

**National Assembly for Wales**  
Constitutional Affairs Committee

Report on the Proposed Rights of Children  
and Young Persons (Wales) Measure

October 2010



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Constitutional Affairs Committee

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## **Constitutional Affairs Committee**

The Constitutional Affairs Committee must consider and report on any of the matters set out in Standing Order 15.2 and may consider and report on any of the matters set out in Standing Orders 15.3, and 15.6.

### **Powers**

The Constitutional Affairs Committee was established in June 2007 (as the Subordinate Legislation Committee). Its powers are set out in the National Assembly for Wales' Standing Orders, particularly SO 15. These are available at [www.assemblywales.org](http://www.assemblywales.org).

### **Committee membership**

| <i>Committee Member</i> | <i>Party</i>                   | <i>Constituency or Region</i> |
|-------------------------|--------------------------------|-------------------------------|
| Janet Ryder (Chair)     | Plaid Cymru/the Party of Wales | North Wales                   |
| Alun Davies             | Labour                         | Mid and West Wales            |
| Kirsty Williams         | Welsh Liberal Democrats        | Brecon and Radnorshire        |
| William Graham          | Welsh Conservatives            | South Wales East              |
| Rhodri Morgan           | Labour                         | Cardiff West                  |

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## **The Committee's Recommendations**

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The Committee's recommendations to the Welsh Government are listed below, in the order that they appear in this Report. Please refer to the relevant pages of the report to see the supporting evidence and conclusions:

**Recommendation 1.** We recommend that any proposals issued for public consultation under section 6(4) must, at the same time, be laid before the Assembly. **page 14**

**Recommendation 2.** We recommend that any orders made under section 7(6) and (7) should be made by a super affirmative procedure that allows time, for Assembly Committees and others to fully consider the proposals and recommend amendments, before the Assembly is asked to approve the final orders. **page 16**

**Recommendation 3.** We recommend that any order made under section 8(5), 8(7) or 8(8) should be subject to the affirmative procedure. **page 18**

## **The Committee's Role**

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1. The Constitutional Affairs Committee may consider and report on the following matters under the National Assembly's Standing Orders:

- Standing Order 15.6 (ii) states that the Constitutional Affairs Committee may consider and report on 'the appropriateness of provisions in proposed Assembly Measures .....that grant powers to make subordinate legislation to the Welsh Ministers'
- Whilst it is not part of the Committee's remit to comment in the merits of the proposal which the proposed Measure is intended to implement, Standing Order 15.6(v) states that the Committee may consider and report on 'any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers' Consideration

## **The Proposed Measure**

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2. The proposed Measure was introduced by Huw Lewis AM, Deputy Minister for Children on 14 June 2010, and was referred to Legislation Committee 5 to report by 22 October 2010.

### **Scope and Intent**

3. The purpose of the proposed Measure is described in the Explanatory Memorandum<sup>1</sup> as follows:-

"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<sup>2</sup> (UNCRC) and its Optional Protocols,<sup>34</sup> 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.

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<sup>1</sup> A copy can be found at: <http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-measures/business-legislation-measures-rightsofchildren.htm>

<sup>2</sup> [Convention on the Rights of the Child](#)

<sup>3</sup> [Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts](#)

<sup>4</sup> [Optional Protocols to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography](#)



1.2 The proposed Measure 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."

### **Legislative Competence**

4. The powers to make the proposed Measure are contained in Matter 15.6 of Schedule 5 to the Government of Wales Act 2006<sup>5</sup> –

#### **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;*

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<sup>5</sup> [Government of Wales Act 2006 c.32](#)

*(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.*

## **Legislative Background**

5. The proposed Measure relates to the UNCRC, and is the first legislative Measure of implementation in the UK which is being done at a devolved level and not on a UK-wide basis.

6. The UNCRC:-

- was ratified by the UK Government in 1991;
- came into force in the UK in January 1992;
- is an unincorporated convention and is not part of our domestic law unless and until it has been incorporated directly into our law;
- the UK agreed in December 1991 to be bound by UNCRC as part of international law, and the UK also entered into Optional Protocols;
- in 2002 the Welsh Government applied 7 core aims to all its work with children and young people up to 25 yrs;
- on 14th January 2004 the UNCRC, was formally adopted by Assembly Members as the basis of policy making on children;
- in July 2009 the Welsh Government indicated its intention to consider a Measure “to embed the principles of the UNCRC into law” in Wales.

## **UK Position**

7. The UNCRC is a treaty which is legally binding in International law on the UK. Therefore, the UNCRC already imposes binding obligations on Ministers and Welsh Ministers to comply with the UNCRC when making any decisions that affect children and young people under 18 years.

