

National Assembly for Wales
Legislation Committee No. 5

Proposed Rights of Children and Young
Persons (Wales) Measure

Stage 1 Committee Report
October 2010



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Legislation Committee No. 5

Legislation Committee No. 5 was established by the National Assembly for Wales to consider and report on legislation introduced into the Assembly, particularly by the Welsh Government. The Committee is also able to consider and report on non-government legislation, as appropriate.

Powers

The Committee was established on 4 February 2009 as one of the Assembly's legislation committees. Its powers are set out in the National Assembly for Wales' Standing Orders, particularly SO 10, 22 and 23. These are available at www.assemblywales.org

Committee membership

<i>Committee Member</i>	<i>Party</i>	<i>Constituency or Region</i>
Mark Isherwood	Welsh Conservative	North Wales
Eleanor Burnham	Welsh Liberal Democrats	North Wales
Alun Davies	Labour	Mid and West Wales
Andrew Davies	Labour	Swansea West
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Summary of Conclusions and Recommendations

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:

General principles and the need for legislation

The Committee notes the support received for this proposed Measure and applauds the Welsh Government's attempt to enshrine the United Nations Convention on the Rights of the Child (UNCRC) and its Optional Protocols into legislation. Therefore the Committee supports the general principles of the proposed Measure. (Page 18)

However, the Committee believes that the proposed Measure requires strengthening in order to meet the intended policy objective of improving its rights based approaches for children and young persons. (Page 18)

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

The Committee has considered the evidence provided and agrees that the current wording is confusing and complicated and believes the phrase 'decisions of a strategic nature' to be limited and restricted. The Committee is disappointed the 'due regard duty' imposed on the Welsh Ministers in the proposed Measure does not correspond with the duties imposed on them regarding equality of opportunity and sustainable development in the Government of Wales Act 2006 which apply to the exercise of their functions. (Page 23)

Recommendation 1: The Committee recommends the proposed Measure is amended to insert the following or similar words into section 1(1) 'The Welsh Ministers must, when exercising their functions, have due regard to the requirements of' [Part 1 of the Convention plus Optional Protocols as set out in section 1(1) of the current draft Measure], and that consequential amendments are made to the proposed Measure to reflect this recommendation (Page 24)

Section 2 - The children's scheme

The Committee believes the phrase 'strategic decisions' is insufficient and is not helpful for people monitoring the impact of this legislation. If recommendation 1 is accepted, the Committee believes this will ensure this issue is resolved, however should recommendation 1 not be accepted, the Committee makes the following recommendation:

(Page 31)

Recommendation 2: The Committee recommends that details of what constitutes a 'strategic decision' should be included on the face of the proposed Measure. (Page 31)

Section 3 - Preparation and publication of the scheme

The Committee acknowledges the majority of evidence is in favour of consulting on the draft children's scheme before publication. The Committee has also considered the evidence of the Deputy Minister. However, the Committee believes that this is an issue which needs to be addressed and makes the following recommendation: (Page 38)

Recommendation 3: The Committee recommends that a duty, is added to the face of the proposed Measure, to consult and involve children, young people and relevant stakeholders in the developing of the children's scheme before publication in draft. (Page 38)

The Committee also considered the evidence which suggests the proposed Measure should include a requirement to consider the outcome of any consultation undertaken. The Committee noted the Deputy Minister's assertion that this would be covered by the general public law duty, but believes that this area warrants specific mention on the face on the proposed Measure. (Page 38)

Recommendation 4: The Committee recommends that section 3 is amended to ensure due consideration and regard must be given to the outcome of any consultation in the development of the children's scheme. (Page 39)

The Committee notes the evidence regarding the inclusion of other consultees under section 3(4), the Committee has seriously considered this issue and recognises that this is an area where many people and organisations have an interest. The Committee agrees with the evidence presented which states that the interested organisations can regularly change, and would not wish for some groups to be excluded from relevant consultations. However, the Committee agrees there should be provision to ensure consultation takes place with the parties listed in article 5 of the UNCRC. (Page 39)

Recommendation 5: The Committee recommends that the duty to consult detailed under section 3(4) is amended to include the following (as detailed under Article 5 of the UNCRC):

(-) Parents or, where applicable the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child.
(Page 39)

Section 4 - Reports

The Committee notes the evidence and recognises that the reporting deadline of five years is in line with the requirement of the UN Committee. (Page 47)

The Committee believes that interim reports should be published to ensure the Welsh Government is systematically recording what is happening and to provide updates on progress. (Page 47)

The Committee also notes and accepts the Deputy Minister's view that interim reports could be requested through the normal business and scrutiny process of the Assembly. (Page 47)

The Committee has reservations and was concerned to note the reference to the judicial review process as a way of securing compliance with the proposed Measure. The Committee considers that another alternative, appropriate, and more effective means of redress is necessary for those who consider that Welsh Ministers have not met their obligations under the proposed Measure. We note that

the Deputy Minister is prepared to consider this matter further, and makes the following recommendation: (Page 47)

Recommendation 6: The Committee recommends that the Deputy Minister enter into discussions including with the Children's Commissioner for Wales and the Welsh Public Services Ombudsman to explore this issue of judicial review further. The overriding aim should be to identify an effective and efficient means of redress involving the submission of complaints to either the Children's Commissioner or Ombudsman or both of them that would provide a simple, straightforward, and most cost effective method of airing grievances within the scope of the proposed Measure. (Page 48)

Section 5 - Duty to promote knowledge of the Convention

The Committee notes the Deputy Minister's view that although section 5 does not import article 42 in its entirety, the duty to promote knowledge of the Convention is sufficiently reflected in the drafting of this section, the Committee accepts this and is also reassured to see that work has already commenced to increase awareness of the UNCRC. (Page 53)

Section 6 - Power to amend legislation etc

Recommendation 7: The Committee endorses the report from the Constitutional Affairs Committee on this section, and also recommends that any proposals for consultation before making an order under section 6(4) should be laid before the Assembly; this would allow the Assembly Committees and Members to give proper consideration to them. (*Effectively creating a super affirmative procedure*) (Page 55)

Section 7 - Application to young persons

The Committee has carefully considered all the evidence on the application of the proposed Measure to 18 – 24 year olds, and believes the differing views offer convincing arguments for both sides. However, as there is no clear consensus the Committee is content for the Welsh Government to maintain the status quo in term of including 18-24 year olds in the scope of the proposed Measure. (Page 61)

Recommendation 8: The Committee supports the recommendation made by the Constitutional Affairs Committee and agrees any order made under this section should be subject to a super affirmative procedure. (Page 62)

Section 8 - The Convention on the Rights of the Child

The Committee has considered the evidence and is content for the Optional Protocols to remain on the face of the proposed Measure. (Page 65)

Recommendation 9: The Committee supports the recommendation made by the Constitutional Affairs Committee and agrees any order made under this section to amend primary legislation should be subject to an affirmative procedure. (Page 65)

1. Introduction

1. On 14 June 2010, the Deputy Minister for Children, Huw Lewis AM (“the Deputy Minister”), introduced the Proposed Rights of Children and Young Persons (Wales) Measure (“the proposed Measure”) and made a statement¹ in plenary the following day.²

2. At its meeting on 8 June 2010, the National Assembly’s Business Committee agreed to refer the proposed Measure to Legislation Committee No.5 (“the Committee”) for consideration of the general principles (Stage 1), in accordance with Standing Order 23.21. It also agreed that the Committee must report on the proposed Measure no later than 22 October 2010. The Business Committee subsequently agreed a two day extension, requiring the Committee to report by 26 October 2010.

Terms of scrutiny

3. At the Committee’s first meeting on 17 June 2010, the following framework was agreed within which to scrutinise the general principles of the proposed Measure:

To consider:

- i) the need for a proposed Measure to deliver the stated objectives of:
 - ‘imposing 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 Right 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’
- ii) whether the proposed Measure achieves its stated objectives;
- iii) the key provisions set out in the proposed Measure and whether they are appropriate to deliver its objectives;

¹ ROP, 14 June 2010, available at: <http://www.assemblywales.org/bus-home/bus-chamber/bus-chamber-third-assembly-rop.htm?act=dis&id=186566&ds=6/2010#4> (NB: unless otherwise stated, subsequent references in this report to RoP refer to the proceedings of the Legislation Committee No.5.)

² A full meeting of the National Assembly for Wales

- iv) potential barriers to the implementation of the key provisions and whether the proposed Measure takes account of them;
- v) the views of stakeholders who will have to work with the new arrangements.

The Committee's approach

4. The Committee issued a general call for evidence and invited key stakeholders, primarily from within the field of children and young people's organisations, to submit written evidence to inform the Committee's work. A list of consultation responses is attached at page 68.

5. The Committee also issued a questionnaire to gather the views of children and young people in respect of the proposed Measure. A summary of their responses is attached at page 70.

6. The Committee took oral evidence from a number of witnesses, details of which are attached at page 66.

7. The following report represents the conclusions and recommendations the Committee have reached based on the evidence received during the course of their work. The Committee would like to thank all those who have contributed.

2. Background

The National Assembly's legislative competence to make the proposed Measure

8. The principal power to enable the National Assembly to make a Measure in relation to children and young persons is contained in matter 15.6 in Part 1 of Schedule 5 to the Government of Wales Act 2006, which relates to the co-operation and arrangements to safeguard and promote the well-being of children or young persons.

The United Nations Convention on the Rights of the Child (UNCRC)

9. 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.

10. If the proposed Measure is approved Wales will be the first country in the UK to integrate the UNCRC into domestic law.

Explanatory Memorandum

11. The Explanatory Memorandum³ accompanying the proposed Measure states that:

“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.”

12. The Explanatory Memorandum explains:

“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;

³ Welsh Assembly Government, *Explanatory Memorandum to the Proposed Rights of Children and Young Persons (Wales) Measure*

- 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.”

3. General Principles and the need for legislation

Background

13. The purpose of the proposed Measure is to impose a duty upon 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.

14. 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.

Evidence from witnesses

15. Most of the evidence received in relation to the general principles of the proposed Measure was very positive. Most witness and respondents welcomed the proposed Measure and agreed that there is a need for legislation to further the application of the UNCRC thus strengthening the rights of children and young people in Wales.

16. The Welsh Local Government Association (WLGA) supported the intention to bring forward legislation in this area. They said:

“We think that it demonstrates leadership and a clear intention to enshrine the UNCRC in legislation It certainly

strengthens and protects the rights of children and young people in Wales.”⁴

17. The UNCRC Monitoring Group believed the legislation was overdue:

“...we think that, 18 years after the UNCRC was signed up to by the UK Government, taking these steps to protect and promote the human rights of children in Welsh legislation is well overdue.”⁵

18. Many organisations also recognised that Wales is the first part of the United Kingdom to enshrine this legislation in domestic law, and welcomed this move. The UNCRC Monitoring Group said:

“We know that good progress has been made in Wales and that Wales has been unique in the UK in showing a commitment to promote children’s rights through policy making and, more recently, through referring to the United Nations Convention on the Rights of the Child in legislation.”⁶

19. The Children’s Commissioner for Wales recognised that the proposed Measure “will be something of a first for the UK”⁷ and he continued “I think that there are several pairs of eyes outside Wales watching what we are doing, and it could have quite an impact across the UK.”⁸

20. However, some respondents have expressed concern as to whether the proposed Measure as drafted will take the children’s rights agenda forward. Whilst the UNCRC Monitoring Group welcomed the legislation, they stated:

“it will not improve or strengthen the rights of the child as such, because no new rights or obligations are contained in the proposed legislation.”⁹

21. In written evidence the Children’s Commissioner acknowledged “concerns have been raised ... about whether the Measure as drafted

⁴ ROP, paragraph 160, 1 July 2010

⁵ ROP, paragraph 15, 1 July 2010

⁶ *ibid*, paragraph 13

⁷ ROP, paragraph 154, 8 July 2010

⁸ *ibid*, paragraph 155

⁹ ROP, paragraph 17, 1 July 2010

could deliver improved outcomes in terms of upholding the rights of children”¹⁰ the Children’s Commissioner continued to say he shared the concerns about taking forward the children’s rights agenda.

