

RIGHTS OF CHILDREN AND YOUNG PERSONS (WALES) MEASURE 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

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

10. This section places the Welsh Ministers under a duty to have due regard to the requirements of –
 - (a) Part 1 of the Convention,
 - (b) articles 1 to 7, excluding article 6(2), of the Optional Protocol to the Convention on the involvement of children in armed conflict, and
 - (c) articles 1 to 10 of the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography.
11. In these notes, this duty is referred to as “the due regard duty”, and (a), (b) and (c) above are referred to as “Part I of the Convention and the Protocols”.
12. The due regard duty applies from 1 May 2012. From 1 May 2012, up to and including 30 April 2014, the due regard duty applies only to decisions of the Welsh Ministers falling within certain categories. The categories are listed in subsection (3). Then, from 1 May 2014, the due regard duty applies to all exercises by the Welsh Ministers of their functions.
13. The due regard duty requires the Welsh Ministers to give the weight that is appropriate in all the circumstances of the case to Part I of the Convention and the Protocols, balancing them against all the other factors that are relevant to the decision in question.
14. **Section 8** of the Measure and the Schedule to the Measure should be referred to in order to find the provisions of Part I of the Convention and the Protocols to which the Welsh Ministers must have due regard.
15. Subsection (1) – The effect of this is that, from 1 May 2014, the Welsh Ministers are subject to the due regard duty when exercising any of their functions.
16. Subsection (2) – The effect of this is that, from 1 May 2012 up to and including 30 April 2014, the Welsh Ministers are subject to the due regard duty when making any decision which falls within the categories of decision which are listed in subsection (3).
17. Subsection (3) - This lists the categories of decision to which the due regard duty applies from 1 May 2012 up to and including 30 April 2014. Therefore, the due regard duty applies to any decision by the Welsh Ministers about –
 - (a) provision proposed to be included in an enactment;
 - (b) formulation of a new policy;
 - (c) a review of or change to an existing policy.

18. Paragraph (a) covers not only provision which the Welsh Ministers are proposing to include in an enactment, but also provision which someone else is proposing to include in an enactment. “Enactment” is defined in section 9 and covers Acts of the United Kingdom Parliament, Assembly Measures and Assembly Acts and subordinate legislation made under any of those. Therefore, for example, if the Welsh Ministers were deciding what view to express to the United Kingdom Government about a provision which the latter was proposing to include in a United Kingdom Parliament Bill, the Welsh Ministers would be required to have due regard to the UNCRC in deciding what their view was.
19. Similarly, paragraphs (b) and (c) not only cover Welsh Ministers’ policies, but also those of others. Therefore, for example, if the Welsh Ministers were deciding what view to express to the United Kingdom Government about a proposed new policy of the latter, the Welsh Ministers would be required to have due regard to the UNCRC in deciding what their view was.
20. Subsection (4) – The effect of this is that references in the Measure to the Welsh Ministers’ duty under section 1 mean –
 - in respect of the period 1 May 2012 to 30 April 2014, the due regard duty in subsection (2) and
 - from 1 May 2014, the due regard duty in subsection (1).
21. Subsection (5) – This makes the First Minister when acting in that sole capacity subject to the same due regard duty as the Welsh Ministers.
22. Under the Government of Wales Act 2006, the First Minister counts as one of the Welsh Ministers and may carry out any function which has been conferred on the Welsh Ministers. When the First Minister is acting as one of the Welsh Ministers he is subject to the Welsh Ministers’ due regard duty. However, some functions are conferred on the First Minister alone. The effect of subsection (5) is that the First Minister is subject to the same due regard duty as the Welsh Ministers when he acts in that sole capacity.
23. Therefore, for example, if in June 2012 the UK Government was complying with a statutory obligation to consult the First Minister about a piece of subordinate legislation which it proposed to make, the First Minister’s decision about how to respond would be subject to the due regard duty. This is because the First Minister would be subject to the same duty as the Welsh Ministers, as set out in subsection (2), to have due regard to Part I of the Convention and the Protocols when making decisions about provision which it is proposed to include in an enactment.
24. Subsection (4) requires references in the Measure to the due regard duty to be read to reflect the fact that the First Minister is subject to the same due regard duty as the Welsh Ministers.