8. The Westminster Government is responsible for overall coordination of the UNCRC, and works with the devolved administrations to ensure that the UNCRC is implemented across the UK. The Westminster Government as well as Wales and the other devolved administrations report regularly to the UN Committee on the rights of the Child on progress made.

9. In the UK, domestic law includes statutes and customary or common law. In general, UK law does not incorporate International treaties such as UNCRC directly into domestic law. Such treaties, including UNCRC, do not form part of domestic law unless they are incorporated by an Act of Parliament. e.g. the Human Rights Act 1998 incorporates the European Convention on Human Rights into the law of England and Wales.

10. Generally, implementation of the UNCRC in the UK has been pursued through various legislation and policy initiatives in England by the Westminster Government and in Wales by the Welsh Ministers and the Welsh Government.

### ***Wales***

11. Currently, in Wales there is no law in place which requires Welsh Ministers or the First Minister to take the UNCRC into account in reaching decisions that affect children and young people.

12. If the proposed Measure is approved:-

- (i) Wales will be the first country in the UK to integrate the UNCRC into law; and
- (ii) the rights and duties in the UNCRC reflected in the proposed Measure will become an important part of what the Welsh Ministers and the First Minister will need to think about when making decisions of a strategic nature about how to exercise any functions which are exercisable by them.

### **Relevant Provisions of the Proposed Measure**

13. Powers to make delegated legislation are dealt with in detail in paragraph 5.1-5.16 of the Explanatory Memorandum. This proposed

Measure is self-contained as all the relevant provisions can be found in the proposed Measure.

### ***Section 1***

14. At the core of the proposed Measure is a provision in section 1 which imposes a duty on Welsh Ministers and the First Minister to have due regard to the rights and obligations in the UNCRC when making decisions of a strategic nature about how to exercise any functions exercisable by them. This duty is referred to as “the main duty” in the Explanatory Notes.

### ***Section 2***

15. This section requires Welsh Ministers to make a Children’s Scheme, makes a provision about other matters that may be included in a Children’s Scheme, and also about revising or remaking the Scheme.

16. A Children’s Scheme must:-

- (i) set out a criteria for identifying decisions which are decisions of a strategic nature, and
- (ii) set out arrangements which Welsh Ministers will need to make in order to secure compliance with the duty in section 1 to give due regard to the Convention.

### ***Section 3***

17. Section 3 includes provisions regarding the preparation and publication of the Children’s Scheme and the section notes the documents which Welsh Ministers need to address when preparing, remaking, or revising the Scheme. The section also permits Welsh Ministers to have regard to any other documents that they consider to be relevant when preparing, remaking, or revising the Children’s Scheme. Welsh Ministers must consult certain people, including children and young people, the Children’s Commissioner for Wales and any other persons or bodies which the Welsh Ministers consider appropriate, before making, remaking or revising the Children’s Scheme. Welsh Ministers must lay a draft of the first Children’s Scheme before the Assembly on or before 31 March 2012.

#### ***Section 4***

18. Section 4 includes the requirement for Welsh Ministers to publish reports about compliance with their main duty. Welsh Ministers must lay a first report before the Assembly on or before 31 January 2013. After that, they must publish a report every five years.

#### ***Section 5***

19. This section imposes a duty on Welsh Ministers to ‘promote knowledge and understanding of the Convention’ and to take such steps as appropriate to ensure this.

#### ***Section 6***

20. This sets out Welsh Ministers’ **power to amend enactments and prerogative instruments by order**. The power to amend is exercisable “for the purpose of giving further and better effect to the obligations set out in Part I of the Convention and [in] the Protocols.”, following a report under section 4 to that effect. The amendments must be within the National Assembly’s legislative competence and consultation must precede the making of the order. Such an order would be subject to the affirmative procedure.

#### ***Section 7***

21. Section 7 requires Welsh Ministers to consider whether Part 1 of the Convention and its Optional Protocols could be relevant to young people between the ages of 18 and 25 and requires the children’s scheme (when first made) to include a statement on the Welsh Ministers’ proposals to consult on this issue. The proposed Measure then permits any provision in the Measure to be applied to young people up to the age of 25 **by order**. Such an order has to be published in draft and consulted upon. Such an order would also be subject to the affirmative procedure.

#### ***Section 8***

22. Section 8 explains what is meant by “Convention” and “Protocols” in the proposed Measure, which are set out in the Schedule to the proposed Measure. There follows a power (if the UK has agreed changes to them) and a duty (if the UK has ratified changes) **to amend the proposed Measure by order** “as they consider appropriate to

reflect” those changes. The power is not limited to the texts set out in the Schedule, but could be used to amend the proposed Measure generally. Although the order would be laid before the Assembly, no procedure would apply. This means that the Assembly would not need to agree the order and that Assembly Members would not be able to table a motion to annul it.

