functions;
- Option 3 places that duty on the Welsh Ministers (and the First Minister) in relation to the exercise of only those of their functions that are 'relevant functions' – i.e. those set out in a scheme; and
- Option 4 places that duty on the Welsh Ministers, the First Minister and devolved bodies in Wales (e.g. delivery agents) in relation to the exercise of all of their functions.

**Option 2 – Introduce a Measure to place a duty on Welsh Ministers (and the First Minister) to have due regard to the UNCRC when taking decisions of a strategic nature about how to exercise their functions.**

1.10 This option (this is the proposed Measure) places a direct duty on the Welsh Ministers to have due regard to the UNCRC in relation to all decisions of a strategic nature about how functions are to be exercised and so ensures a duty of significant breadth. It is intended to create a new obligation on the Welsh Assembly Government Ministers to have due regard to the substantive rights within the UNCRC whenever they take strategic decisions about how to exercise functions. In so doing this option captures all the Welsh Ministers' areas of responsibility at the strategic level.

1.11 This approach would require due consideration of the UNCRC's substantive rights and obligations rather than, as previously, under the current policy considering only the summary interpretation of the UNCRC via the Seven Core Aims. This duty will not confer any new rights directly on children and young people. It will require Ministers to give proper consideration in the circumstances to these rights and obligations, when taking such strategic decisions. Therefore the potential impact on all policy areas is greater than an approach that requires due regard to the UNCRC only in respect of specified functions. The Welsh Assembly Government is of the view that this approach has a stronger and broader focus on furthering the achievement of these rights for children and young people in Wales.

1.12 This option will require a holistic approach to consideration of all the substantive rights and obligations in the UNCRC (so far as they are relevant in any particular case) in strategic decision making, in the context of children and young people insofar as they may be affected by any strategic decision taken right across the Welsh Assembly Government. In order that the duty may be discharged effectively a programme of training and development will be necessary, to ensure the necessary expertise is built up within and across the Welsh Assembly Government. Raising the level of knowledge and expertise in relation to the UNCRC within the Welsh Assembly Government and in turn how this informs Ministerial strategic decisions, is intended to improve the approach and ultimately the benefits achieved for children and young people in Wales: enhance their wellbeing and generally improve social capital and economic prosperity within Wales.

1.13 It is acknowledged that there are some risks to this approach in the short-term if inadequate time and resource are secured to carry out the necessary preparatory work and put in place the appropriate processes. It will be necessary to ensure that staff are trained to the required standard and that detailed consideration is given to developing the scheme and its implementation to ensure that decisions made by the Welsh Ministers and the First Minister in discharging the duty of due regard, are as legally robust as possible so as to minimise the risk of legal challenge (via judicial review).

1.14 Applying the duty to all strategic decision making will support cross-cutting policy development and have advantages over Option 3, where the duty would only bite on 'relevant' functions that have to be identified in a scheme. This was a strong theme that came out of the responses to the consultation on the proposed Measure, where concerns were expressed at the lack of transparency and pervasive application of the UNCRC, and the potential complexity in clarifying which functions were subject to the duty.

**Option 3 – Introduce a Measure to require Welsh Ministers and the First Minister to have due regard to the UNCRC when exercising (at least initially) a limited range of Ministerial functions (“the relevant functions approach”)**

1.15 This was outlined in the consultation document on the draft Measure. Option 3 would not specify on the face of the proposed Measure which functions would be subject to the due regard duty. It would make provision for the Welsh Ministers to decide following a public consultation and following agreement from the National Assembly for Wales, which functions would be subject to the duty by including those in a children's scheme (“relevant functions”). That approach had potential to limit the functions on which the duty would bite, although it also had the potential that all functions could be included in the scheme as relevant functions, which would then need to be agreed by the Assembly following consultation. As the scheme would be reviewed on (at least) a five-yearly basis, additional functions could be added to the scheme as a result of a review.

1.16 This Option was developed to enable a staged-approach to the application of the duty, which was considered to have a number of advantages: it would provide the ability to focus on particular policy areas, for example where most progress could be made bearing in mind the findings of the UNCRC Concluding Observations in 2008, where specific areas of policy were highlighted. It also provided a phased implementation reducing the requirement for training, implementation and monitoring to functions included in the scheme. This approach also lessened but did not rule out the risks of legal challenges on the Welsh Ministers and the First Minister. As such this option had benefits from a cost and deliverability perspective.

1.17 The draft of the proposed Measure that was issued for consultation was based on this option of meeting the requirements of the UNCRC but by progressively moving over a longer period to having all functions in the scheme, whilst recognising that the Welsh Ministers and the First Minister exercise over an estimated 10,000 statutory functions.

