



# Comisiynydd Plant Cymru Children's Commissioner for Wales

## Keith Towler

### Ymateb i Ymgynghoriad / Consultation Response

Date/Dyddiad

May 2013

Subject/Subject

**Child Rights Impact Assessment:  
CCfW Assessment of identified sections of the Social Services and Well-being (Wales) Bill.**

The Children's Commissioner for Wales is an independent children's rights institution established in 2001. The Commissioner's principal aim is to safeguard and promote the rights and welfare of children<sup>1</sup>. In exercising his functions, the Commissioner must have regard to the United Nations Convention on the Rights of the Child (UNCRC).<sup>2</sup> The Commissioner's remit covers all areas of the devolved powers of the National Assembly for Wales insofar as they affect children's rights and welfare.<sup>3</sup>

The UNCRC is an international human rights treaty that applies to all children and young people up to the age of 18. It is the most widely ratified international human rights instrument and gives children and young people a wide range of civil, political, economic, social and cultural rights which State Parties to the Convention are expected to implement. In 2004, the Welsh Assembly Government adopted the UNCRC as the basis of all policy making for children and young people and in 2011, Welsh Government passed the Rights of Children and Young Persons (Wales) Measure.<sup>4</sup> The Measure requires Welsh Ministers to have due regard to Part One of the UNCRC and specified articles of the optional protocols to the UNCRC when making decisions about provision included in new legislation, the formulation of a new policy and in the review of or change to an existing policy.

<sup>1</sup> Section 72A Care Standards Act 2000

<sup>2</sup> Regulation 22 Children's Commissioner for Wales Regulations 2001

<sup>3</sup> Section 75A (1) Care Standards Act 2000

<sup>4</sup> <http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-measures/business-legislationmeasuresrightsofchildren.htm>

## Context: Child Rights Impact Assessment and the Social Services and Wellbeing (Wales) Bill 2013 – Stage 1 scrutiny

Child Rights Impact Assessments (CRIA) are a key mechanism for implementing the United Nations Convention on the Rights of the Child (UNCRC). The United Nations Committee on the Rights of the Child, the monitoring body of the UNCRC, suggests that States Parties can use the child impact assessments as a means of supporting progress in meeting obligations contained under Articles 3 and 4 of the UNCRC. The Committee published General Comment No.5 on the general measures of implementation of the Convention in 2003:

*‘Ensuring that the best interests of the child are a primary consideration in all actions concerning children (art. 3 (1)), and that all the provisions of the Convention are respected in legislation and policy development and delivery at all levels of government demands a continuous process of child impact assessment (predicting the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights) and child impact evaluation (evaluating the actual impact of implementation). This process needs to be built into government at all levels and as early as possible in the development of policy.’<sup>5</sup>*

Welsh Government has been undertaking CRIAs in line with application of the duty of due regard to the UNCRC contained in the Rights of Children and Young Persons (Wales) Measure 2011. The CRIAs are currently not routinely published. I have called for the CRIA process to be made transparent and consistent in the interest of applying key principles of due regard and to improve the scrutiny process for policy and legislation, leading to better outcomes for children and young people. During stage 1 scrutiny of the Social Services and Wellbeing (Wales) Bill, the National Assembly for Wales’ Children and Young People Committee and also the Health and Social Care committee examined my concerns at the robustness of the CRIA process for the Bill. In order to clarify my concerns, I committed to submitting a document to complement my written submission which would outline particular areas within the Bill which I believe may not have been subject to sufficient consideration as part of the CRIA process.

This document is not intended as a full CRIA and does not consider all of the provisions included in the Bill. Instead, the paper focuses on the provisions that are of greatest importance with regard to the application of the UNCRC and is based on the written submission I presented at stage 1 of the legislative process.

## Policy /Legislation:

### Social Services and Well-being (Wales) Bill 2013

<sup>5</sup> Committee on the Rights of the Child (2003), *General Comment No.5, General measures of implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para 6).