Section 2 – The children’s scheme

25. Subsection (1) – This requires the Welsh Ministers to make a children’s scheme. The scheme must set out the arrangements that the Welsh Ministers have made, or propose to make, in order to ensure that they and the First Minister comply with the due regard duty.
26. Subsection (2) - This makes provision about other matters that may be included in the children’s scheme. The scheme may require the Welsh Ministers to publish reports on the operation of the scheme or on any other matter mentioned in it. In addition the scheme may specify matters which must be included in those reports or in reports which the Welsh Ministers must publish under section 4(1) to explain how they and the First Minister have complied with the main duty.

27. Subsection (3) – This allows the scheme to include any other matters that the Welsh Ministers consider appropriate.
28. Subsection (4) – This makes provision about revising or remaking the children’s scheme. The Welsh Ministers must consider whether to revise or remake the scheme within six months of the Committee making any suggestion or general recommendation under article 45(d) of the Convention, based on a report submitted to the Committee by the United Kingdom under its obligation in article 44(1)(b).
29. Subsection (5) – This permits the Welsh Ministers to revise or remake the children’s scheme at any other time.
30. Subsection (6) – This defines terms used in section 2.

Section 3 – Preparation and publication of the scheme

31. Subsection (1) – This provides that when preparing, remaking or revising the children’s scheme, the Welsh Ministers must have regard to the following documents–
 - (i) the Committee’s reports on its activities, which article 44(5) of the Convention requires the Committee to submit every two years to the General Assembly of the United Nations;
 - (ii) any studies on specific issues relating to the rights of the child which have been undertaken by the United Nations’ Secretary-General under article 45(c) of the Convention, and
 - (iii) any other documents issued by the Committee relating to implementation of the Convention or Protocols by the United Kingdom, such as documents relating to the General Days of Discussion.
32. Subsection (2) – This permits the Welsh Ministers to have regard to any other documents (whether or not issued by the Committee) or matters that they consider to be relevant when preparing, remaking or revising the children’s scheme.
33. Subsection (3) – This requires the Welsh Ministers, before making or remaking the children’s scheme, to publish the scheme in draft. If they are revising the scheme they must publish the revisions alone or the scheme as a whole with those revisions included.
34. Subsection (4) – This requires the Welsh Ministers to involve –
 - (a) children and young persons,
 - (b) the Children’s Commissioner for Wales, and
 - (c) such other persons or bodies as the Welsh Ministers consider appropriate, when they are preparing the draft scheme, or the draft of any changes to the scheme, to be published under subsection (3).
35. Subsection (5) – This requires the Welsh Ministers, before making, remaking or revising the children’s scheme, to consult certain people on the draft. They must consult children and young people, the Children’s Commissioner for Wales and any other persons or bodies which the Welsh Ministers consider appropriate.
36. Subsection (6) – The effect of this subsection is that the Welsh Ministers must not make or remake the scheme unless a draft of what is to be made or remade has been laid before the Assembly and has been approved by a resolution of the Assembly. The Welsh Ministers must not revise the scheme unless either the revisions alone, or the whole scheme with the revisions included, has been laid before and approved by the Assembly.
37. Subsection (7) – This requires the Welsh Ministers to lay a draft of the first children’s scheme before the Assembly on or before 31 March 2012.

38. Subsection (8) – This requires the Welsh Ministers to publish the children’s scheme when it is made and whenever it is remade. Where they have revised the scheme they must publish the revisions alone or the whole scheme with the revisions included.
39. Subsection (9) – This requires the Welsh Ministers to lay before the Assembly the document they have published under subsection (8), whether that be the whole scheme or revisions to the scheme.
40. Subsection (10) – This defines terms used in section 3.

