

**Education and Culture Committee  
Children and Young People (Scotland) Bill**

**cl@n childlaw**

## **Introduction**

1. Cl@n childlaw is a unique legal advocacy service delivering free legal advice and representation to children and young people, who would otherwise have found it very difficult or impossible to access the legal help that they require. We help those up to the age of 18, or 21 if they have been looked after children. We deliver specialist training in child law and contribute to policy development in relation to the realisation of rights for children and young people across Scotland through our evidence based Policy Development Unit. In our evidence, we have concentrated on specific parts of the Bill on which we feel that we have a particular contribution to make. However, there are certain matters which we wish to comment on which are of general application throughout the Bill:
  - We are extremely disappointed that no child rights impact assessment (CRIA) has been undertaken in respect of the Bill. A CRIA would identify and measure the effect of the legislation on children and young people, and would be a valuable resource to the Education and Culture Committee in their consideration of the Bill.
  - The Bill does not provide sufficiently for participation and engagement of children and young people in many parts, in relation to, for example, planning and delivery of services and the role of the corporate parent. There is insufficient focus on duties to promote the rights of children and young people throughout the Bill.
  - There is a lack of coherence across legislation. In many respects, for example, it is difficult to see how the provisions of the Bill mesh with those of the Children's Hearings (Scotland) Act 2011.

## **Part 1 – Rights of Children**

2. We welcome proposed legislation which strengthens the position and heightens awareness of the UNCRC in Scotland. Reference is made to our responses to the Consultation on the Rights of Children and Young People Bill<sup>1</sup> and the Consultation on the Children and Young People Bill.<sup>2</sup> We wish to see further realisation of children's rights in Scotland, and welcome the Scottish Government's statement,

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<sup>1</sup> cl@n childlaw response to Consultation on Rights of CYP Bill:  
<http://www.scotland.gov.uk/Resource/0038/00386685.pdf>

<sup>2</sup> cl@n childlaw response to Consultation on CYP Bill:  
<http://www.scotland.gov.uk/Resource/0040/00406431.pdf>

that “the heart of our approach is the aim of making real the rights of children and young people.”<sup>3</sup> We note the policy objectives of the current Bill include “ensuring [children’s rights] are respected across the public sector” (para 2) and that “The Scottish Ministers view the Bill as an important opportunity to make rights more ‘real’ for children and young people in Scotland. This means empowering children themselves to exercise their rights.” (para 45)

3. To date, the UNCRC has not been incorporated into UK or Scots law. Such a treaty ratified by the United Kingdom is, however, binding on the United Kingdom as a party to the treaty. Article 4 of the UNCRC is in the following terms: “States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention.” In a letter dated 29<sup>th</sup> August 2012, the Minister of Community Safety and Legal Affairs stated: “In Scotland, we are committed to enshrining the principles of the Convention into domestic law and policy wherever possible. However, we also believe that incorporation is best achieved on a case by case basis, and are not of the view that wholesale incorporation of the UNCRC into domestic law represents the best way to progress our approach to children’s rights at this time.”<sup>4</sup> Such an approach has, however, led to inconsistent implementation of the UNCRC, with correspondingly inconsistent outcomes for children and young people.<sup>5</sup>
4. Against that background, we are disappointed that the proposed duties on Scottish Ministers in section 1(1), to “keep under consideration” how to secure better effect of the UNCRC, and to take appropriate steps to do so, are little more than a reflection of the existing international obligations of the state (see Article 2 UNCRC).
5. It may be thought that judicial review of Scottish Ministers’ decisions will be slightly more likely, or easier, in light of the proposed section 1(1) duties. However, our view is that it may already be possible to challenge decisions and actings of the Scottish Ministers which are not in accordance with the provisions of the UNCRC, by means of judicial review, on the basis that the UNCRC gives rise to legitimate expectations<sup>6</sup>. No other means for legal redress for children and young people facing violations of their rights are proposed in the Bill. The proposals in Part 2 do not amount to legal redress. There are significant disadvantages in relying on judicial review as the only

<sup>3</sup> SG Consultation CYP Bill: <http://www.scotland.gov.uk/Resource/0039/00396537.pdf>

