

LEGAL & POLICY BRIEFING

Local Authority Services for Separated Migrant and Asylum-Seeking Children in Wales under Part 6 of the Social Services and Well-Being (Wales) Act 2014
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Introduction

This briefing provides information on the duties of local authority social services departments in Wales to separated migrant and asylum seeking children. The briefing considers the nature and scope of the duty to accommodate this group of children and the statutory approach and considerations that local authorities are required to undertake when determining the needs of and making arrangements to support this group of children. In particular, the briefing examines the particular issues that arise for those working in local authorities and those providing advocacy support to separated migrant and asylum seeking children.

Status of this briefing

This briefing does not constitute legal advice and does not have statutory status. For advice on individual cases, legal advice should be sought from your organisation's legal services or an independent legal advisor.¹ Rather, this briefing provides general information on the duties of local authorities in Wales to separated migrant and asylum seeking children.

The Statutory Codes of Practice and Guidance for local authorities on the Social Services and Well-being Act Wales 2014 are available at: <http://gov.wales/topics/health/socialcare/act/code-of-practice/?lang=en>. Local authorities must act in accordance with the codes of practice and have regard for guidance contained within it.

This briefing forms part of a series of briefings, which have been produced for the Migration Services in Wales project. This briefing should be read in conjunction with the other briefings, which are listed with weblinks below:

- [Migrant care leavers: Duties of Welsh local authorities under the Social Services and Well-being \(Wales\) Act 2014 \(July 2016\)](#)
- [The Legal Framework and Options Available to Migrant Women and Girls in Wales Subject to Violence \(July 2016\)](#)
- [Single adult migrants: Destitution, safeguarding and services under the Social Services and Well-being \(Wales\) Act 2014 \(May 2016\)](#)
- [The Employment Rights of Migrants in the Welsh Labour Market \(March 2016\)](#)
- [Human Trafficking, Modern Slavery and the National Referral Mechanism in Wales \(February 2016\)](#)
- [Access to Healthcare for Migrants in Wales \(February 2016\)](#)
- [Migrants' Entitlements to Welfare Benefits in Wales \(January 2016\)](#)
- [Children and families: Destitution, safeguarding and services under the Children Act 1989 \(up to April 2016\) and Social Services and Well-being \(Wales\) Act 2014 \(from April 2016\) \(September 2015\)](#)

Please note: due to the unknown implications of the United Kingdom's withdrawal from the European Union at time of writing, this briefing has been written to reflect the duties of local authorities under EU law as they have been until the time of writing. These affect the duties of local authorities under the Social Services and Well-being (Wales) Act 2014 to mobile EU citizens. These may change in the coming years, therefore please check updates to this briefing for any further information.

How is this briefing structured?

This briefing begins by considering the profile of separated migrant and asylum seeking children. The briefing continues by focusing on the particular statutory and other considerations that need to be paid in care planning for this group of children to ensure that their development and well-being are being safeguarded and promoted. The briefing will also look at the approach to be taken by local authorities where a child's age is uncertain and consider how immigration status influences the provisioning of care and the funding of this group of children.

1. Please see the following website to search for legal advice near to you: <http://find-legal-advice.justice.gov.uk>

Who are separated migrant and asylum seeking children?

This group of children are those who arrive in the United Kingdom from abroad. Many will be coming to the United Kingdom to seek international protection under the Refugee Convention because they fear persecution in their country of origin. They will, for the large part, have no family members in the United Kingdom who are in a position to provide them with the care and support required for their childhood. Others may be sent here on their own to live with relatives or friends and enter the United Kingdom with valid leave to enter or remain but that arrangement has either broken down or there are concerns about the suitability of that relationship. There are also children who have been brought here for the purposes of being exploited and trafficked.

Some may be mobile EU citizens but it is likely that the majority will require a grant of leave by the Home Office to remain in the United Kingdom either as refugees or on human rights grounds because protection is required under the European Convention on Human Rights to protect them from inhumane and degrading treatment (Article 3), exploitation and slavery (Article 4) or to preserve their right to private and family life (Article 8).

Whatever their immigration status, as a matter of law, children are not excluded from access to care and support, education and accommodation from local authority children's services. They are entitled to the full range of support for which they are eligible under the Social Services and Well-Being (Wales) Act 2014.

Duties owed under Part 6 of the Social Services and Well-Being (Wales) Act 2014: an Overview

Duty to provide accommodation

Part 6 of the Social Services and Well-Being (Wales) Act 2014 (the 2014 Act) is directed at the arrangements of accommodation and support for looked after children. Looked after children are defined under section 74 of the 2014 Act as children who have been taken into care under a court approved care order or have been provided with accommodation by the local authority exercising social services functions. There are some exceptions to the duty to accommodate which do not pertain to the group of children who are the subject of this briefing.

Separated migrant and asylum-seeking children, by virtue of having no family or friends in Wales who are able to care for them, will likely be children who are 'looked after' by a local authority. Although some younger separated migrant and asylum-seeking children may be 'looked after' by virtue of being formally subjected to a care order, it is likely that the principal way in which separated migrant and asylum-seeking children become 'looked after' is by the local authority's provision of accommodation under section 76 of the 2014 Act.