The purpose of the Social Services and Well-being (Wales) Bill (the Bill) is to specify the core legislative framework for social services and social care in Wales. Welsh Government's primary policy objectives in relation to the Bill are to improve the well-being outcomes for people who need care and support and carers who need support and to reform social services law. The Welsh Government intends to achieve these objectives through:

- a. simplifying the web of legislation that currently regulates social care in Wales;
- b. providing people with a stronger voice and greater control over services they receive;
- c. ensuring people receive the help they need to live fulfilled lives; and
- d. stronger national direction with clear accountability for delivery.

### Children affected by the proposals

For the purposes of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier (Article 1). The Declaration of the Rights of the Child, states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". The need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly in 1959. It is recognised in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialised agencies and international organisations concerned with the welfare of children.

As of 31<sup>st</sup> March 2012<sup>6</sup> in Wales there were:

- 20,240 children in need included in the Children in Need census;
- A quarter (25 per cent) of children in need had a disability;
- 5,726 children were looked after;
- 246 children were adopted from care between 1 April 2011 and 31 March 2012;
- No robust data in relation to the number of young carers in Wales is available. The 2001 census recorded approximately 860 children under 18 years old providing more than 50 hours care a week. This is known to be an underestimate and Welsh Government have quoted a figure of 11,00 based on the 2011 census in the past.

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<sup>6</sup> SDR 30/2013, *Wales children in need census, 2012; Adoptions, Outcomes and Placements for Children Looked After by Local Authorities*, Year ending March 31<sup>st</sup>, 2012.

## Assessment of likely impact of legislative changes proposed in the Social Services and Well-being (Wales) Bill

**Proposal:** Introduction of a single Act for Wales that brings together local authorities' and partners' duties and functions in relation to improving the well-being of people who need care and support and carers who need support.

**Relevant article(s) of the UNCRC:** article 3

**Assessment:** Inhibits effect of article 3 the UNCRC.

Lack of application of due regard to the UNCRC in relation to the basis for legislative change.

**The Bill includes sections which restate existing legislation from the Children Act 1989 and the Children Act 2004 and other relevant legislation, sections which alter parts of the provision already contained in those Acts and introduces changes in relation to provisions contained in those Acts as they apply to children. Many of these changes appear to have been made in order to align arrangements for children with those introduced for adults through the Bill, rather than on the basis of decisions related to promoting right-based policy for children in Wales in line with the duty of due regard to the UNCRC.**

The Explanatory Memorandum issued in relation to the Social Services and Well-being (Wales) Bill clearly states that the intended effect of the legislation is to 'as far as is possible, integrate and align arrangements so that there is a common set of processes, *for people*' (2013:7). There is no supporting text to explain the ways in which the proposed change to a single Act across children and adults provision and the replacement or restatement of parts of existing legislation relating to children will give greater effect to the best interests of the child in compliance with article 3 of the UNCRC Para 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The introduction of legislative change, specifically designed to introduce a 'common set of processes' across ages is contrary to article 3 of the UNCRC that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

**Proposal:** Amendment to Section 25 of the Children Act 2004 (Section 144 of the Bill).

**Relevant article(s) of the UNCRC:** article 3; article 19

**Assessment:** Lack of application of due regard to article 3 of the UNCRC in relation to amendments to existing legislation.

**The decision to amend the existing duty towards children contained in the 2004 Act regarding cooperation should be based on a consideration of the impact of such a change on the promotion of compliance with the UNCRC.**

Section 144 of the Bill makes amendments to section 25 of the Children Act 2004 (co-operation to improve well-being: Wales). The Bill's Explanatory Memorandum states that 'these amendments are made to ensure that the existing duty in the 2004 (Children) Act to make arrangements to promote co-operation to improve the well-being of children is aligned with the new duty in section 146 of this Bill (arrangements to promote co-operation – adults with needs for care and support and carers)' (2013:137). In this case an assessment should be made of the impact of such a change in relation to

compliance with: Article 3 Para 1: In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative bodies, the best interests of the child shall be a primary consideration.

**Proposal: Provision in relation to safeguarding arrangements (Sections 109, 110, 117 of the Bill).**

**Relevant article(s) of the UNCRC: article 3; article 19**

**Assessment: Retrogression of article 3 of the UNCRC.**

**Inhibits the effect of article 19 of the UNCRC.**

The Bill provides for a National Independent Safeguarding Board to consider safeguarding arrangements for both children and adults (Sections 109 and 110). This arrangement fails to take account of the need for special care for children through the promotion of the best interests principle contained in article 3 of the UNCRC. There is a risk in the context of the new statutory framework for adults as set out in the Bill that a clear focus on providing national direction on the safeguarding of children in Wales may be diluted.

