

Senedd Cymru  
Y Pwyllgor Deddfwriaeth, Cyfiawnder a'r  
Cyfansoddiad  
Gwneud i Gyfiawnder weithio yng Nghymru  
MJW 06  
Ymateb gan: Comisiynydd Plant Cymru

Welsh Parliament  
Legislation, Justice and Constitution Committee  
Making Justice work in Wales  
Response from: Children's Commissioner for  
Wales

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Background information about the Children's Commissioner for Wales

The Children's Commissioner for Wales' principal aim is to safeguard and promote the rights and welfare of children. In exercising their functions, the Commissioner must have regard to the United Nations Convention on the Rights of the Child (UNCRC). The Commissioner's remit covers all areas of the devolved powers of the National Assembly for Wales that affect children's rights and welfare.

The UNCRC is an international human rights treaty that applies to all children and young people up to the age of 18. The Welsh Government has adopted the UNCRC as the basis of all policy making for children and young people and the Rights of Children and Young Persons (Wales) Measure 2011 places a duty on Welsh Ministers, in exercising their functions, to have 'due regard' to the UNCRC.

This response is not confidential.

### **The role and remit of the Children's Commissioner for Wales and justice**

The Children's Commissioner for Wales was established under the Care Standards Act 2000, as amended by the Children's Commissioner for Wales Act and Regulations 2001. The remit of the office is therefore governed by this statutory underpinning.

The principal aim of the Children's Commissioner's office is to safeguard and promote the rights and welfare of children. In carrying out duties and functions, the Commissioner must have regard to the United Nations Convention on the Rights of the Child (UNCRC). The Commissioner's remit covers all areas of the devolved powers of the Senedd insofar as they affect children's rights and welfare. In summary, the powers of the Commissioner extend to:

1. The power to review the effect on children of the exercise of functions or proposed exercise of functions of defined public bodies in Wales including Welsh Government;
2. The power to review and monitor how effective are the arrangements for complaints, whistleblowing and advocacy of defined public bodies in safeguarding and promoting the rights and welfare of children;

3. The power to examine cases in respect of individual children in certain circumstances;
4. The power to provide assistance to a child in certain circumstances;
5. The power to make representations to the Welsh Government about any matters affecting the rights and welfare of children which concern her and for which she does not have the power to act.

The Children's Commissioner for Wales does not have power to act in a number of defined circumstances. These include areas that have not been devolved to the Senedd, which include immigration and asylum, welfare benefits, children in the military, justice and policing, where CAF/CASS (the Children and Family Court Advisory Service) is able to act and where Welsh Ministers have functions in respect of family proceedings. The Commissioner is neither able to enquire about or report on any matter that is or has been the subject of legal proceedings.

Family law proceedings cross the divide of devolved and non-devolved responsibilities, as public law falls under the remit of local authorities in Wales but private law does not. This can create confusion for families when seeking advice or assistance; my office is able to support in some areas of a child's life where that child is in local authority care for example, but I cannot intervene in the court proceedings themselves or prevent a court from making an Order for example.

My Investigation and Advice team is regularly contacted by parents seeking advice on how to overturn or amend court orders, from Grandparents seeking greater involvement with court proceedings, or concerns about family circumstances being misrepresented within proceedings. Aside from advising on/supporting with complaints to the relevant local authority where warranted, my office is unable to directly advise or assist in relation to those court proceedings.

These sorts of cases demonstrate the challenges that can exist not just in terms of the Commissioner's role in providing advice and guidance to families and children, but also the complexities that arise in separating children's lives into the categories of devolved and non-devolved competencies.

### **Divergence in family law and the impact on children and families in Wales**

There are a number of challenges that arise for Welsh domestic law and policy making for children and young people, particularly where England and Wales court proceedings and statutory intervention in family life are required. The Commission on Justice recommends that "the law

relating to children and family justice in Wales should be brought together in one coherent legal system, aligned with functions in relation to health, education and welfare”.