Section 4 – Reports

41. Subsection (1) – This requires the Welsh Ministers to publish reports about how they and the First Minister have complied with the due regard duty. Their first report must be published on or before 31 January 2013. After that, they must publish a report every five years.
42. Reports will deal with compliance with the due regard duty as set out in section 1(1), or as set out in section 1(2), or both, depending on the period which the report covers. The first report, to be published on or before 31 January 2013, will cover a period when the due regard duty as set out in section 1(2) applies; the report will therefore deal with compliance with that due regard duty.
43. During the following five years, the due regard duty as set out in section 1(2) will apply for the first part of that period, while the due regard duty as set out in section 1(1) will apply for the second part of that period. Therefore, a report covering those five years will deal with compliance in accordance with that position.
44. The timing of these reports is designed to fit in with the timing of the United Kingdom’s reports to the Committee on the progress the United Kingdom has made towards achieving the rights contained in the provisions of the Convention and its Optional Protocols. Under Article 44 (1)(b) of the Convention, the United Kingdom has to report to the Committee every five years. The children’s scheme may specify that the Welsh Ministers are to publish their reports at longer or shorter intervals.
45. Subsection (2) – The effect of this is that, if the children’s scheme has required the Welsh Ministers to publish a report on the operation of the scheme or any matter mentioned in it (as it may under section 2(2)(a)), the Welsh Ministers must publish that report.
46. Subsection (3) – This requires the Welsh Ministers to lay before the Assembly reports which they publish under section 4(1) or (2).

Section 5 – Duty to promote knowledge of the Convention

47. This requires the Welsh Ministers to take such steps as are appropriate to promote public knowledge and understanding of the Convention and the Optional Protocols. The provision makes clear that the “public” includes children.
48. This provision is based to a large extent upon article 42 of the Convention and article 6(2) of the Optional Protocol on the involvement of children in armed conflict, in which States have undertaken to make the principles and provisions of the Convention and that Protocol widely known by adults and children. Section 5 requires the Welsh Ministers to promote public understanding, as well as knowledge.
49. **Section 1(1)**, section 8 and the Schedule to the Measure should be referred to in order to find the content of the provisions of the Convention and its Optional Protocols in respect of which the Welsh Ministers must promote public knowledge and understanding.

Section 6 – Power to amend legislation etc

50. Subsection (1) – The effect of this is to set out the circumstances in which the Welsh Ministers’ power under section 6 to amend certain legislation and prerogative instruments is triggered. There are limitations on the power which are set out in section 6.
51. The Welsh Ministers will have that power if, in a report which they have published under section 4, they have concluded that it would be desirable to amend certain legislation or prerogative instruments, in order to give further or better effect to the rights and obligations set out in Part I of the Convention and its Optional Protocols.
52. The types of legislation which may be amended using this power are Acts of the United Kingdom Parliament, Measures and Acts of the Assembly and subordinate legislation made under any of those (see section 9 which contains the definition of “enactment”). Orders, rules and regulations are examples of types of subordinate legislation.
53. Subsection (2) – This provides that the Welsh Ministers may make amendments to legislation or prerogative instruments which they consider to be appropriate in the light of a report which they will have published under section 4. The Welsh Ministers are to make the amendments by making an order.
54. Subsection (3) – The effect of this is that the Welsh Ministers will only be able to use this power to make amendments to legislation or prerogative instruments if those amendments are ones which, at that particular time, the Assembly has legislative power to make.
55. From 5 May 2011 the Assembly’s legislative power is governed by Part 4 (Assembly Acts) of the Government of Wales Act 2006. Section 108 of and Schedule 7 to that Act should be referred to in order to see the Subjects in relation to which the Assembly may pass Acts.
56. Subsection (4) – This requires the Welsh Ministers to consult whoever they consider appropriate before making an order using this power.
57. The Welsh Ministers must not make an order using this power unless a draft of it has been laid before the Assembly and approved by a resolution of the Assembly (see section 10(2)).

