Proposed Rights of Children and Young People (Scotland) Bill

Policy Briefing, November 2011

Introduction
The Scottish Government’s legislative programme for this parliamentary session includes proposals for a Rights of Children and Young People (Scotland) Bill.¹ This is described as the ‘foundation stone’ for all subsequent legislation and is intended to set the strategic direction for respecting the rights of children and young people. The legislation is scheduled for introduction in Parliament in early summer 2012. The Scottish Government’s proposals are largely modelled on the Rights of Children and Young Persons (Wales) Measure 2011,² although there are some notable differences.

I welcomed the announcement of the proposals, and committed to working with the Government to help achieve the strongest possible legislation on children’s rights for Scotland’s children and young people. It is my view that the proposed bill provides a real opportunity for the Scottish Government to enunciate a bold vision for Scotland’s children and young people, which is based around a better understanding and fuller respect for their rights.

The purpose of this briefing is to inform and assist those who are considering the current consultation proposals and any future legislation. It outlines the main features of the Scottish Government’s proposals for legislation and highlights the main areas where the proposals could be improved.

Summary of the Scottish Government proposals
The Scottish Government proposes that a duty to have ‘due regard’ to the UNCRC be placed on the Scottish Ministers, covering all ministerial functions. Ministerial exercise of the duty to have ‘due regard’ would be subject to challenge through the court process of Judicial Review. The ‘due regard’ duty would not cover other public bodies that exercise many important functions that impact on children’s lives, for instance, Local Authorities and Health Boards.

¹ The consultation document Consultation on Rights of Children and Young People Bill is available here: http://www.scotland.gov.uk/Publications/2011/09/07110058/0.
² The Rights of Children and Young People (Wales) Measure Welsh Government,(2011)
The proposals would enshrine existing UNCRC rights in legislation, although it would not make existing rights more accessible or create remedies to challenge infringements of children's rights.

The proposals do not extend to incorporation of the UNCRC into Scots Law.

The proposals include a requirement on Ministers to report to Parliament on implementation of their duty.

The proposals do not place a duty on Scottish Ministers to promote awareness, knowledge and understanding of the UNCRC among children and young people, and the wider public.

The proposals do not make reference to ways in which children and young people would be involved in the processes that it seeks to introduce.

**Incorporation**

The consultation document does not currently propose to incorporate the UNCRC into Scots Law. However, I believe it is a step in the right direction towards the long term vision of incorporation beyond the proposals in the Bill. The UN Committee on the Rights of the Child, stipulates that incorporation involves: making the Convention applicable to domestic public authorities; ensures that it can be invoked in the courts; and provides effective remedies to address any violations.

The main reason cited by the Scottish Government for not proposing incorporation appears to be that it is subject to equality duties and has to comply with the ECHR, and that the Parliament has no power to pass legislation that runs counter to the requirements under the ECHR. This seems to suggest that children’s rights under the UNCRC are in opposition to the rights of others under the ECHR and that these two human rights conventions are somehow mutually exclusive. This is not the case.

On occasions where rights are in conflict, a human rights-based approach enables decision-makers to strike a fair and proportionate balance, taking due account of all relevant rights considerations. This is what the courts do on a daily basis when considering human rights cases. A number of European countries that are subject

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3 The UN Committee is an international panel of experts, which oversees the implementation of the UNCRC globally; its website outlines its main areas of work and contains a large amount of information and documentation: [http://www2.ohchr.org/english/bodies/crc/index.htm](http://www2.ohchr.org/english/bodies/crc/index.htm).


5 Consultation on Rights of Children and Young People Bill, at para 73.

to the ECHR have also incorporated the UNCRC,\(^7\) which suggests that ECHR obligations are not an obstacle to UNCRC incorporation.

**Duty to have ‘due regard’**

The proposed duty on Ministers to have ‘due regard’ to the UNCRC would be applicable across all Scottish Government functions. This is similar to the duty on Welsh Ministers, although it is wider in scope than Wales because of the wider devolved responsibilities held by Scottish Ministers.