1.18 Although this Option has a number of advantages in deliverability, the complexity in identifying the relevant functions and ensuring that cross-cutting policy was considered was an issue that had potential to offset the advantages from an administrative and transparency perspective. The responses to the consultation on this option raised a number of concerns, such as lack of transparency and the difficulty in applying the due regard duty effectively to areas of cross cutting policy work such as tackling poverty. Concerns were also expressed that the relevant functions approach would lead to a lack of joined up thinking within the Welsh Assembly Government, as to how to address the rights and obligations of the UNCRC across all relevant policy areas. Whilst the Welsh Assembly Government remains of the view that that approach did build in an ability to approach matters on a cross-cutting basis the Welsh Assembly Government has taken on board the weight and strength of consultation responses where concerns about the pervasiveness of the due regard duty were raised.

#### **Option 4 – Introduce a Measure to apply a general duty to have due regard to the UNCRC to the Welsh Assembly Government and devolved bodies in Wales**

1.19 This option would introduce legislation which would require the Welsh Ministers (and the First Minister) and other devolved bodies in Wales (e.g. local authorities and others set out in Matter 15.6 Field 15 of Part 1 of Schedule 5 to the Government of Wales Act 2006), to have due regard to the UNCRC in the exercise of all their functions.

1.20 Option 4 is the option with potential for the most impact and would ensure that the due regard duty applied to all of the functions from the date when the proposed Measure became law. It would mean that in order to avoid successful legal challenges all decisions and policies taken or made in the exercise of those functions, would need to comply with that duty so that due regard to UNCRC could be demonstrated in each case. This duty would apply the same requirement on public bodies as on the Welsh Ministers.

1.21 As this duty would be pervasive and include delivery agents, for example Local Authorities, such a significant legislative step merits careful consideration. At this present time placing such a duty on delivery agents has potential to create unknown and currently uncosted burdens, particularly on devolved bodies (e.g. delivery agents), who would need to consider the UNCRC in all aspects of the services that they currently provide and whether they give appropriate consideration and weight to the UNCRC requirements.

1.22 The public consultation did not result in any significant call for the due regard duty to extend beyond applying to the Welsh Ministers and the First Minister at this point. The Welsh Assembly Government's approach has been to limit the application of that duty in this proposed Measure to the exercise of the Welsh Assembly Government ministerial functions, because it is through the exercise of those functions that service delivery through devolved bodies in Wales is largely achieved. The Welsh Assembly Government thinks, therefore, that the focus of the due regard duty should therefore be on the Welsh Assembly Government ministerial functions.

## **2. Costs and benefits**

### **Option 1 – Do nothing**

2.1 Option 1 maintains the status quo of the current WAG policy position of considering the Seven Core Aims. As such it involves no additional cost to the Welsh Assembly Government or any other external organisation. There is no requirement to set up administrative and compliance procedures, although the Welsh Ministers may choose to do so if they considered it appropriate.

2.2 Without a statutory duty, some progress would continue to be made in meeting the objectives of some of the articles of the UNCRC, rather than all of the substantive rights contained within it. This progress however, would be dependent upon the commitment of the Welsh Assembly Government and the level of knowledge, priority and resources available at any particular time. Therefore progress would be limited and potentially the implementation could be patchy across WAG policy areas. Without putting additional monitoring systems in place progress would be difficult to quantify.

2.3 Without a statutory basis, however, the policy will continue to need to be driven proactively to retain momentum if progress is to be maintained.

2.4 This option would not comply with the UN Committee's Concluding Observations (2008) which raised concerns with the lack of progress made in incorporating the Convention into UK domestic law (including law made in the Devolved Administrations).

### **Option 2 - Introduce a Measure to place a duty on Welsh Ministers (and the First Minister) to have due regard to the UNCRC when taking decisions of a strategic nature about how to exercise their functions.**

2.5 This option would satisfy the policy objective to embed the consideration of the UNCRC in Welsh law and would ensure that Ministers give full, proper and appropriate consideration of the UNCRC when taking decisions at a strategic level. The arrangements for securing compliance will ensure that the discharge of the duty is appropriately evidenced for monitoring and evaluation purposes, which would be essential as evidence in the event of legal challenge. This option provides a more structured approach to progressive realisation of (giving further and better effect to) the UNCRC. The arrangement would lead to systematic collection of evidence on how officials and Ministers have had due regard to the Convention in their decision-making processes, and the impact of the duty in particular, with the submission of reports to the National Assembly for Wales and the UNCRC through its reporting cycle.

2.6 This approach would assist greatly in achieving the policy objective by ensuring continuous progress towards fuller implementation of the Convention

within the strategic policy decisions and policy areas for which the Assembly Government has devolved responsibility. The due regard approach allows Ministers to balance consideration of the UNCRC against other factors (including available resources) in making their decisions on whether and how they can give further or give better effect to the rights and obligations in the UNCRC at a strategic level.