23. Sections 14, 15 and 16 of the Human Rights Act 1998 contain similar provisions in relation to protocols to the European Convention on Human Rights, but legislation under those powers is dependent on an affirmative parliamentary procedure in relation to a designation order under sections 14 or 15 of that Act.

### ***Sections 9, 10, 11 and 12***

24. Section 9 sets out definitions of terms used in the Proposed Measure.

25. Section 10 contains the provisions regarding the making of orders. It specifies that orders under sections 6 and 7 would be subject to an affirmative procedure, but those under section 8 would merely be laid.

26. Section 11 contains a power to commence section 1 of the proposed Measure by order of the Welsh Minsters, and the remaining sections come into force at the end of a 2 month period from the day on which the proposed Measure receives royal approval.

27. Section 12 sets out the short title of the proposed Measure.

## **Issues arising from evidence and recommendations of the Committee**

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28. The Committee considered the proposed Rights of Children and Young Persons (Wales) Measure on 1 July 2010 and received written and oral evidence from the Deputy Minister for Children Huw Lewis AM and his officials.

### **General**

29. The Committee has concerns about some of the subordinate legislation provisions in the proposed Measure. However, we do not

believe these alone are sufficient reasons for the National Assembly not to agree to the general principles of the Proposed Measure.

30. Although our primary role in looking at the proposed Measure is to look at subordinate legislation issues, we also have wider concerns about this particular proposed Measure. It would not be appropriate for us to make recommendations on these points, which are properly within the remit of Legislation Committee 5. However, we do wish to put these concerns on record.

31. In doing so, we want to make it clear that we strongly support the principle that Government decisions should take into account, and be influenced by, the content of the UNCRC. We are simply not convinced that the proposed Measure, as presented, manages to achieve this principle in the most effective way.

32. In particular, we are concerned that, in relation to the duty for Welsh Ministers to “*have due regard*” to the Convention when making decisions “*of a strategic nature*”, the proposed Measure provides no definition or explanation of what constitutes such a decision. We believe this may be too nebulous to have any meaningful effect and that the Government should consider strengthening the duty. To achieve this, the Deputy Minister might wish to consider either clarifying the meaning of “decision[s] of a strategic nature” on the face of the proposed Measure, or applying the duty, to “have due regard” to the UNCRC, to all functions exercised by Welsh Ministers.

33. We also support the view that, in many areas of public policy, it makes considerable sense to consider the needs of children and young adults alongside each other. However, we are far from convinced that this principle can or should be applied by the use of rights that are specifically meant to apply to children up to 18 rather than young persons who are not 25, as envisaged in Section 7 of the proposed Measure.

34. We make specific recommendations about subordinate legislation provisions below.

## **Section 6 - Power to Amend Legislation etc**

35. Section 6 of the proposed Measure gives the Welsh Ministers the power to amend Acts of the UK Parliament, Assembly Measures and subordinate legislation. They will be able to do so if a report

(prepared by Welsh Ministers) under section 4 of the proposed Measure concludes that it would be desirable to do so *“for the purpose of giving further or better effect to the rights and obligations set out in ... the Convention and the protocols.”*

36. This power, which will be exercised by affirmative resolution, is only constrained by the need for Welsh Ministers to:

- report their conclusion that a change would be desirable;
- consult on their proposals as they consider appropriate; and
- ensure that the proposed change is within the Assembly’s legislative competence at the time.

37. These are very wide powers to amend primary (and secondary) legislation. Although any amendments will be made by the affirmative procedure after public consultation, we believe that there should be further safeguards placed upon the use of these powers. Specifically, we believe that any proposals issued for public consultation under section 6(4) should, at the same time, be laid before the Assembly to allow sufficient time for Assembly Members and Committees to give proper consideration to them.

**Recommendation 1. We recommend that any proposals issued for public consultation under section 6(4) must, at the same time, be laid before the Assembly.**

## **Section 7 - Application to Young People aged 18-24**

### ***General Principle***

38. Section 7 of the proposed Measure requires Welsh Ministers to consider whether and to what extent the Convention (and optional Protocols) may be relevant to young persons aged 18 to 24 and to what extent the provisions of the proposed Measure could be applied to this group of young people. Section 7 also allows Ministers by order to apply any of the provisions of the proposed Measure to young people and to make any other provision they consider appropriate to apply the requirements of the Convention to young persons.