22. Some organisations even continued to question whether the proposed Measure will result in a backward step for children’s rights in Wales. In written evidence, co-ordinated by the School of Law, Swansea University, said:

“Against this existing backdrop, it is surely already the case that the Welsh Ministers should be paying due regard to the UNCRC when making decisions that engage the UK’s State party obligations of the UNCRC.... This appears, perversely, a step backward rather than forward, since it suggests a limitation on the existing apparent impact on Welsh Ministers of the UNCRC. To produce a progressive impact in law as apparently envisioned when the policy intention was first announced.., we think that the duty needs to be more expansive than this, biting directly on the exercise of Welsh Ministerial functions.”¹¹

23. A legal advice paper submitted to the Committee noted, it could be argued that the limitations placed on the duty (due regard duty to strategic decisions) could reduce its impact, which may result in little or no improvement for children’s rights in Wales.¹²

24. It was also noted that in England and the other devolved countries, where the UNCRC has not yet been enshrined in legislation the application of the UNCRC is not restricted in any way i.e. by ‘relevant decisions’ of a ‘strategic nature’.

25. Whilst stating they did agree with the principles behind the proposed Measure, the National Association of Schoolmasters Union of Women Teachers (NASWUT) believed there was could be problems with “the practice that stems from the principle”, due to a perceived lack of balance between children’s rights and “the need to respect the rights and reputations of others”. Mr Phillips, continued to state it caused a problem for:

¹⁰ CR 5A, Written Evidence

¹¹ CR 23, Written Evidence

¹² Legislation Committee No. 5 Paper: LC5(3)-17-10: Legal Brief

“for teachers and the members whom I represent, it is the practice that has arisen under student voice, learner voice, pupil participation and pupil voice.”¹³

Evidence from the Deputy Minister

26. The Deputy Minister explained that the reasons behind the decision to introduce this legislation were:

“Our belief, simply put, is that the legislation will better express the will of the National Assembly for Wales. In January 2004, there was unanimous cross-party support for the use of the United Nations Convention on the Rights of the Child as the underpinning basis for policy-making regarding children and young people in Wales. Since 2002, we have been using the seven core aims as the basis for planning services for children and young people locally and at an all-Wales level. However, it has been felt that this has not been as systematic or comprehensive as it may have been and that in using the seven core aims, there may have been a tendency to mask the UNCRC by using the seven core aims as a substitute for the convention.”¹⁴

The Deputy Minister continued to state the proposed Measure:

“would enshrine in law a duty for Welsh Ministers to pay due regard to the UNCRC, which takes us a step further into the top level of nations across the world that are committed to the rights of the child.”¹⁵

27. In response to suggestions that the proposed Measure does not take the children’s rights agenda any further forward and is weak in the way it is drafted, the Deputy Minister said:

“You will not be surprised, Chair, to hear me say that I do not really concur with that view. On the balance of the evidence that you have received and which I have managed to take a look at, it appears to be a minority view.”¹⁶

¹³ ROP, Paragraph 6, 30 September 2010

¹⁴ ROP, paragraph 11, 24 June 2010

¹⁵ *ibid*, paragraph 14

¹⁶ ROP, paragraph 10, 7 October 2010

28. The Deputy Minister stated that the interpretation of it being a backward step was not fair.¹⁷ He continued to say he, “strongly rejected the argument that we are weakening the position. We are not changing the position; we are putting something that is really quite novel on top of it.”¹⁸

Our View

The Committee notes the support received for this proposed Measure and applauds the Welsh Governments attempt to enshrine the UNCRC and its Optional Protocols referred to on the face of the proposed Measure into legislation. Therefore the Committee supports the general principles of the proposed Measure.

However, the Committee believes that the proposed Measure requires strengthening in order to meet the intended policy objective of improving its rights based approaches for children and young persons.

¹⁷ ROP, paragraph 16, 7 October 2010

¹⁸ *ibid*, paragraph 20

4. Section 1 - Duty to have due regard to Convention on the Rights of the Child

Background

29. Section 1 of the proposed Measure would impose a duty upon Welsh Ministers and the First Minister to have due regard to the rights and obligations in the UNCRC and its Optional Protocols, when making any relevant decision of a strategic nature about how to exercise functions which are exercisable by them.

Evidence from witnesses

30. Five of the respondents to the written request for evidence specifically stated that the ‘due regard duty’ should apply to all the functions of the Welsh Government, (it should be noted that this included the UNCRC Monitoring Group which is an umbrella group representing ten organisations).

31. In their written evidence to Legislation Committee 5 the UNCRC Monitoring Group state that “the duty to have due regard should apply to the exercise by Ministers of their functions.”¹⁹

32. In additional written evidence provided to the Committee the WLGA state: “the Measure should be all pervasive and apply to all decisions of the Welsh Ministers and First Ministers.”²⁰

33. Witnesses co-ordinated by School of Law, Swansea University argue the case for the proposed Measure to impact on a “whole organisation” basis rather than apply only to some aspects of the work of Welsh Ministers.²¹ Referring to their own written evidence they state:

“The paper offers amendments which would replace the ‘decisions of a strategic nature’ formula by a simple duty on Welsh Ministers to have due regard to the UNCRC when exercising their functions.”²²

¹⁹ CR 2, Written Evidence

²⁰ CR 3A, Written Evidence

²¹ CR 23, Written Evidence

²² CR 23 Written Evidence

34. They go on to point out that the duty to have due regard in section 1 of the proposed Measure is based on the ‘socio-economic duty’ model contained in section 1 of the Equality Act 2010, which they argue is not the right model, stating in their written evidence:

“The question for the National Assembly for Wales, dealing with the draft Rights of Children and Young Persons (Wales) Measure, is whether the ‘socio-economic duty’ in section 1 Equality Act 2010 is the right model for seeking to ‘embed the UNCRC in law’ in relation to devolved government in Wales. We think it is not.”²³

35. The National Society for the Prevention of Cruelty to Children (NSPCC) states that the current wording is “unnecessarily confusing and complicated”²⁴ and that the:

“measure in its current form does not allow for the full embedment of the Convention within the legal framework in Wales. This is because the due regard duty currently only applies to ‘decisions of a strategic nature about how to exercise any functions which are exercisable by (Welsh Ministers).’”²⁵

36. However, the WLGA believed there could be difficulties in applying the ‘due regard’ duty to all decisions. They said:

“It is difficult, because Ministers make decisions on a daily basis in that way, and the proposed Measure needs to be practical and applicable and we need to be clear about its scope. I can understand the concerns about the word ‘strategic’ and what it will encapsulate, but there are also difficulties in saying ‘all decisions’.”²⁶

37. The WLGA also felt that the duty to have due regard to the UNCRC should remain flexible to allow Welsh Ministers to decide on a case by case basis. They said:

“I think that that should be left quite flexible, to look at decisions as and when they come up, because some decisions

²³ CR 23 Written Evidence

²⁴ CR 13, Written Evidence

²⁵ *ibid*

²⁶ ROP, paragraph 183, 1 July 2010

will relate more closely to children and young people and to the protection of their rights than others. It is quite important to ensure that there is a flexible approach to how we look at what a strategic decision is.”²⁷

38. They went onto say:

“Sometimes, having something on the face of a Measure means that you lose a little flexibility. We do not want to see the previous incarnation of this legislation, which listed many policies to which it applied, because you then automatically exclude policies and we certainly do not want that to happen. We want to see the UNCRC being taken into account in a broad range of policies that will impact on children and young people, and not exclude one policy over another.”²⁸

39. The UNCRC Monitoring Group raised concerns that the proposed Measure “would require Ministers to do something that they can already do, namely to seek advice and information on how the exercise of their functions could further or undermine or otherwise have an impact on the implementation of the UNCRC.”²⁹

40. They went onto say:

“The National Assembly passed a resolution in Plenary in 2004 to adopt the UNCRC as an overarching source of principles when dealing with things that affect children and young people in Wales. So, in a sense, it is a little bit startling, now, in 2010, if Welsh Ministers are thinking that law is required in order to follow that through. That raises some questions.”³⁰

41. The UNCRC Monitoring Group suggested an amendment during the Welsh Government’s pre-legislative consultation on the proposed Measure:

“Our little ad hoc group of lawyers offered an amendment to the pre-consultation draft legislation that would have had the

²⁷ ROP, paragraph 176, 1 July 2010

²⁸ *ibid*, paragraph 189

²⁹ *ibid*, paragraph 32

³⁰ *ibid*, paragraph 32

effect of removing the word 'relevant', meaning that the duty was simply to have due regard when exercising functions."³¹

42. The written evidence supplied by witnesses co-ordinated by School of Law, Swansea University gave further detail on this suggested amendment to replace current section 1(1), which is:

"The Welsh Ministers must, when exercising their functions, have due regard to the requirements of..."³²

(nb - this amendment would also have a consequential amendment on 1(2) and 2(1)(a))

Evidence from the Deputy Minister

43. In his oral evidence to the Committee, when questioned as to why the 'due regard' duty did not apply to 'all decisions', the Deputy Minister suggested that this could create confusion and run the risk of diluting the purpose of the proposed Measure. The Deputy Minister indicated that the 'due regard duty' would apply to high level decisions where the greatest affect for children can be achieved.

44. The Deputy Minister said that:

"we are proposing to bring forward a duty that targets the decisions that we think will have the greatest effect on children, and concentrate our resources for having due regard to the UNCRC on those decisions."³³

45. He went onto say:

"If we encompassed all decisions within the remit of the legislation, we would run the risk of diluting the effect of the legislation to such an extent that it became a tick-box exercise...However, if we include on the face of the proposed Measure the idea that all decisions that ever come out of the Assembly Government should be bound by the due regard duty, we could get into a situation in which no kind of strategic effect would be driven by this legislation. We would just have

³¹ ROP, paragraph 44, 1 July 2010

³² CR 23, Written Evidence

³³ ROP, paragraph 26, 24 June 2010

administrative staff ticking boxes as they went about their day-to-day business.”³⁴

46. The Deputy Minister provided some additional written evidence to the Committee, regarding whether the due regard duty ‘would give the Assembly Government freedom to avoid the due regard duty if it were so minded’ the additional evidence states:

“There will be no such freedom. The children’s scheme must set out what the criteria are for identifying decisions of a strategic nature. The Welsh Ministers cannot make the children’s scheme until the Assembly is content with it and has approved it.”³⁵

47. Further evidence provided by the Deputy Minister also addressed the application of the duty limiting the impact of the UNCRC. The evidence states:

“to argue that the proposed application of this duty will limit the influence of the UNCRC is in my view, to misunderstand the effect this duty will have. When *any* function is carried out by *any Minister or official* within the framework of a strategic decision (for example, in policy implementation), it will be carried out against the background of there having been a full consideration of whether that function could be, and is going to be, exercised so as to give greater effect to the 58 substantive rights and obligations in the UNCRC and its Optional Protocols.”³⁶

Our View

The Committee has considered the evidence provided and agrees that the current wording is confusing and complicated and believes the phrase ‘decisions of a strategic nature’ to be limited and restricted. The Committee is disappointed the ‘due regard duty’ imposed on the Welsh Ministers in the proposed Measure does not correspond with the duties imposed on them regarding equality of opportunity and sustainable development in the

³⁴ ROP, paragraph 21, 24 June 2010

³⁵ Legislation Committee No. 5 Paper: LC(3)-16-10 Paper 4 to note, 30 September 2010

³⁶ Legislation Committee No. 5 Paper: LC(3)-17-10 Paper 3, 7 October 2010

Government of Wales Act 2006 which apply to the exercise of their functions.

Recommendation 1:

The Committee recommends the proposed Measure is amended to insert the following or similar words into section 1(1) ‘The Welsh Ministers must, when exercising their functions, have due regard to the requirements of ’ [Part 1 of the Convention plus Optional Protocols as set out in section 1(1) of the current draft Measure], and that consequential amendments are made to the proposed Measure to reflect this recommendation.

5. Section 2 – The children’s scheme

Background

48. The ‘due regard’ duty is coupled with a duty on the Welsh Ministers to make a children’s scheme, and section 2 details that the children’s scheme, must set out:

- the criteria which will be applied for identifying decisions of a strategic nature (as identified in Section 1(2)), and
- the Welsh Ministers’ arrangements for securing compliance with the central “due regard” duty contained in section 1.

