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The best interests of the child as a guiding star in child protection work.

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**Table of contents**

- 1 INTRODUCTION..... 1**
- 1.1 Introduction to the topic ..... 1
  - 1.1.1 Children’s rights and human rights..... 2
  - 1.1.2 The best interests of the child ..... 2
  - 1.1.3 The principle of the best interests of the child and the CPS..... 3
- 1.2 The aim of the thesis. .... 4
- 1.3 Clarification of the aim and scope of the thesis. .... 4
- 1.4 The relevance of the topic in present day child welfare services..... 5
- 1.5 Method ..... 6
- 1.6 The structure of the master thesis..... 8
  
- 2 AN EXPLORATION OF THE LEGAL FRAMEWORK..... 8**
- 2.1 The Convention on the Rights of the Child..... 8
- 2.2 The Norwegian Child Welfare Act of 1992..... 10
  - 2.2.1 Introduction..... 10
  - 2.2.2 Chapter one of the CWA..... 10
  - 2.2.3 Section 4-1 of the CWA..... 10
  - 2.2.4 Sections 4-3, 4-4 (2), (3) and 4-12 of the CWA. .... 11
  - 2.2.5 The phases of a child protection case..... 13
  - 2.2.6 Applying the principle of the best interests of the child in relation to the provisions in CWA. .... 14
- 2.3 Summary. .... 14
  
- 3 THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD AS A SUBSTANTIVE RULE. .... 15**
- 3.1 “Shall be a primary consideration” ..... 15
- 3.2 “The best interests of the child” ..... 16
- 3.3 “All actions concerning” – actions in relation to CWA..... 17
  - 3.3.1 Introduction..... 17
  - 3.3.2 The investigation pursuant to s. 4-3..... 18
  - 3.3.3 Measures pursuant to sections 4-4 (2), (3) and 4-12..... 19
- 3.4 Summary. .... 21
  
- 4 ASSESSING AND DETERMINING THE BEST INTERESTS OF THE CHILD. .. 21**
- 4.1 Introduction ..... 21

4.2	Elements to be taken into account when assessing the child’s best interests.....	22
4.2.1	Introduction.....	22
4.2.2	The child’s right to be heard.....	22
4.2.3	The child’s identity.....	26
4.2.4	Care, protection and safety of the child.....	28
4.2.5	Preservation of the family environment and maintaining relations.....	29
4.2.6	Situation of vulnerability.....	31
4.2.7	The child’s right to health and education.....	33
4.3	Balancing the elements in the best-interests assessment when making a decision.....	33
<b>5</b>	<b>THE BEST INTERESTS OF THE CHILD AS A GUIDING STAR IN CHILD WELFARE WORK – CHALLENGES TO THE TRANSLATION FROM THEORY TO PRACTICE.....</b>	<b>35</b>
	<b>BIBLIOGRAPHY .....</b>	<b>38</b>

# 1 Introduction

## 1.1 Introduction to the topic

The Norwegian Child Welfare Act (CWA)<sup>1</sup> has just been revised, and new provisions entered into force in July 2018. Through the new provision in section 6-3a (hereafter s. 6-3a) the child welfare workers are required, in their decision, to justify the views of the child, and how the best interests of the child has been considered.

This emphasis on the best interests of the child in the CWA is not new to Norwegian child welfare law. The rule in s. 17 of the CWA of 1953 obliged the child protection services (CPS) to observe the best interests of the child when making decisions on the measures to be taken,<sup>2</sup> and the CWA of 1992 obliged the CPS through s. 4-1 to place decisive weight on the consideration of the best interests of the child when applying the other rules in chapter 4 of the act.

In 2003 the 1989 United Nations Convention on the Rights of the Child (the Convention) was implemented into the Human Rights Act of 1999.<sup>3</sup> The principle of the best interests of the child was elevated to a rule of constitutional weight in 2014 and added to the Norwegian Constitution in s. 104 para. 2. In the period between 2003 and 2016, there were approximately 80 cases concerning the Convention before the Norwegian Supreme Court.<sup>4</sup> Half of the cases concerning the principle of the best interests of the child in Article 3 para. 1 (hereafter 3.1)

It is the impression of this writer that the principle of the best interests of the child, despite its presence in two of Norway's most prominent laws and the strong emphasis of the principle in the CWA, is a principle whose content might be difficult to operationalize for CPS workers. This has inspired me to write about the principle of the best interests of the child in the context of Norwegian CPS practice. Since the principle of the best interests is a principle which originates from international law it is natural to go straight to the main source of children's human rights, which today<sup>5</sup> is the Convention of the Rights of the Child. The principle of the best interests of the child can be found in Article 3.1 of the Convention.

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<sup>1</sup> Lov 17.07.1992 Nr.100 Lov om barneverntjenester

<sup>2</sup> LOV-1953-07-17-14 Lov om barnevern

<sup>3</sup> Lov 21.05.1999 Nr. 30 Lov om styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven) s. 2 No. 4.

<sup>4</sup> Bårdsen (2016) p. 2

<sup>5</sup> The principle of the child's best interests predated the UNCRC through the 1959 Declaration of the Rights of the Child (para. 2) and the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) arts. 5 (b) and 16 para. 1 (d)

“The principle of respect for the child’s best interests is to the law what the North Star is to the night sky.”<sup>6</sup> These are the words of Jacques Fierens. His article served as an inspiration for the title of this master’s thesis.

### 1.1.1 Children’s rights and human rights

Human rights are universal rules to which every person is entitled. Children’s rights are human rights for children and the Convention on the Rights of the Child is a treaty that recognizes rights specifically for children.

In 1948 the United Nations adopted the Universal Declaration of Human Rights. Since then, several human rights treaties have been developed. All human rights apply to every child at all times. There is no exception with regard to the child’s ethnicity, gender, religion, language, abilities or any other status. However, because children are especially vulnerable and dependent, they have additional specific and further specified rights through the Convention.

The Convention has 54 articles that cover all aspects of a child’s life and set out the civil, political, economic, social and cultural rights that all children everywhere are entitled to. It has 140 Signatories and 196 Parties.<sup>7</sup>

The principle of best interests of the child is also present in other UN Conventions;<sup>8</sup> it is present in the African Charter of the Rights and Welfare of the Child (ACRWC)<sup>9</sup>, the European Union’s Charter of Fundamental Rights<sup>10</sup> and can be interpreted into regional conventions<sup>11</sup>. The principle must therefore be regarded as a widespread principle of international law.<sup>12</sup>

### 1.1.2 The best interests of the child

The principle of the child’s best interest is, amongst others<sup>13</sup>, expressed in the Convention Article 3.1. The Article reads as follows:

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<sup>6</sup> Jaques Fierens, in Sormunnen (2016), p 36

<sup>7</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#EndDec)  
Accessed 10.10.18

<sup>8</sup> See for example; CEDAW Arts. 5 (b) and 16 para. 1 (d), the 1993 Hague Convention on Intercountry Adoption art. 4b, the 2006 Convention on the Rights of Persons with Disabilities (CRPD) art. 23 para. 2.

<sup>9</sup> Article 4

<sup>10</sup> Article 24

<sup>11</sup> See for example the Inter-American Convention on the International Return of Children Art. 25,

<sup>12</sup> CRC/C/GC/12 (2009) para. 18.

<sup>13</sup> See footnote 8, 9, 10 and 11.

*”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 (Committee), has defined the best interest of the child as one of four general principles of the Convention, together with the principles of non-discrimination in Article 2; the right to life, survival and development in Article 6; and the right of the child to express his or her views freely and those views being given due weight in Article 12.<sup>14</sup>

The principle of the best interests of the child is also present in other provisions in the Convention.<sup>15</sup> The Committee states that assessing the child’s best interests is a unique activity that should be undertaken in each individual case, in the light of the specific circumstances of each child. These circumstances relate to the individual characteristics of the child and the social and cultural context in which the child or children find themselves.<sup>16</sup>

### 1.1.3 The principle of the best interests of the child and the CPS.

The Committee issued its first General Comment in 2001.<sup>17</sup> In 2013 the Committee adopted General Comment No. 14 concerning the best interests of the child. One reason for the late adoption of such a comment was that it was “extraordinarily difficult”.<sup>18</sup> This can be seen as indicative of the challenges the child welfare worker faces when trying to operationalize the principle in individual cases.

Norwegian CPS workers are authorized through the CWA to make decisions or take actions, that directly or indirectly affect individual children every day. When CPS workers enforce the law, they have been delegated the authority to exercise discretion, and this is where the Convention becomes relevant.<sup>19</sup> The Convention is Norwegian Law through the Human Rights Act s. 2 No 4 and according to Article 3.1 of the Convention<sup>20</sup> and the CWA s. 4-1, they are obliged to give the best interest of the child decisive weight when they make their decisions about or take action related to the child’s welfare situation.

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<sup>14</sup> CRC/C/ GC/ 5 (2003), para. 12.

<sup>15</sup> See for example; Article 9.1; Article 18.1; Article 20.1 and Article 21.

<sup>16</sup> CRC/C/GC/14 (2013), para. 48.

<sup>17</sup> CRC/C/GC/1 (2001) The Aims of Education.

<sup>18</sup> Olga Khazova in Sormunnen (2016) p. 28.

<sup>19</sup> Falck-Eriksen and Backe-Hansen (2018) p. 5.

<sup>20</sup> CRC/C/GC/14 (2013) para. 26.

The complexity and vagueness of the principle opens for professional discretion. This raises questions related to how it can be safeguarded that the best interest of the child actually is a primary consideration when child welfare workers take action and make decisions.

## **1.2 The aim of the thesis.**

The aim of the thesis is to clarify the principle of the best interests of the child as a substantive rule in Norwegian child protection work in individual cases pursuant to specific provisions in chapter four of the Norwegian Child Welfare Act.

## **1.3 Clarification of the aim and scope of the thesis.**

The thesis will place its main focus on decisions or actions pursuant to the CWA sections 4-3 concerning the right and obligation of the CPS to conduct an investigation into the welfare situation of the child; 4-4 second and third paragraph<sup>21</sup> concerning measures to assist, control and promote care altering and 4-12 concerning alternative care. Other provisions of the CWA may be touched upon when they have relevance for the matter at hand.

This thesis will concern itself with the determination of the child's best interest in relation to Norwegian CPS, which, for the purpose of this thesis, will be defined as a public service institution. This public service institution is concerned with the protection and welfare of children pursuant to the Norwegian Child Welfare Act of 1992.