39. We noted earlier our concerns about applying the Convention, which is aimed at children, to young adults. In this respect, it is worth



noting the views of the Children's Commissioner in his response to Legislation Committee 5's consultation on the proposed Measure:

"I believe it is inappropriate to apply an international convention for children under the age of 18 to those age 18-24. It must be reiterated that the UNCRC was developed to apply to those aged under 18. The introduction to the Convention states clearly that:

*"in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance and that as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."*

"Whilst the policy intention of the Welsh Government has been to extend the principles of the UNCRC to 18-24 year olds, I do not support the possible extension of the Measure to the 18-24 age range. This proposal would arguably in my view have the effect, in relation to the Welsh Minister's exercise of functions, of extending the impact of UNCRC beyond the scope for which it was intended."

40. The Wales UNCRC Monitoring Group in their response to the consultation makes a similar point:

"The inclusion of this section in the Measure (and the explanation of it in the original consultation document) in our view, creates confusion and perpetuates misunderstandings about children's rights and of the meaning and purpose of the UNCRC. Ministers should continue to consider the ways in which young adults over 18 can access their rights more fully, by recognising the vulnerable position many young adults are in and building on the legislation, strategic approaches and policies already put in place."

41. We acknowledge that there were others<sup>6</sup> with somewhat differing views but we believe particular weight should be given to the views above.

42. It is not strictly within our remit to consider the “policy” behind provisions in the proposed Measure. However, these views suggest to us that the subordinate legislation provisions in section 7(6) and 7(7) are, at least, contentious and would certainly represent a very significant policy development. For this reason, we believe they should be subject to a greater degree of scrutiny by the National Assembly before they are introduced.

### ***Use of “Super Affirmative” Procedure***

43. We wrote to the Deputy Minister suggesting that a “super-affirmative procedure” might be appropriate in this case. A copy of the Chair’s letter and the response from the Deputy Minister is attached as annexes to this report.

44. The Deputy Minister in his response argues that the Assembly’s ability to reject both the children’s scheme to be made under section 2 of the proposed Measure and any order made under section 7 allows sufficient opportunity for scrutiny of orders. We disagree.

45. The contentiousness of the proposed changes, the novelty of what is being proposed and the concern in principle about extending the proposed Measure to 18 to 24 year olds suggests to us that, at the very least, any orders made under section 7 should be made by a super affirmative procedure. This would ensure not only that the Assembly can debate and approve or reject the order but would also sufficient time for Assembly Committees to take evidence from Ministers and others and suggest possible amendments to any order that was proposed.

**Recommendation 2. We recommend that any orders made under section 7(6) and (7) should be made by a super affirmative procedure that allows time, for Assembly Committees and others to fully consider the proposals and recommend amendments, before the Assembly is asked to approve the final orders.**

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<sup>6</sup> Consultation Responses - <http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-measures/business-legislation-measures-rightsofchildren/consultation-res-log.htm>

## **Section 8 – No Assembly Procedure**

46. Section 8 of the proposed Measure was also subject to the exchange of correspondence between the Committee Chair and the Deputy Minister noted earlier and annexed to this report.

47. This section gives Ministers the power (if the UK Government has agreed changes to the Convention or Protocols) and a duty (if the UK has ratified changes) to amend the Measure “as they consider appropriate to reflect” those changes. The power is not limited to amending the texts of the Convention or Protocols set out in the Schedule, but could be used to amend the proposed Measure generally.

48. We accept that there is a need to ensure that the duty to have due regard should be to the Convention as amended from time to time. There is, therefore, a need for a mechanism to ensure that this is reflected in the proposed Measure. However, we are concerned that the powers given to Welsh Ministers go beyond the simple need to update the Convention but also include the ability to amend any other part of the proposed Measure. We believe that an “as amended from time to time” provision would be of less concern and easier to understand.

49. Of greater concern is the absence of an Assembly procedure for orders made under this section. This means that Welsh Ministers will simply be able to make the changes without the usual safeguard, when primary legislation is amended, of scrutiny under the affirmative procedure. Of yet more concern is that it is not proposed to even have the lesser degree of scrutiny afforded by the negative procedure.

50. We were also very surprised by the Government’s view<sup>7</sup> that the appropriate way for the Government to be held to account on this power was by judicial review proceedings against a Welsh Minister who went beyond what was strictly necessary in terms of updating references to international commitments.

51. The Deputy Minister’s response (see Annex) set out an extremely long and elaborate argument in favour of the way the power has been constructed and why there should not be a mechanism for scrutiny

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<sup>7</sup> Record of Proceedings – CA Committee 1/7/10 paras 87-88

and approval of it by the Assembly. The bare bones of his argument seems to come down to being concerned that the Assembly might choose not to approve an order made by Ministers. We are not at all convinced by this argument.

52. There is a very simple, and well-accepted general principle, that Ministers should not be able to amend primary legislation without seeking and obtaining parliamentary approval. There may be occasions when there is a need to depart from this general principle because of the circumstances that apply to a particular piece of legislation. We do not believe such a case has been made on this occasion.