‘Due regard’ is an existing legal concept used in a range of policy areas, prominently in the public sector duties established in UK equality law since 2000.\(^8\) There is a substantial amount of case law relating to the application of those duties, and there may be lessons from that for the present initiative of the Scottish Government to give the UNCRC greater prominence in the domestic law of Scotland. A recent judgment in the High Court of England and Wales discussed the key principles of the ‘due regard’ duty arising from the equality legislation, drawing on and affirming previous landmark judgments.\(^9\) The *Brown* principles\(^{10}\) in particular give helpful guidance as to what a duty to have ‘due regard’ entails, and they can be summarised as follows:

- The nature of the ‘due regard’ duty is chiefly, or even exclusively, about decision-making processes rather than their outcomes;
- The duty must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority. It is not a question of ‘ticking boxes’;
- The duty is continuous, and must be fulfilled before and at the time during which a particular decision is considered, rather than applied retrospectively;
- The duty cannot be delegated to a third party by the public authority charged with it;
- It is good practice for public authorities to keep an adequate record showing that they have considered their duty and all the matters that are relevant to the decision, including any relevant counteracting factors that were taken into account.

The proposed duty on Ministers would result in a requirement on Ministers and their officials to actively and demonstrably consider the implications for children’s rights under the UNCRC of their policy initiatives, legislative proposals, and funding decisions. They would have to approach this task with an open mind and on the basis of evidence.

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\(^8\) See the *Race Relations (Amendment) Act 2000* (c.34) for the first example of such a duty in respect of equality, and the *Equality Act 2010* (c.15) for its most recent, cross-strand application.


\(^{10}\) *R (Brown) v Secretary of State for Work and Pensions, Secretary of State for Business, Enterprise and Regulatory Reform* [2008] EWHC 3158 (Admin), at paras 90-96.
It is not proposed that the UN Committee’s *General Comments*,\(^{11}\) nor the Committee’s *Concluding Observations*\(^{12}\) are included under the ‘due regard’ duty. It is worth noting that these do feature in the Welsh Measure, and I suggest that it would be appropriate to include similar UN Committee documents in Scotland.

The duty would undoubtedly raise the profile of children’s rights across the functions of Scottish Ministers. However, it is not the same as a duty on Ministers to *act compatibly* with the rights guaranteed to children and young people by the UNCRC. In this regard, the proposed bill falls short of fulfilling children’s rights obligations, which Scottish Ministers and others have been subject to in international law since the UK ratified the UNCRC in 1991.

**Scope of the duty**
The Scottish Government’s proposals make clear that the scope of the duty to have ‘due regard’ applies only to Scottish Ministers and there is no current intention to include the decisions of public bodies.\(^{13}\)

A large share of decisions that directly impact on children and young people’s enjoyment of their rights under the UNCRC are made at the local level, by Local Authorities, Health Boards, and others. It is these local decisions made on a daily basis, along with the strategic decisions about national policy and budgets that need to be informed by systematic and thorough consideration of the rights of children and young people. The proposed duty to have ‘due regard’ could achieve more for children and young people if its scope were not to be limited to the national strategic level.

The Scottish Government should ensure that in any public function carried out by public bodies which are not under its direct control, children’s rights are protected and promoted effectively by local agencies. In my opinion, the arguments made in favour of a duty on central government apply equally to public authorities whose decisions impact on children and young people on a local level.

**Judicial Review**
Scottish Ministers’ application of the proposed duty to have ‘due regard’ to the UNCRC would be subject to the scrutiny of the courts through *Judicial Review*\(^{14}\). Judicial Review proceedings in Scotland are commenced by lodging a petition with the Court of Session. A petitioner has to show that they have ‘standing’ before they are allowed to commence Judicial Review proceedings. To do so they have to show that they are a ‘person [directly] affected by or having a reasonable

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\(^{11}\) The UN Committee’s 13 *General Comments* issued to date can be found here: [http://www2.ohchr.org/english/bodies/crc/comments.htm](http://www2.ohchr.org/english/bodies/crc/comments.htm).

\(^{12}\) The UN Committee’s UK Concluding Observations, 2008 can be found here: [http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC_C.GBR.CO.4.pdf](http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC_C.GBR.CO.4.pdf).

\(^{13}\) Consultation on Rights of Children and Young People Bill, at para 74.