2.7 This option would introduce a mandatory consideration of the UNCRC in strategic decision/policy making; as such the duty would require a level of knowledge and expertise on the part of key Welsh Assembly Government officials and lawyers, central compliance units and Ministers, which is higher than generally the case at present. The implications of training and development would need to be addressed and internal processes and systems developed to monitor and evaluate the application of the duty, and to maintain the necessary evidence base.

2.8 The development and implementation of the children's scheme would require internal staff resource. Additionally it would be prudent from the outset in developing the scheme to engage external expertise.

2.9 The fine detail of implementation is currently under consideration and will be progressed over coming months, to establish the most effective and efficient processes. Consideration will also be given to how this duty 'sits' with other 'rights-based' and due regard duties that Welsh Ministers comply with to identify any synergies in relation to implementation and process.

2.10 The broad estimate of cost involved in meeting the proposals for this Measure are:

### *Stage 1*

2.11 This stage will require a central team to be established in July 2010 to develop the draft children's scheme working collaboratively with external partners. The scheme will also need to be consulted upon externally. The team will then be required to develop and put in place the necessary systems and processes to ensure compliance with the "due regard" duty, including the impact assessment tools which will assist officials in meeting the "due regard" duty". This work will involve piloting the materials to ensure they are fit for purpose.

2.12 The team will also develop a range of training materials to raise awareness of the UNCRC and the use of the impact assessment tool. Moderation systems to ensure the duty is applied in a broadly similar way across all WAG departments will need to be developed and put in place. The central unit will ensure that an evaluation system is established to assist in providing evidence for the reporting requirements required by the Measure.

2.13 The estimated costs for staff time increase in each of the first 2 years taking into account the part year costs in 2010/11, the full year costs in

2011/12 and the additional staffing cost required in monitoring the scheme implementation within Departments from 2012 onwards.

2.14 From the third year,(2012/13) onwards we anticipate that staff costs will begin to reduce in relation to the central coordination team from the increased 2011/12 level, as the process of aligning and eventually fully integrating reporting arrangements against the children’s scheme with existing UNCRC reporting and action planning processes begins. However, from that point there will be a small increase in the cost of implementation in Departmental Business Units as the due regard duty goes live.

*Stage 2*

2.15 Costs at this stage will involve the delivery of training courses and the estimated staff time away from normal day to day work, while undertaking training (opportunity costs) in year 2.

*YEAR 1 from July 2010- March 2011*

Requirements	Costs
Staffing resource (central implementation/coordinating team plus central legal adviser) to develop and implement scheme, and internal processes.	£209,000
Development of training and impact assessment tools	£145,000
<b>Total actual costs</b>	<b>£ 354,000</b>

*YEAR 2 from April 2011- March 2012*

Requirements	Costs
Staffing to ensure implementation of the scheme and compliance including the consultation on the children’s scheme	£279,000
Legal and specialist training	£35,000
<b>Total actual costs</b>	<b>£314,000</b>
Opportunity costs for training	£290,000
<b>Total Opportunity costs</b>	<b>£290,000</b>

Year 3 – ongoing

Requirements	
Staffing to ensure ongoing support, compliance and monitoring and evaluation	£272,000
<b>Total actual costs</b>	<b>£272,000</b>
Estimated costs to discharge additional requirements to consider the “due regard” duty duties	£299,000
<b>Total opportunity costs</b>	<b>£299,000</b>

2.16 These costs will be met by the Welsh Assembly Government.

**Option 3 - Introduce a Measure to require Welsh Ministers and the First Minister to have due regard to the UNCRC when exercising (at least initially) a limited range of Ministerial functions (“the relevant functions approach”)**

2.17 The original proposal, as set out in the consultation document, allowed discretion as to which functions were identified as ‘relevant’. As such a staged approach over a 10 – 15 year period may possibly have assisted in effectively managing the costs implications of discharging the main duty.

2.18 A benefit of this approach would have been to set up an implementation system that was progressive in nature and brought in functions in a staged and managed way, ultimately with an option to include all functions in the scheme in the future.

2.19 This approach in deciding which functions would be in the scheme would be open to scrutiny from both the public and the National Assembly for Wales, so involving an important democratic safeguard.

2.20 The costs associated with this option are based on the requirements that in some areas less training and development would be needed in the short term to ensure compliance across the Welsh Assembly Government, but the requirements for central and legal support would remain.

2.21 The costs involved in meeting the proposals for this option are estimated as follows:

*Stage 1*

2.22 This stage will require a central team to develop in the first instance a list of the possible functions that might be included in the scheme. This list would then form part of the draft children’s scheme, which will be consulted upon with external stakeholders. The team will then be required to develop the necessary systems and processes to ensure compliance with the “due regard”

duty. The team would produce the impact assessment tools which will assist officials in meeting the “due regard” duty”. This work will involve piloting the materials to ensure they are fit for purpose. The team will then be developing a range of training materials, which will raise awareness of the UNCRC and how the impact assessment will needs to be used. The central unit will ensure that an evaluation system is in place, which will collect a range of data that will assist in providing evidence for the reporting requirements required by the Measure.