**Recommendation 3. We recommend that any order made under section 8(5), 8(7) or 8(8) should be subject to the affirmative procedure.**

## Witnesses

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The following witnesses provided oral evidence to the Committee on 20 May 2010. A transcript of the session can be viewed in full at [www.assemblywales.org](http://www.assemblywales.org)

### 1 July 2010

|                  |  |
|------------------|--|
| Huw Lewis AM     | Deputy Minister for Children, Welsh Government               |
| Suzanne Chisholm | Head of Children and Young People's Rights, Welsh Government |
| Natalie Lancey   | Lawyer, Legal Services Department, Welsh Government          |

## List of written evidence

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The Committee considered the following written evidence. All written evidence can be viewed in full at [www.assemblywales.org](http://www.assemblywales.org)

| Document  | Reference       |
|---|-----------------|
| Proposed Rights of Children and Young Persons (Wales) Measure   | CA(3)-18-10(p1) |
| Explanatory Memorandum  | CA(3)-18-10(p2) |
| Legal Advisers' Report  | CA(3)-18-10(p3) |
| Letter of 17 June from the Chair inviting the Deputy Minister, Huw Lewis, AM to give evidence to the Committee    | CA(3)-18-10(p4) |
| The Deputy Minister's response of 28 June   | CA(3)-18-10(p5) |
| Written Statement by the Welsh Assembly Government: Proposed Rights of Children and Young Persons (Wales) Measure | CA(3)-18-10(p6) |
| Letter of 8 July from the Chair to the Deputy Minister for Children   | CA(3)-21-10(p3) |
| The Deputy Minister's response of 3 August  | CA(3)-21-10(p4) |

## **Annexe**

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### **Text of letter of 8 July from the Chair of the Constitutional Affairs Committee to the Deputy Minister for Children**

8 July 2010

Dear Huw

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

Thank you for attending the Committee's meeting on 1 July and for answering Members' questions so openly. We agreed that we would write to you to follow up some of the issues that arose.

You will recall that one of the Committee's principal concerns regarding the delegated powers provisions in the proposed Measure was the absence of an Assembly procedure in relation to orders made under section 8. As you will be aware, the usual practice, both here and at Westminster, is that statutory instruments that amend primary legislation are subject to the substantial degree of scrutiny afforded by an affirmative procedure. In this case you do not propose even the lesser degree of scrutiny afforded the negative procedure. Are you able to identify any other examples of primary legislation being amended by a 'no procedure' delegated power?

The Committee was also most surprised that it should be suggested by way of justification that judicial review proceedings should be taken against a Minister who went beyond what was strictly necessary in terms of updating references to international commitments. Are you able to point to any previous UK examples of court proceedings being required for a legislature to hold an executive to account?

While we understand the need to ensure that references to the convention and protocols are kept up-to-date, that does not reduce the need for scrutiny. For example, a provision might be added to the Convention (or indeed a reservation made) with which the Assembly might not be content. It would be possible to amend Section 1 to

exclude such a provision rather than to amend the Schedule to include it. That is a matter of policy in which the Assembly would have a legitimate interest. Why should it be deprived of an opportunity to debate the matter?

If the intention is to make amendments only as necessary to incorporate textual changes to the convention and protocols, could that not be achieved by the use of the "as from time to time amended" formula frequently used in reference to European Community legislation? That would remove the need for the order-making powers contained in section 8. (It would not, however, deal with the Committee's concerns regarding the lack of scrutiny of effective changes to the Measure.)

We also discussed the possible use of a super-affirmative procedure in relation to section 7, and agreed to provide you with further information as to what we had in mind. Whilst there is no set procedure contained in the Statutory Instruments Act, the Committee has considered it to be appropriate that there should be such an additional level of scrutiny when it is proposed that a very significant policy development could be implemented by subordinate legislation.

Welsh Ministers did include such a procedure in section 25 of the Education (Wales) Measure 2009 and I attach an extract from the relevant part of the Measure for your information. That is the sort of procedure upon which we were seeking your views and upon which we would be grateful for any further observations.

I look forward to hearing from you.

Yours sincerely,

**Janet Ryder AM**

**Chair, Constitutional Affairs Committee**



## **The Deputy Minister's response of 3 August**

53.

54. 3 August 2010

Dear Janet,

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

1. I am writing in response to your letter dated 8 July 2010, following my attendance at the meeting of the Constitutional Affairs Committee on 1 July 2010.

### Orders under section 8 of the proposed Measure

2. Your letter refers to the Committee's concern that orders made by the Welsh Ministers under section 8 of the proposed Measure only have to be laid before the Assembly after being made, rather than being subject to affirmative or negative procedure. These are orders amending the proposed Measure to keep it in line with the United Kingdom's international obligations in respect of the United Nations Convention on the Rights of the Child and its Optional Protocols (UNCRC).