\(^{14}\) Consultation on Rights of Children and Young People Bill, at para 35.
concern in the matter to which the application related’.\textsuperscript{15} The high level nature of the decisions covered by the proposed duty may render Judicial Review as a remedy for children’s rights issues remote and inaccessible. Complex processes and potentially very high costs are obstacles to Judicial Review being used. The focus of a ‘due regard’ duty on decision making processes means that Judicial Review of its exercise by Ministers is not an effective mechanism to challenge Minister’s substantive record on children’s rights in individual cases.

It is important to recall that the reasons for creating the UNCRC as a specific set of human rights that applies only to children where their relative immaturity that stems from their age and stage of development, their dependence on adults to meet their needs and protect their rights, and their relative lack of social, economic and political power. It is my view that the proposed legislation would do little to close the gap that exists in terms of accessible and effective remedies for violations of children’s rights in Scotland, and this will remain outstanding with the passage of the proposed Bill.

Regardless of this limitation, the Scottish Government needs to clarify whether legal aid would be available to children and young people who wish to challenge ministerial decisions by way of Judicial Review, where they consider that Ministers did not demonstrate ‘due regard’ to the UNCRC.

Power to amend legislation
The consultation document states clearly that Scottish Ministers do not intend to take a power to amend legislation by order to ensure compliance with the UNCRC. No reasons are given for the exclusion of such a power from the proposals, other than the Scottish Government’s belief that such changes are better made through Bills, including forthcoming children’s legislation in this session of the Scottish Parliament. It is worth noting that Ministers have such a power in relation to the ECHR,\textsuperscript{16} and the Welsh Measure, which the Scottish Government has cited as the example for its proposals, also provides such a power to Welsh Ministers.\textsuperscript{17}

I suggest that a power to amend, coupled with a duty or a commitment by Ministers to conduct a systematic and comprehensive appraisal of the UNCRC compliance of Scottish law, policy and practice, would have the potential to increase the positive impact of the proposed legislation on children and young people’s enjoyment of their rights in Scotland.

The role of children and young people in implementation
The Scottish Government is already under an international obligation under article 12 of the UNCRC to ensure that children have a chance to voice their opinions, and for their views to be taken into account and given due weight, in all

\textsuperscript{15} This test was introduced in the recent UK Supreme Court judgment in Axa General Insurance Limited and others v The Lord Advocate and others [2011] UKSC 46, per Lord Hope of Craighead, at para 63, and replaced the previous, more restrictive test of ‘title and interest’.

\textsuperscript{16} Part 6 of the Convention Rights (Compliance)(Scotland) Act 2001 (asp 7).

\textsuperscript{17} Rights of Children and Young Persons (Wales) Measure, s.6. Welsh Government,(2011)
matters that affect them. In my opinion, it would be consistent with article 12 for the forthcoming legislation to make meaningful proposals relating to children and young people’s participation in the shaping of the Bill and its implementation mechanisms, as well as in the shaping of future policy and legislation when it is expected to affect them. It is worth noting that Welsh Ministers are required to involve children in the preparation of the primary delivery mechanism of the Measure, known as the Children’s Scheme. The intention of the Children’s Scheme in Wales is that children and young people will be ‘continuously involved in the future implementation of the Measure as a whole.’

The Scottish Government could strengthen the participation of children and young people in decision making in Scotland through their involvement in the implementation of the proposed Bill and I suggest it should consider options on how this will be achieved.

**Parliamentary scrutiny**

The Scottish Government proposes to provide for a duty on Ministers to report on their performance of their proposed duty to have ‘due regard’ to the UNCRC to the Scottish Parliament every five years. This has the objective of improving parliamentary scrutiny of the Scottish Government’s exercise of the proposed duty. While the commitment to greater scrutiny and accountability is welcome, consideration needs to be given to the linkage of the reporting on the UNCRC to the UN Committee on the Rights of the Child. The intention is that reporting to Scottish Parliament is in line with the reporting commitments on the UNCRC to the UN Committee on the Rights of the Child. However, this may soon fall out of line with the UN reporting cycle due to significant delays in the UN’s Human Rights Treaty Body system at present. I suggest that a shorter reporting period to the Scottish Parliament would avoid this problem and provide more regular scrutiny of Scottish Ministers.