### **Public Law:**

Children’s social care functions carried out by Welsh local authorities fall between two pieces of legislation; the Social Services and Wellbeing (Wales) Act 2014 (“SSWB Act”) and the Children Act 1989 (for England and Wales). Work to support children in need of care and support falls under the Welsh legislation, including a child coming into the care of a local authority on a voluntary basis, whereas child protection and care proceedings remain under the England and Wales legislation. There is Wales specific guidance for some areas of child protection but largely it is the Children Act that governs these functions. However, despite the common jurisdiction for England and Wales, the SSWB Act has signified a divergence in approach with England in regards to the care, planning and duties towards children who become looked after and when they are placed in care.

There has been significant concern in Wales about the rising rates of children coming into care, per 10,000 of the population. Rates are rising in England also but overall the rate for Wales is significantly higher. As at 31st March 2019, there were 6,845 welsh children in care, a rate of 109 per 10,000. This has been rising year on year but there is also significant variance between the lowest rate of 49 per 10,000 in Carmarthenshire and the highest at 216 per 10,000 in Torfaen<sup>1</sup>. The overall rate for England for the same period is 65 per 10,000<sup>2</sup>. This is despite the fact that the legal threshold for the care orders comes under the same legislation for England and Wales. However, there are a significant number of areas of preventative family support that the Welsh Government and Local Authorities can further develop to reduce the likelihood of children entering the care system.

Whilst the Welsh Government are seeking a more preventative approach to family support to limit the number of children entering the care system and have worked with Local Authorities Social Services departments to set reduction targets on the number of children coming into care, there has been concern from some Local Authorities that elements of this are beyond their control, for

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<sup>1</sup> <https://statswales.gov.wales/Catalogue/Health-and-Social-Care/Social-Services/Childrens-Services/Children-Looked-After/childrenlookedafterat31marchper10000population-localauthority-year>

<sup>2</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/850306/Children\\_looked\\_after\\_in\\_England\\_2019\\_Text.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/850306/Children_looked_after_in_England_2019_Text.pdf)

example, socio-economic factors and the decisions of the family courts. I discussed this area of policy whilst giving evidence to the Children, Young People and Education Committee in November 2019.<sup>3</sup>

The Family Justice Review 2011, an extensive review of the Family Justice Review, set out a vision for a more child centred family court system and led to the establishment of the Family Justice Network for Wales.<sup>4</sup> The need for further strengthened working has been recognised by the Commission of Justice, which has identified reform in the short and longer term, recommending an “all-Wales approach to family justice, developed and led by the Family Justice Network for Wales” to be followed by local authorities in regards to child protection referrals with an agreed objective of avoiding care proceedings if strengthened family support would be more appropriate. The Commission has also recommended there be “vigorous support for a programme of research to underpin reform of Welsh family justice and associated preventative services. The overarching aim should be the reduction in the numbers of children taken into care and the provision of far better evidence of the impacts of intervention on family life”. My office is represented at the Family Justice Network and I support the work that is being explored following the Commission’s report.

A shift to a greater emphasis on preventing statutory intervention in family life will require a shift in the focus and funding decisions of Local Authorities. It is my understanding that Welsh Government undertook some initial scoping work on “rebalancing the sector” for children’s services as part of the reduction of children entering the care system work. However, due to the unprecedented demands placed on Welsh civil service as a result of the COVID-19 crisis, it is my understanding that this work has paused.

#### **Private law:**

As noted above, private family law cases fall outside the remit of both Welsh Government and of my office.

Many separating families will be able to resolve their arrangements without resorting to court applications, but this is not always possible. At present mediation is only available to families

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<sup>3</sup> <https://record.assembly.wales/Committee/5694#C240110>

<sup>4</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/217344/fjr-execsummary.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217344/fjr-execsummary.pdf)

seeking to make a court application by which point their circumstances may have already become protracted. In addition, there is often a cost to access mediation which can be prohibitively expensive for some parents even if it is just what they need to be able to reach a suitable and workable agreement that would benefit them and their children.

The Commission on Justice highlights the impact of the decline in expenditure on legal aid and the consequences this has had for families. Provision of legal aid has been removed for most private family law issues, but has remained for some cases where there has been evidence of domestic violence or child abuse. The Commission reports how this had led to a significant lack of legal advice for families and resulted in a number of individuals representing themselves in court.