49. 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 and will be tested through consultation and will have to be acceptable to the Assembly. The scheme should also set out criteria about the type of decisions which amount to decisions of a strategic nature.

Evidence from witnesses

50. The Committee heard evidence from witnesses co-ordinated by School of Law, Swansea University that the children’s scheme imposes:

“an additional requirement to produce a formal scheme seems an unnecessary burden of administration, carrying with it a risk that the text of the scheme might become the focus of attention to the detriment of thinking about concrete actions to achieve change.”³⁷

51. They believed that if section 1(1) is changed to apply to have due regard when ‘exercising their functions’, there is no requirement for a children’s scheme.

52. However, none of the other evidence referred to the removal of the children’s scheme. Most of the evidence concentrated on the provision under section 2(1)(a) which states that the scheme should

³⁷ CR23, Written Evidence

set “out the criteria they [Welsh Ministers] will apply for determining which of their decisions are decisions of a strategic nature”.

53. There were mixed views in respect of determining which decisions are of a strategic nature. Nine of the consultees and witnesses put forward their own interpretation of what is meant by decisions of a strategic nature, none of these definitions were consistent with each other. Some examples of these varying definitions are detailed below.

54. UNICEF UK stated that a decision of a strategic nature means:

“a decision that sets the direction, course of action and parameters for how to exercise ministerial functions.”³⁸

55. Conwy County Borough Council believed “decisions of a strategic nature are those decisions regarding policies”, although they did state that in their view the wording of the proposed Measure is sufficiently clear and wide.³⁹

56. NASUWT considers that a decision of a strategic nature is:

“any decision that relates to policies, policy areas or service areas that affect, impact on, or involve children and those that work with, or on behalf of, children and young people”⁴⁰

57. This confusion was further evidenced by witnesses co-ordinated by School of Law, Swansea University. They carried out a workshop with a number of experts on children’s rights, including academics and practitioners who were presented with various scenarios, adopting a case study methodology they found that considerable time was spent considering whether a decision was ‘strategic’. They said:

“A lot of the group’s discussion time was spent trying to determine whether the decisions that were being taken within those scenarios fell within the definition of a ‘decision of a strategic nature’, rather than focusing, as was the real intention of the case study, on deciding what rights there were and their implications within the context of the case study itself.”⁴¹

³⁸ CR 6, Written Evidence

³⁹ CR 7, Written Evidence

⁴⁰ CR 11, Written Evidence

⁴¹ ROP, paragraph 190, 23 September 2010

58. They continued to say that “due to the confusion over what constitutes a ‘strategic decision’, the majority of workshop participants felt that a clear definition of what ‘decisions of a strategic nature’ should be specified on the face of the proposed Measure as opposed to the criteria being set out in the children’s scheme.”⁴²

59. Many witnesses agreed with this, Councillor Alana Davies, Bridgend County Borough Council stated that she would prefer “to see a number of headings of examples which would be seen as strategic decisions, as well as some that would not.”⁴³

60. Children in Wales believed that it was critical that “this is addressed and the scope of concept of ‘decision of a strategic nature’ is made clear and placed on the face of the Measure.”⁴⁴

61. The National Youth Advocacy Service Cymru (NYAS) said that in order to create legislation that would promote the rights of children and young people and to be transparent, a clear definition of ‘strategic nature’ needs to be explained.⁴⁵

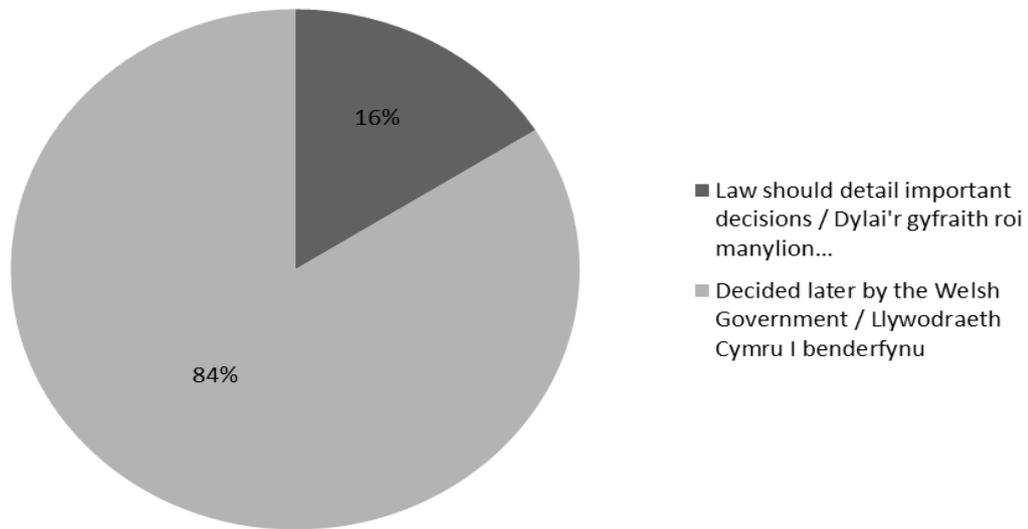
62. From 32 responses received for the children and young people’s consultation questionnaire, 84% felt that the proposed Measure should say exactly what sorts of ‘important decisions’ would be affected.

⁴² CR 23, Written Evidence

⁴³ CR 1, Written Evidence

⁴⁴ CR 19, Written Evidence

⁴⁵ ROP, paragraph 102, 23 September 2010



63. Bethan Adshead, a young representative from Funky Dragon said:

“I think the new law should say what sort of decisions will be made and when, and we should know how they are going to affect us as young people.”⁴⁶

64. The Children’s Commissioner said that:

“I think that we need some clarity within the proposed Measure about what constitutes a strategic decision. I have had a lawyer looking at this, and we have had endless fun describing and trying to define what a strategic decision might be.”⁴⁷

65. He continued to state:

“I would like some definition of the baseline for what constitutes a strategic decision, and I would like that in the proposed Measure.”⁴⁸

⁴⁶ ROP, paragraph 22, 23 September 2010

⁴⁷ ROP, paragraph 106, 8 July 2010

⁴⁸ *ibid*, paragraph 161

66. He also raised concerns that unless a ‘strategic decision’ was defined in the proposed Measure the children’s scheme may struggle to determine it.

“When you think about the next stage of this, which is the scheme that is being proposed, unless you define up front what the strategic decisions are, the scheme will struggle to determine that. So, it needs to be on the face of the proposed Measure.”⁴⁹

67. The UNCRC Monitoring Group, noted that the Explanatory Memorandum accompanying the proposed Measure states ‘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’, the UNCRC Monitoring Group said “with respect we think it wildly optimistic of the Deputy Minister to hope (in his evidence to the Legislation Committee on the 24 June) for an open transparent and inclusive discussion about this.”⁵⁰

68. In additional evidence to the Committee the WLGA stated that they:

“believe that a definition should be on the face of the Measure to ensure clarity and to ensure all Ministers follow the same criteria.”⁵¹

69. The WLGA also raised concerns as to the potential for strategic decisions to be viewed as ‘high level decisions about long term objectives, not day to day decisions’, they continued to state that this led to a distinction between what high level officials and Welsh Ministers deal with and what lower down officials do, the WLGA stated:

“this worries us very much, since the vast majority of interactions between WAG [Welsh Assembly Government] and the public, including children and young people, are with WAG

⁴⁹ ROP, paragraph 195, 8 July 2010

⁵⁰ CR 2, Written Evidence

⁵¹ CR 3A, Written Evidence

officials at relatively low or middle level, not Ministers or their senior advisers.”⁵²

Evidence from the Deputy Minister

70. In further evidence from the Deputy Minister he states that there will be no freedom to avoid the ‘due regard duty’ based on the phrase ‘decisions of a strategic nature’. The letter states “the children’s scheme must set out what the criteria are for identifying decisions of a strategic nature. The Welsh Ministers cannot make the children’s scheme until the Assembly is content with it and has approved it.”⁵³

71. The additional evidence provided by the Deputy Minister goes on to state:

“‘Decisions of a strategic nature’ carries a natural meaning in ordinary language and describes a *type* of decision, irrespective of the subject matter to which the decision relates.”⁵⁴

72. It continues to explain that to be of assistance to the person who wasn’t to know whether a decision is of a strategic nature “the criteria have to be much more detailed and explanatory that can be set out on the face of a piece of legislation.”⁵⁵

73. Annex A of the additional evidence states:

“To the best of our knowledge this will be the first and only definition of strategic decision in UK law. The criteria for identifying a strategic decision will be developed collaboratively with external partners and children and young people.”⁵⁶

74. Annex A of the additional evidence also states that the phrase “‘decisions of a strategic nature’ will also catch any strategic decisions taken by officials, for example around staff recruitment processes”.⁵⁷

75. In relation to the varying definitions of ‘strategic decisions’ received in evidence by the Committee, the Deputy Minister said

⁵² CR 3, Written Evidence

⁵³ Legislation Committee No. 5 Paper: LC(3)-17-10 Paper 3, 7 October 2010

⁵⁴ *ibid*

⁵⁵ Legislation Committee No. 5 Paper: LC(3)-17-10 Paper 3, 7 October 2010

⁵⁶ Legislation Committee No. 5 Paper: LC(3)-17-10 Paper 3: Annex A, 7 October 2010

⁵⁷ *ibid*

“differing interpretations of legal wording are par for the course. That is how law is made”. The Deputy Minister continued to state that the children’s scheme would be used to get “a consensus and a sensible and understandable interpretation.”⁵⁸

Our View

The Committee believes the phrase ‘strategic decisions’ is insufficient and is not helpful for people monitoring the impact of this legislation. If recommendation 1 is accepted, the Committee believes this will ensure this issue is resolved, however should recommendation 1 not be accepted, the Committee makes the following recommendation:

Recommendation 2:

The Committee recommends that details of what constitutes a ‘strategic decision’ should be included on the face of the proposed Measure.

⁵⁸ ROP, paragraph 67, 7 October 2010

6. Section 3 - Preparation and publication of the scheme

Background

76. Section 3 of the proposed Measure includes provisions regarding the preparation and publication of the children's scheme and the section notes the documents to which Welsh Ministers must have regard when preparing, remaking or revising the children's scheme.

77. A draft version of the children's scheme must be laid before and approved by the National Assembly for Wales before the Welsh Ministers can make it. Before the draft is laid in the Assembly, the Welsh Ministers will have to publish the draft and consult upon it. Section 3(4) requires this consultation to include children and young persons, the Children's Commissioner and other persons or bodies that the Welsh Ministers consider appropriate.

Evidence from witnesses

78. Much of the evidence relating to section 3 related to the requirement to consult detailed under section 3(4).

79. Some witnesses queried whether children, young people and appropriate persons and bodies should be consulted and involved in developing the children's scheme rather than being consulted once the draft had been published.

80. The UNCRC Monitoring Group said:

“in our response to the pre-legislative consultation we said that we felt strongly that only consulting with children and young people and the public after the scheme had been settled was too late. We would like to see a more inclusive approach, as reflected in the Government of Wales Act 2006, with children, young people, adults and appropriate bodies involved in the development of that scheme. In a sense, that is why we said that it was too late; we would like to see something that

ensures that children, young people and appropriate agencies are involved in developing the scheme.”⁵⁹

81. When questioned whether external stakeholders should be involved in the drafting of the children’s scheme, as suggested by the UNCRC Monitoring Group, the Children’s Commissioner said:

“That is good practice. There is also a lot of expertise out there that needs to be drawn down. The monitoring group is right. Expertise is available and the Government would be foolish to ignore it.”⁶⁰

82. The WLGA believed that there was merit in consultation taking place both before the publication of the draft children’s scheme and after the publication of the draft children’s scheme. When asked whether they would want to be involved in a consultation on the draft children’s scheme, the WLGA said:

“I think that it is entirely proper to do that. We work closely with the Welsh Assembly Government on a variety of issues, and it consults us and we co-produce some work. We are entirely happy to be involved with that, and I think that other stakeholders probably should be involved as well.”⁶¹

83. When asked whether it is too late to consult after publication of the draft scheme, the WLGA said:

“No, not necessarily; it depends on how you handle the consultation before publication. Both consultations are probably appropriate.”⁶²

84. They continued to state:

“Sometimes, when consultation documents come out, people can have a view that it is the finished article. Having an opportunity to shape and influence what comes out for consultation means that, sometimes, you can get it as right as you can by the time it is ready for consultation. Obviously, there were concerns about the first draft of the proposed Measure, and those concerns have been addressed in taking

⁵⁹ ROP, paragraph 93, 1 July 2010

⁶⁰ ROP, paragraph 228, 8 July 2010

⁶¹ ROP, paragraph 206, 1 July 2010

⁶² *ibid*, paragraph 208

this forward. Having that early engagement means that some of those concerns and issues can be addressed at an early stage rather than after the fact. It enables you to tease out some of the more difficult issues that sometimes cannot have a full airing as part of a consultation process.”⁶³

85. Witnesses also believed that the proposed Measure should contain a commitment to listen meaningfully to what children, young people and their representatives have to say.