2.23 The estimated costs for staff time increase each year, up to the third year. This takes into account the part year costs in 2010/11, the full year costs in 2011/12 and the additional staffing cost required in monitoring the scheme implementation within Departments from 2012 onwards.

### *Stage 2*

2.24 Delivery of training courses and the estimated staff time away from normal day to day work, while undertaking training (opportunity costs) in year 2 The costs of considering the “due regard” duty when commenced.

### *Year 1 from July 2010 to March 2011*

Requirements	Costs
Staffing to ensure the necessary development of the scheme, the processes to ensure compliance evaluation.	£209,000
Development of training and impact assessment tools	£145,000
<b>Total actual costs</b>	<b>£354,000</b>

### *Year 2 from April 2011 – March 2012*

Requirements	
Staffing to ensure implementation of the scheme and compliance including the consultation on the children’s scheme	£279,000
Legal and specialist Training	£35,000
<b>Total actual costs</b>	<b>£314,000</b>
Opportunity costs for training	£221,000
<b>Total opportunity costs</b>	<b>£221,000</b>

Year 3 ongoing

Requirements	
Staffing to ensure implementation of the scheme and compliance including monitoring and evaluation	£272,000
<b>Total actual costs</b>	<b>£272,000</b>
Estimated costs to discharge additional requirements to consider the “due regard” duty duties	£150,000
<b>Total opportunity costs</b>	<b>£150,000</b>

2.25 The central costs and the production of the necessary tools and training remain the same as in option 2. The requirement to consult on the children’s scheme and develop the necessary evaluation and compliance processes also remain the same. However, there will be a reduction in estimated opportunity costs because a smaller number of officials would need to be trained as there would potentially only be a proportion of the overall number of functions. There would also be less official and legal time needed to consider the “due regard” duty as the number of functions would be reduced.

2.26 These costs will be met by the Welsh Assembly Government.

#### **Option 4 Costs and Benefits – Introduce a Measure to apply a general duty to have due regard to the UNCRC to WAG and devolved bodies in Wales**

2.27 The benefits of this option would be a coherent approach from Government through to local delivery partners in carrying forward the development of policy and delivery having “due regard” to the UNCRC.

2.28 Both the Welsh Assembly Government and local partners would have to consider how the “due regard” duty would apply in carrying out their roles and responsibilities with regards to children and young persons.

2.29 The costs with such an approach are expected to be significant as all staff based within the organisations listed in Matter 15.6 in Schedule 5 to the Government of Wales Act 2006 would be required to be fully conversant with the UNCRC and its application as set out in the proposed “due regard” duty.

2.30 An analysis of the costs involved in this option has not been carried out as it is clear that those organisations that would need to act would require additional resource from the Welsh Assembly Government to set up the required compliance processes, including training for their staff.

2.31 However, planning guidance for local authorities and their relevant partners currently makes it clear that they should have regard to these rights

(UNCRC) in providing services. This requirement although not fully considering the articles of the UNCRC through a due regard approach, does go some way to requiring Local Authorities and other partners working with them to adhere to the provisions of the UNCRC in the context of planning and delivery of services.

2.32 The financial implications of this option are considered to be challenging, with all services needing to be reviewed. As such, this option was considered impractical and undeliverable at this point in time.

### **3. Application**

3.1 The due regard duty will apply to decisions of the Welsh Minister and the First Minister which are decisions of a strategic nature about how to exercise functions that they can exercise.

### **4. Competition assessment**

4.1 The competition filter is required to be completed if the proposed Measure affects business, charities and/or the voluntary sector. The filter does not require completion as the Measure does not impact on those sectors.

## 5. Implementation plans

5.1 Plans for the implementation of the new legislation will be developed in the near future. It is anticipated that:

- the development of the first draft children's scheme will commence on or before March 2011.
- Before March 2012, the Welsh Assembly Government officials across all departments will need to undertake basic awareness raising training on the UNCRC and its implications for their work. Key policy officials and legal advisers will require additional training (for example in undertaking UNCRC impact assessments) as well as in recording compliance with the "due regard duty" and staff in business units will need training to operate the Welsh Assembly Government-wide monitoring system which will be established
- Work on developing training resources will begin towards the end of 2010, with training being rolled out during 2011. This will ensure that when the first scheme is made (31 March 2012) and systems go live, the first "wave" of training will already have been completed.
- The intention thereafter is to incorporate the various training modules into the standard Welsh Assembly Government-wide training programme for officials, with the awareness-raising module becoming a mandatory element of the induction course for new staff and the more specialised modules available as menu options for relevant staff.
- Legal Services officials will receive relevant training in order to support the implementation of the "due regard" duty from April 2012.
- Consultation arrangements on the draft scheme will include child and young person-friendly documentation and methodologies in line with the National Participation Standards for Wales. A three month consultation process is planned to begin in September 2011.
- Following consultation, the draft scheme will be amended as necessary in response to comments made and will be laid before the National Assembly for Wales for approval on or before 31 March 2012.
- Full implementation of the children's scheme (including the due Regard duty) once commencement takes place.

