



Ein cyf/Our ref: MA-L/FM/0266/17

Sally Holland, Children's Commissioner for Wales
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8th May 2017

Dear Sally

Thank you for your letter of 31 March about the United Nations Convention on the Rights of the Child (UNCRC) and its status in Wales, specifically in relation to the Additional Learning Needs and Education Tribunal (Wales) Bill.

As I confirmed in my letter of 6 March, the Welsh Government's commitment to the UNCRC remains absolute. In these times of uncertainty, I can guarantee this government's continued focus on the promotion and safeguarding of children's rights.

The Rights of Children and Young Persons (Wales) Measure 2011 was a milestone. I agree that we must now match the principles of law and policy with meaningful actions to improve outcomes for children and young people. However, I do not agree this requires us to place a general duty to have regard to the UNCRC in all primary legislation relating to children and young people.

The UNCRC is aimed at states and, accordingly, it is for governments to ensure compliance through their laws, administrative actions and other appropriate measures. This is an important principle and, unless the state is directly providing the service, this Convention is not targeted at frontline providers of service.

The Welsh Government, as required by the 2011 Measure, has considered children's rights and ensured they are built into the Bill. By complying with the duties in the Bill, service providers and practitioners will give effect to the rights described in the Convention.

A general due regard duty on service providers concerned with supporting learners with additional learning needs would not itself lead to improved outcomes for these children and young people. It would not guarantee a particular action or result and could, in practice, have the opposite effect and work against the well-intended aims of such a duty.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

If we were to place a due regard duty directly on those exercising functions under the Bill, we risk distracting frontline practitioners from supporting learners by creating layers of red tape and bureaucracy – teachers, schools and governing bodies would have to evidence that they have taken the convention into account in their interactions with all children and young people with additional learning needs.

The duty would put schools, colleges and other bodies with functions under the Bill at risk of litigation on grounds of procedural failures. Protecting themselves against such risks creates an additional layer of bureaucracy and takes up time and resources which might otherwise have been spent on supporting children and young people and improving outcomes.

In the case of school governing bodies, for example, who in practice will delegate their statutory duties under the Bill to teachers, we must reflect on whether we want them to focus on teaching and supporting children and young people or filling in forms to evidence how their actions adhere to the articles of the Convention.

The additional administrative burden a general due regard duty will place on classroom teachers, lecturers, additional learning needs coordinators, health professionals and others is a situation I cannot support given there is no evidence that it would have a positive impact in terms of improved outcomes.

It is specific and practical duties on public bodies that will result in improved outcomes and this is the approach we have taken in the Bill.

The Bill sets out clear, tangible and enforceable duties on local authorities and governing bodies in respect of children and young people with additional learning needs, which reflect the important and relevant articles of the UNCRC. At its core, the Bill is about delivering on the right of children and young people to an education which develops their personality, talents and abilities to the full. This is hugely important to us as a government and has shaped our approach. By complying with the duties in the Bill, service providers and practitioners will give effect to the rights described in the Convention.

In developing the Bill's provisions, we have promoted children's rights (specifically articles 12 and 13) by seeking the views of children and young people. Their perspectives have directly influenced the approach we are taking. For example, an extensive programme of engagement with children and young people was undertaken during the consultation on the draft Bill. Views gathered during this exercise were used to inform the Bill introduced into this fifth Assembly.

The very purpose of the Bill is to give children and young people who have additional learning needs the same opportunity to be educated as other children, thereby giving effect to relevant provisions of the Convention (including articles 23, 28 and 29). The Bill does this by placing duties on governing bodies and local authorities to consider whether children and young people have additional learning needs; to determine and set out, in an individual development plan, the provision to meet any such needs and to secure that provision. Children and young people have rights to request reviews of their plan and to receive copies of it.

Through the Bill, children and young people have rights to bring their own appeals and claims to the tribunal, with assistance from adults where appropriate. The Bill also provides rights for children and young people to independent advocacy services, to ensure that their voice is heard. Crucially, section 6 of the Bill requires those exercising functions under the Bill to have regard to (among other things) the views, wishes and feelings of the child or young person concerned.

I have attached a summary of our analysis of how the specific provisions of the Bill address the relevant articles of the Convention.

It is intended there will be further guidance on these duties in the Additional Learning Needs Code, which will be made by the Welsh Ministers. In preparing the Code, Welsh Ministers will be subject to the duty in the 2011 Measure.

I am grateful to you for the collaborative approach you and your office have taken to the development of the Bill and wider transformation programme and I know that the Minister for Lifelong Learning and Welsh Language is too. We share your vision for children and young people in Wales and are keen to continue working closely together to deliver this.

I am copying this letter to the Chair of the National Assembly's Children, Young People and Education Committee.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Carwyn Jones', written in a cursive style.