Section 76, entitled "Accommodation for children without parents or who are lost or abandoned etc.", is a near mirror image of the comparable provision under section 20 Children Act 1989 as applied in Wales up to April 2016. Subsection (1) sets out the main criteria to be met in order for the duty to accommodate to arise:

(1) A local authority must provide accommodation for any child within its area who appears to the authority to require accommodation as a result of—

- (a) there being no person who has parental responsibility for the child,*
- (b) the child being lost or having been abandoned, or*
- (c) the person who has been caring for the child being prevented (whether or not permanently, and for whatever reason) from providing the child with suitable accommodation or care.*

Section 76(3) provides an alternative basis for accommodation, namely "for any child within its area who has reached the age of 16 and whose well-being the authority considers is likely to be seriously prejudiced if it does not provide the child with accommodation."

The duty to provide accommodation is mandatory in circumstances where one of the three criteria under section 76(1) or the condition under section 76(3) applies, as indicated by the use of the words “must provide”. Although a 16-year old young person may be able to object to being accommodated by the local authority, this is unlikely to arise in the context of separated migrant and asylum-seeking children because these children are most likely not to have access to alternative adequate accommodation and require support from the local authority. The duty to provide accommodation under the 2014 Act is a mandatory duty where the criteria are met. It therefore takes primacy over other powers which may also be used to provide accommodation, such as section 95 of the Immigration and Asylum Act 1999 (‘asylum support’). Thus where the criteria are met for accommodation under section 76, a local authority must make accommodation arrangements under that provision and not seek to side-step the duty by looking to other possible powers.²

Duties owed to Looked After Children

Local authorities assume a corporate parenting role for looked after children. They have a statutory duty to safeguard and promote the well-being of the looked after child under section 78 of the 2014 Act, which governs the way in which the child is cared for. This includes a duty to promote the child’s educational achievement, a duty to assess the child’s care and support needs and accordingly provide for the child’s eligible needs, to provide suitable accommodation for the child and to maintain the child in other respects apart from the provision of accommodation.

Section 78 specifies that before making any decision with respect to a looked after child, or a child the local authority proposes to look after, the local authority must have regard to the views, wishes and feelings of the child and any other relevant person. This may be done by seeing the child, speaking with the child or inviting the child to set out wishes and feelings in a written statement. This may be facilitated by an advocate, a foster carer or a key worker. Appropriate methods of ascertaining the child’s wishes and feelings must include a consideration of the child’s religious beliefs, racial origin and cultural and linguistic background. The [All Wales Practice Guidance on Safeguarding and Promoting the Welfare of Unaccompanied Asylum Seeking Children and Young People](#) advises local authorities to arrange an interpreter if necessary to assist with communication with the child. The obligation to consult the wishes and feelings of the child is consistent with the right to be heard under Article 12, UN Convention on Rights of the Child, referred to below.

The overall objective of the looked after child framework is to promote resilience and achievement of personal well-being outcomes. Well-being outcomes are those defined in section 2 of the 2014 Act. A child’s personal well-being should reflect the particular circumstances, needs and aspirations of the individual child or young person and come under several headings:

- protection from abuse and neglect
- promotion of physical and mental health and emotional well-being
- promotion of physical, intellectual, emotional, social and behavioural development
- maintenance or development of family or other significant personal relationships
- involvement in education, training and recreation activities
- development and maintenance of social relationships and involvement in the local community
- social and economic well-being (including not living in poverty)
- living in suitable accommodation.

Care and Support Plans

Pursuant to Regulation 4 of the Care Planning Placement and Case Review (Wales) Regulations 2015, local authorities have a statutory duty to assess the looked after child’s need for services to achieve or maintain a reasonable standard of health or development and to prepare a Part 6 care and support plan setting out the services that will be provided to the child.

2. See: [R\(G\) v LB of Southwark \[2009\] UKHL 26 \[2009\] 1 WLR 1299](#)

Assessing the needs of children and deciding how to best meet those needs is a fundamental part of the care planning process. They must examine all aspects of the child's personal well-being and what needs arise in light of the well-being principles listed under section 2 of the 2014 Act. The assessments must be child centred and rooted in child-development. This means seeing the child, observing the child, and listening to the child and the child's perspective being kept in focus throughout the assessment process.

Regulation 5 of the Care Planning Placement and Case Review (Wales) 2015 Regulations (the 2015 Care Planning Regulations) also direct local authorities in regards to what must be recorded in the Part 6 care and support plan for all looked after children, which also provide a framework for the domains that the needs assessment must cover. This includes a description of the arrangements made to meet the child's needs in relation to health, education and training, emotional and behavioural development, identity (with particular regard to the child's religious beliefs, racial origin, sexual orientation, and cultural and linguistic background), social presentation and self-care skills; whether the child is a potential or identified victim of trafficking and/or the immigration status of the child should also be recorded in the care and support plan. The plan should also include specific achievable and child-focused outcomes intended to safeguard and promote the well-being of the child and identify how progress will be measured. The plan should also include realistic strategies and specific actions to bring about the changes necessary to achieve the planned outcomes and identify the roles and responsibilities of those involved in the child's care.

