

Children and Young People (Scotland) Bill

Written Evidence to the Education and Culture Committee

I welcome the introduction of the Children and Young People (Scotland) Bill and the Scottish Government's stated commitment to children's rights, and I am delighted to assist the Committee in its scrutiny of the Bill.

In my view, this Bill offers a real chance to make a lasting difference to the lives of children and young people in Scotland and meaningful progress towards full implementation of the United Nations Convention on the Rights of the Child (UNCRC). I believe, however, that the Bill as introduced should be more ambitious in this regard and that the Scottish Government should do more to fully grasp the opportunity to bring about a step change for children's rights.

General Comments

UNCRC incorporation and the Bill: the need for real action

The UK Government ratified the UNCRC in 1991, thereby voluntarily accepting the obligation in international law to give effect to all the rights set out in the Convention. All levels of government and public authorities are therefore already obliged to ensure the full realisation of all UNCRC rights for all children in the jurisdiction. Against this background, the Bill does no more than 'reflect' existing obligations¹.

A genuine commitment to children's rights requires the incorporation of the Convention into domestic law, giving it full and direct legal effect in Scotland, in policy and law-making, in the practice of public services, through the courts, and through culture change. At a minimum, the Government should give a commitment to incorporation with a clear timescale, coupled with meaningful legislative measures to ensure real progress in the meantime. I note that the Scottish Government has informed the Committee it has had to 'weigh up the benefits against the potential risks' of incorporation². I would encourage Committee members to request the details of that risk/benefit analysis to inform the Committee's scrutiny of the Government's arguments in this respect.

I share the Scottish Government's ambition for Scotland to be the best place in the world for children and young people. It is time to move beyond rhetoric and largely declaratory provisions. We should listen to the demands of children and young people³ and those working with and for them⁴ and take the steps required to honour our international obligations by incorporating the UNCRC into Scots Law. This is the most effective measure to ensure that the rights of children in Scotland are fully respected, protected and fulfilled. I would be happy to provide the Committee with further evidence on the benefits of incorporation ahead of my oral evidence on 1 October.

¹ Policy Memorandum, para 13.

² Education and Culture Committee, *Official Report*, 25 June 2013, Col. 2648.

³ Children's Parliament (2011), *Rights of Children and Young People Bill: A response from children facilitated by the Children's Parliament*, p. 6; Scottish Youth Parliament (2011), *Response to Rights of Children and Young People Bill Consultation*, p. 2.

⁴ Together (2012), *State of Children's Rights in Scotland*, p. 8f.

Children's Rights Impact Assessment

It is disappointing that the Scottish Government has not carried out a Children's Rights Impact Assessment (CRIA)⁵ on the Bill prior to its introduction in Parliament, despite repeated calls and offers of technical support for this process from the children's sector. The UN Committee on the Rights of the Child, which monitors implementation of the UNCRC globally, considers CRIA an essential part of policy development, a long-held position recently restated in its interpretative guidance on the UNCRC⁶.

A CRIA would have highlighted the likely positive and negative impacts including any unintended consequences of the Bill's provisions from a children's rights perspective, as opposed to the more limited compliance-focused perspective offered by the Government's Privacy and Equality Impact Assessments. This would have allowed for improvements to the Bill to be made. A CRIA on the whole Bill remains necessary, and I would urge the Committee to commission one now to inform its scrutiny of the Bill.

Comments on Specific Provisions

Part 1: Rights of Children and Young People

Short of incorporation, a strong ministerial duty is key to effective leadership on children's rights and to ensure that children's rights are an integral part of legislation, policy and guidance originating from central government. However, the duty on Scottish Ministers in s. 1 (1) of the Bill to 'keep under consideration whether there are any steps which they could take to give better or further effect to the UNCRC requirements' would not bring meaningful progress towards ensuring the Convention's full legal effect in Scotland. The duty appears to be concerned with 'keeping under review' the Government's overall 'approach to implementing the UNCRC'⁷, as nothing in s. 1 (1) indicates that Ministers would be required to consider children's rights in everything they do which affects children. This is not a practical and effective measure to advance children's rights, and it contains numerous qualifiers granting Ministers ample discretion. It is difficult to imagine an effective legal challenge to the exercise of the duty, which underlines the weakness of this provision. This is also a step back from the duty first consulted upon in 2011 and indeed from the key provision of the Welsh Measure that the Government has cited in support of a duty on Ministers⁸.

