

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

Faculty of Advocates

EXECUTIVE SUMMARY

The focus of the Faculty of Advocates' evidence is on the legal effects of the proposed Bill and its coherence with other aspects of the law. The Faculty appreciates the commitment of the Parliament to the welfare of children and young people but has reservations about the efficacy of the proposed legislation to advance the interests of children and young people. The Bill proposes an assumption by the state of functions that have historically in Scotland been the responsibility of parents. The proposed measures place an overlay on an existing structure and measures that are already in place, without specifying how they are designed to function in relation to existing measures.

Part 1 - Rights of Children: This part of the Bill lacks coherence and seems to promote an over-complicated, uncertain and fragmented approach to ensuring that the United Nations Convention on the Rights of the Child is intrinsic to Scottish public life going forward. The Convention has been signed and ratified by the UK Government and so the United Kingdom is already bound in international law to comply with it. The obligation for the Scottish Ministers to lay a report before the Scottish Parliament every three years setting out how the Scottish Ministers have complied with their obligations is otiose given the existing reporting obligation under the Convention.

Part 2 - Commissioner for Children and Young People in Scotland: The Faculty has no overarching concerns about this part of the Bill. It seems to make sensible and coherent proposals for the protection of Scottish children. It is not clear why responsibility for the monitoring of the implementation of the provisions of the Convention has not also been given to the Commissioner rather than relying on the fragmented approach set out in Part 1 of the Bill.

Part 3 - Children's Services Planning: If it is intended that the children's services plan include education services provided by a local authority, the Faculty considers such intention should be clearly and expressly stated. The onerous obligations imposed on local authorities and other service providers in preparing plans every three years can only be met if there are sufficient resources both to provide the services to children and to provide the reporting on such provision. The Faculty is concerned that the terms of clause 17 are both wide and far reaching and appear to misunderstand the nature of the functions conferred on a local authority, a health board or any other service provider by Part 3 of the Bill. The Faculty considers that clause 17 purports to allow the Scottish Ministers to transfer the delivery of services to such a joint board, where the primary responsibility for delivery of services is not conferred by the Bill, but by other legislation. Clause 17 has the potential for confusion and legal challenge.

Part 4 – Named Persons: This part of the Bill dilutes the legal role of parents, whether or not there is any difficulty in the way that parents are fulfilling their

statutory responsibilities. It undermines family autonomy. It provides a potential platform for interference with private and family life in a way that could violate article 8 of the European Convention on Human Rights. The Faculty accepts that there may be cases where a 'named person' will be of assistance but the provision is not focused on the children for whom the measure would be helpful and it does not cohere with other similar measures for such children. No attempt is made in the Bill to integrate the role of a named person with similar roles when other services are provided.

Information sharing: It is not necessary to violate the right to privacy and abrogate the data protection rights of all children and families in Scotland. The open transfer of data in the manner contemplated in the Bill represents a serious intrusion on individual rights. The data protection principles set out in the Data Protection Act 1998 were developed to secure an appropriate balance between the need to process information and the need to protect the rights of the subject or source of the information. It is not clear how that balance is achieved in these proposals, which may in any event relate to matters reserved to Westminster.

Part 5 - Child's Plan: The Faculty suggests that such a child's plan should only be made where no other statutory plan is in place for the child. The Faculty considers the definition of "wellbeing need" to be so wide as to apply to every child in Scotland. Part 5 provides no mechanism for assessment of whether a child has a wellbeing need. Where there is no period for assessment, no provision for request for assessment and no provision for ongoing assessment of every child in Scotland, the time limiting provisions of clause 33 (2) are meaningless. The Faculty respectfully questions whether, if Part 5 is to be made law, it is necessary to exclude children who have a parent who is a member of the regular forces. Co-operation already exists between local authorities, the Reporter to the Children's Hearing and the armed forces in cases where a prospective member of the armed forces is subject to a compulsory supervision order.

Part 6 - Early Learning and Childcare: The Faculty queries the necessity for this Part of the Bill. Section 1(1A) of the Education (Scotland) Act 1980 already allows the Scottish Ministers to prescribe the children for whom pre-school education must be made available. Section 1(1B) allows the amount to be prescribed. Using the Bill to achieve these objects fragments the provision over different legislation. The facility to offer alternative arrangements for pre-school children is also already met by section 27 of the Children (Scotland) Act 1995.

Part 7 – Corporate Parenting: Children do not need "corporate parents". These provisions are equating parents with corporate entities. If this part of the Bill were to become law it might be thought to be an intrusion on families' lives and on natural parenting. It is difficult on the basis of the content of the Bill to appreciate how the statutory framework proposed is going to provide a basis for the stated policy goals to be achieved. The duties of corporate parents are broadly defined. Many are vague in their terms. The policy behind the Bill appears to be diluted by the selective approach taken to identifying which public bodies are to be burdened with the corporate parenting duties. The Bill as drafted does not make clear the extent to which corporate parenting duties are enforceable by legal action. Actions for judicial review may conceivably be brought on the basis a corporate parent has failed to fulfil

their duties. It is easy to conceive of a legal battleground emerging in relation to how the statutory duties are to be interpreted in the context of the qualification that the duties are to be exercised by the corporate parents “in so far as consistent with the proper exercise of its other functions”.

Part 8 – Aftercare: The extension of section 29 of the Children (Scotland) Act 1995 to confer a discretion to provide after-care to young persons who were formerly looked after by a local authority is extended to the age of 26. This gives formerly looked after children an advantage over children brought up by their own parents in extending the provision of assistance, potentially including financial assistance, beyond the age at which aliment provided by parents ceases (that being age 25). Unless the confusion as to which local authority is responsible (i.e. the one where the young person is present or the one which last looked after the young person) is resolved there is a risk that the new measures will be less effective than the Scottish Parliament intends.