The 2015 Care Planning Regulations require the preparation of a health plan, a personal education plan and a placement plan and these should form an integral part of the overall Part 6 care and support plan for the child, which then serves as the blueprint for future care planning for the child. From the age of 16, the care and support plan will be subsumed within the young person's pathway plan, which will set out the actions which are necessary to support the young person make a successful transition to adulthood and greater independence.

Permanence

Achieving permanence is a key consideration in the care and support planning, the principle objective being to ensure that children have a secure, stable and loving family to support them through childhood and beyond. This is a particularly difficult task in the context of separated migrant and asylum seeking children given the uncertainty of their immigration status. Although separated migrant and asylum seeking children are entitled to access to accommodation and support irrespective of their immigration status, the uncertainty of their immigration status makes permanence planning in the United Kingdom a complex process.

The [Code of Practice under Part 6 of the 2014 Act \(Looked After and Accommodated Children\)](#) recommends local authorities to undertake twin track or parallel planning arrangements to account for uncertainty in the child's life but to ensure that there is no less careful planning having proper regard to the primary duty to safeguard and promote all children's well-being. For example, short-term achievable goals may need to be identified in the care plan pending a determination of the child's immigration status, with long-term options taking account of the possibility of the child being granted leave to remain in the United Kingdom or alternatively being expected to leave the United Kingdom. Planning for different possibilities is necessary in the context of this group of children because of the uncertainty of their immigration status.

The [All Wales Practice Guidance on Safeguarding and Promoting the Welfare of Unaccompanied Asylum-Seeking Children and Young People](#) highlights the responsibility of social workers to appoint legal representatives for the looked after child, appoint an appropriate adult to attend all immigration interviews, arrange interpreters within Children's Services and refer children and young people to advocacy services so that this group of children are able to access appropriate support through the immigration process. The Practice Guidance advises that those working with separated migrant and asylum-seeking children have some working knowledge of the asylum and immigration processes in order to support the children effectively through the process.

Placement Plans

Section 81 of the 2014 Act sets out the ways in which looked after children are to be accommodated and maintained. This includes a placement with an individual who is a relative, friend or other person connected with the looked after child and who is also a local authority foster parent; a local authority foster parent; a placement in a children's home or another appropriate placement.

In determining the most appropriate placement for a looked after child, local authorities must ensure the placement does not disrupt the child's education or training. If the child has a sibling for whom the local authority is also providing accommodation, local authorities must ensure that it enables the looked after child and the sibling to live together. If the child has disabilities, the accommodation provided should be suitable to meet the child's particular needs.

There is an overarching presumption that looked after children will be accommodated within the area of the responsible local authority. This is clear from the duty under section 75 requiring local authorities to take steps to secure sufficient placements so that they are able to provide looked after children with accommodation that is within their area and meets the needs of those children. Section 81(9) reinforces this by directing that local authorities provide accommodation within their area for a looked after child. Local authorities may only decide to place a child outside its area if it is satisfied that there is no placement available within its area capable of meeting the child's needs. Regulation 12 of the 2015 Care Planning Regulations set out the approach to be taken in these circumstances. Local authorities must seek an out of area placement of the child in the following order of preference: within a local authority in Wales whose area borders that of the responsible authority; within a local authority in England whose area borders that of the responsible authority; within any other local authority; within a local authority in England, or where approved by the court or someone with parental responsibility, outside England and Wales.

Decisions to place a child out of area should be based on a thorough assessment and analysis of the child's needs. This may be because a placement in a neighbouring English authority would allow the child to remain in the same school or to access specialist healthcare or support. When considering an out-of-area placement the local authority must ascertain the child's wishes and feelings and these must be given due consideration when the placement decision is made. There may be occasions where concerns regarding potential trafficking or modern slavery may arise in the context of placements of looked after children with relatives or other persons connected with the child. Local authorities are required to assess the risks and should follow the [All Wales Practice Guidance for Safeguarding Children who may have been Trafficked](#). Further information about trafficking and anti-slavery in Wales can be found in [Human Trafficking, Modern Slavery and the National Referral Mechanism in Wales](#), a briefing produced as part of the Migration Services in Wales project.

Where a looked after child has someone – whether a relative, friend or another connected with the child – who is able to provide accommodation to the child and who is, or can be, eligible to become a local authority foster parent, local authorities shall give preference to such accommodation arrangements over other options but only if this is the most appropriate placement. This may arise in the context of separated migrant and asylum-seeking children where they come to the United Kingdom seeking to be reunified with family members already in the United Kingdom. The simple fact of the child having family members in the United Kingdom does not in and of itself mean that there can be no duty to accommodate the child and to 'look after' the child. An assessment is required to determine whether the family members are able to provide the child with suitable care and accommodation. Where they are unable to do so without continued intervention of local authority children's services, local authorities should accept a duty to accommodate and to arrange for the placement with the relevant family members to be treated as a placement under section 81.³

3. See for example [R \(KS\) v City of Bradford \[2014\] EWHC 11 \(Admin\)](#); [LB of Southwark v D \[2007\] EWCA Civ 182](#).