The definition of a child in this thesis will follow the definition of a child in Article 1 of the Convention. Like the Convention, this thesis will not take any stand concerning the question of when life begins, i.e. whether you become a child at conception or at birth.

CWA sections 4-4 (3) and 4-12 are decided upon by Fylkesnemnda for barnevern og sosiale saker (hereafter County Board) pursuant to chapter 7 of the CWA. A decision by the County Board can be appealed to a Court of Law pursuant to s. 7-24 (1). This thesis will not elaborate upon procedures in relation to the County Board or appeal to Court of Law when they decide upon measures pursuant to s. 4-4 (3) and 4-12 of the CWA.

The focus will be on the actions within the CPS before an eventual reference of the case to the County Board for judicial review.

The thesis will have its main focus on the understanding of the principle of the best interests of the child in Article 3.1 of the Convention on the Rights of the Child.

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<sup>21</sup> Different paragraphs in Norwegian provisions will be referred to in this manner; S. 4-4 (2) here exemplified by CWA S. 4-4 second paragraph.

Any definitions or understandings of the principle existing in different regional conventions, under domestic law or international and domestic jurisprudence might be used to point out differences, similarities or universal understandings of the content of the best interests of the child.

The Norwegian Supreme Court said in *Retstidende* 2015 page 93 (hereafter Rt. 2015 p. 93) para. 64 that the General Comment No. 14 from 2013 by the Committee is a natural starting point when interpreting Article 3.1 of the Convention. Bårdsen states that as far as the Committee's General Comments gives clear guidance on what the Convention demands in a situation that is before the Supreme Court, the views of the Committee will be given a strong weight.<sup>22</sup> This is perhaps a bit optimistic view looking at Rt. 2015 p. 1388.<sup>23</sup>

The status of International Soft Law in Norwegian Law will not be further elaborated upon in this thesis.

The Committee and different academic writers use different words, like “concept”, “notion”, “construct” and “principle” related to the best interests of the child. The “main meaning of a principle is a fundamental idea or general rule that is used as a basis for a particular theory or system of belief.”<sup>24</sup> The Committee has defined the best interests of the child as one of four general principles of the Convention.<sup>25</sup> This thesis will use the word “principle”, as this word best catches the scope and role of the best interests of the child within the Convention.

#### **1.4 The relevance of the topic in present day child welfare services.**

The CPS is in some cases the baseline defence for children's wellbeing. A decision in the first instance that does not sufficiently take into consideration the best interest of the child, may lead to the child, for a longer or shorter period, living with the consequences of a decision that might not be in the child's best interests.

The principle of the best interest is, for the purpose of this thesis, a principle of international law, whose content is determined by rules of human rights and knowledge from, amongst others, psychology, pedagogy and social science. The principle therefore requires an interdisciplinary approach. The flexibility of Article 3.1 in the Convention leaves room for professional discretion and to find good solutions for each and every child, but it also leaves room for manipulation as pointed out by the Committee.<sup>26</sup>

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<sup>22</sup> Bårdsen (2016) p. 4.

<sup>23</sup> Paras. 151-154. Concerning the weight of General Comment No. 12 (2009)

<sup>24</sup> <https://blog.oxforddictionaries.com/2011/08/30/principle-or-principal/>

<sup>25</sup> CRC/C/GC/14 (2013) para. 1.

<sup>26</sup> CRC/C/CG/14 (2013) para 34.



Article 42 of the Convention emphasizes the duty of States parties' to make the principles and provisions of the Convention widely known. The article indicates that widespread knowledge of the rights of the child in public opinion is the best protection against infringements. In their last supplementary report to the Committee, the Norwegian Children's Ombudsman commented the demand for more knowledge about the Convention from several professionals on different levels who already work with or for children. There is especially a need for knowledge about the principles of the best interests of the child and the child's right to be heard and the application of these principles in daily practice.<sup>27</sup>

The Committee often underlines the importance of awareness about children's rights among professional groups working for and with children in their Concluding Observations (COB) on different States parties' reports.<sup>28</sup>

In its COB on the combined fifth and sixth periodic reports of Norway, the Committee points out that the training provided on the Convention to relevant professionals does not fully cover all professional groups, is not systematic and that knowledge of the rights of the child among relevant professional groups remains insufficient.<sup>29</sup>

The Committee also recommends that Norway establish clear criteria regarding the best interests of the child for all authorities that take decisions affecting children and ensure that the right of the child to have his or her best interests taken as a primary consideration appropriately integrated and consistently interpreted and applied in, amongst others, administrative proceedings and decisions.<sup>30</sup>

The questions this thesis asks must therefore, based on the above, be said to have some relevance for present day Norwegian child welfare services.

## **1.5 Method**

The thesis strives to understand the substantive meaning of the principle of the best interests of the child in the Convention of the Rights of the Child Article 3.1. The Convention itself is the main source of information. In addition to the Convention, the General Comments of the Committee and the COB's on the States parties' Periodic Reports has contributed to understand the meaning of the Articles within the Convention and how the rights enshrined in the Convention are supposed to be practised.

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<sup>27</sup> Barneombudet (2017) p 10.

<sup>28</sup> See for example CRC/C/AGO/CO/5-7 para. 12; CRC/C/MNE/CO/2-3 para. 16; CRC/C/LKA/CO/5-6 para. 11.

<sup>29</sup> CRC/C/NOR/CO/5-6 para. 10.

<sup>30</sup> CRC/C/NOR/CO/5-6 para. 13.

The thesis focuses on the principle of the best interests of the child in Norwegian CPS and measures pursuant to specific provisions in chapter four of the CWA.

Norwegian Law,<sup>31</sup> preparatory documents to these Laws and Norwegian Public Reports (NOU) relevant to the subject has been drawn upon to determine the meaning of the provisions.

Norwegian jurisprudence from the Supreme Court has been drawn upon to highlight their practice on Article 3.1. Jurisprudence has been found through search in Lovdata and through literature on the subject.

The Norwegian Barne-, ungdom- og familie Direktoratet has issued a Circular Letter (hereafter Circular Letter) in which the interpretation of relevant laws and regulations are described.<sup>32</sup> The Circular Letter has been relied upon to understand how the principle of the best interests of the child might be interpreted in Norwegian child welfare services.

To find support for further elaboration on relevant subjects with the thesis touches upon, the thesis relies upon academic literature found through search in Oria and the International Journal on Children's Rights. The list of references in these articles has been used to find further relevant literature on the subject.

Handbooks, manuals and elaboration on the subject from UN organizations and Non-government organizations like Save the Children, United Nations International Children's Emergency Fund (UNICEF), Child Rights International Network (CRIN) and the Red Cross has been obtained by visiting the individual organizations website.

Also public reports relevant to the subject has been drawn upon to highlight the current situation and/or challenges in relation to the principle of the best interests of the child in present child welfare work.

The academic literature, reports and the material from different organizations have contributed to a better and wider understanding of the principle of the best interests of the child, and the obstacles and solutions to the translation from theory to practise.

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<sup>31</sup> Lov 1814.05.17 Kongeriket Norges Grunnlov (the Norwegian Constitution); Lov 1999.05.21, No. 30 Lov om styrking av menneskerettighetenes stilling i norsk rett (the Human Rights Act); Lov 1992 07 17 No. 100 Lov om barneverntjenester (the Child Welfare Act) and Lov 1967.02.10 Lov om behandlingsmåten i forvaltningssaker (the Public Administration Act).

<sup>32</sup> <https://www.bufdir.no/Barnevern/Fagstotte/saksbehandlingsrundskrivet/>

The children's voice is present in this thesis through the shadow report from the Norwegian Barneombudet to the Committee in 2017<sup>33</sup>, an the book initiated by Forandringsfabrikken, partly written by children with experience from Norwegian child welfare services<sup>34</sup> and The children's own shadow report to the Committee in 2017 "Kidza har rett"<sup>35</sup>

The limitation to the selected method is that there might exist more relevant and appropriate literature and jurisprudence on the subject to be found through different search engines or literature databases.

## **1.6 The structure of the master thesis.**

The thesis will start with an exploration of the legal framework for the thesis; the Convention and the chosen provisions in the CWA with related provisions will be presented in section 2.

In section 3 the attention will turn to examine the meaning of the principle of the best interests of the child as a substantive rule as described by the Committee in its General Comment No 14 (2013) and attempt to relate it to the chosen provisions in the CWA.

The assessment of the child's best interests will be at the centre of attention in section 4. Here the list of elements in General Comment No. 14 will be the starting point and the thesis will try to operationalize the elements in relation to the chosen provisions in the CWA.

Finally in section 5 the thesis will look at some challenges that may complicate the translation from theory to practice.

## **2 An exploration of the legal framework.**

In this section, I will examine the legal framework for the thesis. The thesis will start with the Convention itself in section 2.1. The attention will then turn to the chosen provisions in the Norwegian Child Welfare Act of 1992 in section 2.2.

### **2.1 The Convention on the Rights of the Child**

The Convention on the Rights of the Child entered into force on 2 September 1990. The Convention complemented and anchored the moral obligations with regard to children, already enshrined in the 1924 Geneva Declaration and the 1959 Declaration on the Rights of the Child, in one legally binding international human rights document.<sup>36</sup>

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<sup>33</sup> Barneombudet (2017).

<sup>34</sup> Steinrem red. (2018).

<sup>35</sup> Forum for barnekonvensjonen (2017)

<sup>36</sup> Verhellen (2015) p. 43

The Convention has been complemented by three optional protocols. Today, the Convention is the most widely ratified international human rights treaty in the world.<sup>37</sup>

The preamble of the Convention does not contain binding principles, but gives a frame of reference, in the light of which the articles are to be interpreted.

The Convention grants children with rights related to protection, provision and participation. These are often referred to as the “three Ps”. Articles in the Convention relating to protection are specific for children, addressing their special needs and especially their vulnerability in comparison to adults. Protection rights aim to shield children from the consequences of harmful decisions of others.<sup>38</sup> Provision rights are about creating and guaranteeing access to certain goods and services in order to ensure children’s healthy development, not only physically, but also emotionally and spiritually.<sup>39</sup> Participation rights are about rights to act and to participate in society.<sup>40</sup>

The full application of the concept of the child's best interests requires the development of a child rights-approach.<sup>41</sup> According to the Committee, a child rights-approach<sup>42</sup> is one which furthers the realization of the rights of all children as set out in the Convention by developing the capacity of duty bearers to meet their obligations to respect, protect and fulfill rights and the capacity of rights holders to claim their rights. This child rights-approach is holistic and places emphasis on supporting the strengths and resources of the child him/herself and all social systems of which the child is a part: family, school, community, institutions, religious and cultural systems.

