Response to Welsh Government’s Consultation on Draft Children’s Rights Scheme 2014

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Introduction

The Discrimination Law Association (‘DLA’), a registered charity, is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information; the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law-makers and others and of the necessity for a complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.

The DLA is a national association with a wide and diverse membership. The membership currently consists of some 350 members. Membership is open to any lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from a complainant perspective.

The DLA welcomed the introduction of the Measure which for the first time requires the executive of one of the nations within the UK to have due regard to the substantive rights and obligations under a UN human rights convention - the UNCRC. The extension of the duty to include the exercise of all Ministerial functions is also very much welcomed.
Consultation Questions

1) Do you think that the arrangements set out in this revised Children’s Rights Scheme are sufficient to ensure that Welsh Ministers have due regard to children’s rights according to the UNCRC, when exercising any of their functions?

Yes x
Please tell us why:

The DLA, having considered the contents of the draft Scheme, are of the view that, overall, the arrangements that have been set out, if properly implemented, are sufficient to ensure that Welsh ministers have due regard to the requirements of the UNCRC to protect and ensure human rights of all children when exercising any of their functions. Our comments below, however, highlight certain areas which would benefit from clarification and, in a few instances, recommend certain amendments.

The duty on Welsh Ministers is a duty to have “due regard”. Case law (in relation to public sector equality duties) has established certain principles that are considered to be necessary parts of having “due regard”. Generally, these principles would appear to be reflected in the draft Scheme.

We note, however that a previous consultation had highlighted concerns about the vagueness of the meaning of “due regard” in the Scheme; which could result in Welsh Ministers avoiding to act on issues particularly to avoid difficult or expensive measures.. It is important therefore that the meaning of the term is clarified in the Scheme.

Principles of “due regard” established in case law include:

- The need for those responsible for taking decisions to be aware of the duty
- Due regard involves a conscious approach and state of mind and is fulfilled before and at the time a particular policy of relevance to the duty is under consideration, as well as at the time a decision is taken; not after the decision is taken
- The duty must be exercised in substance, with rigour and with an open mind in such a way that it influences the final decision. It is good practice for the policy or decision maker to make reference to its due regard duty in all cases when it is in play.

1 In particular what are known as the Brown principles in 1 R. Brown v Secretary of State for Work and Pensions & Ors [2008] EWHC 3158; also
• The duty is a non-delegable one. The duty will always remain the responsibility of the body subject to the duty, although in practice another body may actually carry out the practical steps to fulfil a policy stated by a body subject to the duty.

• The duty is a continuing one.

• It is good practice to keep an accurate record showing that the duty had been considered.

• Those taking decisions involving due regard must ensure they have sufficient information to assess the effects of policies and how functions have been carried out.

The draft Scheme clearly outlines the responsibilities of those who will be involved in having due regard, in particular the responsibilities and roles of Ministers as well as an Implementation Group, Operations Teams and external monitoring groups. The draft Scheme also outlines the procedures for carrying out CRIAs and recognises that this is a continuing process from the development of proposals or pieces of work as well as to their implementation.

The DLA suggests that although there is some reference to the Equality Act 2010 in the Scheme there could be clearer co-ordination so that where there is an overlap between the UNCRC and equality law the processes in place for complying in particular with the public sector equality duty could be made explicit. Reference to the Equality Act 2010 could serve the purpose of capturing the needs of children with particular protected characteristics who may require particular attention; this would support Ministers' having due regard to Article 2 UNCRC requiring that Convention rights are ensured without discrimination. We note that there was a request in the previous consultation for more emphasis in the Scheme on children with disabilities and other protected characteristics. Furthermore the Wales Equality Strategy makes reference to the importance of making strong links between equality, human rights and inclusion in the Welsh Government and that the Equality, Diversity and Inclusion Division would be leading on this work.

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2 CPAG v Secretary of State for Work and Pensions [2011] EWHC 2616
2. **Do you think that the arrangements set out in this revised Children’s Rights Scheme will deliver the desired impact, i.e. that Welsh Ministers will have due regard and that outcomes for children and young people will improve as set out in the UNCRC?**

Yes x
Please tell us why:

If the arrangements in the revised Scheme are implemented effectively then the desired outcomes should be possible. However, Welsh Ministers will need to be clear about how these are measured in their particular area of responsibility. Outcomes will only be possible if Ministers are willing to act upon evidence that is collated through the CRIA process or equivalent, and steps are taken to mitigate any adverse impact where appropriate.