3. You have asked me whether I can identify any other examples of primary legislation being amended by a "no procedure" delegated power. The Human Rights Act 1998 (HRA) contains such provisions.

4. The HRA incorporates into the domestic law of the United Kingdom certain rights which are contained in the European Convention on Human Rights (ECHR) and Protocols to that Convention. The Act makes it unlawful in domestic law for a public authority to act in a way which is incompatible with those rights. Among other things, it allows those who allege that they are victims of such an unlawful act to take legal action against the public authority in question.

5. The HRA sets out in Schedule 1 the particular Articles of the ECHR and certain Protocols which the HRA incorporates into United Kingdom domestic law. Section 1(2) of the HRA provides that those Articles are to have effect subject to any derogation or reservation which the United Kingdom has made in respect of them, and which the Secretary

of State has “designated” for the purposes of the HRA by making an order.

6. Derogations and Reservations are set out in Schedule 3 to the HRA.

7. Section 14(1) of the HRA gives the Secretary of State a power to make an order designating a derogation for the purposes of the HRA, while section 15(1)(b) contains a power for the Secretary of State to make an order designating a reservation.

8. Section 14(5) places the Secretary of State under a duty to amend Schedule 3 of the HRA as they consider appropriate to reflect any order they have made under section 14(1) designating a derogation, or to reflect the fact that a designated derogation has been amended or replaced.

9. Section 15(5) places the Secretary of State under a duty to make such amendments to the HRA as they consider appropriate to reflect any order they have made under section 15(1)(b) designating a reservation, or to reflect the fact that a designated reservation has been withdrawn in whole or in part.

10. Section 16(7) places the Secretary of State under a duty to make such amendments to the HRA as they consider appropriate to reflect any withdrawal of a designated derogation by the United Kingdom.

11. Orders made under the provisions referred to in paragraphs 8 to 10 above are not subject to any Parliamentary procedure, and only have to be laid before Parliament (section 20(3) of the HRA).

12. You may find it helpful to consider the report of the House of Lords Select Committee on Delegated Powers and Deregulation, considering the above subordinate legislation making powers.<sup>1</sup> The report says:

28. Although the powers under clauses 14 (5), 15(5) and 16(7) are not subject to parliamentary control the Committee considers this

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<sup>1</sup> House of Lords Select Committee on Delegated Powers and Deregulation, 1997-1998 Session, 6<sup>th</sup> Report, 6 November 1997, HL 32, 0 10 403298 7, <http://www.publications.parliament.uk/pa/ld199798/ldselect/lddereg/032vi/dr0601.htm>

appropriate as the powers are, in effect, consequential and limited to adapting the text of the bill to match changed international obligations. Parliament will, however, have control over derogations (see paragraph 29 below).

13. As this extract from the Select Committee's report notes, Parliament has control over whether ECHR rights drawn down into the Human Rights Act are made subject in the longer term to any derogations by the United Kingdom from those rights.

14. This is achieved through section 16(3) of the HRA which provides that an order made by the Secretary of State under section 14(1) designating a derogation will cease to have effect after a certain period (40 days less periods when Parliament is dissolved etc), unless approved by a resolution of both Houses.

15. Against this background, the Select Committee reported:

20. Accordingly subsection (5) of clause 14 requires the Secretary of State to make such amendments to Schedule 2<sup>2</sup> as he considers appropriate to reflect any order under subsection (1)(b) or the effect of subsection (3). Where a new derogation is designated, Parliamentary scrutiny will focus on the designation order itself as explained at paragraph 18 above. Given that close scrutiny, it is considered adequate that the essentially consequential provision which would be contained in an order under subsection (5) should simply be laid before Parliament (clause 20(2)).

16. The Select Committee reported in respect of the duty in section 16(7):

23. Where a designated derogation is withdrawn, consequential amendments will be needed to the Act to reflect that withdrawal. Clause 16(7) therefore requires the Secretary of State to make such amendments to the Act as are required to reflect the withdrawal of a designated derogation. An order under subsection (7) of clause 16 is required to be laid before Parliament (clause 20(2)). This is considered an appropriate degree of Parliamentary control for an order making such consequential changes.

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<sup>2</sup> Schedule 2 in the Human Rights Bill became Schedule 3 in the Human Rights Act 1998.

17. The Select Committee reported in respect of the duty in section 15(5):

24. Article 64 of the Convention allows a state, when ratifying the Convention, to enter a reservation to a provision of the Convention modifying its legal obligations to the extent provided for in the reservation. The United Kingdom currently has a reservation in place in respect of Article 2 of the First Protocol and clause 15(1)(a) makes that reservation a "designated reservation" for the purposes of the Bill. Under clause 1, Article 2 of the First Protocol has effect under the Bill subject to any designated reservation. There is power for the Secretary of State to designate by order any other reservation which may be entered by the United Kingdom (clause 15(1)(b)).