**The Bill affords powers to Welsh Minister to amend section 117 of the Bill to require that a Safeguarding Children board and a Safeguarding Adult Board combine creating single regional boards. Should this provision within the Bill be applied it will be contrary to a commitment to policy that focuses on the rights guaranteed by the UNCRC.**

The Declaration of the Rights of the Child was adopted by the General Assembly in 1959 states that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth”. Children who have support and care needs requiring social care intervention and children at risk of abuse, neglect or other forms of harm are particularly vulnerable in this regard. Article 19 of the UNCRC sets out the provisions that should be put in place to promote the protection of children as a right.

**Proposal: Basis for an authority to have a duty to meet the care and support need of a child (Sections 19, 23, of the Bill).**

**Relevant article(s) of the UNCRC: article 18; article 19**

**Assessment: Inhibits the effect of article 18 of the UNCRC.**

**Inhibits the effect of article 19 of the UNCRC.**

**The Bill does not address the processes that will be in place to meet the needs of those children who have an assessment that identifies that they have care and support needs, but are not considered at risk and do not meet the eligibility criteria. The lack of provision on the face of the bill outlining the right to support in relation to this cohort may inhibit promotion of Article 19 Paragraph 2 and Article 18 Paragraph 2 of the of the UNCRC.**

Section 19 of the Bill provides that an assessment will be undertaken to conclude if a child has care and support needs or if a child carer has support needs. Once it is concluded that there are needs to be met the local authority must then determine whether the needs meet the eligibility criteria. Section 23 states that the application of the eligibility criteria will be the principle means of determining the child’s needs for care and support (condition 2). The eligibility criteria are not provided on the face of the Bill.

Article 19 Paragraph 2 provides that: Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and those who have the care of the child, as well as other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement. While Article 18 Paragraph 2 provides that: Para 2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

**Proposals: Provisions for a parent or child to refuse an assessment of a child's care and support needs (Sections 13, 14, of the Bill).**

**Relevant article(s) of the UNCRC: article 3; article 19**

**Assessment: Contravenes article 3 of the UNCRC.**

**Inhibits the effect of article 19 of the UNCRC.**

**While article 12 of the UNCRC provides that a child who is capable of forming his or her own views has the right to express those views freely in all matters affecting them, this right to be heard should support rather than undermine the application of article 3 (best interests) and article 19 (protection) of the UNCRC. The introduction of provision through which a child can refuse the assessment of their own need and retention of the existing provision for a person with parental responsibility to refuse consent to an assessment does not take account of the requirements of article 3 of the UNCRC. Further these provisions inhibit the implementation of article 19 para 2. of the UNCRC.**

The Bill provides under section 13 that:

- Where a child aged 16 or 17 refuses a needs assessment under section 12, the duty under that section to assess the child's needs does not apply. Unless the authority is satisfied that the child lacks capacity or suspects the child may be at risk of abuse, neglect or other kinds of harm.
- Where a child under the age of 16 refuses a needs assessment under section 12, the duty under that section to assess the child's needs does not apply if the local authority is satisfied that the child has sufficient understanding to make an informed decision. Unless the authority suspects that the child may be at risk of abuse, neglect or other kinds of harm.

Section 14 of the Bill provides that:

- If a person with parental responsibility for a child aged under 16 refuses a needs assessment for that child under section 12, the duty under that section to assess the child's needs does not apply. Unless the local authority suspects that the child is experiencing or at risk of abuse, neglect or other kinds of harm; the local authority is satisfied that the person with parental responsibility for the child lacks capacity to decide whether to refuse to have the assessment or the local authority is satisfied that the child has sufficient understanding to make an informed decision and the child does not agree with the refusal by the person with parental responsibility for the child.

These provisions represent a clear breach of the 'best interests' principle. The Bill's Explanatory Memorandum states that this provision is introduced as this 'recognises the importance of ensuring children have the same control as adults over whether the local authority is to be involved in providing or arranging services to meet their care and support needs' (2013:98). This position fails to account for the need to extend safeguards and care to children and for application of the best interest principle.

