

Huw Lewis AC/AM
Y Dirprwy Weinidog dros Blant
Deputy Minister for Children



Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Ein cyf/Our ref: LF/HL/0017/10

Mark Isherwood AM
Chair
Legislation Committee No. 5
National Assembly for Wales
Cardiff
CF99 1NA

27 September 2010

Dear Mark

Proposed Rights of Children and Young Persons (Wales) Measure: Deputy Minister for Children's Statement to Legislation Committee No. 5

I am writing further to my letter dated 2nd August 2010 in which I expressed my intention to provide the Committee with a written submission responding to a number of issues which had been raised in the Committee's sessions on the Proposed Rights of Children and Young Persons (Wales) Measure.

I set out below some of the main points, which have been raised in the evidence sessions before the Committee, along with the Welsh Assembly Government's response to them.

Is the phrase "decision of a strategic nature" too unclear and will it give the Assembly Government freedom to avoid the due regard duty if it were so minded?

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.*

If the criteria which the Welsh Ministers set out in their draft scheme are too vague, or do not catch the types of decision which the Assembly considers are strategic decisions, the Assembly can refuse to approve the scheme. The Welsh Ministers will have to bring an amended scheme before the Assembly until the Assembly is prepared to give its approval.

Once the due regard duty has come into force, *any decisions made by Welsh Ministers or officials acting on their behalf, which meet the criteria set out in the scheme will be caught by the due regard duty.*

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1NA

English Enquiry Line 0845 010 3300
Llinell Ymholiadau Cymraeg 0845 010 4400
Ffacs • Fax 029 2089 8129
Correspondence.Huw.Lewis@wales.gsi.gov.uk

Wedi'i argraffu ar bapur wedi'i ailgylchu (100%)

Printed on 100% recycled paper

There will be no question of Ministers or officials being able to decide that a particular decision is not caught by the duty if that decision meets the criteria set out in scheme.

We have no intention of proposing criteria in our draft scheme which would exclude particular functional areas (e.g. health, planning etc) of the Welsh Assembly Government's work. Indeed, our view is that the proposed Measure would not allow the criteria in the scheme to do that.

"Decision 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. It would conflict with the use of that term in the proposed Measure if the children's scheme tried to provide that, for example, decisions in the field of health were strategic for the purposes of the Measure, while decisions in the field of transport were not.

I hope the Committee will therefore appreciate that this proposed Measure *gives the Assembly full control over deciding the types of decisions which will be decisions of a strategic nature.*

If the Assembly Government agrees that the Assembly should have full control over deciding which types of decisions the due regard duty will apply to, why doesn't it just set out in the proposed Measure which types of decisions the duty will apply to?

To be of practical assistance to the person (be they Minister, official, Assembly Member or member of the public) who wants to know whether a particular decision is a decision of a strategic nature, the criteria have to be much more detailed and explanatory than can be set out on the face of a piece of legislation.

Using the children's scheme to set out what is meant by a decision of a strategic nature will allow us to set out detailed explanations and include examples; in essence we want the scheme to be a practical toolkit for identifying a decision of a strategic nature. This toolkit will of course be developed collaboratively with external partners and children and young people *and will require approval from the Assembly.*

What types of decisions do you expect that your *draft* criteria will catch?

Some examples are in Annex A. I have already said publicly that we expect that the draft criteria we will bring forward for the Assembly's approval will cover *all* policy development and the development of most legislative proposals. I also expect that decisions about resource allocation will be covered.

There is an example in Annex B of the type of very technical legislation which we don't intend to catch.

Will the due regard duty affect the way in which Welsh Ministers' functions (i.e. powers and duties) are actually carried out?

Most definitely. Concerns have been expressed that strategic decisions will only encompass the top tier of Government decision making and therefore influence of the UNCRC will be limited. However, decisions of a strategic nature are far more pervasive throughout Government business and are made on a frequent basis.

Under the current system of Government, Ministers receive formal written advice from officials in the form of submissions. It is the decisions made in relation to many of these submissions that formally set the policies and legislative proposals of the Government. We

estimate that approximately between 3,500 and 4,000 such decisions are made per annum across all Cabinet portfolios.