Within the Norwegian CPS, which builds upon a “family service” system<sup>43</sup> and aims to promote a healthy childhood and prevent serious risk and harm, a child rights-approach should be possible. It might be useful here to look to the Norwegian CWA S. 1-1 which states that the aims of the Act is to secure that children living in conditions that can damage their health and development receives necessary help, care and protection at the appropriate time. The Act shall contribute to children and young people being met in a manner that enhances their feeling of security, love and understanding and that all children experience good and safe up-

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<sup>37</sup> Ruck et al. (2016) p. 16.

<sup>38</sup> Ruck et al. (2016) p. 17. See for example Articles 6; 19; 32; 36; 37 and 34.

<sup>39</sup> Ruck et al. (2016) p. 17. See for example Articles 28; 29; 24; 26; 27 and 31.

<sup>40</sup> Ruck et al. (2016) p. 17. See for example Articles 12; 13; 14; 15 and 17.

<sup>41</sup> CRC/C/GC/14 (2013) para. 5.

<sup>42</sup> CRC/C/GC/13 (2011) para. 59

<sup>43</sup> Skivenes og Skramstad (2015), p. 812.

bringing. The aims described in S. 1-1 are wide, and should give of room for the CPS to enhance children's rights through a child rights-approach in their everyday work.

The provisions in the Convention must be seen as minimum rules. The provision in S. 4-1 of the Norwegian CWA can serve as an example; the provision states that the best interests of the child shall be "the decisive" consideration, while Article 3.1 of the Convention states that the best interests of the child shall be "a primary" consideration.

## **2.2 The Norwegian Child Welfare Act of 1992.**

### **2.2.1 Introduction.**

In section 2.2.3 and 2.2.4 the thesis will give an account of sections 4-1, 4-3, 4-4 (2), (3) and 4-12 of the CWA. Section 2.2.5 will give a short overview of the phases in a child welfare case pursuant to CWA. In section 2.2.6 the attention turns to when the best interests assessment takes place in relation to the provisions and address the relationship between sections 4-1 and 1-4 of the CWA.

First, in section 2.2.2, the thesis will give a short overview of the overarching provisions in chapter one of the CWA.

### **2.2.2 Chapter one of the CWA**

Chapter one of the CWA contains overarching provisions, which influence the other provisions of the Act. The purpose or aim of the CWA in s. 1-1 is stated above. s. 1-4 contains a requirement of acceptability; according to s. 1-5 the child is a right holder and is the main subject in a case pursuant to the Act<sup>44</sup> and the child has a right to participate according to s. 1-6. The provision in s. 1-7 states that the CPS is obliged to cooperate with the child and the parents. In this regard, the preparatory work enhances dialogue, respect and cooperation as important factors for good child welfare work.<sup>45</sup>

### **2.2.3 Section 4-1 of the CWA.**

Chapter four of the CWA contains provisions of special measures to be taken if the requirements in the provisions are met. s. 4-1 of the Act states that when the CPS applies the other provisions of the chapter, the best interests of the child shall be the "decisive" factor.

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<sup>44</sup> Prop. 169 L (2016-2017) chapter 17.1, Til § 1-5.

<sup>45</sup> Prop. 169 L (2016-2017) chapter 17.1, Til § 1-7.

The consideration of the child's best interests is by s. 4-1 given a stronger position for provisions and measures in chapter four, than for the provisions in the rest of the Act.<sup>46</sup> Chapter four of the Act is central to the child, parents and the CPS in the sense that it is in this section of the Act that all the possible measures and the requirements for applying them are positioned. It is therefore essential that the best interests of the child guide the decisions pursuant to the chapter. The principle of the child's best interests is present in several procedural rules in other chapters of the Act, for example in s. 6-3a and s. 7-19 (3). These provisions state that the justification for a decision shall clearly state how the best interests of the child have been considered in the decision-making process.

#### 2.2.4 Sections 4-3, 4-4 (2), (3) and 4-12 of the CWA.

##### 2.2.4.1 *Section 4-3.*

CWA s. 4-3 contains provisions regarding the right and duty of the CPS to investigate into the welfare situation of a child. Section 4-3 (1) of the provision states that the CPS shall urgently investigate into the matter if there are reasonable grounds to believe that there are conditions present in the child's life that may justify measures pursuant to chapter four of the Act. There is also a reference to the time limit of such an investigation. CWA sections 4-3 (2) to (5) are provisions as to how the investigation may be conducted. The CPS is obliged not to make the investigation more extensive than the reported concern indicates, and weight shall be put on not spreading knowledge of the investigation unnecessary. The parents cannot oppose to visits in their home as part of an investigation. The CPS may engage an expert and both the expert and the CPS may talk to the child alone. If the CPS suspects that the child has been mistreated or subjected to other forms of serious abuse, the CPS may impose examination of the child in a hospital or other institutions. According to s. 4-3 (6) the decision to close the case after an investigation is an individual decision which must be justified according to S. 6-3a. It follows from the Norwegian Public Administration Act s. 23 that an individual decision shall be in written form.<sup>47</sup>

##### 2.2.4.2 *Section 4-4 (1)-(3).*

CWA s. 4-4 contains provisions designed to assist children and their families. According to s. 4-4 (1) the CPS shall contribute to good living conditions and the development opportunities for the individual child through the offering of advice, guidance and measures designed to aid the children and their families. The measures designed to aid shall have the purpose of con-

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<sup>46</sup> See the best interest of the child as "a primary consideration" in the Constitution S 104 (2) and Sections 2 No. 4 and 3 in the Human Rights Act which applies to the other provisions of the CWA.

<sup>47</sup> Prop. 169 L (2016-2017) chapter 17.1, Til § 4-3.

tribute to positive change for the child or the child's family. This provision tells us the purposes and aims of measures pursuant to s. 4-4.

The provision in s. 4-4 (2) places an obligation on the CPS to apply measures when the child due to conditions in his or her home or for other reasons has a particular need for such measures. The requirement for the obligation to offer such help is the special need of the child for such measures because of the conditions at home or for other reasons. The term "particular need" is not a very strict requirement, but the child must have a particular need for the assistance that other children usually do not have. Measures pursuant to this provision are voluntary, and the parents or the child may choose not to accept such measures.

As a main rule, measures designed to assist are voluntary, but measures pursuant to s. 4-4 (3) are not voluntary. The provision regulates the cases where the parents do not want the offered measures. In these instances the CPS may refer the case to the County Board and request that the measures be imposed on the parents. The measures can be measures to assist<sup>48</sup>, to control<sup>49</sup> or to promote care altering<sup>50</sup>.

The requirements to impose measures to assist is that the measures must be necessary to ensure the child satisfactory care or for other reasons. The measures that can be taken under this provision are listed in the provision, and includes amongst others; day care solutions; visiting home and personal assistance to the child for leisure activities or other compensatory measures. The list in the provision is exhaustive.<sup>51</sup>

The requirement to impose measures designed to control or to promote care altering is that the measures must be necessary to secure the child satisfactory care. The option "for other reasons" because of the child's "special needs" is not available for measures after the second and third sentence.

The necessity demand implies that the CPS cannot remedy the child's situation by less intrusive measures.<sup>52</sup>

The chosen solution pursuant to sections 4-4 (2) and (3) must be in the best interests of the child pursuant to s. 4-1.

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<sup>48</sup> CWA S. 4-4 (3) first sentence.

<sup>49</sup> CWA S. 4-4 (3) second sentence (supervision, reporting obligation, testing to rule out the use of illegal drugs or extensive use of alcohol).

<sup>50</sup> CWA S. 4-4 (3) third sentence.

<sup>51</sup> Prop. 72 L (2014-2015) chapter 12, Til 4-4 tredje til femte ledd.

<sup>52</sup> Prop. 72 L (2014-2015) Chapter 12, Til § 4-4 tredje til femte ledd.

### 2.2.4.3 Section 4-12.

According to CWA s. 4-12 (1) the child may be placed in alternative care in four different situations.

Firstly, pursuant to letter a); if there are serious deficiencies in the daily care provided to the child or serious deficiencies in relation to the personal contact and safety that the child needs in relation to the child's age and development. Secondly, pursuant to letter b); if the parents do not secure that a child who is sick, has disabilities or is especially dependent on help gets the treatment and training it needs because of these conditions. Thirdly, pursuant to letter c); if a child is mistreated or subjected to other serious abuse at home. Fourthly, pursuant to letter d); if it is predominantly likely that the child's health or development may be seriously damaged because the parents are unable to take sufficient responsibility for the child.

A decision pursuant to letters a) to d) in s. 4-12 (1) can only be made when one of the requirements is satisfied and in addition if it is necessary because of the situation the child is in pursuant to s. 4-12 (2).

According to s. 4-12 (2), such a decision cannot be made if the child's situation will be regarded satisfactory by measures pursuant to sections 4-4, 4-10 or 4-11, which are all lesser intrusive measures.

Finally the solution has to be in the best interest of the child pursuant to s. 4-1.<sup>53</sup>

Decisions pursuant to sections 4-4 (3) and 4-12 are, by petition according to CWA sections 7-10 and 7-11, made by the County Board.

### 2.2.5 The phases of a child protection case.

Usually a child protection case starts with the CPS being contacted by persons having concerns about the welfare situation of a child. This can be a private person or someone working in public service.<sup>54</sup> The CPS must then within a week decide whether to investigate or close the case.<sup>55</sup> If they decide to investigate, they must do so within a three-month period.<sup>56</sup> When the three-month period is up, the CPS must decide whether to close the case or apply measures according to chapter four of the Act. There are provisions in the CWA demanding plans for the CPS' intervention, and demands for evaluation of the chosen measures on a reg-

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<sup>53</sup> Rt. 2006 p.1672 para 39.

<sup>54</sup> CWA s. 6-4 (1) imposes a duty for people in public service or in professions which by Law have a duty of confidentiality to inform the child welfare services in specific circumstances, and s. 6-4 (2) gives the child welfare services a right to require information from the same instances in relation to specific concerns.

<sup>55</sup> S. 4-2 (1).

<sup>56</sup> This period may be expanded if certain terms are met according to s. 6-9 (1).



ular basis.<sup>57</sup> If the measures lead to a satisfactory change in the child's welfare situation, the CPS may decide to close the case. If the chosen measures have not resulted in positive change for the child, the CPS may choose to offer different measures. The principle of the best interests of the child applies to decisions or actions taken throughout all the phases according to s. 4-1.