CARWYN JONES

Summary of applicable part of UNCRC Article	ALN Bill section
<p><i>Article 2</i></p> <p>This Article requires state parties to respect and ensure the rights set out in the convention apply to each child without discrimination of any kind, irrespective of the child's disability. It also provides that the state takes all appropriate measures to ensure that the child is protected against all forms of discrimination.</p>	<p>The overall ethos of the Bill is to give legally enforceable rights to children and young people with additional learning needs (ALN), whether the ALN results from a disability, or otherwise, so that they have the same opportunity to be educated as all children. See for example sections 10 and 12, which provide that where a governing body or local authority decides a child or young person has ALN, it must prepare an individual development plan (IDP), and maintain it. Where a governing body or local authority maintains an IDP it must secure the additional learning provision contained within the plan (sections 10 and 12).</p>
<p><i>Article 4</i></p> <p>State parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present convention.</p>	<p>This table demonstrates the many ways in which the applicable articles of the UNCRC would be integrated into law through the Bill. The ALN Code to be made under section 4 of the Bill would also be implemented to take into account the relevant rights under the UNCRC.</p>
<p><i>Article 5</i></p> <p>State parties shall respect the responsibilities rights and duties of parents...in a manner that is consistent with the evolving capacities of the child.</p>	<p>Parents, as well as children and young people, have rights to relevant documents, e.g. the IDP, and also to information and advice about the ALN system (section 7). Parents also have rights to bring appeals to the Education Tribunal (section 63(2)) on behalf of their children under the Bill.</p>
<p><i>Article 12</i></p> <p>State 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 due weight in accordance with the age and maturity of the child.</p> <p>For this purpose the child shall in</p>	<p>Section 6 of the Bill puts a statutory duty on persons exercising functions under Part 2 of the Bill to: a) have regard to the views, wishes and feelings of the child, child's parent, or young person; b) have regard to the importance of the child, the child's parent, or the young person participating as fully as possible in decisions relating to the exercise of the function concerned; and c) have regard to the importance of the</p>

<p>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.</p>	<p>child, the child’s parent, or the young person being provided with the information and support necessary to enable participation in those decisions.</p> <p>This section is a pervasive requirement that flows throughout all of the applicable functions, and applies to governing bodies and local authorities exercising their ALN functions.</p> <p>The Bill provides direct rights to children and young people to bring a claim to the Education Tribunal. Section 63(2) allows children and young people to appeal to the Tribunal on the matters listed in that section. Children and young people can engage in arrangements to avoid and resolve disagreements (see section 61). Children can bring claims to the Tribunal through their parents, or in their own name (including with the assistance, representation and support of a case friend – section 76). Children and young people are to be provided with independent advocacy services (section 62) in order to assist them to bring claims (and to provide advice at an earlier stage than the Tribunal) and make their voices heard.</p>
<p><i>Article 13</i></p> <p>The child shall have the right to freedom of expression, this right includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.</p>	<p>See sections 6 and 7 of the ALN Bill (and entry above generally).</p>
<p><i>Article 23</i></p> <p>State parties recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self reliance and facilitate the child’s active participation in the community.</p>	<p>One of the overall purposes, and the legal effect of the Bill, is to allow children and young people with ALN, which could be as a result of a mental or physical disability, to fully engage in the education system, with particular provision being made to assist and allow the child to learn. The statutory entitlement to additional learning provision under the</p>

<p>Paragraph 3 of this article specifically provides for recognising the special needs of a disabled child, and ensuring that the child has effective access to and receives education and training in a manner conducive to the child achieving the fullest possible social integration and individual development.</p>	<p>Bill plays a very large part in the enjoyment of a full and decent life of a child or young person with ALN, facilitates self reliance and also facilitates the child's or young person's active participation in the community.</p> <p>There are also provisions in the Bill to maximise the inclusion of children in mainstream schooling and activities (sections 45 and 46).</p>
<p><i>Article 28</i></p> <p>State parties recognise the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity.</p>	<p>Again, this reflects the fundamental purpose, and the legal entitlements for children and young people with ALN under the Bill. Where a child or young person requires additional learning provision to enable them to learn, the Bill provides for this. Local authorities and governing bodies must put the provision in place (sections 10 and 12). Furthermore, there are appealable and enforceable rights in the Education Tribunal.</p>
<p><i>Article 29</i></p> <p>State parties agree that the education of the child shall be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential.</p>	<p>This principle is reflected within the enforceable rights that are outlined in this table, and will be secured through the Bill.</p>
<p><i>Article 31</i></p> <p>State parties recognise the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child.</p>	<p>The age range of the Bill is from 0-25 and therefore includes very young children who learn through play.</p>