The decision of whether it is an appropriate placement is based on an assessment that must take into account factors outlined in schedule 5 to the 2015 Care Planning Regulations, namely the nature and quality of any existing relationship the connected person has with the looked after child and their capacity to care for children and in particular in relation to the looked after child to provide for the child's physical and emotional needs, to protect the child adequately from harm or danger, to ensure the accommodation and home environment is suitable with regard to the child's age and development, to promote the child's learning and development, and to provide a stable family environment which will promote secure attachments for the child. Considerations also need to be had in relation to the potential carer's statement of health, their family relationships and household composition, their family history, what if any criminal history of conviction and cautions they may have, their past and present employment and other sources of income, the nature of the neighbourhood in which their home is situated and the resources available in the community to support the child.

Regulation 26 of the 2015 Care Planning Regulations provide a means for temporary approval of a relative, friend or other person connected with the child notwithstanding the connected person is not approved as a local authority foster parent. This arises if the local authority is satisfied this would be the most appropriate placement, and that it is necessary for the child to be placed with the connected person before the connected person's suitability to be a local authority foster parent has been assessed in accordance with the Fostering Service (Wales) Regulations 2003 (as amended) or the Fostering Services (England) Regulations 2011.

Suitability of any placement for a looked after child is subject to assessment and the placement plan must be incorporated into the care and support plan pursuant to Regulation 10 of the 2015 Care Planning Regulations.

Matters that need to be addressed in the placement plan under Regulation 10 are set out under Schedule 3 to the 2015 regulations. This includes:

- how on a day to day basis the child will be cared for and how the child's well-being will be safeguarded and promoted;
- what contact arrangements, if applicable, will be in place;
- arrangements made for the child's health (including physical, emotional and mental health) and dental care, including any arrangements for the giving or withholding of consent to medical or dental examination or treatment for the child;
- the arrangements made for the child's education and training;
- the arrangements made for visits to the child by a local authority representative
- the names and contact details of the Independent Reviewing Officer, the independent visitor, if one is appointed, the local authority's representative responsible for visiting the child.

The role of the Independent Reviewing Officer (IRO) is explained further below.

Personal Education Plans

Local authorities are required to promote educational achievement as an integral part of their duty to safeguard and promote the well-being of the children they look after. This has been a long-standing specific duty since the Children Act 2004 and reflects concerns that too many looked after children fall out of education and/or do not remain in education when they turn 18. The duty to promote educational achievement directs local authorities to ensure that children are able to achieve educational outcomes comparable to their peers who are not looked after. Specifically, local authorities are required to pay particular attention to the educational implications of any decision about the child's overall well-being. For example, the duty requires the local authority to recognise that when deciding where to place a looked after child, a local authority should do everything possible to minimise disruption to the child's education. This means maximising efforts to arrange a care placement which enables existing educational provision to be maintained where this is in the child's best interests.

[Part 6 Code of Practice \(looked after and accommodated children\)](#) states that an effective and high quality personal education plan is crucial to the child's long-term Part 6 care and support plan. The pathway planning process which commences when a looked after child turns 16 will build on the personal education plan in terms of post-18 education and training. As set out under Chapter 1 of the Code of Practice), local authorities must include the following in personal educational plans for looked after children:

- a chronology of the child's educational history
- existing arrangements for their education and training including details of specialist support which is put in place to promote their educational achievement
- details of the child's leisure interests
- details of the arrangements in place to minimise disruption of their education and training where a change in their educational arrangements is unavoidable
- a description of the role of the carers in supporting the child's educational achievement including how they support the child to pursue leisure interests.

The Welsh Government's *School Admission Code* (2013) recognises that looked after children generally should be afforded the highest priority to looked after children in the school admissions process. In circumstances where full-time school placement cannot be immediately secured, section 19 of the Education Act 1996 requires local authorities to ensure children access interim education. What constitutes suitable education must be assessed on an individual basis and it should not be presumed that a migrant or asylum-seeking child is only capable of accessing English for Speakers of Other Languages ('ESOL') courses. Alongside generic pupil support services, there are additional support mechanisms in place for unaccompanied asylum seeking children and young people via the Minority Ethnic Achievement Service teams in local authorities. These teams work to support minority ethnic children and young people in schools to support their educational achievement through additional funding from the Welsh Government.

Review of care and support plans

Part 6 care and support plans are subject to regular review. The purpose of the review meeting is to consider the plan for the well-being of the child, monitor progress and make decisions to amend the plan or reconfirm previous decisions as necessary in light of updated information and circumstances.