### 2.2.6 Applying the principle of the best interests of the child in relation to the provisions in CWA.

When applying the provisions in CWA presented above in section 2.2.3, the CPS must first hold the facts in the case up against the requirements for applying the provision. If the requirements are met, the CPS may proceed to consider the possible courses of action that the provision opens for. This is where the CWA opens for professional discretion, and the CPS must consider which solution will best serve the best interests of the child in question.

The provision in s. 1-4 of the CWA might be a source of potential confusion. Section 1-4 prescribes a requirement of acceptability of the services provided pursuant to the Act. The requirement is a legal standard,<sup>58</sup> which means that it is norms outside the law itself that defines the content of the requirement.

The acceptability provision is placed in chapter one of the Act and it applies to the entire Act. Section 4-1 requiring that the best interests of the child shall be given decisive weight is placed in chapter four of the Act, and thus applies for the provisions in chapter four. For measures taken pursuant to chapter four, the best interests of the child must be the determining consideration, hence a service or measure that does not meet the acceptability requirements can never be in the best interests of the child. The quality of the different measures and services must be included in the overall best interests assessment.<sup>59</sup>

## 2.3 Summary.

Section 2 has shown that the Convention gives directions for a child right-based approach and that the three P's implies that there can be no protection without provision and participation and vice versa.

When applying the provisions in the CWA and the principle of the best interests of the child to a particular child in a particular situation, the CPS must first hold the facts up against the requirements in the provisions to decide if the requirements for applying one of the provisions are met. If the requirements in one of the provisions are met, the provision opens for different

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<sup>57</sup> See s. 4-5.

<sup>58</sup> Prop. 106L (2012-2013), chapter 31, Til § 1-4.

<sup>59</sup> Sandberg (2016) p. 25.

measures, and the principle of the best interests of the child guides the CPS in their decision on what measures to choose or offer.

There is a principle of presumption in Norwegian Law that implies that provisions in that Norwegian Law is interpreted in consistence with International Law.<sup>60</sup> The Committee reporting on Human Rights in the Constitution also points this out,<sup>61</sup> as seen above. The aims of the CWA are wide, and give room for professional discretion through a child rights-approach.

### **3 The principle of the best interests of the child as a substantive rule.**

In this section the thesis will attempt to relate the legal analysis of the best interests of the child in Article 3.1 as a substantive rule made by the Committee in its General Comment No. 14 in 2013 to sections 4-3, 4-4 (2), (3) and 4-12 of the CWA.

Practice from the Norwegian Supreme Court will be drawn upon to enlighten the understanding of the principle in Norwegian Law.

The wording of Article 3.1 in the Convention is stated under section 1.1.2 of this thesis.

#### **3.1 “Shall be a primary consideration”**

The words “shall be” places a strong obligation not to exercise discretion as to whether a child’s best interests is to be assessed and ascribed the proper weight as a primary consideration in any action undertaken.<sup>62</sup> It means that the child’s best interests may not be considered on the same level as all other considerations. A larger weight must be attached to what serves the interests of the child best.

Viewing the best interests of the child as “primary”, or as decisive as CWA s. 4-1 demands, requires a consciousness about the place that that the child’s best interests must occupy in all actions and a willingness to give priority to those interests in all circumstances and especially when an action has an undeniable impact on the child concerned,<sup>63</sup> which is the case in child protection cases.

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<sup>60</sup> Bernt and Mæhle (2010) p. 135.

<sup>61</sup> Dok. 16 (2011-2012) pp. 89-90.

<sup>62</sup> CRC/C/GC/14 (2013) para. 36.

<sup>63</sup> CRC/C/GC/14 (2013) para. 36.

The Norwegian Supreme Court has in several cases elaborated upon the content of the best interests of the child as a “primary” consideration. In Rt. 2015 p. 155, the Supreme Court sums up its own practise related to the principle; the consideration for the child is not the only consideration, and not always the decisive; when balancing in relation to other interests the consideration of the child’s interests shall be awarded great weight – it is not to be regarded as one of many moments in an overall assessment; the child’s interests shall form the basic starting point and shall be especially lifted to the forefront.<sup>64</sup>

The word “decisive” in s. 4-1 of the CWA indicates that it is difficult to see any other consideration being able to set it aside.

### **3.2 “The best interests of the child”**

As mentioned before, the principle of the best interests of the child is complex, flexible and adaptable, and allows it to be responsive to the situation of individual children and to the child’s development and evolving capacities. However it may also leave room for manipulation.<sup>65</sup>

As a substantive right in relation to the provisions in CWA Chapter four, the principle of the best interests of the child means the right of the child to have his or her best interests assessed and taken as a decisive consideration when different interests are being considered in order to reach a decision on the issue at stake.<sup>66</sup> The child’s best interests as a substantive rule obligates the CPS to assess what are the best interests of that particular child in the case at hand, and in relation to the decision to be made or the course of action to be taken.

The principle of the best interests of the child is intended to ensure the full and effective realisation of all rights secured by, inter alia, the Convention. Accordingly, the child’s best interests are not necessarily what the individual CPS worker considers best for the child but what, objectively, secures for the child both the full and effective realisation of all the rights secured in the convention, and his or her overall development.<sup>67</sup>

The Committee states that all the rights provided for in the Convention are in the child’s best interests and no right can be compromised by a negative interpretation of the child’s best interests or an adult’s judgement of a child’s best interests.<sup>68</sup> The CWA s. 1-1 declares the pur-

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<sup>64</sup> Paras. 47-48.

<sup>65</sup> See section 1.4 of this thesis.

<sup>66</sup> CRC/C/CG/14 (2013) para. 6.

<sup>67</sup> Sormunnen (2016), p. 13.

<sup>68</sup> CRC/C/CG/14 (2013) para. 4.

pose of the Act.<sup>69</sup> The aims described in s. 1-1 echoes some of the Articles in the Convention and some of the values in the Preamble of the Convention. The CPS shall also strive to prevent neglect, emotional- social- and behavioural problems according to s. 3-1 of the CWA. These are all aims that are in the child's best interests.

Brottveit sees the principle of the best interests of the child *inter alia* as a rule of decision and a rule of justification. As a rule of decision, it correlates to the principle as a substantive rule.<sup>70</sup> As a rule of decision the principle of the best interests of the child implies that the CPS, as far as possible, base their considerations on the views and wishes of the child when considering different measures.<sup>71</sup> As a rule of justification it implies that all individual decisions must be justified based on what is in the best interests of the individual child,<sup>72</sup> and it correlates to the best interests of the child as a procedural rule.<sup>73</sup> This is now stated in CWA s. 6-3a.

Supreme Court practice in relation to the child's best interests as a "primary" consideration says that there is an obligation to clarify what exactly is in the best interests of the child and how these interests best are fulfilled. Secondly, the result of this clarification must be brought in as a base for the decision to be made.<sup>74</sup> This process also gives direction for the practice of the CPS pursuant to CWA s. 4-1.

### **3.3 "All actions concerning" – actions in relation to CWA.**

#### **3.3.1 Introduction**

The principle of the best interests of the child is to be applied "in all actions". This does not only mean decisions, but also all acts, conduct, proposals, services, procedures and other measures. Actions like inaction or failure to take action and omissions are also "actions".<sup>75</sup>

The word "concerning" means that the legal duty applies to all decisions and actions that directly or indirectly affects children. This applies even when they are not the direct targets of the decision.

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<sup>69</sup> The content of the provision is explained in section 2.1 of the thesis.

<sup>70</sup> CRC/C/CG/14 (2013) para. 6.

<sup>71</sup> Brottveit (2013) p. 22.

<sup>72</sup> Brottveit (2013) p. 29

<sup>73</sup> CRC/C/CG/14 (2013) para. 6.

<sup>74</sup> Rt. 2009 p. 1261 para. 85, Rt. 2010 p. 1313 para. 13.

<sup>75</sup> CRC/C/GC/14 (2013) para. 17.

The thesis will turn the attention to what constitutes actions in relation to sections 4-3 regarding investigations, 4-4 (2) regarding measures to assist, 4-4 (3) regarding measures to assist, control or promote care altering and 4-12 regarding placement in alternative care.

### 3.3.2 The investigation pursuant to s. 4-3.

CWA s. 4-3 (1) states when the child welfare service shall investigate into the case.<sup>76</sup>

Brottveit sees the child's best interests as a principle of investigation. As such, it implies the recognition of the child as a valuable contributor of facts.<sup>77</sup> She asserts that the principle seems to be under communicated in the early phases of CPS case management.<sup>78</sup>

There are many actions to be taken and decisions to be made during the investigation carried out by the CPS. These are among others; whether there should be a visit to the child's home, and how many visits; whether to engage an expert in the investigation; from who or which instances the CPS should gather information about the child's situation; what information and how information should be shared with the child, parents, guardians and other informants to the case in question or on when, how and where to talk to the child. These are all actions or decisions that directly or indirectly affect the child in question. The principle of the best interests of the child in Article 3.1 of the Convention and CWA S. 4-1 seen as a principle of investigation might secure that the CPS is guided by the principle of the best interests of the child throughout the investigation.

The CPS has a time limit of three months to complete the investigation. In exceptional cases the allowed time can be extended to six months.<sup>79</sup> A decision by the CPS to investigate into a child's welfare situation must be said to be a decision that directly affects the child in question. The CPS may visit the child's home and/or talk to the child. The latter is very often done during school hours and means disturbing the child's situation at school. The process may upset the child's parents. Sometimes to such an extent that it may affect the child's perception of the home environment as stable and/or might make the child afraid of losing his or her parents. This indicates that a decision to prolong the investigation period must take into consideration how such a prolonged period might affect the child. The need for extra time must be weighed against, on the one hand the severity of the concerns for the child's welfare situation and on the other hand the effect of the prolonged period of investigation on the child on the other hand. The Committee points out that where a decision will have a major impact on a

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<sup>76</sup> The content of the provision is explained in section 2.2 of the thesis.

<sup>77</sup> Brottveit (2013) p. 22.

<sup>78</sup> Brottveit (2013) p. 28.

<sup>79</sup> CWA § 6-9 para. 1.

child, a greater level of protection and detailed procedures to consider their best interests is appropriate.<sup>80</sup> The question the CPS must ask is whether the long term best interests of the child outweighs the stress that the child is put under for the duration of the investigation.

The investigating phase results in a decision either to close the case or to offer help to the child or his or her caretakers. The provisions in CWA chapter four, from S. 4-4 and forthwith, describe different measures and the conditions for applying the different measures.