## **6. Post implementation review**

6.1 There is a requirement within the proposed Measure that reports will be produced as part of the requirements of reporting on the due regard duty. The first of these reports will be required on or before January 2013. This date will allow us to provide evidence of how the implementation of the duty and the scheme has developed in the first six months of operation.

6.2 The next set of UNCRC Committee Concluding Observations in relation to the UK state party is expected towards the end of 2014. These will trigger a review of the scheme with the second scheme including an action plan for Wales setting out, inter alia, how the Welsh Assembly Government proposes to respond to issues highlighted by the Committee.

## ANNEX A

### Rights of Children and Young Persons (Wales) Measure 2010

#### Explanatory Notes

##### Introduction

These explanatory notes relate to the proposed Rights of Children and Young Persons (Wales) Measure 2010. The notes have been prepared by the Welsh Assembly Government's Department for Children, Education, Lifelong Learning and Skills in order to assist the reader in understanding the proposed Measure. They do not form part of the proposed Measure and have not been endorsed by the National Assembly for Wales.

The notes should be read in conjunction with the proposed Measure. They are not, and are not intended to be, a comprehensive description of the proposed Measure. So where a section or part of a section does not seem to require any explanation or comment, none is given.

The Measure gives further effect in domestic law to the provisions of the United Nations Convention on the Rights of the Child and the Optional Protocols to it.

##### Background

The United Nations Convention on the Rights of the Child ("the Convention") is an international convention setting out the civil, political, economic, social and cultural rights of children. The text of the Convention on the Rights of the Child was approved by the Member States of the United Nations on 20<sup>th</sup> November 1989.

On the 16<sup>th</sup> December 1991, the Government of the United Kingdom of Great Britain and Northern Ireland ratified the Convention and it came into force in respect of the United Kingdom on 15<sup>th</sup> January 1992.

The United Kingdom has also ratified two Optional Protocols to the Convention. The first of these relates to the involvement of children in armed conflict, and the second relates to the sale of children, child prostitution and child pornography.

Countries that have ratified the Convention are required by article 44(1)(b) of it to report to, and may appear before, the United Nations Committee on the Rights of the Child ("the Committee") every 5 years providing details of their progress towards full implementation of the Convention and its Optional

Protocols. The Committee is established under article 43(1) of the Convention for the purpose of examining the progress made by State Parties towards its implementation. The Committee is composed of ten experts in the areas covered by the Convention, who are elected to the Committee by the States which are parties to the Convention.

In January 2004, the National Assembly for Wales constituted under the Government of Wales Act 1998 adopted the Convention as the underpinning basis for its policies concerning children and young people aged 0 to 25 (i.e. including those aged 25) thus reinforcing "Seven Core Aims" it had developed in 2002 in respect of children and young people, based on the Convention. Most of the functions of the National Assembly for Wales constituted under the Government of Wales Act 1998 were transferred to the Welsh Ministers by the Government of Wales Act 2006. The Welsh Ministers are part of the Welsh Assembly Government.

When developing its policies concerning children and young people in Wales the Welsh Assembly Government makes reference to two age-groups. Children aged under 11 years old are referred to as "children", and people aged 11 to 25 years are referred to as "young people". In this Measure people aged under 18 are referred to as "children" and those aged 18 to 24 (i.e. including those aged 24) years are referred to as "young persons". This approach has been adopted in order to be consistent with the Convention and with Matter 15.6 in Schedule 5 to the Government of Wales Act 2006, from which the legislative competence for this Measure is derived.

## Section 1 - Duty to have regard to the Convention on the Rights of the Child

Subsection (1) – This places a duty on the Welsh Ministers to have due regard to the requirements of –

- (a) Part 1 of the Convention,
- (b) articles 1 to 7, excluding article 6(2), of the Optional Protocol to the Convention on the involvement of children in armed conflict, and
- (c) articles 1 to 10 of the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography,

when making any relevant decision (referred to in these notes as "the main duty"). This main duty requires the Welsh Ministers, when making any "relevant decision", to give the weight that is appropriate in all the circumstances of the case to the provisions referred to in subsection (1), balancing them against all the other factors that are relevant to the decision in question.

Section 8 of the Measure and the Schedule to the Measure should be referred to in order to find the content of the provisions of the Convention and its Optional Protocols to which the Welsh Ministers must have due regard.

Subsection (2) – This explains what a “relevant decision” is. It is a decision of a strategic nature about how to exercise any function exercisable by the Welsh Ministers (or the First Minister, as explained below). The effect of this and subsections (1) and (4) is that when the Welsh Ministers and the First Minister are carrying out the strategic planning of how to exercise their functions, they must have due regard to the Convention and its Optional Protocols. The duty applies to decisions of a strategic nature about how to exercise functions which are exercisable by the Welsh Ministers and the First Minister, which includes functions which are their own, as well as those of other bodies or persons which have been delegated to them.