The review should be chaired by an Independent Reviewing Officer (IRO) who local authorities are required to appoint pursuant to section 99 of the Act. The IRO has an important role in ensuring that a local authority has a consistent approach toward the care of children for whom it is corporately responsible. The responsibilities of the IRO, outlined at section 100 of the Act include:

- ensuring that care and support plans for looked after children are based on a detailed and informed assessment, are up-to-date and effective, and provide a real and genuine response to each child's needs
- identifying any gaps in the assessment process or provision of service
- offering a safeguard to prevent any 'drift' in care and support planning and the delivery of services
- monitoring the activity of the local authority acting as a good corporate parent
- ensuring that all reasonable steps have been taken to ascertain, and give proper consideration and weight to, the child's current views, wishes and feelings
- ensuring that the child fully understands the implications of any changes to the care and support plan
- making sure that the child is aware of their entitlement to an advocate and what an advocate does
- ensuring (for an accommodated child) that a review takes place prior to discharge from care.

When I am Ready Scheme

The Welsh Government has issued a good practice guide, [When I am Ready \(March 2016\)](#), to supplement the statutory Code of Practice relating to Part 6 of the 2014 Act. The code sets out a local authority's legal responsibilities in respect of post-18 living arrangements for young people in foster care. Local authorities are required to set up local 'When I am Ready' schemes in line with the requirements in the code. The object is to allow young people in foster care to continue living with their foster carers when they turn 18. It is aimed at allowing young people to remain in a stable and nurturing family environment up to the age of 21, or up to age 25 if they are in a programme of education or training. It also provides them with opportunities to develop their skills and confidence so that they can make a successful transition to more independent living.

'When I am Ready' arrangements may be made where:

- the young person was looked after immediately prior to their 18th birthday and was living with foster carers in a placement arranged by the local authority.
- the carers were acting as approved foster carers for the young person immediately prior to their 18th birthday
- the young person and the foster carers both wish to enter into a 'When I am Ready' arrangement, and the arrangement has been set out in the young person's pathway plan
- the local authority is satisfied that such an arrangement is not inconsistent with the young person's well-being
- a proportion of the allowance paid to the 'When I am Ready' carer will be paid for by the local authority.

'When I am Ready' arrangements can therefore cover all young people who were previously in foster care, and who were looked after immediately prior to their 18th birthday, as long as the above criteria are met. Whether a child can move into a 'When I am Ready' arrangement with their foster carer when they turn 18 is dependent on consideration of whether this is in their best interests and whether this arrangement continues to meet their assessed needs as identified in their Part 6 Care and Support plan. The scheme does not operate in principle by reference to a child's immigration status but that may have a bearing of the child's eligibility for the scheme when they transition to adulthood. The issues as to eligibility for continued support post-18 is covered in the Migrant Care Leavers briefing (please see: <http://migration.wales/migration-information/legal-briefings>).

Other Statutory Duties relevant to Local Authority Services for Separated Migrant and Asylum Seeking children

Children Act 2004

Part 3 of the Children Act 2004 pertains specifically to children's services in Wales. Pursuant to section 25 of the Children Act 2004, local authorities must make arrangements to promote cooperation between them and their relevant partners and other such persons who are engaged in activities in relation to children in the local authority's area. The purpose is as stated in the Explanatory Note to the 2004 Act, namely to create a statutory framework for local co-operation between local authorities in Wales, key partner agencies ("relevant partners") and other relevant bodies ("other bodies or partners"), including the voluntary and community sectors, in order to improve the well-being of children in the area. The duty to make these arrangements is placed on local authorities and a duty to co-operate is placed on the partner agencies listed in subsection (4). The arrangements are to be made with a view to improving the well-being of children in the local authority's area. The duty informs how local authorities ought to approach care planning under Part 6 of the 2014 Act. Well-being is defined under section 25(2) as physical and mental health and emotional well-being; protection from harm and neglect; education, training and recreation; contribution made by children to society; and social and economic well-being. The well-being principles under section 25(2) of the 2004 Act complement the more detailed list of well-being principles directed at individual children under section 2(2) of the 2014 Act.

Section 28(2) imposes an overarching obligation on local authorities in Wales to make arrangements for ensuring that – (a) their functions are discharged having regard to the need to safeguard and promote the welfare of children; and (b) any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to that need. This is comparable to the provision applicable to England under section 11(2) of the same act. In [Nzolameso v Westminster City Council \[2015\] UKSC 22 \[2015\] PTSR 549](#), the Supreme Court held that this overarching obligation casts the evidential net rather wide so that a decision based on an assessment of the child’s need should identify how the local authority has had regard to the need to safeguard and promote the welfare of children both individually and collectively. Lady Hale giving judgment for the Court stressed the need for local authorities to be able to show how the child’s welfare and best interests have been taken into account and how they have been afforded a primary consideration. Although the Supreme Court was examining this in the context of statutory homelessness, the analysis is applicable to the context of the assessment of children in need of care and support generally, and looked after children specifically, as evident by the Court of Appeal’s adoption of this analysis to children’s needs assessments in [R \(C, T, M and U\) v LB of Southwark \[2016\] EWCA Civ 707](#).