Section 7 – Application to young persons

58. The purpose of the provisions in this section is to require consideration of, and allow potential for, the appropriate application in relation to young people of Part I of the Convention and its Optional Protocols, or provisions of this Measure.
59. Subsection (1) – This requires the Welsh Ministers to consider whether and to what extent the requirements of Part I of the Convention and its Optional Protocols may be relevant to young people, and whether and to what extent the provisions of this Measure could be applied to young people.
60. This includes considering whether Part I of the Convention and its Optional Protocols could be relevant to young people, or this Measure could be applied in relation to them, in an amended form.
61. “Young persons” is defined in section 9 and means 18 to 24 year olds (i.e., those who are under 25).
62. Subsection (2) - This requires that the first time the Welsh Ministers make and publish the children’s scheme, they must include in that scheme their proposals to carry out consultation on the relevance of Part I of the Convention and its Optional Protocols to young people, and on the potential application of the Measure to them.

63. Subsection (3) – This allows the Welsh Ministers, alongside the consultation under subsection (2), to also carry out consultation about any other matter relating to young people which they consider appropriate. This may cover a consultation on whether there are other more appropriate ways to address the rights of young people.
64. Subsection (4) – This requires the Welsh Ministers to publish a report on their conclusions under subsection (1) as to the relevance of Part I of the Convention and its Optional Protocols to young people, and on the potential application of the Measure to them.
65. Subsection (5) – This requires the Welsh Ministers to lay before the Assembly a copy of the report which they have published under subsection (4).
66. Subsections (6) and (7) – These allow the Welsh Ministers by making an order to apply the whole of, or any provision of, this Measure in relation to young people. They may do so in a modified form if that is what they consider appropriate. The Welsh Ministers may also make any other provision which they consider appropriate to apply the requirements of Part I of the Convention and its Optional Protocols in relation to young people.
67. Subsection (8) – This requires the Welsh Ministers, before making an order under subsection (6), to publish the order in draft and to consult whoever they consider appropriate about that draft.
68. The Welsh Ministers must not make an order using this power unless a draft of it has been laid before the Assembly and approved by a resolution of the Assembly (see section 10(2)).

Section 8 – The Convention on the Rights of the Child

69. Subsection (1) - This explains what is meant by “the Convention” and “the Protocols” in this Measure.
70. “the Convention” means the United Nations Convention on the Rights of the Child which was adopted and opened for signature, ratification and accession by resolution 44/25 of the General Assembly of the United Nations, dated 20 November 1989.
71. “the Protocols” means Articles 1 to 7, excluding article 6(2), of the Optional Protocol to the Convention on the involvement of children in armed conflict, and Articles 1 to 10 of the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography.
72. Article 6(2) of the Optional Protocol to the Convention on the involvement of children in armed conflict is the provision under which States have undertaken to make the principles and provisions of that Protocol widely known by adults and children. Section 5 of the Measure places the Welsh Ministers under a duty which is similar to that undertaking.
73. Subsection (2) – This provides that the Schedule to this Measure (“the Schedule”) sets out the text of:
 - (1) Part I of the Convention (the Preamble, and Parts II and III which deal with procedural and similar matters in relation to the United Nations, have not been included) – this is in Part 1 of the Schedule,
 - (2) The two Optional Protocols as mentioned above – these are in Part 2 of the Schedule,
 - (3) Declarations by the United Kingdom relating to the Convention and its Optional Protocols – these are in Part 3 of the Schedule.