As most actions and decisions directly affecting children and families are taken at the local level, it is essential that a duty on Ministers is matched by a duty that would help develop an effective approach to children's rights closer to 'frontline' service provision. In s. 2 (1), the Bill provides a duty on other listed public authorities to report every three years on the 'steps...taken [by them] in that period to secure better or

⁵ Paton & Munro (2006), *Children's Rights Impact Assessment: The SCCYP Model*, Edinburgh: SCCYP.

⁶ UN Committee on the Rights of the Child (2013), *General Comment No. 14: The Right of the Child to have his or her Best Interests taken as a Primary Consideration*, CRC/C/GC/14, para 35.

⁷ For example, Policy Memorandum, para 44.

⁸ Rights of Children and Young Persons (Wales) Measure 2011 (nawm 2), s. 1 (1); cited in Scottish Government (2011), *Consultation on Rights of Children and Young People Bill*, para 57.

further effect within its areas of responsibility of the UNCRC requirements'. I welcome this provision in principle, although it should be accompanied by a duty to take action and clarity is required as what mechanisms for accountability would be put into place in respect of these periodical reports.

In order to come closer to meeting the Scottish Government's stated objective to 'make rights real'⁹, I would urge that:

- Ministers be pressed to make a commitment to incorporating the UNCRC into Scots Law, and specify a timescale in which they will do so;
- the duty on Ministers in s. 1 (1) be significantly strengthened through the parliamentary process;
- the reporting duty on other public authorities (s. 2) be augmented with a duty requiring action to advance children's rights by a comprehensive range of bodies whose functions affect children and families.

I welcome the duty on Ministers to promote awareness and understanding of the rights of children in s. 1 (2), which in effect transposes article 42 of the Convention into Scots Law, and I believe that this could have a significant positive effect. I would suggest that the financial provision in respect of this duty be scrutinised in order to ensure that it enables the comprehensive effort that is required to achieve a sound understanding of children's rights among children and young people and adults, including all professionals whose work affects children and young people.

Part 2: Commissioner's Powers of Investigation

I welcome the Scottish Government's proposal to amend my office's power of investigation to extend to individual cases brought by children and young people or on their behalf (s. 5). An individual investigation mechanism through the Commissioner's office could be a useful addition for children and young people in Scotland. Indeed, the UN Committee on the Rights of the Child advises state parties to set up such mechanisms¹⁰, although in addition to access to the courts rather than as an alternative¹¹. At present, litigation is expensive, inaccessible and mostly unavailable as the UNCRC rights cannot currently be relied upon directly in the courts. As a result, there is no meaningful mechanism for children and young people to seek redress for violations of their UNCRC rights. The Government aims to provide one such limited mechanism through the Commissioner's office.

The extension of my investigatory power would necessitate the setting up of a casework function, capable of dealing with a significant number of complaints. Of those complaints a small number may turn into larger scale investigations, but I anticipate that the bulk of my office's workload under this new function would be dealing with cases that fall short of a full investigation, as specifically provided for in what would be new s. 7 (5). It is important to emphasise, however, that these cases would also provide vital evidence, helping to build up a picture of rights issues arising

⁹ Scottish Government (2012), *A Scotland for Children*, Ministerial Foreword, p. 3.

¹⁰ UN Committee on the Rights of the Child (2002), *General Comment No. 2: The role of independent national human rights institutions in the promotion and protection of the rights of the child*, para 13, 19 (a).

¹¹ UN Committee on the Rights of the Child (2005), *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5, para 24f.

for children and young people across Scotland. Given the broad range of children's rights in the UNCRC, and the national remit of my office, it would be misleading to suggest that the work involved in handling these complaints at any level short of an investigation is likely to be 'marginal'¹².

This new mechanism would be additional to my existing statutory functions and I envisage that it would require significant changes to the way in which my office operates. The operation of a complaints function as described above would have been unjustified hitherto, given the nature, purpose and statutory framing of my existing power of investigation as one that is to be used exceptionally¹³ and in a manner not dissimilar to a public inquiry¹⁴ rather than a means of 'redress'¹⁵. Numerous respondents to the Government's consultation who supported this proposal made clear that such a function requires sufficient resources¹⁶. I share that view and consider that adequate resourcing of this new function is critical to delivering the quality of service that children and young people have a right to expect.