Rights of Children and Young Persons (Wales) Measure 2011

The 2011 measure requires ministers to have due regard to articles of UNCRC and Optional Protocols when developing new / amending existing policies or legislation. It has been extended to require due regard to children’s rights *whenever* ministers exercise any functions. This means the formulation of codes of practice such as that under the 2014 Act and policy relating to the assessment of needs and care arrangements for children, including separated migrant and asylum-seeking children, must be approached having regard to the best interests of children as a primary consideration and the host of obligations set out in the UNCRC. The 2011 measure further requires production of a Children’s Rights Scheme defining roles and responsibilities of individuals / groups in Welsh government. Although the measure is directed at ministers in the Welsh government, it demonstrates the clear intention of the government, in passing legislation and formulating policy in relation to children, to adopt an approach which places the best interests of children as a primary consideration. It signals a need for decision making at individual levels to adopt a similar approach, one fortified by the obligations under the Children Act 2004.

UN Convention on the Rights of the Child (UNCRC)

Part 3 of the Code of Practice to the 2014 Act advises local authorities that assessments of needs of children must have due regard to obligations owed by local authorities under the UNCRC.⁴

The guiding principle of the UNCRC is contained in article 3(1) which states: *“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”* The Committee on the Rights of the Child, in its General Comment No 14 on article 3(1), linked that article to three further general principles under the UNCRC: Article 2 (right to non-discrimination); Article 6 (right to life, survival and development); and Article 12 (right to be heard). Together these rights form the framework within further specific UNCRC rights are to be applied. Of particular relevance is Article 27 (the right to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development).

The Committee on the Rights of the Child, in [General Comment No 14](#), analysed a child’s *“best interests”* in terms of a three-fold concept.⁵ In [SG v SSWP \[2015\] UKSC 16](#), Lord Carnwath described (at [105]-[106]) the committee’s analysis as authoritative guidance. The first aspect of the concept is the child’s substantive right to have his best interests assessed as a primary consideration whenever a decision is made concerning him. The second is an interpretative principle that, where a legal provision is open to more than one interpretation, that which more

4. See paragraph 46 of [Part 3 of the Code of Practice](#).

5. See para 6 of the General Comment No 14.

effectively serves his best interests should be adopted. The third is a “*rule of procedure*”, described as follows in General Comment No 14: *Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned ... Furthermore, the justification of a decision must show that the right has been explicitly taken into account ...*⁶

[General Comment No 6](#), published by the UN Committee on the Rights of the Child, is directed at the treatment of unaccompanied and separate children outside their country of origin, recognising they face greater protection risks and are often discriminated against and denied access to food, shelter, housing, health services and education. They are also often denied entry to or detained by border or immigration officials and require additional support to ensure their asylum and immigration claims are handled in an age and gender sensitive manner. With this group of children, General Comment No 6 states that a determination of what is in the best interests of the child will require a clear and comprehensive assessment of the child’s identity and consideration of short, medium and long-term solutions in their best interests. General Comment No 6 emphasises the importance of access to a guardian and legal representatives, full access to education, adequate standard of living and health provisions specific to the needs of the children, having regard to their experiences of loss, trauma, disruption and violence. The obligations under article 39 of the Convention set out particular duties on the states to provide rehabilitation services to children who have been victims of any form of abuse, neglect, exploitation, torture, cruel and inhuman and degrading treatment or armed conflict. In order to facilitate such recovery and reintegration, culturally-appropriate and gender sensitive mental health care should be developed and qualified psycho-social counseling provided.

Distribution of duties, powers and resources between public bodies

Inter-Authority Duties and Powers

Sections 76(2) and (2A) provide the general structure and procedure by which one local authority could transfer responsibility for a child eligible for accommodation under section 76 (and thus eligible to become looked after) to another local authority. Subsection (2) applies generally to local authorities in Wales and subsection 2A applies to a transfer from England of a child who is accommodated under section 20 of the Children Act 1989 (which is in broadly similar terms to section 76(1)).

The request for a transfer must be done by way of a notification in writing. The local authority in receipt of the request has discretion to decide whether to accept the transfer request within three months of the request being made. Until and unless transfer has been accepted by the receiving authority, the duty to provide accommodation remains with the originated local authority: [R \(Liverpool City Council\) v LB of Hillingdon \[2009\] EWCA Civ 43 \(2009\) 12 CCL Rep 286](#). Thus even where a local authority decides that the most appropriate placement is out of the authority’s area, the responsibility remains with the placing local authority to comply with all the duties under Part 6 of the 2014 Act applicable to looked after children unless and until the authority hosting the child accepts a request for the transfer of responsibility. The hosting authority would, however, be bound by sections 25 and 28 of the Children Act 2004 (if a Welsh authority) or sections 10 and 11 of the Children Act 2004 (if an English authority) to cooperate to safeguard and promote the looked after child’s well-being.