### 3.3.3 Measures pursuant to sections 4-4 (2), (3) and 4-12.

The information that the CPS is in possession of after an investigation pursuant to s. 4-3, may be enough or the right information when it comes to the determination on which measure to apply in relation to the formal requirements in the different provisions. The CPS may not on the other hand have the required information on what solution would be in the best interest of this particular child. This means that some actions from the investigation phase might be repeated.

Brottveit asserts that the principle of the best interests of the child might be seen as a basic principle of consideration, applied justification and a principle of decision.<sup>81</sup> In relation to sections 4-4 (2), (3) and 4-12 the principle must be seen as a principle of decision in deciding between multiple measures to offer or apply.

In choosing between different measures when deciding which measure would be in this child's best interest it is actually not possible to do this without talking to the child. Research indicates that when the child is not given a voice or the opportunity to influence on the framing of the problem, the design of protection and care has a very strong tendency to be poorly matched to the problems documented in the child investigation and vice versa.<sup>82</sup> To increase the chances that children will benefit from protection and preventive measures the child must be seen as the primary client, aiming at creating a partnership with the child with a view of children as bearers of rights.<sup>83</sup> The children want the CPS to regard them as their closest collaborator.<sup>84</sup> Norwegian research on children's participation in their own cases within the CPS, as we shall see in section 4.2.2 of this thesis, shows that children in many cases do not participate. Poorly matched measures that do not result in a better situation for the child cannot be seen as being in the child's best interests, and for measures after s. 4-4 (2) and (3), the aim of

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<sup>80</sup> CRC/C/GC/14 (2013) paras. 19 and 20.

<sup>81</sup> Brottveit (2013) p. 18.

<sup>82</sup> Heimer et al (2018) p. 321.

<sup>83</sup> Heimer et al (2018) p. 322.

<sup>84</sup> Steinrem red (2018) p. 64.

the measures are to promote according to s. 4-4 (1). This means that the child must be allowed to participating in framing the problem and the solution to it.

Actions pursuant to s. 4-4 (2) will typically be the consideration of different measures to offer to the child and the parents. This could be compensatory measures because of the parents' lack of parenting skills, like personal assistance to the child, visiting home or other measures to compensate for the lack of care in the home to the child. It could be care altering measures like advice, guidance or parenting classes. Both aims at securing a better care for the child.

In this regard the CPS might need to cooperate with other professionals to clarify the content of the different measures available and if this particular measure is right for the child and his parents.

The best interests principle dictates that the decision upon which measures to choose pursuant to s. 4-4 (2) should be done in close cooperation with the child. Reports indicate that there is a general difficulty in establishing the necessary trust and cooperation with the parents within the CPS.<sup>85</sup> It is therefore necessary to cooperate with the child's parents to make sure that the design is acceptable to them.<sup>86</sup> This might lead to a more successful outcome of the assisting measures and hence the more intrusive measures in sections 4-4 (3) or 4-12 are avoided.

If the child or parents do not accept the help provided pursuant to s. 4-4 (2), the CPS must decide whether the concern for the child is so serious that measures pursuant to sections 4-4 (3) or (5)<sup>87</sup> should be considered.

The decision of whether or not, to submit a petition to the County Board to impose measures or to place the child in alternative care pursuant to sections 4-12 (1) and 4-4 (3) are actions pursuant to Article 3.1. The CPS must first assess whether the requirements in the provisions are met, and if the measures are necessary pursuant to sections 4-4 (3) and 4-12 (2). When choosing measure(s), the best interests of the child must be given decisive weight pursuant to s. 4-1 and must be justified in the decision pursuant to s. 6-3a.

As we shall see below in section 4.2 and 4.3 of the thesis, the best interests assessment may greatly influences the decisions with regard to what measures to offer or apply pursuant to sections 4-4 (2), (3) and 4-12.

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<sup>85</sup> Bredal, Melby (2018) p. 93.

<sup>86</sup> This also follows from S. 1-7 of the CWA.

<sup>87</sup> S. 4-4 para 5 states that if a child has or is in danger of developing serious behavioural problems as described in S. 4-24, the County Board can decide upon supportive measures for the parent when the children resists such measures.

### **3.4 Summary.**

The discussion under section 3 shows that the principle of the best interests of the child as a substantive rule in relation to CWA sections 4-3, 4-4 (2), (3) and 4-12 imply the duty of the CPS to assess the best interests of the child and when this must be done.

## **4 Assessing and determining the best interests of the child.**

### **4.1 Introduction**

When assessing and determining the best interests of the child in order to make a decision on a specific measure, the Committee recommends that certain steps should be followed. First, within the specific factual context of the case, find out what are the relevant elements in a best-interests assessment, give them concrete content, and assign a weight to each in relation to one another. Secondly, to do so, follow a procedure<sup>88</sup> that ensures legal guarantees and proper application of the right.<sup>89</sup>

The “best-interests assessment” consists in evaluating and balancing all the elements necessary to make a decision in a specific situation for a specific individual child,<sup>90</sup> and should start with an assessment of the specific circumstances that make the child unique.<sup>91</sup>

As mentioned in section 2.2.6, the CPS must first determine whether the facts of the case satisfies the requirements in the provisions, and then assess the best interests of the individual child. The best interests of the child must therefore be seen as a rule that guides the choice between the different solutions that the provision opens for once the facts of the case satisfies the requirements set by the provision.

In section 4.2 the thesis will present the different elements in the list drawn up by the Committee in General Comment No. 14 and attempt to give them substance and relate the content to the best interest assessment pursuant to CWA sections 4-3, 4-4 (2), (3) and 4-12.

The focus in section 4.3 will be on the balancing of the elements in order to reach a best interests decision.

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<sup>88</sup> The principle of the best interests of the child as a rule of procedure does not fall within the scope of this thesis and will not be further elaborated upon.

<sup>89</sup> CRC/C/GC/14 (2013) para 46.

<sup>90</sup> CRC/C/GC/14 (2013) para 47.

<sup>91</sup> CRC/C/GC/14 (2013) para 49.



## **4.2 Elements to be taken into account when assessing the child's best interests.**

### **4.2.1 Introduction.**

The Committee has drawn up a non-exhaustive and non-hierarchical list of elements that could be included in a best-interests assessment by any decision-maker having to determine a child's best interests. The non-exhaustive nature of the elements in the list implies that it is possible to go beyond those and consider other factors relevant in the specific circumstances of the individual child or group of children. All the elements of the list must be taken into consideration, if relevant, and balanced in light of each situation.<sup>92</sup>

### **4.2.2 The child's right to be heard.**

Assessment of a child's best interests must include respect for the child's right to express his or her views freely and due weight given to said views in all matters affecting the child as stated in Article 12. Articles 3.1 and 12 have complementary roles: the first aims to realize the child's best interests and the second provides the methodology for hearing the child and their inclusion in all matters that affect the child, including the assessment of his or her best interests. The Committee states that Article 3.1 cannot be correctly applied if the requirements of Article 12 are not met. Similarly, Article 3.1 reinforces the function of Article 12 by facilitating the essential role of children in all decisions affecting their lives.<sup>93</sup>

The right of the child to be heard and the child's view being awarded due weight according to age and maturity is present in s. 104 (1) of the Norwegian Constitution, in the Human Rights Act s. 2 No. 4 through the implementation of the Convention and in the CWA s. 1-6.<sup>94</sup> Still, research shows that there is a long way to go before this right is realized for all children in contact with the Norwegian CPS.<sup>95</sup>

The child's right to be heard is seen as central to the preservation of a child's dignity, integrity and self-esteem. That is why the right to participation is regarded as a valuable instrument in the realization of the best interests of the child. The connection between the child's right to participation and the best interests of the child is especially materialized in two settings.<sup>96</sup>

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<sup>92</sup> CRC/C/GC/14 (2013) para 50.

<sup>93</sup> CRC/C/GC/14 (2013) para. 43.

<sup>94</sup> See also §§ 6-3 and 6-3a.

<sup>95</sup> See Ulvik & Gulbrandsen (2015) p. 213, Skauge (2010) pp. 6-7 (for english summary pp. 8-9), Skivenes and Strandbu (2006) p. 15.

<sup>96</sup> Stang (2007) p. 39.

The first setting is where adults consider that it is not in the child's best interests to be heard. It is clear from the above<sup>97</sup> that a negative interpretation of the child's best interests cannot be used to limit a child's right to express his/her views.<sup>98</sup>

The second setting concerns the situations where a child expresses his or her views, but where the child's wishes do not coincide with the CPS' views on what will be in this child's best interests.<sup>99</sup> This setting concern the weight awarded to the child's views, this will be addressed further below.<sup>100</sup>

Section 104 (1) of the Norwegian Constitution and Article 12 of the Convention imposes a clear legal obligation on the CPS to recognize this right and ensure that the child is given the opportunity to express his or her views and that these views are accorded due weight.<sup>101</sup> This also follows from CWA s. 6-3 (1). The provision gives children over the age of 7 an unconditional right to be heard. Children under the age of 7 also have the right to be heard pursuant to s. 104 (1) of the Constitution and Article 12 of the Convention.<sup>102</sup>

The child's views may potentially influence how the investigation pursuant to s. 4-3 is conducted. Children's advice is that the CPS should talk to the child first because this enables a safe space for children to give their story about what life is like for them. Many children have experienced being instructed or threatened by grown ups about what to tell and not to tell to the CPS if the grown ups are talked to first.<sup>103</sup> The Public Administration act s. 16 states that a party to a decision shall be notified before an individual decision pursuant to s. 2b is made and s. 18 gives the parties access to the CPS documents in the case either to complain about the decision or to be able to safeguard their own interests. The provisions leaves some room for the CPS to come to an agreement with the child on when to inform the parents about the information the child has given in the conversation(s) with the CPS.

Concerning measures to aid pursuant to CWA sections 4-4 (2), (3) The children recommend that the CPS consider talking to the child alone when planning what measures to offer, and that the child is given an opportunity to bring a person whom the child trusts to the meeting. The CPS and the child cooperate on how and when information shall be given to caretakers and other professionals and the child is invited to partake in the planning and implementation

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<sup>97</sup> Thesis section 3.3.

<sup>98</sup> Stang (2007) p. 41

<sup>99</sup> Stang (2007) p. 40

<sup>100</sup> See page 26 of the thesis.

<sup>101</sup> CRC/C/GC/12 (2009) para. 15.

<sup>102</sup> Through S. 2 No. 4 of the Human Rights Act.