I am aware that the current costs in the Financial Memorandum are speculative¹⁷ and I am in discussion with Scottish Government regarding a realistic appraisal of the costs to ensure that the Scottish Parliament are reassured that sufficient resources are available to support this new function.

In the meantime, I would also wish to welcome the procedural changes in s. 6, and will continue to work with the Scottish Government and others to ensure that the legislative framework in Part 2 is further improved and strengthened.

Part 4: *Getting It Right for Every Child (GIRFEC)*

I continue to support the principles of GIRFEC and the Bill's proposal to roll out the Named Person role. However, my view is that full implementation of the Named Person requires significant investment of resources especially in the provision of a universal health visitor service. I welcome the provision in the Financial Memorandum for additional resources for Health Visitors, but they are insufficient and are required now, rather than later. For these reasons, I urge the Committee to closely scrutinise this aspect of the Bill to ensure that the aspirations for early years developments are matched by the resource allocation.

I am concerned about the introduction of the new information sharing duty on public authorities and service providers at s. 26, which has not been consulted upon¹⁸. My understanding is that the new test requiring information sharing where information 'might be relevant to the exercise of the named person functions' (s. 26 (2)(a)) would significantly lower the current thresholds for information sharing and substantially broaden the grounds on which such information sharing would occur. This is a shift

¹² Financial Memorandum, para 30.

¹³ Education, Culture and Sport Committee, *2nd Report 2002, Report on Report on Inquiry into the Need for a Children's Commissioner in Scotland*, paras 58-66; Commissioner for Children and Young People (Scotland) Bill Committee, *Official Report*, 4 February 2003, Cols. 18ff.

¹⁴ See, for example, the rather stringent procedural provisions in ss. 7-9 and Schedule 2.

¹⁵ Policy Memorandum, para 49.

¹⁶ E.g. Save the Children, SCRA, SHRC, Scottish Women's Aid, UNICEF UK, Together, SW Scotland CJA.

¹⁷ Financial Memorandum, para 30.

¹⁸ Indeed, *A Scotland for Children* stated in this context: 'the intention is that such information sharing would occur within existing legal frameworks' (para 120).

from sharing relevant information where there are concerns about the 'risk of harm'¹⁹ to sharing information where there are concerns about the 'well-being of individual children and young people'²⁰ – where 'well-being' is very broadly defined in terms of children being: Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible and Included (SHANARRI)²¹. This would appear to be a radical change to existing information sharing frameworks relating to children and young people.

It is crucial that the right balance is struck between the need to share information to protect and promote the child's wellbeing and the child's right to privacy (art. 16 UNCRC; art. 8 ECHR), taking account of the UNCRC's general principles including the best interest principle (art. 3) and children's right to be heard (art. 12). This has to be made clear in the Bill, with guidance reinforcing this point in practice. Where information is shared, such disclosure of personal information must be proportionate, appropriate and relevant.

Children value their privacy and confidential services, as is clear from numerous reports²² and recognition has to be taken of this fact. I believe this is a clear example of the need for a CRIA to be carried out on all of the Bill's provisions.

Part 8: Young People Leaving Care

The Bill proposes an extension of the powers for local authorities to support young people leaving care up to and including the age of 25 years, which I support although I feel that the provision in s. 60 should be strengthened. However, I am concerned for those young people who leave care at age 16/17 and who subsequently experience difficulties, often becoming homeless and on occasion imprisoned. In my view, the Bill should give young people who leave care aged 16-17 years and who subsequently become homeless a right to be looked after and accommodated by the local authority.

I trust these comments are of assistance to the Committee and look forward to engaging further with the Committee during stage 1 and beyond.

Tam Baillie

Scotland's Commissioner for Children and Young People

19 July 2013

¹⁹ National Guidance for Child Protection in Scotland 2010, para 93

²⁰ Policy Memorandum, para 73

²¹ Policy Memorandum, para 59

²² For example, ChildLine Scotland & Centre for Learning in Child Protection (2011), *Finding the balance: Children's right to confidentiality in an age of information sharing*; Morrison, C. (2008), *Our Journey: A report on a project exploring the interface between service responses to the needs of LGBT young people and child protection policy and practice*, Edinburgh: LGBT Youth Scotland, pp. 64, 73.