<sup>4</sup> <http://www.togetherscotland.org.uk/pdfs/Scottish%20Government%20UPR%20response%2029-08-2012.pdf>

<sup>5</sup> Together (2012) State of Children’s Rights report: <http://www.togetherscotland.org.uk/pdfs/TogetherReport2012.pdf>

<sup>6</sup> cl@n childlaw response to Consultation on Rights of CYP Bill: <http://www.scotland.gov.uk/Resource/0038/00386685.pdf>

remedy<sup>7</sup>. In any event, children experience difficulties generally in obtaining legal aid.<sup>8</sup>

6. There is no proposal in the Bill for any systematic consideration of securing better effect of the UNCRC, leaving consideration and the taking of any steps at the Ministers' discretion. It is not proposed that there are any duties on public authorities, other than reporting duties in section 2. Those reporting duties would allow public authorities to report that they had taken no steps towards furthering the UNCRC, without any sanction. We would welcome the use of child rights impact assessments across decision making processes.
7. In conclusion, whilst we welcome any proposal which has the effect of strengthening the position of the UNCRC in Scotland, we do not think that the duties in Part 1 go far enough. We would strongly support any proposal whereby the provisions of the UNCRC were incorporated into Scots Law and were thereby directly actionable in Scottish courts. Cl@n childlaw would like to see duties imposed on **Scottish Ministers and on all public bodies** which concentrate on both **process** and **outcomes** which will make children's rights real in Scotland. The imposition of such duties would be clear legislative realisation of the policy objectives for the Bill, which is unlikely to be achieved by means of the current proposals.
8. We welcome the duty set out at section 1(2) of the Bill, which makes the existing duties under Article 42 of the UNCRC explicit in legislation. We would like to see some indication of how it is proposed to measure the performance of this duty. The performance of the duty could also be strengthened by a commitment to the placing of children's rights at the heart of the school curriculum, possibly by the national adoption of the Rights Respecting Schools initiative<sup>9</sup>.
9. We are of the view that the Children and Young People Bill represents a clear opportunity for the actual realisation of children's rights in Scotland, rather than merely a restatement of international obligations which already exist. We would like to see a more ambitious programme of actual realisation of children's rights in the proposed legislation. We would strongly support any proposal whereby the provisions of the UNCRC were implemented in Scots Law and were thereby directly actionable in Scottish courts. However, we acknowledge that some measures of realisation could be achieved through various legislative provisions, although our clear preference in the longer term is for full incorporation of the UNCRC.
10. Against that background, we would, at the minimum, like to see the core principles of the UNCRC (Non-discrimination, Protection, Development & Participation) on the face of the Bill, along with the following specific measures:

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<sup>7</sup> cl@n childlaw response to Consultation on Rights of CYP Bill:

<http://www.scotland.gov.uk/Resource/0038/00386685.pdf>

<sup>8</sup> cl@n childlaw FOI analysis: <http://clanchildlaw.org/2013/05/legal-aid-for-children/>

<sup>9</sup> <http://www.unicef.org.uk/rrsa>

- The best interests of the child to be the paramount consideration in all actions undertaken by Scottish Ministers and public bodies concerning children, unless it is necessary to make a decision inconsistent with the paramountcy of the child's welfare, in which case the best interests of the child should be a primary consideration rather than the paramount consideration.
- The child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the child's age and maturity.
- All children have the right to advocacy services to assist them in the expression of those views. We would also welcome the registration of Child Advocacy Services who are required to adhere to Minimum Standards and a Code of Practice.
- Independent complaints procedures are established to enable children whose rights have been violated to seek redress. Legal Aid is made available to children to enable them to pursue remedies in court. The restrictions on financial eligibility of children, introduced by regulations on 31<sup>st</sup> January 2011, are removed.
- A child who is not living with a parent, or who is not living with a sibling, has the right to maintain personal relations and direct contact with the parent or with the sibling on a regular basis. Where a child is looked after, the local authority has a duty to promote, on a regular basis, personal relations and direct contact between the child and the parent, or between the child and the sibling. Appropriate provision is made for the child to apply to the court or children's hearing for an order for, or condition of contact.
- The Antisocial Behaviour etc. (Scotland) Act 2004 is amended to abolish Antisocial Behaviour Orders for 12 to 15 year olds. These orders are rarely used.
- Section 51 of the Criminal Justice (Scotland) Act 2003 is repealed. Parental physical punishment is an assault. The concept of "justifiable assault" is removed from legislation. Children are given the same protection from assault as adults.
- The age of criminal responsibility is raised from 8 to 12.