In this regard, the Commission recommends that “legal advice should be available to each private family law dispute prior to the commencement of proceedings”. This would contribute significantly to the de-escalation of disputes reaching court. There are likely to be significant financial implications for this shift in family law practice, and again, would require further scrutiny and consideration by the committee.

I am aware that some initial scoping work on developing a Supporting Separating Families Alliance (SSFA) for Wales is being undertaken by CASCADE (Children’s Social Care Research and Development Centre). The SSFA’s purpose will be to help separating families resolve issues outside of the family court system and support families to resolve conflict in a more children-focused way.

### **Devolution of Youth Justice, the Age of Criminal Responsibility and the UNCRC:**

My Office and I provided evidence to the Commission on Justice to set out my concerns in regards to Wales’ inability to fully implement its commitment to children’s rights insofar as elements of youth justice and criminal responsibility remained non-devolved. I would advocate for the Committee to explore the further devolution of youth justice and criminal responsibility to Wales on the grounds this is linked intrinsically to Wales’ commitment to social equality and human rights, including those set out in the UNCRC.

### **The Minimum Age of Criminal Responsibility and the UNCRC**

In England, Wales and Northern Ireland the age of criminal responsibility is currently 10 years of age, subjecting children to the lowest age of criminal responsibility in Europe. This is the lowest of

all European Union Member States, since the minimum age of criminal responsibility in Scotland recently increased to 12 years of age, from the previous 8 years of age.<sup>5</sup>

The current age of criminal responsibility for England and Wales is considerably lower than the age recommended by the UN Committee on the Rights of the Child, and has been for some time. This is despite the fact the UNCRC is incorporated into Welsh Law via the Rights of Children and Young Persons (Wales) Measure 2011, unlike England. The UN Committee has recently published its General Comment on children's rights in the child justice system. In 2019, the Committee concluded that in regards to adolescent's rapid brain development which "affects risk-taking, certain kinds of decision making and the ability to control impulses... state parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age". The Comment further notes that adolescents continue to develop and mature cognitively beyond the teenage years and "commends state parties that have a higher minimum age, for instance 15 or 16 years of age" <sup>6</sup>.

It is worth noting, that whilst the Commission on Justice recommended that the minimum age for criminal responsibility is increased to at least 12 years of age, this falls below the recommended age by the UN Committee on the Rights of the Child. For Wales to truly pay full regard to its commitment to children's rights, the minimum age of criminal responsibility should be raised to 16, or at the very least, the recommended age of 14.

## **Youth Justice**

The Commission on Justice highlighted the close partnership working that exists in Wales in regards to youth justice, with well-established interconnections between devolved youth services, youth justice and other relevant devolved services, of which the Youth Justice Board for Wales facilitates co-operation.

In Wales we have seen a significant focus on a preventative approach to youth justice. This has been facilitated by greater emphasis on the need to reduce the number of children and young people entering the justice system across many elements of the youth justice system. As

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<sup>5</sup> <https://beta.parliament.scot/bills/age-of-criminal-responsibility-scotland-bill>

<sup>6</sup> [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f24&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f24&Lang=en)

highlighted in the Commission's report, approximately 50% of the work undertaken by youth offending teams in Wales is preventing and diverting children away from entering the youth justice system. As a result, Wales has seen a significant reduction in the number of children entering the youth justice system. In 2009, there were 5,228 first time entrants to the youth justice system. In 2019, this has fallen to 553.<sup>7</sup> We have also seen a significant reduction in the number of children in Wales being placed in custody, with (as of 12 May 2020) 24 young Welsh placed in custody, compared to 42 in May 2015.<sup>8</sup>

However, my office continues to hear of cases where young people do not have the support in place for their release from custody, particularly in regards to community support, such as access to mental health services and identifying appropriate placements or housing arrangements. This seems to be affected by the fact that young people are the responsibility of non-devolved custody and/or probation services, but many of the support services come from devolved provision including health, social care and education.