86. The Children’s Commissioner said:

“there is a whole issue about how Government consults and listens. How children and young people understand that they have been listened to is a critical part of this, so I think that an amendment is required to make that happen.”⁶⁴

87. The WLGA noted that the Welsh Government has a variety of schemes in place to consult children and young people but stated:

“With regard to consultation with children and young people, all we want to do is ensure that, enshrined in this, is a commitment to listen meaningfully to what children and young people have to say about it...we want to ensure that it is not just a tick-box exercise in which you can just say that you have talked to children and young people. We want to ensure that it is a key part of this and that they are meaningfully engaged in the process.”⁶⁵

88. UNICEF UK agreed with this view:

“It will be very important not only to consult with all relevant stakeholders but to consult them early. It would be ideal to start consulting them as early as when the scheme is being developed.”⁶⁶

89. However, the UNCRC Monitoring Group felt that the proposed Measure as drafted was sufficient, they said:

⁶³ ROP, paragraph 209, 1 July 2010

⁶⁴ ROP, paragraph 230, 8 July 2010

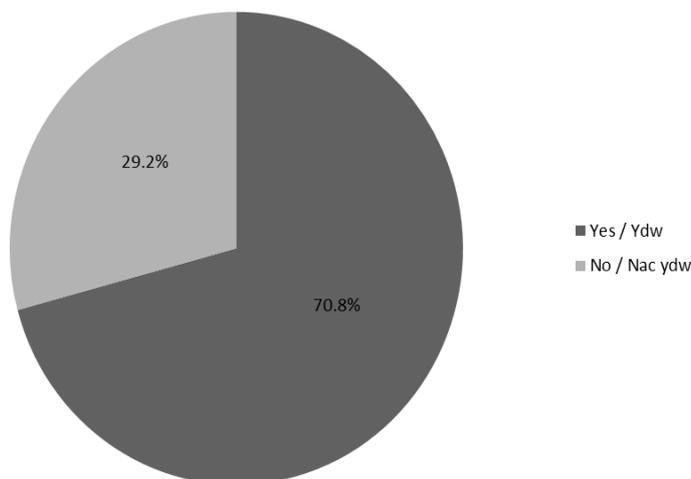
⁶⁵ ROP, paragraph 215, 1 July 2010

⁶⁶ ROP, paragraph 25, 15 July 2010

“Ordinary public law, that is, case law that is under judicial review, has established that where there is a duty to consult, the statutory consulter must take some notice of the responses to the consultation and show that they have had regard to them. Otherwise, there are issues about process and perhaps about the rationality of the ultimate decision that could undermine its legality in terms of judicial review. My response as a public lawyer would be, ‘Yes, you do have to, so maybe you don’t need to have a specific statutory duty’. However, there are examples, which I do not have to hand, elsewhere in the statute book of an express duty to have regard to the responses of consultees.”⁶⁷

90. Some witnesses commented on the list of consultees listed under section 3(4). Christian Action Research,⁶⁸ Evangelical Alliance Wales⁶⁹ and Care for the Family⁷⁰ all believed that parents should be mentioned on the face on the proposed Measure as a group listed under section 3(4) that should be consulted with.

91. Children and young people were asked ‘when changing things written in this children’s scheme, the Welsh Government must ask children and young people for their views and ideas. Do you think anyone else should be asked about what they think?’. The majority of children and young responded ‘yes’.



⁶⁷ ROP, paragraph 95, 1 July 2010

⁶⁸ CR 12, Written Evidence

⁶⁹ CR 16, Written Evidence

⁷⁰ CR 20, Written Evidence

92. When questioned who else should be consulted, the responses from children and young people included parents/guardians, relatives, social workers, adults and teachers.

93. However, the majority of witnesses were satisfied with the list of consultees and felt that specifying a list of other appropriate bodies may lead to omissions or a potentially prolonged debate about who should or should not be included in the list of consultees.

94. The UNCRC Monitoring Group believed that there was scope for the list of bodies to continually grow and change, and they hoped that structures were already in place to engage with specialist expertise on the Convention. They continued to say:

“Including too much detail on the face of the proposed Measure at this stage could hamper implementation at a later date, but we would hope that Welsh Ministers would engage with external stakeholders as they have done, and as they do currently.”⁷¹

95. The WLGA agreed the Children’s Commissioner should be identified on the face of the proposed Measure as “that is where children go if they have concerns about some of these issues” but believed there was a danger in listing other consultees as it could result in excluding certain groups and people, they said:

“If you keep it as broad as possible, referring to external stakeholders, for example, that leaves enough scope for people to be consulted. You have also got to bear in mind that, hopefully, this legislation will stand the test of time, and new organisations for children and young people may spring up that we would certainly not want to exclude from the consultation.”⁷²

Evidence from the Deputy Minister

96. The Deputy Minister stated:

⁷¹ ROP, paragraph 107, 1 July 2010

⁷² *ibid*, paragraph 214

“there will be further consultation with all stakeholders on drawing up the scheme in an attempt to get a robust, clear and transparent understanding.”⁷³

97. Marcus Hill, Specialist Policy Adviser, continued to say:

“we will develop the scheme with stakeholders. They will include children and young people”⁷⁴

98. When questioned whether the proposed Measure should be amended to include a provision to have regard to consultation responses the Deputy Minister said:

“I do not believe that anything needs to be said on the face of the proposed Measure in order to change the way that we respond to consultation, because Welsh Ministers are already under a public law duty to take proper account of the responses that they receive.”⁷⁵

99. The Deputy Minister said including a list of consultees on the face of the proposed Measure posed a danger “of omissions”, which could result in problems in years to come. The Deputy Minister said the Children’s Commissioner had been included as “that is built into the warp and weft of everything that we will do in relation to children and young people”, but there was still a need for flexibility to:

“respond to circumstance and how those circumstances affect children and young people. So, we do not think that it would be appropriate to have a prescriptive list published at the moment because I would bet my mortgage that, at some point or other, we would find that list to be inadequate, unfair or inflexible in some way.”⁷⁶

100. When questioned specifically about adding parents to the list of consultees included on the face of the proposed Measure, the Deputy Minister said he was not convinced this would add anything, he continued to state:

⁷³ ROP, paragraph 55, 24 June 2010

⁷⁴ *ibid*, paragraph 56,

⁷⁵ ROP, paragraph 91, 24 June 2010

⁷⁶ *ibid*, paragraph 86

“It leads to us having to be careful about children who live in various other forms of family units or who are looked after.”⁷⁷

101. The Deputy Minister continued:

“you would have to get into another definition argument about who exactly we were talking about. The other point is that the rights of parent are protected by the convention of Human Rights. It is illegal for public authorities to act incompatibly with the rights of parents. So parents are protected there. The third point I would make is that this law is about the rights of children and young people, not adults.”⁷⁸

Our View

The Committee acknowledges the majority of evidence is in favour of consulting on the draft children’s scheme before publication. The Committee has also considered the evidence of the Deputy Minister. However, the Committee believes that this is an issue which needs to be addressed and makes the following recommendation.

Recommendation 3:

The Committee recommends that a duty, is added to the face of the proposed Measure, to consult and involve children, young people and relevant stakeholders in the developing of the children’s scheme before publication in draft.

The Committee also considered the evidence which suggests the proposed Measure should include a requirement to consider the outcome of any consultation undertaken. The Committee noted the Deputy Minister’s assertion that this would be covered by the general public law duty, but believes that this area warrants specific mention on the face on the proposed Measure.

⁷⁷ ROP, paragraph 149, 7 October 2010

⁷⁸ *ibid*, paragraph 158

Recommendation 4:

The Committee recommends that section 3 is amended to ensure due consideration and regard must be given to the outcome of any consultation in the development of the children's scheme.

The Committee notes the evidence regarding the inclusion of other consultees under section 3(4), the Committee has seriously considered this issue and recognises that this is an area where many people and organisations have an interest. The Committee agrees with the evidence presented which states that the interested organisations can regularly change, and would not wish for some groups to be excluded from relevant consultations. However, the Committee agrees there should be provision to ensure consultation takes place with the parties listed in article 5 of the UNCRC.

Recommendation 5:

The Committee recommends that the duty to consult detailed under 3(4) is amended to include the following (as detailed under article 5 of the UNCRC):

(-) Parents or, where applicable the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child.

7. Section 4 - Reports

Background

102. Section 4 of 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. Reporting deadlines have been chosen to align with the intervals at which the UK reports to the UN Committee on the Rights of the Child on progress in the UK and on which the devolved countries have chosen to provide their individual country reports. This would allow the contents of the Welsh Ministers' report to be included in the UK report.

103. However, there is provision in the proposed Measure which allows that 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.

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

Evidence from witnesses

105. Witnesses were content with the reporting deadline of five years as in line with the reporting requirement of the UN Committee. The WLGA agreed that the five year reporting cycle was "in line with the reporting requirements of the UN committee, so it makes sense."⁷⁹

106. They went on to say that:

"There will be a need for regular feedback and updates on progress, but that does not necessarily need to be included in the proposed Measure. Five years is a reasonable timeframe for formal reports."⁸⁰

107. The UNCRC Monitoring Group also agreed and said that the five year reporting deadline was "the minimum requirement to fit in with

⁷⁹ ROP, paragraph 222, 1 July 2010

⁸⁰ *ibid*

the reporting process of the UN Committee on the Rights of the Child, and it makes sense for the reporting cycle of the Welsh Assembly Government to fit in with that.”⁸¹

108. However, most witnesses felt that interim reports should be published to ensure that the Welsh Government was systematically recording what was happening and updating on progress as well as ensuring there was not a huge drafting task every five years.

109. The UNCRC Monitoring Group noted that the five year cycle would be likely to extend beyond the term of office for Ministers, and this is where the Assembly scrutiny function would be needed. They said:

“We think that this is where the Assembly’s scrutiny role has an opportunity to be bolstered and developed... we believe that within the five-year period there should be an opportunity for the Assembly to call for additional reports.”⁸²

110. Whilst the Children’s Commissioner was content with the five year reporting deadline, he suggested annual reports should be published. He said that:

“Tying the monitoring cycle in with the UNCRC cycle makes sense, but I would be looking for something annual—and my annual report plays a part in that. That is to ensure that we are not waiting five years for this to happen. This is about what is happening in Wales, what improvements are being driven through for children, and that information is being held, managed and debated systemically.”⁸³

111. He also explained that interim reports should then inform the report every five years “so that we do not get to the UN committee in Geneva every five years with a massive drafting task to do because we have not made this happen systematically.”⁸⁴

112. The issue of judicial review and accountability was raised a number of times during the evidence sessions, much of the evidence gathered during the Committees consideration of the proposed

⁸¹ ROP, paragraph 99, 1 July 2010

⁸² *ibid*

⁸³ ROP, paragraph 232, 8 July

⁸⁴ *ibid*

Measure debated whether the reporting arrangements was an effective form of monitoring and scrutiny, or whether the proposed Measure required amending to take account of legal redress and judicial review.