25. An order under clause 15(1)(b) designating a reservation is to be laid before Parliament (clause 20(2)). Since any new reservation would go hand in hand with ratification of a protocol, Parliament would be asked to approve under the draft affirmative resolution procedure<sup>3</sup> the addition of any new Article in relation to which a reservation had been entered. If approval was forthcoming it would be given in the knowledge of the reservation itself and of the order designating it for the purposes of the Act.

26. As where a designated derogation is amended or replaced, the addition or removal of a designated reservation will necessitate amendments to Schedule 2. Accordingly subsection (5) requires the Secretary of State to make such amendments to Schedule 2 as he considers appropriate to reflect any order under subsection (1)(b) or the effect of subsection (3).

27. As with an order made under clause 14(5) or clause 16(7), a requirement to lay any such order before Parliament is considered adequate for an order making such consequential changes (clause 20(2)).

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<sup>3</sup> See sections 1(4) and 20(4) of the Human Rights Act 1998.

18. The Constitutional Affairs Committee will note from the above extracts that the Select Committee was satisfied with the existence of Parliamentary control over:

a) whether rights in any new protocol to the ECHR ratified, or to be ratified, by the United Kingdom (which could possibly be subject to a reservation by the United Kingdom) are incorporated into United Kingdom domestic law by being drawn down into the Human Rights, and

b) whether any of the rights drawn down into the HRA are made subject in the longer term to any derogation by the United Kingdom from those rights.

19. The Select Committee did not consider it necessary for Parliament to be able scrutinise orders by the Secretary of State making consequential amendments to the HRA to reflect whether and how rights in the ECHR or protocols to it had been incorporated into domestic law by being drawn down into the HRA.

20. Therefore, to respond to the question in the third paragraph of your letter, if it was considered that the Secretary of State had made amendments to the HRA which went beyond what was appropriate to reflect whether and how rights in the ECHR or protocols to it had been incorporated into domestic law by being drawn down into the HRA, the mechanism for challenging the Secretary of State's use of the power would be judicial review on the grounds that they had acted *ultra vires*.

21. On reading this, the issue which may occur to the Constitutional Affairs Committee is that, unlike Parliament in respect of the Human Rights Act, there is no stage at which the National Assembly for Wales scrutinises or exercises control over whether, for example, a new United Kingdom ratified protocol to the UNCRC is "incorporated into domestic law", or a right in a protocol is made subject to a derogation or reservation.

22. It may seem that this difference between the circumstances surrounding the HRA, and those surrounding this proposed Measure, lends weight to an argument that the National Assembly for Wales should be able to exert a degree of control over orders made by the Welsh Ministers under section 8 of the proposed Measure, amending it

to reflect the fact that the United Kingdom has ratified a new protocol to the UNCRC etc.

23. However, the view of the Welsh Assembly Government is that it is precisely this difference between Parliament in relation to the ECHR and HRA, and the National Assembly for Wales in relation to the UNCRC and the proposed Measure, which would make it inappropriate for the National Assembly for Wales to be able to annul, or be asked to approve, an order by the Welsh Ministers updating the proposed Measure to keep it in line with the United Kingdom's UNCRC obligations.

24. Parliament passed the Human Rights Act 1998 to incorporate into domestic law in the United Kingdom certain international obligations contained in the ECHR and Protocols to it. Parliament continues to have ultimate control over whether rights in new protocols to the ECHR, or new derogations from rights, should be incorporated in United Kingdom law via the Human Rights Act. Parliament also has a role in decisions by the United Kingdom to ratify new protocols to the ECHR, as it would in respect of decisions to ratify new protocols to the UNCRC.

25. In contrast, the National Assembly for Wales has no control over decisions by the United Kingdom to ratify new protocols to the UNCRC or to make derogations, reservations or declarations in respect of UNCRC rights (nor has the Welsh Assembly Government of course)

26. The central purpose of the proposed Measure is to require Welsh Ministers in their strategic decision-making to have due regard to international obligations under the UNCRC, as entered into by the United Kingdom. Hence the need for the proposed Measure to be able to be kept up to date with those obligations.

27. If orders under section 8 of the proposed Measure were made subject to either negative or affirmative procedure, it would mean that the National Assembly for Wales would be able to resolve so as to prevent the proposed Measure being updated in line with the United Kingdom's international obligations.