Subsection (3) - The effect of this is that if a function has been conferred or imposed by legislation or a prerogative instrument (e.g. Royal Charters) but has not yet come into force, and the Welsh Ministers or the First Minister are carrying out the strategic planning of how to exercise that function, the duty to have due regard to the Convention and its Optional Protocols will still apply.

Subsection (4) – This makes the First Minister subject to the same main duty as the Welsh Ministers when he or she is making decisions of a strategic nature about how to exercise functions which are exercisable by the First Minister alone. Under the Government of Wales Act 2006, the First Minister also counts as one of the Welsh Ministers and may carry out any function which has been conferred on the Welsh Ministers. Therefore, the First Minister must have due regard to the provisions referred to in subsection (1) when making a decision of a strategic nature about how to exercise a function which is exercisable by him or her alone, as well as when making decisions of a strategic nature about how to exercise functions which are exercisable by the Welsh Ministers.

## Section 2 – The children’s scheme

Subsection (1) – This requires the Welsh Ministers to make a children’s scheme. The scheme must set out the criteria which will apply for determining which decisions are decisions of a strategic nature. The scheme must also set out the arrangements that the Welsh Ministers have made, or propose to make, in order to secure that they and the First Minister comply with the main duty.

Subsection (2) - This makes provision about other matters that may be included in the children's scheme. The scheme may require the Welsh Ministers to publish reports on the operation of the scheme or on any other matter mentioned in it. In addition the scheme may specify matters which must be included in those reports or in reports which the Welsh Ministers must publish under section 4(1) to explain how they and the First Minister have complied with the main duty.

Subsection (3) – This allows the scheme to include any other matters that the Welsh Ministers consider appropriate.

Subsection (4) – This makes provision about revising or remaking the children's scheme. The Welsh Ministers must consider whether to revise or remake the scheme within six months of the Committee making any suggestion or general recommendation under article 45(d) of the Convention, based on a report submitted to the Committee by the United Kingdom under its obligation in article 44(1)(b).

Subsection (5) – This permits the Welsh Ministers to revise or remake the children's scheme at any other time.

Subsection (6) – This defines terms used in section 2.

### Section 3 - Preparation and publication of the scheme

Subsection (1) – This provides that when preparing, remaking or revising the children's scheme, the Welsh Ministers must have regard to the following documents –

(i) the Committee's reports on its activities, which article 44(5) of the Convention requires the Committee to submit every two years to the General Assembly of the United Nations;

(ii) any studies on specific issues relating to the rights of the child which have been undertaken by the United Nations' Secretary-General under article 45(c) of the Convention, and

(iii) any other documents issued by the Committee relating to implementation of the Convention or Protocols by the United Kingdom, such as documents relating to the General Days of Discussion.

Subsection (2) – This permits the Welsh Ministers to have regard to any other documents (whether or not issued by the Committee) or matters that they consider to be relevant when preparing, remaking or revising the children's scheme.

Subsection (3) – This requires the Welsh Ministers, before making or remaking the children’s scheme, to publish the scheme in draft. If they are revising the scheme they must publish the revisions alone or the scheme as a whole with those revisions included.

Subsection (4) – This requires the Welsh Ministers, before making, remaking or revising the children’s scheme, to consult certain people on the draft. They must consult children and young people, the Children’s Commissioner for Wales and any other persons or bodies which the Welsh Ministers consider appropriate.

Subsection (5) – The effect of this subsection is that the Welsh Ministers must not make or remake the scheme unless a draft of what is to be made or remade has been laid before the Assembly and has been approved by a resolution of the Assembly. The Welsh Ministers must not revise the scheme unless either the revisions alone, or the whole scheme with the revisions included, has been laid before and approved by the Assembly.

Subsection (6) – This requires the Welsh Ministers to lay a draft of the first children’s scheme before the Assembly on or before 31 March 2012.

Subsection (7) – This requires the Welsh Ministers to publish the children’s scheme when it is made and whenever it is remade. Where they have revised the scheme they must publish the revisions alone or the whole scheme with the revisions included.

Subsection (8) – This requires the Welsh Ministers to lay before the Assembly the document they have published under subsection (7), whether that be the whole scheme or revisions to the scheme.

Subsection (9) – This defines terms used in section 3.

#### Section 4 - Reports

Subsection (1) – This requires the Welsh Ministers to publish reports about how they and the First Minister have complied with their main duty. Their first report must be published on or before 31 January 2013. After that, they must publish a report every five years. The timing of these reports is designed to fit in with the timing of the United Kingdom’s reports to the Committee on the progress the United Kingdom has made towards achieving the rights contained in the provisions of the Convention and its Optional Protocols. Under Article 44 (1)(b) of the Convention, the United Kingdom has to report to the Committee every five years. The children’s scheme may specify that the Welsh Ministers are to publish their reports at longer or shorter intervals.