**Proposals: Conditions that must be met for a local authority to be under a duty to meet the care and support needs of a child in its area derived from but replaces Section 17 of the Children Act 1989 (Section 23 of the Bill).**

**Relevant article(s) of the UNCRC: article 23**

**Assessment: Retrogression of article 23 of the UNCRC.**

**The inclusion of a disabled child under criteria to qualify as a ‘child in need’ under section 17 and Schedule 2 of the Children Act 1989 affords protection in relation to the right to ‘special care and assistance’. The changes introduced on the face of the Bill in relation to children who are entitled to support for their care and needs omits specific reference to disabled children and weakens regard to article 23 of the UNCRC as described in the General Comment No. 9 on the rights of children with disabilities.**

The Bill contains provision related to the conditions that must be met for a local authority to be under a duty to meet the care and support needs of a child in its area (Section 23). This section is derived from but in effect replaces the duties contained under section 17 and Schedule 2 of the Children Act 1989.

For the purposes of section 17 of the Children Act 1989 a child shall be taken to be ‘in need’ subject to a number of criteria including *C) he is disabled*. However section 23 of the Bill provides for a duty to meet care and support needs of a child where:

*(1) A local authority must meet a child’s needs for care and support if it is satisfied that conditions 1 and 2, and any conditions specified in regulations, are met.*

*(2) Condition 1 is that the child is within the local authority’s area.*

*(3) Condition 2 is that—*

*(a) the needs meet the eligibility criteria, or*

*(b) the local authority considers it necessary to meet the needs in order to protect the child from—*

*(i) abuse or neglect or a risk of abuse or neglect, or*

*(ii) other harm or a risk of such harm.*

The Bill removes the status of ‘child in need’ and the associated support connected to that status as afforded to disabled children under the Children Act 1989. Information on what will constitute ‘eligible need’ under the Bill has yet to be developed and will be the subject of regulation. Article 23 Paragraph 2 of the UNCRC states that:

States Parties recognise the right of the disabled child to special care and shall encourage and ensure extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child’s condition and to the circumstances of the parents or others caring for the child.

The changes contained in the Bill in relation to those children to be included as subject to the duties imposed upon local authorities represent retrogression in relation to compliance with article 23 of the UNCRC. The United Nations Committee on the Rights of the Child issued General Comment No. 9<sup>7</sup> on the rights of children with disabilities in 2006. The General Comment states that in the application of paragraph 2 of article 23 States Parties should ‘effectively implement a comprehensive policy by means of a plan of action ... Which ensures that a child with disability and her or his parents/or others caring for the child do receive the special care and assistance they are entitled to under the Convention’ (2006:4).

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<sup>7</sup> Committee on the Rights of the Child (2006), *General Comment No.9, the rights of children with disabilities*.

**Proposals:** Application of policy intent to secure a stronger voice and real control in regard of children (Sections 8, 159, of the Bill).

**Relevant article(s) of the UNCRC:** article 12; article 13

**Assessment:** Fails to give due consideration to article 12 and article 13 of the UNCRC.

**There is no reference to advocacy in Section 8 of the Bill in relation to information, advice and assistance. Section 159 of the Bill replicates the provision in section 26A of the Children Act 1989 in relation to assistance for persons making representations but does not refer to independent professional advocacy services specifically. There is little evidence in the rest of the Bill of provisions that will provide a stronger voice and real control to children with care and support needs.**

Section 8 of the Bill places a duty on local authorities to secure the provision of an information, advice and assistance service. The purpose of the service is set out as to provide people with information and advice relating to care and support and to provide assistance to them in accessing it. The Bill does not address the need for such a service to meet the needs of children in terms of age appropriate and fit for purpose information and assistance for children so that they understand the care and support that is available to them and their families and get appropriate assistance in accessing advice on their care and support. Article 13 of the UNCRC provides that:

The child shall have their right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

Article 12 of the UNCRC provides that:

Para 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Para 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Advocacy plays a critical role in enabling children and young people to safeguard themselves by exercising their rights as outlined in the UNCRC and specifically in relation to having their voices heard in line with article 12.