113. UNICEF UK, acknowledged the outcomes of the proposed Measure would be subject to parliamentary scrutiny, and the reporting to the UN Committee will also allow interested parties to monitor and scrutinise the proposed Measure, but UNICEF UK believed the proposed Measure:

“falls short of the full incorporation of the convention and children having their rights under the convention as legal rights that they could use as stand-alone rights in a court of law, which is what that UN committee would ideally have liked to see.”⁸⁵

114. The WLGA also believed the process for holding Welsh Ministers to account was unclear and they would “wish to see some clarity”, they also noted, “that is a very complex process for a child or young person to understand with regard to how they could challenge that and what support mechanisms would be available.”⁸⁶

115. The Children’s Commissioner commented on his role in holding the Welsh Ministers to account:

“The children’s commissioner can review and make recommendations and representations as well as call the Government to account by asking it to explain how and why it made a decision and why it did not have due regard for something, if that were the case. So, I can make that happen—I can call the Government in and make recommendations and it has to decide how it will respond to me and tell me what it would do if it agreed with me. If it did not agree with me, it would have to outline its reasons for not doing so. So, I have the ability to do that with regard to any devolved function, but I do not have that ability with regard to non-devolved matters.”⁸⁷

⁸⁵ ROP, paragraph 70, 15 July 2010

⁸⁶ ROP, paragraph 231, 1 July 2010

⁸⁷ ROP, paragraph 182 & 183, 8 July 2010

116. The Children’s Commissioner stated “the issue of legal redress is really significant. We have a bit of a problem with that in the proposed Measure.”⁸⁸

117. He continued to say he was the only avenue for children and young people who wished to raise a challenge:

“The only person that they can come to at the moment is me. The children’s commissioner has powers in relation to making representation, supporting children and acting as an advocate. In some circumstances, he or she can provide financial support. At the moment, it hardly works in terms of financial support, for example. It has not happened during my time as commissioner. If it happened when Peter Clarke was commissioner, it must have been a rare event. However, the only place that they could come would be the children’s commissioner.”⁸⁹

118. UNICEF UK continued to state that there was the possibility for an enhanced and strengthened role for the Children’s Commissioner “including increasing his powers with regard to dealing with individual complaints.” UNICEF UK also noted this was “something that the UN committee has recommended in its last concluding observations.”⁹⁰

119. The UNCRC Monitoring Group said that they felt that judicial review should be available, but believed “the main mechanism for accountability in the proposed Measure should be parliamentary scrutiny”.⁹¹

120. They continued to state their concerns at how feasible judicial review would be in terms of the ‘decisions of a strategic nature’ formula:

“...because how do we on the outside know when a decision of a strategic nature about how functions may be exercised in future has been made? The Government thought process and the communication between officials and Ministers—their meetings and deliberations—are not made public. Cabinet minutes are published and when a specific power or duty is

⁸⁸ ROP, paragraph 257, 8 July 2010

⁸⁹ *ibid*, paragraph 259

⁹⁰ ROP, paragraph 71, 15 July 2010

⁹¹ ROP, paragraph 136, 1 July 2010

exercised there would be some sort of public record, but these internal, planning and strategy-writing type things are not so visible. So, there is a concern about accountability in relation to such judicial mechanisms perhaps being appropriate, but there is also a concern about how the Assembly is also going to exercise its parliamentary scrutiny role.”⁹²

121. However, the UNCRC Monitoring Group did not wish to see any amendments to the proposed Measure in respect of judicial review.

“we are not calling for any additions to the proposed Measure in respect of legal redress. As well as the transparency of the processes that children and young people may want to challenge, the committee will also be aware that judicial review is not the most child-friendly of legal processes and it is highly unlikely that large numbers of children and young people are going to challenge the Government through judicial review.”⁹³

122. The UNCRC Monitoring Group also referred to two cases of judicial review taken on by the Children’s Commissioner in Northern Ireland, and both cases had to be dropped due to lack of finance. They believed:

“it is important that children and young people get support from agencies and from their elected Members and can depend on the scrutiny role of the Assembly to really hold the Government to account on the rights of children and young people. In addition, if they were to use the method of legal redress open to them, a lot of support would need to be given to ensure that that was possible.”⁹⁴

123. NYAS agreed that redress was not an easy option, with “successful judicial reviews in any area are pretty well few and far between”, however they continued to state that this legislation did not differ greatly from any other area of law and their main concern “was about making sure that children and young people were put on the same level playing field as adults.” And they agreed that maybe it was “right that the bar is set quite high to challenge that, because pieces of

⁹² ROP, paragraph 138, 1 July 2010

⁹³ *ibid*, paragraph 148

⁹⁴ CR 23, Written Evidence

legislation are examined closely before they are put on the statute book.⁹⁵

124. The Committee also received a legal briefing which outlined some of the key points on judicial review:

- often results in a very contentious process;
- only allows those with a sufficient interest or standing to bring forward a case;
- is governed by the Civil Procedure Rules; CPR Part 54 and Pre action Protocol which specify strict time limits and other procedural requirements that must be followed for cases to proceed;
- is subject to a permission stage, and permission to proceed may be refused by the Court;
- is a discretionary remedy, which means that a successful claimant has no absolute right to a remedy, and therefore a successful claim for judicial review does not guarantee a claimant a favourable outcome;
- is a remedy of last resort, and parties are expected to have exhausted all other remedies before commencing a claim;
- is very costly, and the ability to claim public legal funding is becoming increasingly difficult to obtain; and
- is not always an appropriate remedy in every instance.⁹⁶

Evidence from the Deputy Minister

125. The Deputy Minister explained that the reporting deadline of five years was to coincide with the reporting requirement of the UN Committee. He reassured the Committee that reports of progress could be requested through the normal scrutiny process of the Assembly.

⁹⁵ ROP, paragraph 170, 23 September 2010

⁹⁶ Legislation Committee No 5 Paper: LC5(3)-17-10 Legal Paper

126. He said:

“the first reporting period would end at the end of January 2013, which would be 12 months after the introduction of the proposed Measure. So, after 12 months we would pause and have a look at how things are progressing. Given the way in which we run things in Wales, there is nothing to stop reports of progress being requested through the normal business and scrutiny process of the Assembly. Committees, Assembly Members, Plenary and organisations such as the office of the Children’s Commissioner for Wales, for example, could get involved in this.”⁹⁷

127. During evidence sessions the Deputy Minister explained Welsh Minister would be held to account as:

“The proposed Measure places an obligation on Ministers to explain publicly, periodically, through the reports that we were talking about earlier, how they have complied with the duty. So, there is another accounting mechanism, as it were, in the form of the statutory requirement for Ministers to report. Legal redress or any kind of legal comeback would be through the normal judicial review process.”⁹⁸

128. The Deputy Minister continued to say, “built into the whole thing, to a greater extent than for most legislation, are things such as the duties upon Ministers to report and safeguards involving the Assembly itself in order to hold Ministers to account, through Plenary procedures and committees.”⁹⁹

129. When questioned whether this takes account of the financial implications and the background and means of young people who may wish to challenge the Welsh Ministers, the Deputy Minister stated:

“I take your point that going through a judicial review process is a scary, if not terrifying, prospect for individuals, and particularly for a young person. However, unfortunately, my legislation does not set out to right the wrongs of the judicial review process. Legal aid does exist. That is not meant to be a pat answer. In Wales, crucially, we also have bodies and

⁹⁷ ROP, paragraph 97, 24 June 2010

⁹⁸ *ibid*, paragraph 138

⁹⁹ *ibid*, paragraph 140

organisations such as the office of the children’s commissioner, for whom taking the Assembly Government to court might not be such a scary prospect, if it thought that this was necessary and wanted to right a wrong, as it saw it. So, yes, I take your point; perhaps there are limitations with regard to judicial review across our citizenry, but I cannot right that wrong through this proposed Measure.”¹⁰⁰

130. In the second evidence session with the Committee the Deputy Minister stated:

“There is a legal process; it is open for people to seek legal redress. As far as avenues for grievances to be expressed are concerned, Wales is right out in front, in my view.”¹⁰¹

131. The Deputy Minister continued:

“that it is always there and is always available. It is a last resort, of course, and it is a nuclear option, but it is very important that the door is not closed on judicial review—you cannot close it, anyway.”¹⁰²

Our View

The Committee notes the evidence and recognises that the reporting deadline of five years is in line with the requirement of the UN Committee.

The Committee believes that interim reports should be published to ensure the Welsh Government is systematically recording what is happening and to provide updates on progress.

The Committee also notes and accepts the Deputy Minister’s view that interim reports could be requested through the normal business and scrutiny process of the Assembly.

The Committee has reservations and was concerned to note the reference to the judicial review process as a way of securing compliance with the proposed Measure. The Committee considers that another alternative, appropriate, and more effective means of

¹⁰⁰ ROP, paragraph 140, 24 June 2010

¹⁰¹ ROP, paragraph 184, 7 October 2010

¹⁰² *ibid*, paragraph 191

redress is necessary for those who consider that Welsh Ministers have not met their obligations under the proposed Measure. We note that the Deputy Minister is prepared and is committed to considering this matter further, and make the following recommendation:

Recommendation 6;

The Committee recommends that the Deputy Minister enter into discussions including with the Children’s Commissioner for Wales and the Welsh Public Services Ombudsman to explore this issue of judicial review further. The overriding aim should be to identify an effective and efficient means of redress involving the submission of complaints to either the Children’s Commissioner or Ombudsman or both of them that would provide a simple, straightforward, and most cost effective method of airing grievances within the scope of the proposed Measure.

8. Section 5 – Duty to promote knowledge of the Convention

Background

132. Section 5 of the proposed Measure places a duty on the Welsh Ministers to take appropriate steps to promote knowledge and understanding amongst the public including children, of the UNCRC and its Optional Protocols.

Evidence from witnesses

133. Most of the witnesses and respondents that commented on this section, welcomed the duty that would be placed on the Welsh Ministers to promote knowledge and understanding of the Convention.

134. However, witnesses raised concerns that the main barrier to implementing the proposed Measure would be lack of awareness and understanding and therefore there is a great need for training and education of officials in addition to the duty to promote knowledge and understanding amongst the general public and children and young people.

135. In his written evidence the Children’s Commissioner stated:

“I would suggest that the main barriers to implementing the Measure would be lack of awareness and understanding of the Convention and thus the need for training and education of officials... A further key barrier will be the knowledge and understanding of children and adults of the UNCRC and its optional protocols.”¹⁰³

136. UNICEF UK agreed stating “a child rights based approach to legislative reform depends on building capacities, such as training civil servants and law enforcement officials, among others, which will allow institutions to function effectively.”¹⁰⁴

¹⁰³ CR 5, Written Evidence

¹⁰⁴ CR 6, Written Evidence

137. Welsh Women's Aid also believed there was a need to train and educate officials to raise awareness and understanding of the UNCRC.¹⁰⁵

138. The Committee also heard evidence that awareness of the UNCRC is currently low. Young representatives from Funky Dragon explained to the Committee the lack of awareness their friends and other young people have of the UNCRC. Jess Peters said:

"I have had one or two personal and social education lessons that briefly mentioned children's rights, but hardly any of my friends know their rights. The ones who do only know about them from what I have said to them. I only know about children's rights because of what Funky Dragon and my youth forum have told me. In 2008, Funky Dragon asked 10,000 young people from every county in Wales whether they knew about the UNCRC and only 8 per cent said 'yes'."¹⁰⁶

139. Bethan Adshead said that she had not heard anything through school but was informed about the UNCRC through a youth forum. She said:

"I did not find out about the UNCRC until I joined the Blaenau Gwent youth forum. I have not heard anything through school, which shows that there is not enough being taught about the UNCRC in schools."¹⁰⁷

140. Witnesses and respondents noted that section 5 was based on article 42, however, some witness felt the proposed Measure should include article 42 in its entirety.