28. Indeed, forgive me if I have misunderstood the fourth paragraph of your letter, but in that paragraph I think you may be contemplating a

situation in which the Assembly might not be content with a new UNCRC right ratified by the United Kingdom, or a reservation from it made by the United Kingdom. You express the view : “That is a matter of policy in which the Assembly would have a legitimate interest. Why should it be deprived of an opportunity to debate the matter?”

29. However, if such debate culminated in, for example, the Assembly resolving under a negative procedure to annul an order made by the Welsh Ministers reflecting such a new right or reservation, it would mean that the proposed Measure was no longer in line with international UNCRC obligations as entered into by the United Kingdom.

30. The National Assembly would have effected a “departure” from those international obligations for the purposes of the proposed Measure. This would mean that the Welsh Ministers would be required to have due regard to something which was not entirely the United Kingdom’s international UNCRC obligations.

31. Your letter suggests, as an alternative to keeping the Measure up to date via an order-making mechanism, including wording in the proposed Measure to have the effect of making the proposed Measure automatically reflect whatever the United Kingdom’s UNCRC obligations were at the relevant time.

32. I have not had the impression so far that the Committee disagrees that there is a value in setting out in the proposed Measure the substantive rights and obligations to which the Welsh Ministers must have due regard. I and my officials explained the Welsh Assembly Government’s reasons for doing this when we attended Committee on 1 July 2010.

33. In essence, the reasons are:

a) to try to make it easy for anyone to find those rights and obligations without having to refer back to and examine the UNCRC, its Protocols and United Kingdom reservations etc, and

b) to allow courts to interpret the rights and obligations set out in the Schedule in the UK and Wales context, should they consider it appropriate to do so.

34. Our view is that if the proposed Measure is not textually updated, and is instead updated automatically via “words of update”, the value of having the rights and obligations set out in the proposed Measure begins to be undermined.

35. Furthermore, we don’t think that automatic words of update could deal with, for example, inserting after section 1(1)(c) a reference to a new protocol which the United Kingdom had ratified.

36. Accordingly, we think that, given the approach we have taken of including the substantive rights and obligations in the text of the proposed Measure, and the purpose behind that approach, the order making functions in section 8 are necessary in order to ensure that the value of that approach is not eroded over time. However, I have noted the concerns that have been expressed about the lack of opportunity for the Assembly to scrutinise orders under section 8 before they are made. This is a matter which I am prepared to consider further.

#### Orders under section 7 of the Proposed Measure

37. We discussed at the meeting the provision made by the proposed Measure for orders under section 7 to be subject to affirmative procedure in the Assembly; you asked me whether consideration had been given to a super-affirmative procedure. Your letter refers me to an example in the Education (Wales) Measure 2009 of a super affirmative procedure and seeks my observations.

38. The form of super-affirmative procedure in the Education (Wales) Measure requires the Welsh Ministers, if they are proposing to exercise the power in question, to consult such persons as appear to them to be representative of interests affected by their proposals. The Welsh Ministers are also required to lay a draft of their proposed order before the Assembly for a particular period, along with an explanation of their proposals and details of their consultation.

39. However, as my officials and I explained when we attended Committee, section 7 of the proposed Measure contains a number of provisions which are specifically designed to provide an opportunity for scrutiny of proposals by the Welsh Ministers to exercise their power under that section.



40. The Welsh Ministers are required to consult on whether, to what extent and with what amendments, the provisions of the Measure may be applied to 18 to 24 year olds using the section 7 power. The Welsh Ministers are required to set out in the children's scheme their proposals for consulting on this matter. As the children's scheme has to obtain approval from the Assembly, if the Assembly thinks that the consultation is not sufficiently broad it can refuse to approve the scheme. The Welsh Ministers will then have to revise their consultation proposals until they are in a form which is acceptable to the Assembly.

41. Following this consultation, the Welsh Ministers are required to lay before the Assembly a report on their conclusions about the issue of applying the Measure to 18 to 24 year olds. Public law duties mean that the Welsh Ministers will necessarily be required to take into account consultation responses in formulating their conclusions.

42. If the conclusion of the Welsh Ministers is that they are going to exercise the section 7 power, they are required to publish a draft of their proposed order and consult such persons and bodies as they consider appropriate on that draft. The view of the Welsh Assembly Government is that the consultation period should give the Assembly sufficient time to consider the published draft and make any representations to the Welsh Ministers that they consider appropriate.

43. Finally, as orders under section 7 are subject to affirmative procedure, if the Assembly was unhappy with a draft order as laid before it for approval, and considered that further scrutiny of the draft was needed, it could refuse to approve the order. This would mean that the Welsh Ministers could not make the order.

44. Accordingly, I remain of the view that section 7 already allows sufficient opportunity for scrutiny of orders to be made under that section.

I hope that the above assists the Committee.

Yours sincerely,

**Huw Lewis AM/AC**