<sup>103</sup> Steinrem (2018) p. 137.

of the selected measure(s). The child is in the same manner invited into evaluation of the measures.<sup>104</sup>

For measures pursuant to s. 4-12, the children recommend<sup>105</sup> that the child be heard before a proposal is submitted to the County Board, and when deciding on where the child should live.

Expressing his or her views is a choice for the child, not an obligation. The realization of the right requires that the child is informed by the CPS worker that is responsible for hearing the child about the matters, options and possible decisions to be taken and their consequences. This right to information is essential, because it is the precondition of the child's clarified decisions.<sup>106</sup>

Both s. 104 (1) of the Constitution and Article 12 of the Convention states that the views of the child must be "given due weight in accordance with the age and maturity of the child". Age alone cannot determine the significance of a child's views, so these views must therefore be assessed on a case-by-case examination.<sup>107</sup> Article 5 of the Convention brings attention to the concept of the evolving capacities of the child. The concept is central to the balance embodied in the Convention between recognising children as active agents in their own lives, entitled to be listened to, respected and granted increasing autonomy in the exercise of rights, while also being entitled to protection in accordance with their relative immaturity and youth.<sup>108</sup>

Article 12 implies that children are seen as competent, unless it is proven that they are not, in which case adults and the State have the obligation to guide them towards this competence.<sup>109</sup> The fact that the child is very young or in a vulnerable situation (e.g. has a disability, belongs to a minority group, is a migrant, etc.) does not deprive him or her of the right to express his or her views, nor reduces the weight given to the child's views in determining his or her best interests.<sup>110</sup>

General Comment No. 12 links the words "capable of forming his or her own views" to the assessment of the child's capacity.<sup>111</sup> Tisdall<sup>112</sup> argues that the use of the word "capacity" in the General Comment on Article 12 is often used to bolster children's participation – but also

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<sup>104</sup> These are a selection of the advice from the children, they have many more.

<sup>105</sup> Steinrem red. (2018) p. 158.

<sup>106</sup> CRC/C/GC/12 (2009) para. 25.

<sup>107</sup> CRC/C/GC/12 (2009) para. 29.

<sup>108</sup> Landsdown (2005) p. Vii, see also CRC/C/GC/20 (2016) para. 22.

<sup>109</sup> Verhellen, (2015), p. 51

<sup>110</sup> CRC/C/GC/14 (2013) para. 54.

<sup>111</sup> CRC/C/GC/12 (2009) para. 28.

<sup>112</sup> Tisdall (2018) pp. 165-166

allows the exclusion of children judged as not having the necessary capacity. She points to Series, which in her article discusses the model of legal personality and capacity as they appear in the UN Convention on the Rights of Persons with Disabilities (CRPD) Article 12. Series<sup>113</sup> asserts that this new approach treats a person's agency as shaped by their environment and relationships with others. The approach calls for the provision of whatever support is necessary to ensure that disabled people are able to exercise full legal capacity on an equal basis with others.

In this writer's opinion, the approach described by Series is not contrary to Article 12 of the Convention. Article 12 and the Committee's General Comment<sup>114</sup> requires the CPS to presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them,<sup>115</sup> and in doing so, provide whatever support is necessary for the child to express his or her views. The body language, facial expression or emotional expression or the lack of such with an infant interacting with his or her parents can provide much information to a trained observer. This also applies to children who have impairments in the ability to express themselves with language. Interaction in play or observation of children in activity in the kindergarten can together with information from the staff that knows the child well can give the CPS much information on the perception of the child of his or her life. The Committee has further commented upon this right for children in vulnerable situations to be heard in its General Comment No. 16,<sup>116</sup> so it is not a question whether they should be heard or not, it is a question of finding the tools and give sufficient support so that they may let their voices be heard.<sup>117</sup>

The Committee's statement in General Comment No. 12 that the term participation has evolved and is now widely used to describe on-going processes. The process include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.<sup>118</sup>

In Norway the children calls for cooperation between the child and the CPS.<sup>119</sup> This means that the child must get enough and useful information; that the child can feel safe when talking to the child welfare services; that the child is given the opportunity to partake in the deci-

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<sup>113</sup> Series (2015) p. 80

<sup>114</sup> CRC/C/GC/12 (2009) para. 20.

<sup>115</sup> CRC/C/GC/12 (2009) para. 20.

<sup>116</sup> CRC/C/GC/16 (2013) para. 21.

<sup>117</sup> See also Skivenes and Strandbu (2006) p. 16.

<sup>118</sup> CRC/C/GC/12 (2009) para. 3.

<sup>119</sup> Steinrem red. (2018), p. 64.

sions to be made; that the child can be an active part in the documentation done by the CPS and that the child is allowed to give feedback to the child welfare services.

Daly<sup>120</sup> argues for the adoption of a children's autonomy principle in legal decisions in which the best interests of the child is the primary consideration. Children should get to choose, if they wish, how they are involved and the outcome; unless it is likely that significant harm will arise from their wishes. Daly argues that there needs to be greater and more explicit recognition that overriding a child's wishes is very likely going to be harmful. It should be the children in question who are seen as the primary experts on what is more or less harmful for them in their personal lives.<sup>121</sup>

#### 4.2.3 The child's identity.

The identity of the child includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality. Although children and young people share basic universal needs, the expression of those needs depends on a wide range of personal, physical, social and cultural aspects, including their evolving capacities. The right of the child to preserve his or her identity is guaranteed by the Convention in Article 8 and must be respected and taken into consideration in the assessment of the child's best interests.<sup>122</sup>

In child protection work, the child's identity may influence the assessment of the best interests of the child in several instances, inter alia girls subjected to gender stereotyping in their families on the grounds of cultural background may inhibit their right to development both in relation to Article 6 of the Convention and in relation to CWA sections 1-1 and 4-4 (1). It is important to proceed in a culture sensitive manner both under the investigation phase pursuant to CWA s. 4-3 and when choosing between the different measures available through s. 4-4 (2) and (3), for example choosing culture sensitive guidance. Research concerning negative social control relating to girls belonging to minorities and the handling of this within the child welfare services, indicates that there is room for improvement.<sup>123</sup>

Also children who identify themselves within the LGBTI may need support from the child welfare services both in the sense of help to come to terms with their identity or help with their families to come to terms with it. When helping the child it is essential that the case manager is sensitive to the child's identity and that assistance is given in a manner that actually helps and is in this particular child's best interests.

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<sup>120</sup> Daly (2018) p. 61

<sup>121</sup> Daly (2018) p. 82.

<sup>122</sup> CRC/C/GC/14 (2013) para. 55.

<sup>123</sup> Bredal and Melby (2018) pp. 151-153

Research concerning children's perception of violence in close relations suggests that there are more similarities than differences in the way that children perceive or experience this, but it also shows several conditions that can make the situation more difficult for children with a minority background. The difficulties originate from certain cultural aspects within the family and the culture the child belongs to and certain additional difficulties as a consequence of the child belonging to a minority group.<sup>124</sup> Minority children experience a lack of culture sensitivity in their meetings with the Norwegian CPS, and research shows that the children are most content when the individual CPS worker has an understanding for their cultural background and takes the challenges they experience because of that background seriously.<sup>125</sup>

For the CPS the above suggests that it is important to cooperate with the child in question so that the advancement of the investigation pursuant to s. 4-3 happens in a manner sensitive to the child's identity and does not result in the intervention by the child welfare services putting the child at risk of additional stress. This also applies in relation to the choice of solutions pursuant to sections 4-4 (2), (3). Above in section 3.3.3 I mentioned that there is a general challenge in establishing the necessary trust and cooperation. Distrust and a lack of understanding of the role of the CPS are especially present in different ethnical minority groups.<sup>126</sup>

Parents exercising negative social control might originate from a lack of understanding of the Norwegian society, and might be addressed by guidance to the parents. If this does not happen in a culture sensitive way, in which the parents and the child feel the needed trust to fully cooperate, the measure most likely does not help the situation. If the necessary trust and cooperation cannot be achieved when applying measures pursuant to s. 4-4 (2), the CPS must consider whether the situation can be helped by force through measures pursuant to s. 4-4 (3). Measures to promote care altering might not be in the best interests of the child because it might be difficult to achieve real change as required by s. 4-4 (1). Measures that aim to assist the child might be better suited in such a situation, but also in relation to such measures the resistance from the parents and the stress this will place on the child must be considered.

The exercise of negative social control might be done in such a manner that the requirements for applying measures after sections 4-12 (1) letter a) or c) are satisfied. In relation to measures pursuant to s. 4-12 (1) the CPS should consider what alternative-care solution would be in the best interests of this child with this identity according to s. 4-15 (1) and Article 20.3 of the Convention. This means that this element could *inter alia* influence on the choice of

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<sup>124</sup> Hofman (2011), p. 6.

<sup>125</sup> Hofmann (2011), p. 38.

<sup>126</sup> Bredal, Melby (2018) p. 93.

home for the child, for example in deciding which solution would be most supportive in relation to a child with a LGBT identity or to the cultural identity of a minority child.

#### 4.2.4 Care, protection and safety of the child.

The rationale behind the CWA is safeguarding the care, protection and safety of the child.<sup>127</sup> The child has a right to such protection and care as is necessary for his or her well-being according to Article 3.2 of the Convention. Information or facts under this element is highly relevant in relation to determining whether the requirements in the different provisions in the CWA are met in addition to be central to the best interests assessment.

The Committee underlines that the terms “protection and care” must also be read in a broad sense, that is in relation to the comprehensive ideal of ensuring the child’s “well-being” and development. Children’s well being, in a broad sense includes their basic material, physical, educational, and emotional needs, as well as needs for affection and safety.<sup>128</sup>

As mentioned above in section 3.2 of the thesis, the rights in the Convention are all in the best interests of the child. Hence, it will always be in the best interests of the child not to grow up in environments as described in Articles 3.2, 19 and 32-39. In some cases reported to the CPS the pursuant investigation aims to uncover whether the child lives under conditions described in the mentioned Articles. According to s. 4-3 (3) of the CWA the parents cannot resist investigation being made through a visit in the home. A visit to the child’s home is often done to observe the interaction between children and their parents in natural surroundings. A study indicates that both the child and the parents experienced these home visits as stressful and artificial,<sup>129</sup> because of this the CPS should consider whether it would be better for the child if parents and children are observed in activities requiring interaction between the child and his/her parents outside the home. This could be an activity that requires interaction between the child and parents like playing a game, or working together on a designed task.

Emotional care is a basic need of children; children need to form an attachment to a caregiver at a very early age, and such attachment, if adequate, must be sustained over time in order to provide the child with a stable environment.<sup>130</sup> An emotional rejection of the child or a situation where the parents are not capable to meet the child’s need for contact or where use of force or violence in the home may lead to an insecure environment for the child both physical

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<sup>127</sup> See S. 1-1 of the CWA.