In future officials will initially need to advise, and Ministers to decide on whether or not each of these decisions is strategic or not. That decision will be recorded. Strategic decisions will then need to be subject to the “due regard” duty. Strategic decisions may also be taken at official level - for example in the area of human resources policy.

It is anticipated that decisions made in this way will need to evidence the discharge of the due regard duty, ensuring that consideration of the UNCRC is incorporated in all strategic decisions and consequently shaping any subsequent actions taken in the exercise of Ministerial functions

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 *any* 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 plus substantive rights and obligations in the UNCRC and its Optional Protocols.

Furthermore, where the functions in question are exercised in respect of external bodies, (for example, making regulations about how local authorities should carry out certain aspects of their work), the effects of the due regard duty will spread to outside the “tower block”.

Examples of how the due regard duty will affect the carrying out of functions are set out in Annex C.

Why doesn't the duty apply *directly to the exercise* (i.e. carrying out) of functions?

The main purpose of the proposed Measure is to firmly embed into all strategic decisions made by Welsh Ministers *about how to exercise their functions*, a *thorough* consideration of:

(a) the *58-plus* (there are 58 substantive articles but many contain more than one right) complex rights and obligations in the United Nations Convention on the Rights of the Child and its Optional Protocols (UNCRC),

(b) whether and how Welsh Ministers can use the functions (i.e. powers and duties) available to them to give greater effect to those rights and obligations, weighing up that consideration against other relevant factors.

This is so that the future development of government policies, legislative proposals and other strategic decisions will incorporate a full and proper consideration of UNCRC rights and obligations.

We envisage rigorous internal processes being put in place to comply with this duty to try to ensure that it achieves its aim of greater effect being given to the UNCRC. A “general awareness” of the UNCRC on the part of Ministers and officials will not be enough to enable the duty to be discharged, nor will a “light-touch” consideration of whether a particular policy or legislative proposal impacts on children.

We think that our approach is the most effective way of ensuring that those decisions which have the greatest potential to make a difference for children involve a full and rigorous

consideration of giving greater effect to the UNCRC. Our resources for undertaking that rigorous process will be targeted on those decisions.

I believe that the evidence which Mr Dragan Nastic from UNICEF gave to the Committee¹ recognises the rationale behind the approach we have taken. Mr Nastic said:

“..we do recognise there is an issue of resources and we appreciate that there is that balance to be struck. As I said, the burden, let us say, of implementing the duty is not to be underestimated. If we consider it in the light of the expectations from the UN committee, UNICEF and others, we see this as starting the process of full harmonisation of the legislation, a review of legislation, monitoring child rights, impact assessments and so on. All of this is demanding of resources and so on, so we recognise that there is a balance to be struck.”

Does this mean that if a child writes to the Assembly Government about something that has happened to them in breach of their UNCRC rights, the person drafting the response will not do so in a “UNCRC-conscious” way.

It does not mean that. Correspondence is generally referred to the policy areas to which the issues raised relate, so that officials there can draft or advise on a response. The training given to officials so that they comply with the due regard duty when working on policy and legislative development and other strategic decisions, will mean that they will be alive to any UNCRC issues which are raised in the letter.

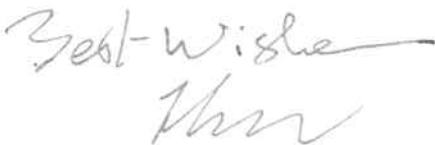
As with any piece of correspondence which asks Welsh Ministers if they are able to “fix” a particular problem, it would be responded to in the light of a consideration of which Welsh Ministers’ powers and duties are relevant to that issue.

How does the due regard duty in this proposed Measure compare with other duties to which Welsh Ministers are subject, such as the general equality duties?

A comparison is set out in Annex D.

I hope that the above assists the Committee on some of the main issues which have so far been raised before it. I shall of course be pleased to discuss these and others further at the meeting on 30 September.

A copy of this letter is also being sent to the Chairs of the Finance Committee and Constitutional Affairs Committee given their scrutiny of the proposed Measure.



Huw Lewis AM/AC

¹ Paragraph 63 of the official transcript, 15 July 2010.