141. The UNCRC Monitoring Group felt strongly that the full text of article 42 should be included on the face of the proposed Measure and raised concerns as to the strength of the duty under section 5. In their written evidence they stated:

"Article 42 is omitted and whilst we recognise the intention that its import is covered by the direct duty in section 5 of the

¹⁰⁵ CR 15, Written Evidence

¹⁰⁶ ROP, paragraph 25, 23 September 2010

¹⁰⁷ *ibid*, paragraph 26

proposed Measure we have concerns about the strength of this duty.”¹⁰⁸

142. During their oral evidence to the Committee they went onto say:

“we feel that article 42 should be placed explicitly in the proposed Measure in order to ensure that it is implemented fully. Article 42 talks about a clear effect on the direction of Government, so we feel that putting phrases such as 'widely known', 'active means' and 'adults and children alike' in the proposed Measure would strengthen it. The target should be that all children know about the convention, and we feel that there should be an obligation to assess progress on that. It is very clear what article 42 is trying to get Governments, that have signed up to the convention, to do. Therefore, we very much want to see it being included in the proposed Measure; we see no reason why it should not be.”¹⁰⁹

143. The NSPCC also agreed that article 42 should be included in the proposed Measure. In their written evidence they stated:

“We are, however, disappointed that the wording of Article 42 of the Convention has not been entirely replicated in the Measure. In this instance, we disagree with the Welsh Assembly Government’s view that ‘it is not always appropriate to use the wording of international agreements in UK domestic law.’ We feel that the duty of Ministers could be more clearly set out.”¹¹⁰

144. However, Families Need Fathers said they “strongly welcome the embracing of article 42 of the UNCRC by WAG, and the determination to go further than simple raising awareness of the articles.”¹¹¹

Evidence from the Deputy Minister

145. The Deputy Minister said that levels of awareness were low and that part of the purpose of the proposed Measure was to ensure children and young people understand that they have rights and entitlements. He said:

¹⁰⁸ CR 2, Written Evidence

¹⁰⁹ ROP, paragraph 105, 1 July 2010

¹¹⁰ CR 13, Written Evidence

¹¹¹ CR 9, Written Evidence

“We all recognise that the levels of awareness are too low. Part of the purpose of the legislation is to alter mindsets...Making children and young people understand that they have a voice and entitlements is central to changing our mindsets with regard to the effects of legislation and decision making upon young people.”¹¹²

146. In written evidence to the Committee the Deputy Minister explained that much work had already commenced to address the lack of awareness of the UNCRC, and stated that raising awareness of the UNCRC was a “specific priority within ‘Getting it Right’, our UNCRC Action Plan for Wales”¹¹³, the letter continues to detail some activities which have already taken place to raise awareness of the UNCRC.

147. In further evidence to the Committee, Natalie Lancey, Government Lawyer explained why article 42 had not been imported into the proposed Measure in its entirety. She said:

“the UNCRC is an international convention and an agreement, not a piece of legislation...If you are taking international obligations and converting them into a provision and a piece of domestic legislation, it is often not appropriate just to take the exact words and put them in the piece of domestic legislation, because our domestic legislation has to be clear and unambiguous... So, the drafting counsel has taken article 42 and translated it into the language of domestic legislation. Then, as the Deputy Minister has said, it goes further because the duty to promote understanding has been bolted on, so it does not just mention knowledge.”¹¹⁴

148. In relation to how effectiveness of the duty to promote knowledge and understanding is to be measured, the Deputy Minister said:

“it is something that we need to explore as we develop the children’s scheme, for instance. Our partner organisations would act as watchdogs with regard to measuring what success looks like in this regard, and the office of the Children’s Commissioner springs to mind as being the obvious outside

¹¹² ROP, paragraph 100, 24 June 2010

¹¹³ Legislation Committee No. 5 Paper: LC5(3)-17-10: Paper 2

¹¹⁴ ROP, paragraph 96, 7 October 2010

body to do that. Perhaps we need to explore that further as we develop the scheme.”¹¹⁵

149. However, in relation to some of the figures which had been presented to the Committee in terms of levels of awareness, Marcus Hill, Specialist Policy Adviser said:

“It is important to remember with regard to the Funky Dragon research that the question that was actually asked was, ‘Have you been taught about the UNCRC in school?’. We find that many of the surveys that are being undertaken by different people ask different questions; therefore the answers and the proportions that you get are very different.”¹¹⁶

Our View

The Committee notes the Deputy Minister’s view that although section 5 does not import article 42 in its entirety, the duty to promote knowledge of the Convention is sufficiently reflected in the drafting of this section, the Committee accepts this and is also reassured to see that work has already commenced to increase awareness of the UNCRC.

¹¹⁵ ROP, paragraph 104, 24 June 2010

¹¹⁶ Ibid, paragraph 102

9. Section 6 – Power to amend legislation etc

Background

150. Section 6 of the proposed Measure contains a provision for Welsh Ministers by subordinate legislation to modify legislation or prerogative instruments. The section notes limitations on the power, but Acts of the United Kingdom Parliament, Measures of the Assembly and subordinate legislation (including regulations and orders) made under either of those may be amended.

Evidence from witnesses

151. The Children’s Commissioner said that section 6 “empowers Welsh Ministers to amend any legislation in order to give further effect to the convention”. The Children’s Commissioner noted the provision in section 6 was similar to the provision in section 10 of the Human Rights Act 1998, which allows UK Ministers to make orders to amend legislation which is not compatible with the UNCRC, the Children’s Commissioner noted in this case the power is subject to the affirmative resolution in both Houses of Parliament. In the Children’s Commissioner’s view:

“the power under section 6 of the proposed Measure should similarly be subject to affirmative resolution of the Assembly. This is because, whilst the power gives a (theoretically at least) more convenient and speedy way of updating legislation, nevertheless, it is ultimately a legislative function, not an executive one and of a kind needs proper democratic scrutiny.”¹¹⁷

152. With regard to the provision to amend primary legislation by subordinate legislation, NSPCC Cymru said they were “happy with the provisions of Section 6”. However, NSPCC Cymru also noted that “this is a significant power and should be subject to extensive scrutiny by the Assembly.”¹¹⁸

¹¹⁷ CR 5, Written Evidence

¹¹⁸ CR 13, Written Evidence

153. Christian Action Research and Education raised concerns that the powers to make any change to legislation included under section 6 could have wide repercussions if there is not sufficient accountability within the Assembly. They also said:

“The breadth of the issues dealt with by the Convention must raise concerns that as currently drafted the Measure has scope to effectively give the Minister to much of a blank check. It is conceivable that some changes could be proposed with quite far reaching consequences and these should be subject to full Assembly scrutiny.”¹¹⁹

154. The UNCRC Monitoring Group also believed the power being given under section 6 is “a significant power”, and they agreed this should be subject to the affirmative procedure, however, they were disappointed there was no procedure for Members to make amendments to subordinate legislation.¹²⁰

155. The response from Conwy County Borough Council regarding the provisions in section 6, were “a reasonable way to update the Measure.”¹²¹

Evidence from the Deputy Minister

156. In a letter to the Constitutional Affairs Committee the Deputy Minister said the power in section 6 could “potentially be exercised to make amendments to powers of the Welsh Ministers contained in other legislation.” The letter continued to outline that the power in section 6 can only be exercised :

“following a report by the Welsh Ministers under the proposed Measure which concludes that it would be desirable to amend legislation or prerogative instruments to give further or better effect to the UNCRC and its Optional Protocols.”¹²²

157. The Committee also considered the evidence the Deputy Minister had given to the Constitutional Affairs Committee, Natalie Lancey, Government Lawyer, said:

¹¹⁹ CR 12, Written Evidence

¹²⁰ CR 2, Written Evidence

¹²¹ CR 10, Written Evidence

¹²² Constitutional Affairs Committee paper: CA(3)-18-10: Paper 5: The Ministers response

“Section 6 provides the power to amend legislation to give further and better effect to the UNCRC after the Welsh Ministers have issued one of their reports under the legislation and concluded that that is desirable. There is a specific consultation duty on the Welsh Ministers to consult before the power is exercised, and the exercising of the power is held subject to affirmative procedure in the Assembly. Therefore, the draft Order would have to be laid before the Assembly, and the Assembly would have to approve it. If the Assembly does not approve it, the Welsh Ministers cannot make the Order.”¹²³

Our View

Recommendation 7:

The Committee endorses the report from the Constitutional Affairs Committee on this section, and also recommends that any proposals for consultation before making an order under section 6(4) should be laid before the Assembly; this would allow the Assembly Committees and Members to give proper consideration to them. (*Effectively creating a super affirmative procedure*)

¹²³ Constitutional Affairs Committee: ROP, paragraph 39, 1 July 2010

10. Section 7 – Application to young persons

Background

158. Section 7 of the proposed Measure requires the Welsh Ministers to consider, and to set out in the children’s scheme their proposals for consulting on, whether and if so, to what extent and with what amendments:

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

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

160. 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.

Evidence from witnesses

161. There are differing views on the application of the proposed Measure to persons who have reached 18 years, but are not yet 25 years. Strong arguments have been put forward in support and in opposition to the inclusion of this age group. Of those in favour of including older young people, they suggest the inclusion of specific groups of ‘vulnerable’ 18-24 year olds rather than all young people in this age range.

162. The UNCRC Monitoring Group, the Children’s Commissioner, the NSPCC, Children in Wales and the WLGA all oppose the inclusion of young people aged 18-24 within the proposed Measure.

163. The UNCRC Monitoring Group oppose the inclusion of young people aged 18-24 within the proposed Measure. They said that whilst they recognise the needs of some vulnerable young adults, they believed:

“the UNCRC in itself is an instrument to safeguard and protect those aged under 18. It cannot be applied to people over 18, and it would be wholly inappropriate to put it within this legislation.”¹²⁴

164. The Children’s Commissioner and the WLGA agreed that 18-24 year olds should not be included and that this age group was protected by the Human Rights Act 1998. Both witnesses felt that the inclusion of 18-24 year olds would lead to greater confusion. The Children’s Commissioner stated that:

“the UN Convention on the Rights of the Child relates to children up to the age of 18. The vulnerability of age is what defines the UN convention...The UN convention is not designed for 18 to 24-year-olds, but for children up to the age of 18.”¹²⁵

165. He went onto say that:

“many 18 to 24-year-olds are vulnerable, but it is the Human Rights Act 1998 and other legislation that is in place for them. If there is an issue about redress—and the proposed Measure includes 18 to 24-year-olds—it becomes incredibly confusing and does not stand up, legally.”¹²⁶

166. The WLGA said that:

“Time and again, when we have looked the Assembly Government’s work, we have seen a constant confusion, with different age ranges for different policies, and I think that this would add to that confusion. We need some clarity here. As I said, the key issue here is that as soon as someone turns 18, the Human Rights Act 1998 kicks in; before that, they are covered by the UNCRC. It could get very confusing if we were to look at extending the UNCRC’s provisions to cover those aged 18 to 24.”¹²⁷

167. UNICEF UK, Welsh Women’s Aid, and NYAS put forward a case for the inclusion of young people aged 18-24.

¹²⁴ ROP, paragraph 113, 1 July 2010

¹²⁵ ROP, paragraph 240, 8 July 2010

¹²⁶ *ibid*, paragraph 241

¹²⁷ ROP, paragraph 224, 1 July 2010

168. UNICEF UK said:

“One thing that we notice here is that it has been public policy for some time to look at least at some aspects of welfare for children from birth to 25, and I understand that some entitlements are the same for those aged from 11 to 25. So, within that context, we can see the rationale and why you would want to align some of those policies with this proposed Measure.”¹²⁸

169. Welsh Women’s Aid said including young people aged 18-24 years old:

“would seem to make sense...to ensure consideration is given to a young person’s continuing vulnerabilities when she or he reaches adulthood.”¹²⁹

170. NYAS agreed, and believed many young people would benefit from the proposed Measure, specifically some groups of young people:

“we would suggest strongly that young people who are leaving the care system and young people with disabilities who are going through the transitional process between children and adult services would benefit significantly from having this piece of legislation take them into account.”¹³⁰

171. Conwy County Borough Council agreed with the concept of seeking to protect vulnerable adults but question how practical it is to include specific groups which are vulnerable.¹³¹

Evidence from the Deputy Minister

172. The Deputy Minister explained that section 7 maintains the Welsh Government’s approach to children and young people, which since “2000, with regard to policy in Wales has really looked at the children and young people bracket, which is 0 to 25-years-old.”¹³²

¹²⁸ ROP, paragraph 37, 15 July 2010

¹²⁹ CR 15, Written Evidence

¹³⁰ ROP, paragraph 147, 23 September 2010

¹³¹ CR 7, Written Evidence

¹³² ROP, paragraph 110, 24 June 2010

173. The Deputy Minister continued to explain the proposed Measure commits the Welsh Government to the application of the UNCRC for children from birth to the age of 18, but the proposed Measure, also:

“commits us to consider and consult as to whether any part of the proposed Measure, with modifications, should also be applied to the 18 to 24 age group. In other words, we have not shut the door on this, because there is a dissonance between the way that the United Nations does things and the way that the Assembly Government has been doing things over the last 10 years. There are strengths to both arguments.”¹³³