Police forces in Wales have shown progressive leadership in their approaches to crime prevention, particularly in regards to young people, with a growing commitment and understanding of employing a trauma based approach, greater recognition of adverse childhood experiences and a commitment to adopting a children's rights approach in policing. South Wales Police in particular have enshrined their commitments to children's rights with the publication of a Children's Rights Charter<sup>9</sup>, which my team were able to support and advise on during its development. I am hoping to facilitate further discussions with both the youth justice and policing sectors in Wales and am planning to host a Children's Rights Seminar for the sector, to explore innovative practice by the forces and agencies to recognise the impact of trauma on children and how children's rights can be further embedded in policing and youth justice.

Despite the aforementioned positive aspects of youth justice I have been particularly concerned that levels of criminalisation remain considerably higher for care experienced young people, and my office is represented on a working group being led by NYAS Cymru to explore the potential

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<sup>7</sup> <https://www.gov.uk/government/statistics/youth-justice-statistics-2018-to-2019>

<sup>8</sup> <https://www.gov.uk/government/statistics/youth-custody-data>

<sup>9</sup> <https://www.childcomwales.org.uk/wp-content/uploads/2020/05/SWP-Charter.jpg>

development of an all-Wales protocol to reduce the unnecessary criminalisation of care experienced young people, as is currently in place in England.<sup>10</sup>

The Youth Justice Blueprint for Wales has been an important recognition of, and plan forward to, facilitate Wales' unique approach to youth justice<sup>11</sup>. The Blueprint is bold in its commitment to improve the "criminal and social outcomes for children who come into contact with the youth justice system" and sets out short, medium and long term objectives to deliver a whole-system approach to reform. The Blueprint is clear in its commitment to children's rights and sets out its ambition to ensuring children are active participants in the system ensuring devolved and non-devolved services work together to realise children's rights. It also recognises the complex mix of needs children experience who find themselves within the youth justice system, such as mental health, communication and development needs and childhood trauma. However, I am aware that due to the current demands on the civil service in Wales as a result of the Coronavirus pandemic, this work has been paused.

My team and I have also been working to raise awareness of the distinct lack of secure and semi-secure accommodation for children and young people in Wales who have complex needs. Children with complex emotional and behavioural needs can often become caught between health and social care, to find the most suitable placement for them. Children are being escalated up the system towards secure accommodation due to a lack of suitable and safe accommodation that would meet their needs. Development of this vital provision, jointly commissioned by health and social services, would enable children and young people with complex emotional and behavioural needs to be placed appropriately and receive therapeutic care and support across their health and social care needs without being held in secure accommodation or inpatient mental health units. I have been reassured that work to develop this provision is progressing with Welsh Government, but there is scope to explore how children and young people, potentially for those at risk of criminalisation, could benefit from such provision. Discussions about this have taken place in the context of the Youth Justice Blueprint since 2018 but as yet no tangible progress has been made.

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<sup>10</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/765082/The\\_national\\_protocol\\_on\\_reducing\\_unnecessary\\_criminalisation\\_of\\_looked-after\\_children\\_and\\_care.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/765082/The_national_protocol_on_reducing_unnecessary_criminalisation_of_looked-after_children_and_care.pdf)

<sup>11</sup> [https://gov.wales/sites/default/files/publications/2019-05/youth-justice-blueprint\\_0.pdf](https://gov.wales/sites/default/files/publications/2019-05/youth-justice-blueprint_0.pdf)



Welsh public services are responsible for health, social care, housing and education; all key elements of support for young people involved in the justice system. The artificial separation of youth justice however can create confusion between services as to their responsibilities and it is young people that are negatively impacted by this. Devolution of youth justice would enable Wales to fully realise its commitment to the UNCRC and legal duty to promote and protect the rights of its children and young people. This aligns with the recommendation made by the Commission on Justice, that “Building on the reducing numbers of children and young people in custody and those entering the criminal justice system, youth justice policy should be determined and delivered in Wales”.

In light of this, I believe that further exploration of the devolution of youth justice is required, which in turn could support a movement towards increasing the age of criminal responsibility to 16 years of age, or at the very least the recommended age of 14.