There is also a need for clarification as to the nature of the link between the reporting by Ministers to the Scottish Parliament and the UN reporting cycle. It needs to ensure that Scotland’s part in UK state party reporting does not solely become about Ministers’ exercise of their duty under the proposed legislation to have ‘due regard’ to the UNCRC. The focus for UN reporting should be the extent to which the Scottish Government and Scotland as a whole complies with the UNCRC, as it has been required to show by international law since ratification in 1991.

**Promoting awareness, knowledge and understanding**

The consultation document states that it is not the Scottish Government’s intention to include a duty on Ministers to promote knowledge and understanding of the UNCRC to children and young people and the wider public. The reasons given for the absence of such a proposal is, among other things, that ‘Scotland’s

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18 Rights of Children and Young Persons (Wales) Measure 2011, s.3 (4). Welsh Government, 2011
19 Draft Children’s Scheme Arrangements for having due regard to the UNCRC, Welsh Government, 2011, p3
Commissioner for Children and Young People is already under a very similar duty'.  

While there is such a duty under the Commissioner for Children and Young People (Scotland) Act 2003, this does not release the Scottish Government from its obligations under article 42 of the UNCRC. The UN Committee on the Rights of the Child has made it clear that this is primarily the duty of governments.  

The Scottish Government obligation to promote awareness, knowledge and understanding of the UNCRC cannot simply be ‘outsourced’ to the office of Scotland’s Commissioner for Children and Young People. It should be noted that the Welsh model for the proposed legislation does include such a duty on Welsh Ministers.

The UN Committee has recommended that state parties to the UNCRC develop a comprehensive strategy for disseminating knowledge of the Convention throughout society and this should include child-friendly publications and learning through the school curriculum. Further awareness-raising and competence-building measures, such as ongoing, high-quality and in-depth training and development programmes for Scottish Government staff, and other relevant groups of professionals, should also feature prominently in this.

Summary of main messages

The following are summary points on the proposed measures in the Scottish Government’s consultation document.

Main Message

I believe that the proposed Bill is a significant step in the right direction. The measures reaffirm the Government’s stated commitment to the UNCRC and send out an important message on the value the Scottish Government places on children’s rights across all functions of government. If accompanied by adequate implementation mechanisms, this will help to ensure improved compliance with the UNCRC.

However, there are several areas where I suggest the proposals can and should be improved.

Main Areas for Improvement

- The Scottish Government should restate its position on the mutually reinforcing relationship between the ECHR and the UNCRC, and respect and promote both, and this will assist progress towards the long term vision of incorporation.

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20 Consultation on Rights of Children and Young People Bill, at para 76.
21 UN Committee on the Rights of the Child (2002), General Comment 2: The role of independent human rights institutions, CRC/GC/2002/2, at para 19 (m) - (o).
22 Ibid, at para 19 (m).
23 See s.5 of the Rights of Children and Young Persons (Wales) Measure 2011
24 General Comment 5, at para 67.
• The Scottish Government should ensure that the application of the proposed duty to have ‘due regard’ is subject to robust and transparent requirements to maximise the potential impact of the duty.

• The Scottish Government should include the UN Committee General Comments and Concluding Observations to be covered by the duty to have ‘due regard’.

• The Scottish Government should reconsider the scope of the proposed duty, with a view to placing the same duty on other public bodies, such as Local Authorities and Health Boards.

• The Scottish Government should note the gap in effective and accessible remedies for children and young people to challenge any infringements of their rights under UNCRC and consider how this will be addressed in future.

• The Scottish Government should commit to review law, policy and practice in respect of UNCRC compliance and consider a power to amend through the proposed legislation.

• The Scottish Government should propose meaningful ways in which children and young people could be involved in the implementation of the proposed legislation.

• The Scottish Government should rethink its proposals for parliamentary scrutiny, with a view to ensuring greater frequency, accountability and clarity with regard to the link with UN reporting.

• The Scottish Government should include a duty on Ministers to promote awareness, knowledge and understanding of the UNCRC to children and young people in particular and to the general public of Scotland.

**Conclusion**

The proposals are welcomed, and can be strengthened in a number of areas as outlined. The real test will be the extent to which the proposals have a demonstrable impact on legislation, policy and practice, in respect of children and young people. This should be evidenced through the better realisation of rights embodied in the UNCRC, and in doing so, improve the lives of children and young people in Scotland.

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