<sup>128</sup> CRC/C/GC/14 (2013) para. 71.

<sup>129</sup> Lurie et al (2018) p. 12.

<sup>130</sup> CRC/C/GC/14 (2013) para. 72.

and psychological. Parents with mental illness<sup>131</sup> or substance abuse may also create an insecure situation for the child.

These are situations that often may fall under s. 4-12 (1) letter a), c) or d) of the CWA. This element will in such situations both tell the case manager whether the requirements in the provision are met and serve as a guide in the best interests determination in relation to which measure to apply.

Assessment of the child's best interests in a CPS context must also include consideration of the child's safety, in particular in relation to CPS cases, the right of the child to protection against all forms of physical or mental violence, injury or abuse as obligated by the Convention in Article 19<sup>132</sup> and in relation to the obligations in Articles 32-39<sup>133</sup> are highly relevant.

Widespread social and cultural attitudes and practices condone violence.<sup>134</sup> In cases involving minority children, a culture-sensitive approach must be followed.<sup>135</sup> Cases reported to the CPS may concern corporal or physical punishment, but also non-physical forms of punishment.<sup>136</sup> These are instances that may easily satisfy the requirement in s. 4-12 (1) letter c), the necessity requirement in s. 4-12 (2) and the requirements in s. 4-4 (3)<sup>137</sup>. Provided the requirements are fulfilled the best interests assessment in relation to which measure to choose, might be influenced by the child's wish to stay with her or his family. Thus, the chosen measure might be care-altering methods pursuant to s. 4-4 (2) if the parents agree, or according to s. (3) if the parents resist the measures offered and the necessity demand is met.

Measures taken pursuant to s. 4-4 are according to s. 4-4 (1) aimed at promoting positive change in the child or within the family. The situation may be such that it will not be in the child's best interests to stay at home until some change is achieved, which may mean that the overall best interests assessment will differ from the child's wish.

#### 4.2.5 Preservation of the family environment and maintaining relations.

The Committee acknowledges the family as the fundamental unit of society and the natural environment for the growth and well being of its members, particularly children. The right of

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<sup>131</sup> Ot.prp. nr. 44 (1991-1992), chapter 4, Til § 4-12.

<sup>132</sup> This is often commented upon in the COB's by the Committee, also corporal punishment administered as an instrument for child rearing and/or disciplinary causes are prohibited; see for example CRC/C/PAN/CP/5-6 para. 21 (b); and CRC/C/SYC/CO/5-6 23 para. (a).

<sup>133</sup> CRC/C/GC/14 (2013) para. 73.

<sup>134</sup> CRC/C/GC/13 (2011) para. 12.

<sup>135</sup> See section 4.2.3 of this thesis.

<sup>136</sup> For definitions, see CRC/C/GC/8 (2006) paras. 11 to 15.

<sup>137</sup> First, second and third sentence.



the child to family life is protected under Article 16 of the Convention. The term “family” must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom in Article 5.<sup>138</sup> The child’s right to protection of their private and family life also follows from s. 102 of the Norwegian Constitution.

The involvement of the child’s extended family and social network in the early phases of the CPS case may lead to a closure of the case. The resources of the extended family might prove to be sufficient to create a safe and caring environment for the child. The involvement of extended family and social network in the investigating phase might also contribute to information concerning the child and the parents which otherwise would not be available to the CPS. This may lead to a better framing of the problem and to more accurate measures. Also the child’s right to respect for his or her family life entails the obligation for the CPS to not intrude on this right more than necessary – if the involvement of extended family and social network leads to a shorter period of intervention, Article 16 and s. 102 of the Constitution, implies that this in most cases will be in the best interests of the child.

Sometimes it is in the child’s best interest to be protected from the parents’ wish for or their right to family life.<sup>139</sup> These are conflicting interests when the necessity requirement in s. 4-12 (2) of the CWA for one of the four listed reasons in the s. 4-12 (1) is met, and the CPS need to place the child in alternative care. Section 4-12 (2) second sentence does not open for placing children in alternative care unless it is necessary because of the child’s situation or if satisfactory care can be achieved with lesser intrusive means. This is also the view of the Committee; given the gravity of the impact on the child of separation from his or her parents. Before resorting to separation, the State should provide support to the parents in assuming their parental responsibilities, and restore or enhance the family’s capacity to take care of the child, unless separation is necessary to protect the child. Section 4-12 (2) states clearly that measures to assist according to s. 4-4 must have been tried or considered first.

An example here can be cases concerning new-born children, where there have been great concerns as to the parenting skills of the parents-to-be throughout the pregnancy. The removal of the child from parental care at birth should be kept to a minimum.<sup>140</sup> The alternative would be to offer a place at a family centre for a longer or shorter period, where the new parents may receive guidance that may contribute to the necessary change required by s. 4-4 (1) of the CWA.

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<sup>138</sup> CRC/C/GC/14 (2013) para. 60.

<sup>139</sup> Bårdsen (2016) p. 14.

<sup>140</sup> Resolution 2232 (2018) section 5.5

The Guidelines for the Alternative Care of Children aims to ensure that children are not placed in alternative care unnecessarily; and that where alternative care is provided, it is delivered under appropriate conditions responding to the rights and best interests of the child. In particular, financial and material poverty, or conditions directly and uniquely imputable to such poverty, should never be the only justification for the removal of a child from parental care, but should be seen as a signal for the need to provide appropriate support to the family.<sup>141</sup> The Committee also states that economic reasons cannot be a justification for separating a child from his or her parents.<sup>142</sup> Families with multiple challenges are families in where all their challenges are woven together and where the parents are unable to manage these challenges.<sup>143</sup> Research shows that these families do not get the necessary help from the CPS.<sup>144</sup>

Section 4-22 (3) of the CWA states that when placing a child in foster care the child welfare services shall look for a foster home in the child's familiar or social network. As mentioned above, trying to find solutions to assist the family in the child's network pursuant to s. 4-4 (2) and (3) may also be useful to avoid taking the child into alternative care.

In case of separation, the State must guarantee that the situation of the child and his or her family has been assessed, where possible, by a multidisciplinary team of well-trained professionals with appropriate judicial involvement, in conformity with Article 9 of the Convention, ensuring that no other option can fulfil the child's best interests.<sup>145</sup> The Norwegian CPS is usually not organized in multidisciplinary teams. The majority of employees are barneverns-pedagoger or sosionomer. If the case is referred to the County Board the case will be handled in a more interdisciplinary way. Section 4-3 (4) allows the use of experts, whether this option is widely used is unknown to me.

#### 4.2.6 Situation of vulnerability.

Children share a universal vulnerability with other human beings, yet have a particular vulnerability as children and even more so as being individually positioned within that group.<sup>146</sup> In addition, children may be exposed to situations that increase their vulnerability,<sup>147</sup> such as having a disability, belonging to a minority group or being a girl. The best interests of a child in a specific situation of vulnerability will not be the same as those of all the children in the

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<sup>141</sup> CRC/C/GC/14 (2013) para. 62 and A/RES/64/142, para 15

<sup>142</sup> CRC/C/GC/14 (2013) para. 61.

<sup>143</sup> Clifford et al (2015) p. 163

<sup>144</sup> Clifford et al (2015) p. 233

<sup>145</sup> CRC/C/GC/14 (2013) para. 64.

<sup>146</sup> Sandberg (2015) p. 221, the Abstract.

<sup>147</sup> Sandberg (2015) p. 245.

same vulnerable situation. The CPS needs to take into account the different kinds and degrees of vulnerability of each child, as each child is unique and each situation must be assessed according to the child's uniqueness.<sup>148</sup>

The right to non-discrimination in Article 2 of the Convention not only requires the prohibition of all forms of discrimination in the enjoyment of rights under the Convention, but also requires appropriate proactive measures to ensure effective equal opportunities for all children to enjoy the rights under the Convention.<sup>149</sup>

Children are discriminated against all the time; girls are not treated like boys, disabled children are not treated like non-disabled ones, rural children do not get the same opportunities as those living in the cities, migrant children do not benefit from the same rights as national children etc. Children are more vulnerable than adults based on gender, race, religion or other reasons.<sup>150</sup> All forms of discrimination against children are exacerbated by virtue of their age and vulnerability,<sup>151</sup> and it will always be in the best interests of the child not to be discriminated against.

Because of the above it might be situations in which measures of positive discrimination<sup>152</sup> should be taken, for example there might be reasons for offering additional aid to a child and his or her family pursuant to CWA s. 4-4 (2), if the child is discriminated against in a manner that may endanger the child's healthy development.<sup>153</sup> This could be in the form of child supportive measures like a support person for the child or care-altering measures in the form of guidance to the parents on how to best support the development of their child. Whether it would be in the best interests of the child to impose care-altering measures as the only measure pursuant to s. 4-4 (3) if the parents themselves are the ones discriminating the child because of e.g. the child is a girl or has a disability is questionable if the discrimination is a result of deep cultural beliefs.

Children in adolescence or early childhood bring special entails special vulnerabilities that require special considerations when assessing the best interests of the child. The Committee comments upon this in its General Comments Nos. 7 and 20.<sup>154</sup> The CPS is obliged to consider these vulnerabilities when making decisions or taking actions.

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<sup>148</sup> CRC/C/GC/14 (2013) para. 76.

<sup>149</sup> See for example CRC/C/GC/14 (2013), para. 41; CRC/C/GC/11 (2009), paras. 5, 25 and 30 and CRC/C/GC/9 (2007), para. 8

<sup>150</sup> Besson (2005) p. 433.

<sup>151</sup> CRIN (2009), Introduction.

<sup>152</sup> See for example CRC/C/MHL/CO/3-4 para 27 (b) and (c)

<sup>153</sup> This is often pointed out by the Committee in COB's, see for example CRC/C/SLB/CO/2-3 para. 19; CRC/C/PLW/CO/2 para. 21 (a), (c) and CRC/C/ARG/CO/5-6 para. 14.

<sup>154</sup> See for example CRC/C/GC/20 (2016) paras. 26-36 and CRC/C/GC/7 (2005) paras. 11, 12 and 13.

The vulnerability of the child is an essential element to consider when placing the child into alternative care pursuant to s. 4-12 (1). It is important that the new home is equipped with caregivers that can meet this particular child's vulnerability in a way that enhances the overall development of the child according to Article 6 of the Convention.