3. **Do you think that the monitoring arrangements, including the roles and working relationships of all those involved, will ensure that Welsh Ministers have due regard to children’s rights according to the UNCRC when exercising any of their functions?**

Yes x
Please tell us why:

The involvement of a specialist implementation group as well as operations teams and external monitoring groups should assist in the development of a framework for the effective management of monitoring arrangements. However, these will need to be implemented effectively, and a strong evidence base created so that they inform Ministers decisions when having due regard to the duty.

4. **Do you think that the Children’s Rights Impact Assessment is fit for purpose and provides the opportunity for analysis that will lead to positive outcomes for children and young people?**

Yes x
Please tell us why:

The development of procedures for carrying out CRIAs are to be welcomed. The CRIA template, if followed, could potentially lead to positive outcomes if there is a sound evidence base in place. The template could make clearer that where the assessment indicates potential adverse impact on UNCRC rights consideration should be given to mitigating this impact. Consideration should also be given to ways in which a policy or function could be revised in order to give greater weight to UNCRC rights. Furthermore, we strongly advise that the draft impact assessment process is amended in order to
acknowledge the importance of involving children in decision-making. Step 2 of the CRIA procedure refers to it being the stage at which staff should consider whether children and young people should be engaged to inform the work being undertaken. We would recommend that to meet the basic principles of the UNCRC, it should be presumed that such engagement is required unless the staff are satisfied that there are reasons that such engagement is not appropriate and such reasons are recorded, and that the CRIA guidance should be amended accordingly.

As a general rule CRIAs should be published for purposes of transparency.

5. **Do you think that the arrangements for providing training, information and advice are sufficient to ensure understanding of the UNCRC, and the process needed to be followed to comply with the duty to have due regard?**

Yes x
Please tell us why:

The plans for training appear to be comprehensive; and designed to address those staff who would be involved in work relating to children’s rights. However we would qualify this comment by recommending that there are clear mechanisms in place for obtaining feedback on the training and for identifying any gaps in training provision as well as suggestions for improvements to the training programmes. We note that there were concerns expressed in the previous consultation about training provision, so it is important that any reasonable criticisms are addressed through these new arrangements.

Furthermore, it is not clear why it is not proposed also to provide basic training on this duty to Welsh Ministers whose legal responsibility it is to comply with this statutory duty. As a minimum they could be briefed on the value of the Measure as it applies to all of their functions and what their specific obligations are as prescribed under the revised Scheme.

6. **Do you think that the reporting arrangements set out in the revised Children’s Rights Scheme are sufficient to ensure transparency on compliance with the duty to have due regard?**

Yes x
Please tell us why:

The reporting arrangements of publishing a report every 2.5 years are clearly an improvement on the statutory requirements of reporting every 5 years. The Scheme could be drafted to allow other reports to be published if necessary.
7. **Do you agree with including an update on how Ministers are complying with the duty to promote knowledge and understanding of the UNCRC, as set out in Section 5 of the Measure, in the next compliance report?**

Yes x

Please tell us why:

Promoting knowledge and understand of the UNCRC is an important responsibility overall for Ministers. Without wider public knowledge and understanding of the UNCRC children and members of the public generally will not be able to hold Welsh Ministers to account for compliance with their Section 1 duty. It would therefore be extremely important for such an update to be included in the next compliance report.

8. **We have asked a number of specific questions. If you would like to comment on any related issues that we have not specifically addressed, please use the space below.**

The Seven core aims, referred to in the glossary of terms need to demonstrate how the individual Articles have been grouped. This has been done previously in other documents; although the Welsh Government may wish to review these to ensure they capture the aims and requirements of the UNCRC effectively.

- A flying start in life: Articles 3, 29, 36
- A comprehensive range of education and learning opportunities: Articles 23, 28, 29, 32
- Enjoy the best possible health and freedom from abuse, victimisation and exploitation: Articles 6, 18-20, 24, 26-29, 32-35, 37 and 40.
- Access to play, leisure, sporting and cultural activities: Articles 15, 20, 29, 31
- Be listened to, treated with respect and have their race and cultural identity recognised: Articles 2, 7, 8, 12-17, 20.
- Have a safe home and community which supports physical and emotional well-being: Articles 19, 20, 25, 27, 32-35, 37 and 40.
- Are not disadvantaged by poverty: Articles 6, 26, 7, 28.

The DLA welcomes the reference in the Scheme to various steps children and young people or their representatives can take if they think that Welsh Ministers have not had due regard to the UNCRC when making decisions that affect their lives. They are not confined to taking legal action through the judicial review system but include as well as a complaints procedure, and contacting individual assembly members as well as the Assembly itself. This will assist in ensuring that politicians are held accountable for Welsh compliance with the UNCRC.