74. Subsection (3) – The effect of this is that whenever, for the purposes of this Measure (for example, where the Welsh Ministers are complying with the due regard duty in carrying out some particular function), the requirements of the Convention or the Protocols need to be referred to, then what must be referred to is the text which, at that particular time, is in Parts 1 and 2 of the Schedule.
75. However, that text must be read subject to any declarations or reservations which are set out at that particular time in Part 3 of the Schedule. At the time of enacting this Measure there are no reservations by the United Kingdom to the Convention and its Optional Protocols and therefore none appear in Part 3 of the Schedule. The powers and obligations of the Welsh Ministers to amend Part 3 appear in subsections (5), (7) and (8).
76. Subsections (4) and (5) – These provisions are relevant where the United Kingdom has signed or indicated agreement to, but not actually ratified:
- (i) an amendment to the Convention as set out at that particular time in Part 1 of the Schedule,
 - (ii) an amendment to the Protocols as set out at that particular time in Part 2 of the Schedule, or
 - (iii) a new Protocol.
77. In those circumstances the Welsh Ministers may amend section 1(1), 8(1), 8(2), 8(3) or the Schedule to reflect:
- (i) the amendment to the Convention or Protocols,
 - (ii) the new Protocol, or
 - (iii) any declaration or reservation by the United Kingdom to the amended Convention or Protocols, or to the new Protocol.
78. Subsections (6) and (7) - These provisions are relevant where the United Kingdom has ratified:
- (i) an amendment to the Convention as set out at that particular time in Part 1 of the Schedule,
 - (ii) an amendment to the Protocols as set out at that particular time in Part 2 of the Schedule, or
 - (iii) a new Protocol.
79. In those circumstances the Welsh Ministers must amend section 1(1), 8(1), 8(2), 8(3) or the Schedule to reflect:
- (i) the amendment to the Convention or Protocols,
 - (ii) the new Protocol, or
 - (iii) any declaration or reservation by the United Kingdom to the amended Convention or Protocols, or to the new Protocol.
80. Subsection (8) – The effect of this is that the Welsh Ministers are required to amend the text in Part 3 of the Schedule (declarations and reservations by the United Kingdom) so that Part 3 will reflect any changes to the declarations and reservations which it contains.
81. Any order under this section must be laid before the Assembly in draft before being made and a certain period of time must pass before it can be made (see section 10(4), 10(5) and 10(6)).

Section 9 – Other interpretive provisions

82. This defines various terms used in the Measure.

Section 10 – Orders

83. Subsection (1) – This provides that any order made under this Measure must be made by statutory instrument. This means that the instrument is subject to procedural and other requirements which are set out in the Statutory Instruments Act 1946.
84. Subsection (2) – This provides that an order under section 6 (power to amend legislation) or 7 (application to young persons) must not be made unless a draft of the order has been laid before the Assembly and approved by a resolution of the Assembly.
85. Subsection (3) – This provides that 40 days (calculated in accordance with subsection (6)) must pass before the Assembly can vote to approve or reject the draft of an order under section 6 or 7. The purpose of this provision is to ensure that the Assembly has a certain minimum amount of time to scrutinise the drafts of orders under section 6 or 7, before having to decide whether to vote to approve them.
86. Subsection (4) – This provides that a draft of an order under section 8 (power to reflect changes to the Convention etc) must be laid before the Assembly before it can be made, and that it cannot be made until 40 days (calculated in accordance with subsection (6)) has passed. The purpose of this provision is to give the Assembly an opportunity to scrutinise orders under section 8 in draft before the Welsh Ministers make them.
87. Subsection (5) – This provides that section 6(1) of the Statutory Instruments Act 1946 does not apply to a draft of an order under section 8. Without subsection (5), the effect of section 6(1) of the Statutory Instruments Act 1946 would be to prevent the Welsh Ministers from making an order under section 8 if the Assembly passed a resolution that they should not do so.
88. Subsection (6) – This provides how the period of 40 days referred to in subsection (3) and (4) is to be calculated.

Section 11 - Commencement

89. This provides that the Measure comes into force once two months have elapsed after the date that the Measure is enacted. A Measure is enacted once it is passed by the Assembly and then approved by Her Majesty at a meeting of the Privy Council.

Section 12 - Short Title

90. This provides that this Measure may be referred to as the Rights of Children and Young Persons (Wales) Measure 2011.