#### 4.2.7 The child's right to health and education.

Article 24 of the Convention assures the child's right to health and his or her health conditions are central in assessing the child's best interest.<sup>155</sup> Article 28 ensures the right to access to education. The child's right to development in Article 6 is closely connected to the right to health and education.<sup>156</sup>

CWA s. 4-12 (1) letters b) and d) concerns this aspect in that it allows for placement in alternative care if it is necessary and if the child's health and development might be seriously damaged because the parents cannot properly care for the child (letter d)) or if they do not make sure that a child who is sick or have special needs gets the treatment and training it needs (letter b)). This means that if health-, development- or educational issues are part of the underlying problem these elements must be considered in the best interests assessment when measure pursuant to sections 4-4 (2), (3) and 4-12 of the CWA are considered. During the investigation pursuant to s. 4-3 these elements may dictate what information to collect and from which instances, both for information necessary to assess the requirements in the different provision and for the best interests assessment.

### 4.3 **Balancing the elements in the best-interests assessment when making a decision.**

The basic best-interests assessment is a general assessment of all relevant elements of the child's best interests, the weight of each element depending on the others. Not all the elements will be relevant to every case, and different elements can be used in different ways in different cases. The content of each element will necessarily vary from child to child and from case to case, depending on the type of decision and the concrete circumstances, as will the importance of each element in the overall assessment.<sup>157</sup> It is essential here to again point out that the assessment of the best interests of the child and the balancing of the elements in relation to the CWA takes place after the application of the requirements in the different provisions to the facts in the case.

The balancing of element results in an understanding of what measure or course of action is in the best interests of this particular child in this particular situation. This may result in a deci-

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<sup>155</sup> CRC/C/GC/14 (2013), para. 77 and CRC/C/GC/15 (2013) paras. 12-15.

<sup>156</sup> See CRC/C/GC/1 (2001) para. 2.

<sup>157</sup> CRC/C/GC/14 (2013) para. 80.

sion to offer measures to assist pursuant to sections 4-4 (2) or (3) even though the requirements in s. 4-12 (1) and (2) are met, because this solution is considered to be in the best interests of the particular child.

The elements in the best-interests assessment may be in conflict when considering a specific case and its circumstances.<sup>158</sup> For example, the child's expressed wish to stay with his or her parents may conflict with the need to protect the child from the risk of violence or abuse by parents as prescribed by s. 4-12 (1) letter c).

During the investigation phase pursuant to s. 4-3 the question might be how to secure the child's views if the child is in a vulnerable situation when the CPS suspects negative social control to be an issue. Research shows that children subjected to strong patriarchal control might be afraid of reprisals.<sup>159</sup>

In relation to s. 4-4 (2) of the CWA the aim of the best interests assessment is to choose the right measure of assistance to offer to the child and the parents. In some situations care-altering measures may best serve the child's best interests. In other cases the vulnerability of the child might indicate that personal assistance to the child is necessary for enjoying the right to play or take part in leisure activities as stated in Article 31.<sup>160</sup> This is also true for the considerations in relation to s. 4-4 (3), but here the element of force that the provision opens for must be considered. What elements in the best interests assessment speaks for the use of forced measures designed to control and promote care-altering methods and which do not.

In situations where there is conflict between the elements, the Committee recommends the age and maturity of the child to guide the balancing of the elements. The CPS should take into account the physical, emotional, cognitive and social development of the child to assess the level of maturity of the child.<sup>161</sup>

In the best-interests assessment, the CPS has to consider that the capacities of the child will evolve. The CPS should therefore consider measures that can be revised or adjusted accordingly, instead of making definitive and irreversible decisions. To do this, they should not only assess the physical, emotional, educational and other needs at the specific moment of the decision, but should also consider the possible scenarios of the child's development, and analyse them in the short and long term. In this context, decisions should assess continuity and stabil-

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<sup>158</sup> CRC/C/GC/14 (2013) para. 81.

<sup>159</sup> Bredal and Melby (2018) p. 63.

<sup>160</sup> The significance of this right to the child's health and well-being is extensively discussed by the Committee in its General Comment No. 17 (2013). See for example section III of the General Comment.

<sup>161</sup> CRC/C/GC/14 (2013) para. 83.

ity of the child's present and future situation.<sup>162</sup> This precautionary principle means that the child welfare worker must try to see into the future. This represents a challenge in most cases, but assumptions based on child psychology, social science and research might provide some indication on the future development.

In weighing the various elements, the CPS needs to bear in mind that the purpose of assessing and determining the best interests of the child is to ensure the full and effective enjoyment of the rights recognized in the Convention, and the holistic development of the child.<sup>163</sup> In a Norwegian CPS context the aims of the measures are stated in CWA s. 1-1 and for measures pursuant to s. 4-4 in s. 4-4 (1). There is no contradiction, as I see it, between the rights in the Convention and the aims expressed in sections 1-1 and 4-4 (1). The Convention and the Committees General Comments provides a better operational frame of reference for the understanding of the content of s. 1-1 of the CWA.

Falch-Eriksen and Backe-Hansen sees the Convention, not only as a banner, but also as a toolkit that expresses a normative order, that is, a human rights standard for how to legitimately protect children.<sup>164</sup>

## **5 The best interests of the child as a guiding star in child welfare work – challenges to the translation from theory to practice.**

Data from Statistics Norway<sup>165</sup> shows that, in 2017, the CPS received 58 580 reports on concern. In 2017 the Norwegian CPS investigated 48 775 cases and 55 697 children received different measures of help from the child welfare services.

These children are entitled to their best interest being given decisive weight throughout the entire duration of their contact with the CPS.

The principle of the best interest of the child is vague and, in a CPS context, it is indefinable until it is seen in relation to a specific child in a specific situation. This vagueness allows it to be responsive in relation to different children in different situation. This vagueness also implies that the content of the principle of the best interests of the child must be well known to

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<sup>162</sup> CRC/C/GC/14 (2013) para. 84.

<sup>163</sup> CRC/C/GC/14 (2013) para 82.

<sup>164</sup> Falck-Eriksen and Backe-Hansen (2018) p. 2.

<sup>165</sup> <https://www.ssb.no/barneverng>

the individual CPS worker if it is to be practiced in conformity with the child rights-approach provided for by the Convention and in line with the Committee's general Comment No. 14.

The education of child welfare workers in Norway has its main focus on social sciences, pedagogy and psychology. Recent research on the knowledge of the Convention among practitioners in Norway shows that there is a lack of knowledge about the Convention. In a study on the subject in 2017<sup>166</sup> the findings indicated that the status and the force of the Convention within Norwegian law was still too little known by many essential professionals who in their daily work have an important role when it comes to translate the rights enshrined in the Convention and the recommendations of the Committee into practice.

A study from 2018 on the knowledge of the Convention of students participating in a web based education on the Convention and Children's Human Rights<sup>167</sup> indicates that the Convention still lacks the necessary force as an instrument for administrative practice; as an argument in discussions about prioritizing or as a guiding star for the daily interaction and work with children.<sup>168</sup> The study shows a need for further education for professionals on the subject.<sup>169</sup>

The vagueness of the principle together with this lack of knowledge may indicate that current CPS practice may not, in many cases, correctly apply the principle of the best interests of the child.

The Circular Letter issued by Bufdir refers to General Comment No. 14 of 2013, and that the assessment of what is in the best interests of the child shall be based on the following professional considerations: biological bonds, the quality of affiliation and relation or the caregivers ability to care for the child, the mildest effective measure and the child's participation. It is not very clear from the Circular Letter what the exact meaning of the best interests of the child is, or how the principle is to be applied in individual cases.<sup>170</sup> This is unfortunate since the Circular Letter is widely used by individual CPS workers as "the" tool of information on the CWA and related provisions.

In the future this may be remedied by a new Act explicitly mentioning the elements in the best interests assessment.<sup>171</sup> Educational measures has also been taken, and from autumn 2018

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<sup>166</sup> Kipperberg (2018) p. 71

<sup>167</sup> This is an additional or continuing educational program, and is offered to professional working with and for children such as in child welfare authorities, at the office of Fylkesmannen, in schools and so on.

<sup>168</sup> Kipperberg (2018) p. 80

<sup>169</sup> Kipperberg (2018) p. 79.

<sup>170</sup> Circular Letter section 1.1.1.2.

<sup>171</sup> NOU 2016:16 p. 54.

courses concerning the consideration of the best interests of the child started in Oslo Met and Høgskulen på Vestlandet.

It may be a reasonable assumption that the lack of knowledge of the Convention and in particular Article 3.1 may lead to the child's best interests assessment in the present most often is being performed in a subjective instead of a rational way. Research indicates the need for more practical tools to facilitate a more objective or neutral child's best interests determination.<sup>172</sup>

There already exist different tools to aide the best interests assessment. The Best Interests Questionnaire (BIC-Q) seems capable of generating a reliable and valid professional appraisal of the rearing circumstances in which children grow up.<sup>173</sup> Together with adolescents there has been developed a Best Interests of the Child Self-Report questionnaire (BIC-S).<sup>174</sup> The United Nations High Commissioner for Refugees handbook has compiled Guidelines on the determination of the best interests of the child. The tools therefor exist, but perhaps the knowledge of these tools is not widely known.

CPS workers have difficulties finding the time to talk to children, and the children finds it difficult to speak their mind to and be heard by the CPS.<sup>175</sup> Research as mentioned in section 4.2.2 indicates that the child is not always given the opportunity to make her or his views known. The discussion in section 4.2.3 shows challenges in the culture sensitivity when the CPS meets children and families with a minority background. NOU 2017: 12 indicates massive challenges within the CPS to secure the children's right enshrined in Articles 3.2, 19 and 32-39.<sup>176</sup>

The strategy for the Norwegian CPS for the period 2018-2024 aims at, inter alia, investigation and measures building on research and systematized knowledge of children's needs and what assistance that works; measures to assist is better adjusted to the individual child and children's participation is given more attention in both investigations and measures to aid.<sup>177</sup>

Whether this strategy leads to a better understanding of the principle of the best interests of the child within the Norwegian CPS witch again will lead to more decisions being in the best interests of the child, is for the future to tell.

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<sup>172</sup> Op de Beeck (2014) p. 6.

<sup>173</sup> Zijlstra et al (2012) p. 850.

<sup>174</sup> Ten Brummelaar et al (2014) p. 569.

<sup>175</sup> Forum for Barnekonvensjonen (2017) p. 20

<sup>176</sup> NOU 2017:12 chapter 6.

<sup>177</sup> Barne- og likestillingsdepartementet (2017) p. 9



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