Subsection (2) – The effect of this is that, if the children’s scheme has required the Welsh Ministers to publish a report on the operation of the scheme or any matter mentioned in it (as it may under section 2(2)(a)), the Welsh Ministers must publish that report.

Subsection (3) – This requires the Welsh Ministers to lay before the Assembly reports which they publish under section 4(1) or (2).

#### Section 5 – Duty to promote knowledge of the Convention

This requires the Welsh Ministers to take such steps as are appropriate to promote public knowledge and understanding of the Convention and the Optional Protocols. The provision makes clear that the “public” includes children.

This provision is based to a large extent upon article 42 of the Convention and article 6(2) of the Optional Protocol on the involvement of children in armed conflict, in which States have undertaken to make the principles and provisions of the Convention and that Protocol widely known by adults and children. Section 5 requires the Welsh Ministers to promote public understanding, as well as knowledge.

Section 1(1), section 8 and the Schedule to the Measure should be referred to in order to find the content of the provisions of the Convention and its Optional Protocols in respect of which the Welsh Ministers must promote public knowledge and understanding.

#### Section 6 – Power to amend legislation etc

Subsection (1) – The effect of this is to set out the circumstances in which the Welsh Ministers’ power under section 6 to amend certain legislation and prerogative instruments is triggered. There are limitations on the power which are set out in section 6.

The Welsh Ministers will have that power if, in a report which they have published under section 4, they have concluded that it would be desirable to amend certain legislation or prerogative instruments, in order to give further or better effect to the rights and obligations set out in Part I of the Convention and its Optional Protocols.

The types of legislation which may be amended using this power are Acts of the United Kingdom Parliament, Measures of the Assembly and subordinate legislation made under either of those. Orders, rules and regulations are examples of types of subordinate legislation (see section 9(c) which contains the definition of “enactment”).

Subsection (2) – This provides that the Welsh Ministers may make amendments to legislation or prerogative instruments which they consider to be appropriate in the light of a report which they will have published under section 4. The Welsh Ministers are to make the amendments by making an order.

Subsection (3) – The effect of this is that the Welsh Ministers will only be able to use this power to make amendments to legislation or prerogative instruments if those amendments are ones which, at that particular time, the Assembly has legislative power to make.

At the time of enacting this Measure, the Assembly's legislative power is governed by Part 3 (Assembly Measures) of the Government of Wales Act 2006. Section 94 of and Schedule 5 to that Act should be referred to in order to see the Matters in relation to which the Assembly may pass Measures. In the future, the Assembly's legislative power may instead be governed by Part 4 (Acts of the Assembly) of the Government of Wales Act 2006, following a "yes" vote in a referendum in Wales.

Subsection (4) – This requires the Welsh Ministers to consult whoever they consider appropriate before making an order using this power.

The Welsh Ministers must not make an order using this power unless a draft of it has been laid before the Assembly and approved by a resolution of the Assembly (see section 10(2)).

## Section 7 – Application to young persons

The purpose of the provisions in this section is to require consideration of, and allow potential for, the appropriate application in relation to young people of Part I of the Convention and its Optional Protocols, or provisions of this Measure.

Subsection (1) – This requires the Welsh Ministers to consider whether and to what extent the requirements of Part I of the Convention and its Optional Protocols may be relevant to young people, and whether and to what extent the provisions of this Measure could be applied to young people.

This includes considering whether Part I of the Convention and its Optional Protocols could be relevant to young people, or this Measure could be applied in relation to them, in an amended form.

"Young persons" is defined in section 9(d) and means 18 to 24 year olds (i.e., those who are under 25).

Subsection (2) - This requires that the first time the Welsh Ministers make and publish the children's scheme, they must include in that scheme their proposals to carry out consultation on the relevance of Part I of the Convention and its Optional Protocols to young people, and on the potential application of the Measure to them.

Subsection (3) – This allows the Welsh Ministers, alongside the consultation under subsection (2), to also carry out consultation about any other matter relating to young people which they consider appropriate. This may cover a consultation on whether there are other more appropriate ways to address the rights of young people.

Subsection (4) – This requires the Welsh Ministers to publish a report on their conclusions under subsection (1) as to the relevance of Part I of the Convention and its Optional Protocols to young people, and on the potential application of the Measure to them.

Subsection (5) – This requires the Welsh Ministers to lay before the Assembly a copy of the report which they have published under subsection (4).

Subsections (6) and (7) – These allow the Welsh Ministers by making an order to apply the whole of, or any provision of, this Measure in relation to young people. They may do so in a modified form if that is what they consider appropriate. The Welsh Ministers may also make any other provision which they consider appropriate to apply the requirements of Part I of the Convention and its Optional Protocols in relation to young people.