174. Marcus Hill, Specialist Policy Adviser continued to explain:

“The proposed Measure offers the opportunity to consult on whether it should apply or what else we could possibly put in place to address that gap in a common way, given that this is not necessarily just an UNCRC Wales proposed Measure—it is the Proposed Rights of Children and Young Persons (Wales) Measure. That is trying to tie the two together to reflect our policy position in Wales as well as take forward what the UN committee has asked us to take forward.”¹³⁴

175. The Deputy Minister explained that the proposed Measure is flexible and allows Welsh Ministers to:

“apply any part of it to 18 to 24-year-olds, so the flexibility is there. We might want to continue with that flexibility being handed to Ministers and for them to be able to say 'For this part, we've really got to include people up to the age of 25'. That power would be subject to an affirmative procedure in the Assembly, so it would not just be a Minister, but the Assembly as a whole, that would have a say in that.”¹³⁵

176. When confronted with the evidence presented to the Committee in terms of including or not including 18-24 year olds, the Deputy Minister, stated:

“The arguments are understandable and are not foolish, but they miss the unique aspect of the way that we have done

¹³³ ROP, paragraph 111, 24 June 2010

¹³⁴ *ibid*, paragraph 117

¹³⁵ *ibid*, paragraph 112

things in Wales for some considerable time now. Throughout our policy relating to children and young people, we have included that 18-24 age group.”¹³⁶

177. The Deputy Minister was questioned as to whether he had considered use of the affirmative procedure to exercise the powers under section 8. He responded:

“it is not something that would make me throw my hands up in horror.”¹³⁷

178. Natalie Lancey, Government Lawyer continued to say that there is no set procedure for a super affirmative procedure, but stated:

“We have built a fair amount of consultation into section 7 at the moment. Welsh Ministers have to set up the children’s scheme and the proposals for consulting. They then have to publish a report with their conclusions. Then, they have to do the consultation and then lay their report and conclusions before the Assembly. Then, if they decide to go ahead, and make an Order applying some part of the Measure to the older age group, they have to publish a draft Order and go through a consultation process. At the end of all that, the Assembly gets to decide whether to approve it or not. Therefore, there are things built into it that make it more than an affirmative procedure—it bolts on extra consideration mechanisms to the affirmative procedure.”¹³⁸

Our View

The Committee has carefully considered all the evidence on the application of the proposed Measure to 18 – 24 year olds, and believes the differing views offer convincing arguments for both sides. However, as there is no clear consensus the Committee is content for the Welsh Government to maintain the status quo in term of including 18-24 year olds in the scope of the proposed Measure.

¹³⁶ ROP, paragraph 100, 7 October 2010

¹³⁷ Ibid, paragraph 119

¹³⁸ ROP, paragraph 120, 7 October 2010

Recommendation 8

The Committee supports the recommendation made by the Constitutional Affairs Committee and agrees any order made under this section should be subject to a super affirmative procedure.

11. Section 8 – The Convention on the Rights of the Child

Background

179. Section 8 gives effect to the Schedule, which sets out the substantive rights of and obligations towards children, which are contained in the UNCRC and its Optional Protocols.

Evidence from witnesses

180. Consultation respondents were asked, as the Assembly does not have powers relating to armed conflict and has limited power in relation to the sale of children, child prostitution and child pornography, whether these protocols should be included in the proposed Measure. Evidence received was generally supportive of including these optional protocols on the face of the proposed Measure in Part 2 of the Schedule.

181. The UNCRC Monitoring Group strongly supported the Optional Protocols being included on the face of the proposed Measure rather than being referenced separately. They said:

“the protocols should be included on the face of the Measure – to make clear those principles will be part of domestic law in Wales. Even though Assembly powers would be limited in respect of these protocols, much preventative action and work to promote rights can still take place.”¹³⁹

182. UNICEF UK¹⁴⁰ and Welsh Women’s Aid¹⁴¹ were both “delighted” to see the Optional Protocols incorporated.

183. Families Need Fathers Cymru felt the proposed Measure “should not include the text of some sections of the UNCRC and exclude others.”¹⁴²

¹³⁹ CR 2, Written Evidence

¹⁴⁰ CR 6, Written Evidence

¹⁴¹ CR 15, Written Evidence

¹⁴² CR 9, Written Evidence

184. The NSPCC agreed and felt the inclusion of the Optional Protocols “sends a strong message to UN that the UNCRC principles and provisions are incorporated into domestic law in Wales.”¹⁴³

185. However, Cwm Taff Local Health Board believed if the Optional Protocols were appropriately referenced “then there would not be a need to include the actual text within the face of the proposed Measure.”¹⁴⁴

186. Section 8 also contains the provision for Welsh Ministers to make amendments to the proposed Measure by order, section 10 states:

“10(3) A statutory Instrument containing an order under section 8 must be laid before the Assembly”

187. The Children’s Commissioner in his written evidence noted that the section 8 power is:

“similar to the power of UK Ministers to extend the HRA [Human Rights Act] to cover protocols under section 1(4) of the HRA, which is again subject to affirmative resolution by both Houses of Parliament (see section 20(4) HRA). Once more, democratic control seems appropriate over this exercise by the Executive of a legislative function.”¹⁴⁵

188. The UNCRC Monitoring Group felt the power was “less problematic” as it concerns updating the proposed Measure to reflect changes in the obligations placed on the State Parties to the UNCRC or its Optional Protocols, however, they continue to state:

“there would be some merit in applying some degree of control by the Assembly if only to ensure the opportunity for focus and debate.”¹⁴⁶

189. However, Families need Fathers stated “this is a reasonable way to update the Measure.”¹⁴⁷

Evidence from the Deputy Minister

¹⁴³ CR 13, Written Evidence

¹⁴⁴ CR 14, Written Evidence

¹⁴⁵ CR 5, Written Evidence

¹⁴⁶ CR 2, Written Evidence

¹⁴⁷ CR 9, Written Evidence

190. The Deputy Minister said that the Optional Protocols were included in the proposed Measure to aid transparency and so it was clear what substantive rights and obligations the Welsh Ministers must have due regard for. Natalie Lancey, Government Lawyer continued to explain:

“we have taken all of the substantive rights and obligations that apply to the UK and put them in the proposed Measure, because we thought that, once we had started down the road of not including particular substantive rights, because we thought that Welsh Ministers could have limited effect in respect of them, we were starting to construct something of a piecemeal version of the UNCRC.”¹⁴⁸

191. When questioned why ‘in the legislation as it is currently drafted, section 8 of the proposed Measure effectively deprives the Assembly of the ability to scrutinise amendments,’¹⁴⁹ the Deputy Minister stated:

“the thinking is that it would be inappropriate for the Assembly to be able to refuse to approve or annul the proposed Measure in order to keep it in line with the UNCRC. In other words, we are not the signatory to the UNCRC; we are signed up to the UNCRC through the United Kingdom. It would not be a matter for us to alter through that kind of mechanism. It is not within our remit so to do.”¹⁵⁰

Our View

The Committee has considered the evidence and is content for the Optional Protocols to remain on the face of the proposed Measure.

Recommendation 9

The Committee supports the recommendation made by the Constitutional Affairs Committee and agrees any order made under this section to amend primary legislation should be subject to an affirmative procedure.

¹⁴⁸ ROP, paragraph 124, 24 June 2010

¹⁴⁹ ROP, paragraph 124, 7 October 2010

¹⁵⁰ *ibid*, paragraph 125

Witnesses

192. The following witnesses provided oral evidence to the Committee on the dates noted below. Transcripts of all oral evidence sessions can be viewed in full at <http://www.assemblywales.org/bus-home/bus-committees/bus-committees-perm-leg/bus-committees-third-lc5-agendas.htm>

24 June 2010

Huw Lewis AM	Deputy Minister for Children, Welsh Assembly Government
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1 July 2010

Jane Williams	School of Law, Swansea (UNCRC Monitoring Group*)
Sean O' Neil	Children in Wales (UNCRC Monitoring Group)
Trudy Aspinwall	Save the Children (UNCRC Monitoring Group)
Darren Bird	Funky Dragon (UNCRC Monitoring Group)
Naomi Alleyne	Welsh Local Government Association
Daisy Seabourne	Welsh Local Government Association

8 July 2010

Keith Towler	Children's Commissioner for Wales
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15 July 2010

Dragan Nastic	UNICEF UK
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23 September 2010

Darren Bird	Funky Dragon
Bethan Adshead	Young Persons Representative - Funky Dragon

*The UNCRC Monitoring Group's membership includes: Action for Children, Aberystwyth University Centre of Welsh Legal Affairs, Barnardos Cymru, Cardiff University Department of Child Health, Children in Wales, Funky Dragon, NACRO Cymru, NSPCC Cymru, Save the Children Wales, and Swansea University - School of Law.

Jess Peters	Young Persons Representative - Funky Dragon
Nathan Flanagan	Young Persons Representative - Funky Dragon
Sharon Lovell	National Youth Advocacy Services
Debbie Singleton	National Youth Advocacy Services
Jane Williams	School of Law, Swansea (Evidence and witnesses co-ordinated by School of Law, Swansea University)
Dr Osian Rees	School of Law, Bangor University (Evidence and witnesses co-ordinated by School of Law, Swansea University)
Dr Simon Hoffman	School of Law, Swansea University (Evidence and witnesses co-ordinated by School of Law, Swansea University)
Emyr Lewis	Morgan Cole Solicitors (Evidence and witnesses co-ordinated by School of Law, Swansea University)
<i>30 September 2010</i>	
Rex Phillips	National Association of Schoolmasters Union of Women Teachers (NASUWT)

List of written evidence

193. The following people and organisations provided written evidence to the Committee. All written evidence can be viewed in full at <http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-measures/business-legislation-measures-rightsofchildren/consultation-res-log.htm>

<i>Name / Organisation</i>	<i>Reference</i>
Cllr Alana Davies, Cabinet Member for Children & Young People and Ward Member Porthcawl East Central, Bridgend County Borough Council	CR 1
United Nations Convention on the Rights of the Child (UNCRC) Monitoring Group	CR 2
Welsh Local Government Association (WLGA)	CR 3
Additional evidence, WLGA	CR 3A
Association of Teachers and Lecturers (ATL Cymru)	CR 4
Children's Commissioner for Wales	CR 5
UNICEF UK	CR 6
Additional evidence, UNICEF UK	CR 6A
Additional evidence, UNICEF UK	CR 6B
Conwy County Borough Council	CR 7
Higher Education Funding Council for Wales (HEFCW)	CR 8
Additional evidence, HEFCW	CR 8A
Families need Fathers Cymru	CR 9
Conwy Children and Young Peoples Partnership	CR 10
National Association of Schoolmasters & Union of Women Teachers (NASUWT)	CR 11
NASUWT - Annex A	CR 11A
Christian Action Research and Education (CARE)	CR 12
National Society for the Prevention of Cruelty to Children (NSPCC)	CR 13

Margaret Foster, Cwm Taf Local Borough Council	CR 14
Welsh Women's Aid	CR 15
Evangelical Alliance Wales	CR 16
National Youth Advocacy Service (NYAS)	CR 17
Velindre NHS Trust	CR 18
Children in Wales	CR 19
Care for the Family	CR 20
Royal College of Nursing Wales	CR 21
Tina Sava (Facebook response)	CR 22
Evidence and witnesses co-ordinated by School of Law, Swansea University)	CR 23

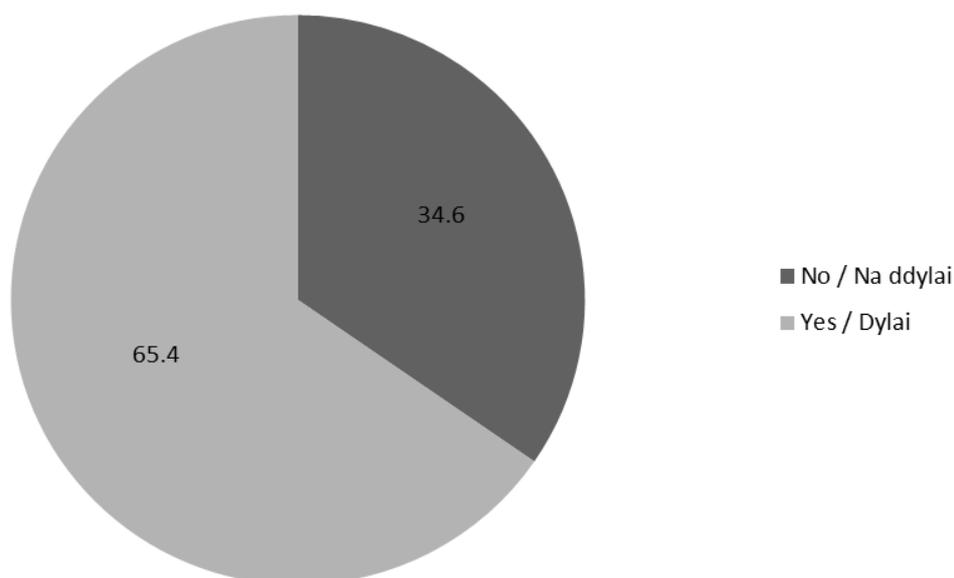
Summary of evidence received to the children and young people's questionnaire

194. As the proposed Measure related to the rights of children and young people, the Committee agreed to issue a questionnaire aimed at children and young people. The questionnaire was made available via the Committee's Internet page and in hardcopy. A link to the questionnaire was sent to various young people's organisations and was also used by external communication at summer shows including the National Eisteddfod in Ebbw Vale, Llangollen Eisteddfod and the Royal Welsh show.