**Proposals:** Provisions related to looked after and accommodated children (Part 6 of the Bill).

**Relevant article(s) of the UNCRC:** article 2; article 20

**Assessment:** Fails to give due consideration to article 2 and article 20 of the UNCRC.

**Guidance and Regulations on measures to strengthen arrangements for the placement, health and well-being of looked after children and young people; and responsible commissioner for secondary health care for children places away from home was issued by Welsh Government in 2007 under sections 35, 27 and 28 of the Children Act 2004 and**



**section 7 of the Local Authority Social Services Act 1970. The inclusion of the provisions contained in this guidance could be usefully incorporated into the Bill in order to give greater effect to article 2 and article 20.**

The Explanatory Memorandum accompanying the Bill states that ‘the obligations and duties of local authorities (and LHBs) currently in provisions within Part 3 of the Children Act have been included in this Part (6). The provisions have been updated and clarified but do not in essence change the obligations and duties towards these groups of children and young people’ (2013:13). The Explanatory Memorandum also states that ‘the Bill simplifies (but does not change the effect of) the complex provisions within Part 3 of the Children Act 1989 which describe the different categories of young persons who constitute ‘care leavers’ and seeks to clarify the local authority’s often different obligations and duties towards each category of young person’ (2013:13,14). While the intention to clarify duties in relation to care leavers may lead to improvements the Bill has not been used as a vehicle to strengthen the approach to supporting looked-after children in Wales or to promote a rights-based approach to policy relating to looked-after children in-line with the spirit of the duty of due regard to the UNCRC on Welsh Ministers. The Bill could have been utilised as a legislative tool to strengthen arrangements in relation to looked after children with regard to article 20 of the UNCRC the application of the other articles of the UNCRC in line with the principle of non - discrimination under article 2 of the UNCRC and the United Nations framework: Guidelines for the Alternative Care of Children (2009).

**Proposals: Application of policy intent in relation to improve the well-being with regard to children.**

**Relevant article(s) of the UNCRC: article 19**

**Assessment: Fails to give due consideration to article 19 of the UNCRC.**

Section 58 of the Children Act 2004 removed the defence of ‘reasonable chastisement’ for those with parental responsibility but replaced it with one of ‘reasonable punishment’. While section 58 prevents the use of the defence in relation to serious assaults, it may be used in relation to charges of common assault. The Children Act 2004 therefore fails to prohibit all physical punishment in the family. Where a parent hits a child, they are able to claim a justifying defence – one that would not be available were the victim over the age of 16. As such, children are denied the equal protection of the law. It is lawful for parents to use ‘reasonable punishment’ as long as it does not leave more than a ‘transitory mark’ on the child.

The potential for the Bill to deliver on the intention to improve the well-being of children and young people in Wales would be considerably strengthened if the issue of equal protection was addressed on the face of the Bill in order to give greater effect to article 19 of the UNCRC. Children’s right to respect for their human dignity and physical integrity and to equal protection under the law requires removal of the ‘reasonable punishment’ defence. The Committee on the Rights of the Child issued General Comment No.8 on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment in 2006<sup>8</sup>. The General Comment was issued to highlight the obligation of States parties to prohibit and eliminate all corporal punishment.

**Proposals:** Provisions for a child carer to receive an assessment as a child with care and support needs (Section 15 of the Bill).

**Relevant article(s) of the UNCRC:** article 3; article 19

**Assessment:** Gives greater effect to article 3 and article 19 of the UNCRC.

The duty to assess the needs of carers for support (section 15) includes direction on the consideration by the local authority in carrying out a carers assessment of whether a child carer is actually a child with care and support needs in their own right who should be assessed under section 12. This provision gives greater effect to article 3 and article 19 Paragraph 2 of the UNCRC.

**Proposals:** Definition of well-being as it applies to children.

**Relevant article(s) of the UNCRC:** article 3

**Assessment:** Respects article 3 of the UNCRC.

The definition of well-being included in the Bill as it applies to a child includes: (a) physical, intellectual, emotional, social and behavioural development and (b) welfare (as interpreted in the 1989 Children Act) in addition to the 7 domains included in the definition for all 'people'.