Home Office – Local Authority Relationship

The Home Office has long operated an agreement with local authorities to make funds available to them in respect of their costs of support unaccompanied asylum seeking children (“UASC”). A UASC is defined as an individual, who is under 18, has arrived in the UK without a responsible adult, is not being cared for by an adult who by law or custom has responsibility to do so, is separated from both parents and has applied for asylum (including a claim raising

6. See also the Committee on the Rights of the Child in *General Comment No 5 on General Measures of implementation of the Convention on the Rights of the Child* at para 45.

Article 3 of the European Convention on Human Rights) in the United Kingdom in his/her own right. Those who have not made an asylum claim would not fall within the scope of the funding arrangement. Further exclusions include children who have the nationality of a European Economic Area (EEA) state and children of a UASC.

The [UASC Funding Instruction for 2016/2017](#) sets payment rates for each eligible UASC at the rates set out in the table below. A 'legacy' case is a UASC who entered the UK on or before 30 June 2016 and who has not been transferred to the care of another local authority from local authorities accepted by the Home Office to have more than 0.07% UASCs to the child population in the local authority area.

Category	£ daily
Legacy case aged under 16	£95.00
Legacy case aged 16 or 17	£71.00
Other case aged under 16	£114.00
Other case aged 16 or 17	£91.00

If a local authority's actual expenditure is less than the sum calculated by applying the rates in the table, payments will be capped at the level of actual expenditure. Funding by a local authority of the care of a UASC is not dictated by the amount contributed by the Home Office.

The Home Office will automatically cease payments the day before the UASC turns 18. A different funding arrangement is made by the Home Office for certain categories of care leavers post-18. There are other circumstances where payment will also cease, including if a UASC is absent or in long-term care (such as in hospital) for more than 28 days and if the UASC is placed in a Young Offenders Institute. Certain care leavers may also be affected by the provisions of withdrawal and withholding of support under section 54 and schedule 3 to the Nationality Immigration and Asylum Act 2002 depending on their immigration status. See further the Briefing Paper on Migrant Care Leavers.

Interim National UASC Transfer Protocol

By section 69 of Part 5 of the Immigration Act 2016, a scheme has been set up to provide that local authorities in England can transfer UASCs into the care of another local authority. Although the statutory provision only applies to English authorities, section 73 of the same act enables the Secretary of State to make regulations to extend this to Wales. There are no such regulations made yet. However, at present, local authorities in Wales can enter into similar voluntary arrangements. The Home Office has issued an [Interim National UASC Transfer Protocol](#), effect on 1 July 2016 which sets out how the scheme is meant to operate in England. The expectation is that voluntary arrangements in Wales would mirror this.

Age Assessments of Separated Migrant and Asylum-Seeking Children

Support under Part 6 of the 2014 Act are directed at those who are objectively children under the age of 18. The Supreme Court in *R (A) v LB of Croydon* [2009] UKSC 8 held that the question of whether a child is under 18, and his precise date of birth is an objective question which admits only one right answer. As many separated migrant and asylum-seeking children arrive in the United Kingdom without documents capable of proving their date of birth or age and in the absence of a scientifically accurate way of determining age, a social work process was developed in 2003 by the London Boroughs of Hillingdon and Croydon aimed at assessing the child's age. The practice guidance produced by these two local authorities was approved by the Court in *R (B) v LB of Merton* [2003] EWHC 1689 (*Admin*) and the pro forma developed by the two local authorities have now been adopted as the accepted pro forma for age assessments.

Age assessments should not be carried out as a matter of routine practice and should only be done where there is "*significant reason to doubt*" that the young is not a child. This was made clear in the statutory guidance, *Care of*

Unaccompanied and Trafficking children and adopted in the [All Wales Multi-Agency Toolkit on Age Assessment of Unaccompanied Asylum Seeking Children](#) (July 2015) (Age Assessment Toolkit). For children who may be victims of trafficking or modern slavery, there is a statutory presumption under the Modern Slavery Act 2015 that they are treated as children until the resolution of any age dispute.

There may be occasions when local authorities do not feel an age assessment is necessary but the Home Office are requesting one before they will agree to treat the young person as a child in the immigration process. The *Toolkit* directs local authorities to explain to the Home Office why the young person should be treated as a child without further assessment in the first instance. There is no power on the part of the Home Office to compel a local authority to carry out an age assessment and it is generally the Home Office's policy to accept the views expressed by the local authority.

However where there remains a dispute with the Home Office, or where there is significant doubt on the part of the local authority that the young person is the age he claims to be (whether accepted to be a child or not), a *Merton-compliant* age assessment should be undertaken. The term Merton-compliant refers to the lead judgment of *R (B) v LB of Merton [2003] EWHC 1689 (Admin)* which was the first case to lay down principles for conducting age assessments. The Merton principles have evolved and been elaborated upon by the courts and in the *Age Assessment Toolkit*, and *Merton-compliant* is now short-hand for all of the principles applicable. They can be summarised as follows:

- The purpose of an age assessment is to establish, so far as possible, a person's chronological age rather than physical, mental and emotional maturity. This must thus naturally start with listening to the child and seeing what the child has to say about his or her age and history.
- There is in law no burden on the child to prove his or her age: [R \(CJ\) v Cardiff CC \[2011\] EWCA Civ 1590](#).
- The assessment must be a holistic one and must start with an open mind and should be undertaken by two qualified social workers.
- The young person should be afforded the opportunity to have an appropriate adult with whom he or she is familiar present during the interview.
- Physical appearance and demeanour are notoriously unreliable factors not determinative of age.
- In evaluating evidence, assessors must be careful to distinguish between internal inconsistencies in a person's account giving rise to concerns about credibility and a decision maker's own assumptions of how a person ought to have behaved.
- The cultural, ethnic and racial context of the young person being assessed must be considered as these may reflect in their presentation as well as their descriptions of their lives.
- General credibility is not to be determinative of age. It is more likely that a young person who tells a consistent account of his or her life which supports his or her claimed age will be the age s/he claims to be. Conversely, young people may lie for reasons unrelated to age but related to their claims for protection or the reasons they had to leave their country of origin.
- If the chronological information provided by the child is credible, believable and plausible, then no observation about the child's apparent physical appearance or demeanour is likely to tip the balance against the age stated by the child and derived from his oral history.
- If there are concerns about matters which may be taken adversely against the young person, fairness requires the assessors to provide the young person an opportunity to know these concerns and to provide a response to the concerns before a final decision is made about the young person's age. This may be done at the end of the age assessment process when a provisional view has formed; the young person may be given an opportunity to take legal advice if he or she so wishes. Although questions throughout the process may address some of the adverse credibility matters, that approach is too ad hoc and may not fully comply with what is required of a fair procedure.
- The child should be afforded the benefit of the doubt where evidence can tip one way or the other.

- Age assessment interviews with social workers can involve artificiality. Thus weight should be afforded to views of teachers, foster carers and other professionals who may have spent more time with the young person outside the context of an age assessment.

More detailed guidance on how to undertake a holistic, multi-agency age assessment and on different scenarios giving rise to age disputes and how local authorities should deal with age disputes is outlined in the *Age Assessment Toolkit*.

Further resources

Welsh Government Social Services and Well-being (Wales) Act 2014 homepage
<http://gov.wales/topics/health/socialcare/act/?lang=en>

Key legislation

[Social Services and Well-being \(Wales\) Act 2014](#)

[The Care and Support \(Assessment\) \(Wales\) Regulations 2015](#)

[The Care and Support \(Eligibility\) \(Wales\) Regulations 2015](#)

[Care Planning Placement and Case Review \(Wales\) Regulations 2015](#)

[Children Act 2004](#)

[Rights of Child and Young Persons \(Wales\) Measure 2011](#)

[Human Rights Act 1998](#)

Codes of Practice and Statutory Guidance

[Part 2 Code of Practice \(General Functions\)](#)

[Part 3 Code of Practice \(Assessing the Needs of Individuals\)](#)

[Part 6 Code of Practice \(Looked After and Accommodated Children\)](#)

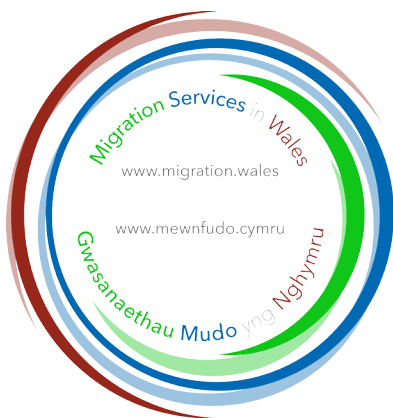
[Part 11 Code of Practice \(Miscellaneous and General\)](#)

Useful resources

[Care Council for Wales – Social Services and Well-being \(Wales\) Act 2014 Learning Hub](#)

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Migration Services in Wales

Funded by Welsh Government, Migration Services in Wales is a project led by the Welsh Refugee Council in partnership with COMPAS that aims to increase understanding of migration policy and practice in Wales, and to support and facilitate the development of a 'strategic approach' to migration in Wales, one that will ensure relevant stakeholders are able to access detailed and up-to-date information.



The Migration Observatory

Based at the Centre on Migration, Policy and Society (COMPAS) at the University of Oxford, the Migration Observatory provides independent, authoritative, evidence-based analysis of data on migration and migrants in the UK, to inform media, public and policy debates, and to generate high quality research on international migration and public policy issues. The Observatory's analysis involves experts from a wide range of disciplines and departments at the University of Oxford.



COMPAS

The Migration Observatory is based at the Centre on Migration, Policy and Society (COMPAS) at the University of Oxford. The mission of COMPAS is to conduct high quality research in order to develop theory and knowledge, inform policy-making and public debate, and engage users of research within the field of migration.

www.compas.ox.ac.uk



Welsh Refugee Council

The Welsh Refugee Council has over 25 years' experience working with refugees and asylum seekers in Wales. It aims to ensure that Wales is a place of welcome through the delivery of specialist services in Cardiff, Wrexham, Newport and Swansea and by influencing policy and practice to improve the lives of migrants across Wales.