195. The Committee received a total of 32 responses to the questionnaire that was issued on 23 June 2010, with a closing date of 27 August 2010.

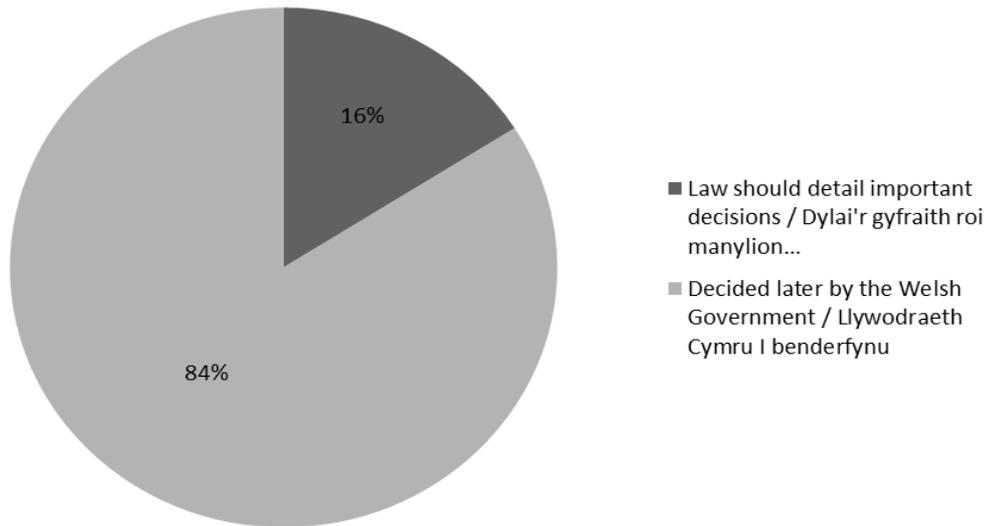
Summary of Responses

Q1: Should the National Assembly pass a law in Wales to try and make children's rights more important than they already are?

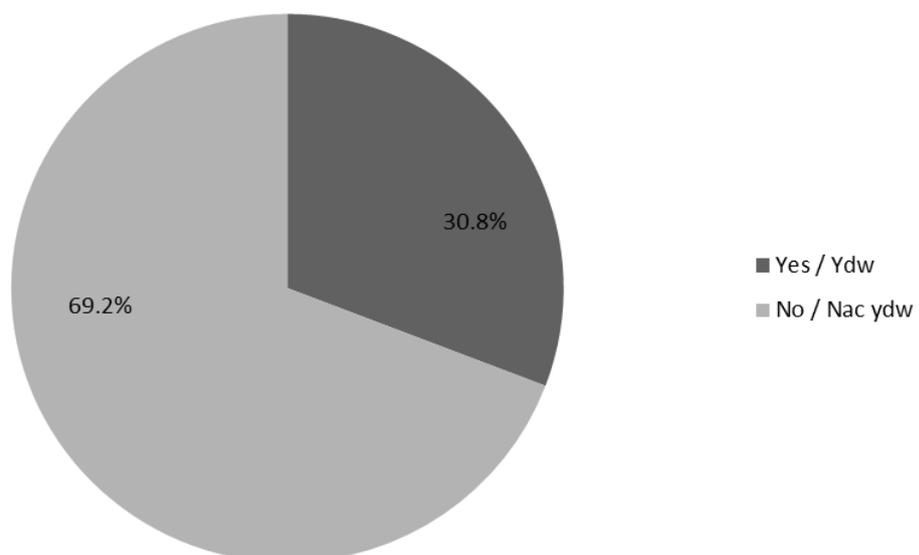


Q2: The new law is trying to make sure that children's rights are thought about very carefully when the Welsh Government makes important

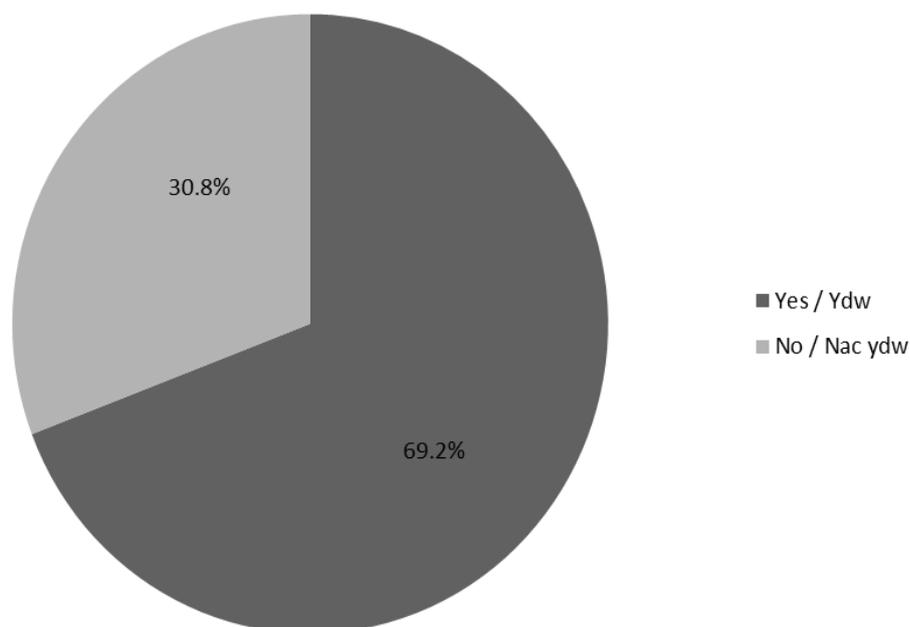
decisions which might affect lots of children and young people. Do you think the law should say exactly what sorts of 'important decisions' will be affected or could this be decided later on by the Welsh Government?



Q3: The UNCRC has a 'list of rules' which gives rights to children and young people aged 0-18. Do you think this law should also include young people aged between 18 - 25?



Q4: As part of the new law, there must be a Children's Scheme, which should tell us more about how the Welsh Government will decide what sorts of important decisions will be affected and tell us more about how the Welsh Government will make sure they actually do what the new law says. Do you think children and young people should be able to ask for the things written in this scheme to be changed?

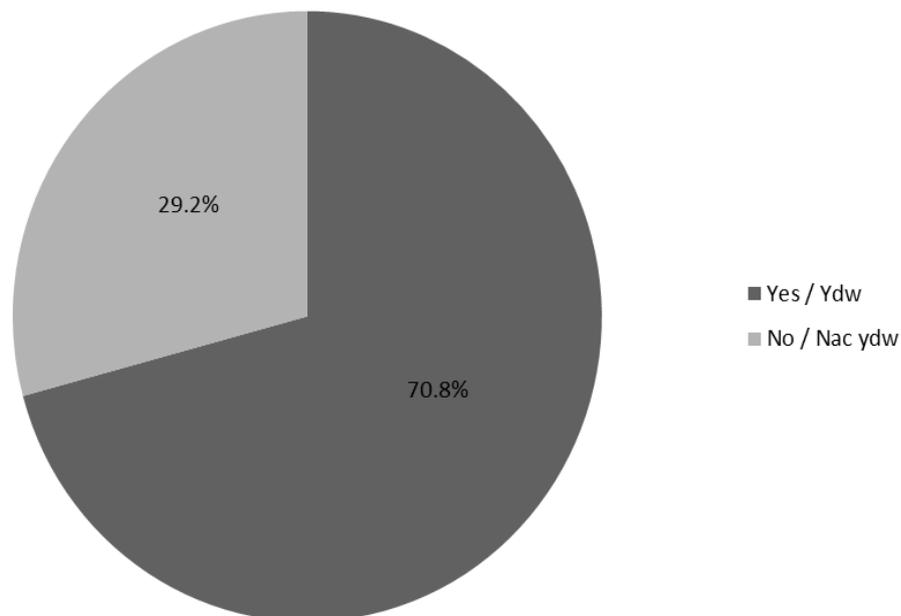


If yes why do you think children and young people should be able to do this?

- The legislation is about rights, and who knows what children want better than the children themselves?
- To ensure that children and young people are empowered; to ensure that the scheme looks after their interests at all times.
- Because it is their life.
- Young people should be able to ask for places to go to keep them out of trouble and off the street, somewhere they can voice their opinions as its their opinion that counts and they know what's best for them.
- Because having young people opinions might make it better as they know what is better for themselves and not from an adult's point of view.
- The children can input suggestions to benefit themselves and future generations.
- Because it will effect them.

- It's their life.
- It is affecting children completely and their decisions and views should be considered.
- If they feel that decisions that have been made are not being effective in their aims.
- They will be affected by this. Obviously it should be used as a reference.
- Because it effects them and they should have a say.
- Considering the new law is going to be affecting young people, it would be sensible to give them the opportunity to request change if they believe it to be necessary.
- They have a right to know their rights are upheld and decisions affecting them.
- If young people are to be at the centre of the scrutiny of policies etc for children and young people, they should also be able to ask for things to be changed in order to get the best from the Children's Scheme.

Q5: When changing things written in this Children's Scheme, the Welsh Government must ask children and young people for their views and ideas. Do you think anyone else should be asked about what they think?



If yes, what sorts of people should be asked?

- Someone to review decisions that involve children to ensure that they are useful.
- Schools, parents, social workers and so on.
- Parents. - Respected like adults.
- Young adults
- They should come up with a range of activities in our area so children don't hang around street corners getting up to all sorts of stuff.
- Adults, OAPs
- Parents, Relatives.
- Parents, Relatives, Teachers. - I don't think children should have more say because it puts pressure on them to learn and understand things they don't need to yet.
- Parents/Guardians. - Treats adults like us.
- People involved in the bringing up, looking after and organisation of children, and children's activities.
- Parents, Teachers and other people who have influence or children and young people. -

Article 12 states that we should be allowed to say what we think should happen. Does this include the right to vote. If this is the case more detail must be put in as young people in general lack the political knowledge to make that decision.

- Parents/Guardians. - Consider whether the law is actually beneficial or detrimental to the work of the National Assembly when there are already international laws placed.
- Question 3 - Not everybody, perhaps 21?
- People who work closely with children and teachers/social workers
- Question 3 - Depends how easy it is to amend.
- Question 6 Parents should be asked as they are responsible for their children.

I think it should be up to 18 year olds as past that individuals can have a vote so they can change the Government if they want.

- I think we should consider if more legislation is really necessary.
- A range of people must be asked as asking just children and young people will provide a bias response towards lenience.
- Parents. - Perhaps the rights in question should be scrutinised in a truly meaningful and realistic way as some of them are clearly vague and hardly applicable, not to mention they're

unnecessary, considering the current law enforces these rights already. There seem to be an urgent need for a more pragmatic way to tackle these problems.

- Parents/Guardians
- Parents and teachers should also be part of the decision making process. Children's rights determine what's best for children and young people; parents and teachers would be able to provide additional information.