Subsection (8) – This requires the Welsh Ministers, before making an order under subsection (6), to publish the order in draft and to consult whoever they consider appropriate about that draft.

The Welsh Ministers must not make an order using this power unless a draft of it has been laid before the Assembly and approved by a resolution of the Assembly (see section 10(2)).

## Section 8 – The Convention on the Rights of the Child

Subsection (1) - This explains what is meant by "the Convention" and "the Protocols" in this Measure.

"the Convention" means the United Nations Convention on the Rights of the Child which was adopted and opened for signature, ratification and accession by resolution 44/25 of the General Assembly of the United Nations, dated 20 November 1989.

“the Protocols” means Articles 1 to 7, excluding article 6(2), of the Optional Protocol to the Convention on the involvement of children in armed conflict, and Articles 1 to 10 of the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography.

Article 6(2) of the Optional Protocol to the Convention on the involvement of children in armed conflict is the provision under which States have undertaken to make the principles and provisions of that Protocol widely known by adults and children. Section 5 of the Measure places the Welsh Ministers under a duty which is similar to that undertaking.

Subsection (2) – This provides that the Schedule to this Measure sets out the text of:

(1) Part I of the Convention (the Preamble, and Parts II and III which deal with procedural and similar matters in relation to the United Nations, have not been included) – this is in Part 1 of the Schedule,

(2) The two Optional Protocols as mentioned above – these are in Part 2 of the Schedule,

(3) Declarations by the United Kingdom relating to the Convention and its Optional Protocols – these are in Part 3 of the Schedule.

Subsection (3) – The effect of this is that whenever, for the purposes of this Measure (for example, where the Welsh Ministers are complying with their main duty in carrying out some particular function), the requirements of the Convention or the Protocols need to be referred to, then what must be referred to is the text which, at that particular time, is in Parts 1 and 2 of the Schedule.

However, that text must be read subject to any declarations or reservations which are set out at that particular time in Part 3 of the Schedule. At the time of enacting this Measure there are no reservations by the United Kingdom to the Convention and its Optional Protocols and therefore none appear in Part 3 of the Schedule. The powers and obligations of the Welsh Ministers to amend Part 3 appear in subsections (5), (7) and (8).

Subsections (4) and (5) – These provisions are relevant where the United Kingdom has signed or indicated agreement to, but not actually ratified:

(i) an amendment to the Convention as set out at that particular time in Part 1 of the Schedule,

(ii) an amendment to the Protocols as set out at that particular time in Part 2 of the Schedule, or

(iii) a new Protocol.

In those circumstances the Welsh Ministers may amend the text in the Schedule to reflect:

(i) the amendment to the Convention or Protocols,

(ii) the new Protocol, or

(iii) any declaration or reservation by the United Kingdom to the amended Convention or Protocols, or to the new Protocol.

Subsections (6) and (7) - These provisions are relevant where the United Kingdom has ratified:

(i) an amendment to the Convention as set out at that particular time in Part 1 of the Schedule,

(ii) an amendment to the Protocols as set out at that particular time in Part 2 of the Schedule, or

(iii) a new Protocol.

In those circumstances the Welsh Ministers must amend the text in the Schedule to reflect:

(i) the amendment to the Convention or Protocols,

(ii) the new Protocol, or

(iii) any declaration or reservation by the United Kingdom to the amended Convention or Protocols, or to the new Protocol.

Subsection (8) – The effect of this is that the Welsh Ministers are required to amend the text in Part 3 of the Schedule (declarations and reservations by the United Kingdom) so that Part 3 will reflect any changes to the declarations and reservations which it contains.

Any order under this section must be laid before the Assembly after being made (see section 10(3)).

## Section 9 – Other interpretive provisions

This defines various terms used in the Measure.

## Section 10 – Orders

Subsection (1) – This provides that any order made under this Measure must be made by statutory instrument. This means that the instrument is subject to procedural and other requirements which are set out in the Statutory Instruments Act 1946.

Subsection (2) – This provides that an order under section 6 (power to amend legislation) or 7 (application to young persons) must not be made unless a draft of the order has been laid before the Assembly and approved by a resolution of the Assembly.

Subsection (3) – This provides that an order made under section 8 (power to amend Measure to reflect changes to Convention etc) must be laid before the Assembly after being made.

## Section 11 – Commencement

Subsection (1) – This provides that section 1 of the Measure (the main duty) is to be brought into force by the Welsh Ministers making an order.

Subsection (2) - This provides that the remainder of the Measure will come into force once two months have elapsed after the date that the Measure is enacted. A Measure is enacted once it is passed by the Assembly and then approved by Her Majesty at a meeting of the Privy Council.

## Section 12 – Short Title

This provides that this Measure may be referred to as the Rights of Children and Young Persons (Wales) Measure 2010.