## **Part 2 – Commissioner for Children and Young People in Scotland**

11. We broadly welcome the proposed extension of the Commissioner's powers. We note that the Government considers that it is "highly likely that any investigation process will be more accessible and child friendly than a judicial process"<sup>10</sup>. That may be so. However, no effective redress will be provided by means of extended powers of investigation. We would rather see the estimated extra expenditure of

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<sup>10</sup> Para 54, Policy Memorandum

£162,000 p.a.<sup>11</sup> directed towards providing equitable access to legal redress, by making legal aid more readily available for children and young people, thereby securing better actual realisation of their rights.

#### Part 4 – Provision of Named Persons

12. The focus of the Bill appears to be more on information sharing among professionals than on the service the named person should provide to the child of young person. We would welcome a strengthening of the duties on the named person in relation to the rights of the child.

13. We have very grave concerns about the proposals on **information sharing** contained in the draft Bill. In the original Consultation, it was envisaged that “information sharing would occur within existing legal frameworks.”<sup>12</sup> There has been no consultation on the proposals now contained at sections 26 and 27. Effective pre-legislative scrutiny has not taken place.<sup>13</sup> The Privacy Impact Assessment took place before the current proposals were made.

14. A child has a right to confidentiality. That right is central to decisions to share information. Information given in confidence should not generally be shared, subject to certain limited exceptions: (1) if the child gives consent; or (2) if there is no consent, only if that lack of consent can be overridden in the public interest; or (3) if there is a legal obligation to breach confidentiality. The public interest will include where there are child protection concerns, that is, a risk of significant harm. Should the current proposals be implemented, we have the following concerns:

- Children and young people will be reluctant to access and engage with confidential services if they feel that information is likely to be shared without their consent.
- Professionals will be likely to share more information than is necessary and proportionate, in breach of children’s privacy rights under Article 8 ECHR and Article 16 UNCRC.
- Decisions about wellbeing of children and likelihood of harm or significant harm to children will be flawed, and lacking in transparency. Important information will be lost amongst the “white noise” of large quantities of information being shared. Children and their families will not be consulted fully on what information should be shared and with whom. Vulnerable children will be placed at risk.

<sup>11</sup> Para 34, Table 7, Financial Memorandum

<sup>12</sup> Para 120, SG Consultation CYP Bill: <http://www.scotland.gov.uk/Resource/0039/00396537.pdf>

<sup>13</sup> Para 2.3, Guidance on Public Bills: [http://www.scottish.parliament.uk/S3\\_Bills/GuidanceonPublicBills.pdf](http://www.scottish.parliament.uk/S3_Bills/GuidanceonPublicBills.pdf)

- No mention is made of consideration of the child's views or of the child being asked for consent to share.
- The proposed duties include no threshold at which information must be shared with and through the named person. Information will be shared based on a subjective consideration by the information holder that sharing is relevant in order to promote, support or safeguard the wellbeing of the young person. The current proposal might be interpreted to legislate for the sharing of any information about any child or young people.
- There is nothing in current legislation that prevents proportionate and relevant information being shared about children and young people where it is in their best interests to protect them. Problems with information sharing can be successfully addressed through training and clear practical guidance for professionals. Evaluation of GIRFEC pathfinder suggests that processes around information sharing and the named person led to improvements in consistency and quality of information shared, with no concerns arising around existing legal frameworks.

## **Part 8 – Aftercare**

15. We are disappointed that the proposed amendments to section 29 of the Children (Scotland) Act 1995 do not impose stronger duties on local authorities to support previously looked after children up to the age of 26. For those under 19, they still have to be looked after at or after reaching school leaving age. The onus is still on the young person over 19 to apply to the local authority. That depends on the young person being aware of their right to apply. Much appears to be left to the discretion of the local authority, after assessment. "Eligible needs" are not yet defined. We would like to see a much stronger commitment to the support of this most vulnerable group of young people.

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**15 July 2013**