Part 9 – Counselling Services: No definition has yet been provided of who is to be considered an “eligible child”, so it is difficult to consider in any meaningful way the impact this proposed part of the legislation will have.

Part 10 – Support for Kinship Care: In clause 65 (3), a “guardian” is excluded from being considered a “qualifying person” for the purposes of clause 65(1). The person who is a guardian, is exactly the kind of person who may benefit from access to the support being considered in this part. There is some confusion in the definition of “kinship care order”. The right in section 2(1)(a) of the Children (Scotland) Act 1995 is not “free standing”, being one of a number of rights that exist in order to enable a person to fulfil parental responsibilities.

Part 11 - Adoption Register: The Faculty notes the increase in children placed for adoption in 2010/11 but opines that increase was more likely the result of the introduction of the Adoption and Children (Scotland) Act 2007 in 2009 and not as a direct result of the establishment of the voluntary national register. In the context of contested adoption proceedings it is unlikely that a parent will consent to their child’s details being included in the proposed statutory register as required by clause 13C(2)(a). The Faculty is concerned that delays will be caused in identifying adoption placements for such children.

Part 12 – Other Reforms: The definition of “relevant person” in clause 71 for the purposes of an appeal under section 44A of the Criminal Procedure (Scotland) Act includes persons who are “deemed” to be “relevant persons” in the children’s hearing where the child is subject to a compulsory supervision order. However it does not include the full range of persons who fall within the statutory definition of “relevant person” in section 200 of the Children’s Hearings (Scotland) Act 2011.

Part 13 – General: The Faculty questions whether enshrining the policy of Getting it Right for Every Child in terms of clause 74 is necessary or appropriate. The use of “wellbeing” to signify these objectives, risks detracting from the standard and well-understood test relating to welfare or best interests of children. There is a well-developed case law on welfare and best interests which is found in areas such as

family law, child law and immigration law. Introducing a new, but related, concept may cause confusion.

FACULTY OF ADVOCATES RESPONSE

General

1. The Faculty of Advocates is the independent bar in Scotland. It exists, not for its own benefit, nor the benefit of its members, but to serve the public interest by securing to the people of Scotland the benefits of an independent referral bar. The Faculty has unrivalled general experience in litigation in the civil courts of Scotland and also includes members with particular experience and expertise in the law relating to children and young people. It is on the basis of that experience and expertise that the Faculty of Advocates offers written evidence to the Scottish Parliament in relation to the proposed Children and Young People (Scotland) Bill. The Faculty does not comment on matters of policy, as these are for the Parliament. The focus of the Faculty's evidence is on the legal effects of the proposed Bill and its coherence with other aspects of the law.
2. The Faculty of Advocates appreciates the commitment of the Parliament to the welfare of children and young people. The Faculty does however have reservations about the efficacy of the proposed legislation to advance the interests of children and young people. It is, of course, for the Parliament to determine policy, but policy does not require to be stated in legislation. The function of legislation is to provide a legal framework within which policy is given effect. The law requires to be certain and to be enforceable. Aspects of the present Bill are statements of policy and as such are neither certain, nor enforceable for the benefit of children.
3. While the intentions of the Bill are clearly benign, it does have some potentially insidious aspects. It proposes an assumption by the state of functions that have historically in Scotland been the responsibility of parents. State intervention in the private and family lives of its citizens should be confined to cases where this is "necessary in a democratic society" (to use the words of article 8 of the European Convention on Human Rights). This means that interference in the individual case should be justified by a pressing social need and should be proportionate to the need in that case. By making indiscriminate provision for possible interference in the lives of all children, rather than providing for focused intervention when the need arises, the Bill risks enshrining a structure that has the potential to be used to undermine families.
4. This brings us to a third aspect of the Bill that causes concern. The proposed measures place an overlay on existing structure and measures that are already in place, without specifying how they are designed to function in relation to existing measures. This is particularly so in relation to parental responsibility for children, but also applies to existing provision for local authority and children's hearing interventions under the Children (Scotland) Act 1995 and the Children's Hearings (Scotland) Act 2011, and the interventions in relation to additional support needs in the Education (Additional Support for Learning) (Scotland) Act 2004 (as

amended in 2009). There is a risk of confusion and inefficiency, which will be to the detriment of children and families.

Part 1 - Rights of Children

5. The Faculty does not consider that Part 1 of the Bill further develops the rights of children and young people in Scotland to a significant extent. Reference is made to the Faculty's response of 29 November 2011 to the Consultation Paper in relation to the then proposed Rights of Children and Young People Bill. As noted in that response, the United Nations Convention on the Rights of the Child ("UNCRC") has been signed and ratified by the UK Government and so the United Kingdom is already bound in international law to comply with it. In relation to devolved matters¹, it is the responsibility of the Scottish Government to comply with the United Kingdom's obligations in international law and where Convention rights are at issue, they may be justiciable in the Scottish Courts.² The Scottish Government has already published reports on the implementation of the UNCRC in Scotland and the 2007 Report³ concluded that "it is the policy of the Scottish Executive to reflect the provisions of the Convention wherever possible in the development of policy and legislation". Assuming that the Scottish Government continues in good faith to adhere to and implement that commitment, this part of the Bill should therefore be unnecessary to ensure that all decisions of the Scottish Government and its day-to-day business have regard to the Convention. Although clause 1 may provide scope for judicial review of the Scottish Ministers in some circumstances, the Faculty questions the added value which this part of the Bill would make to the rights of children and young people having regard to the following factors:

- As services for children and young people are delivered at a local level by local authorities and other public bodies, the possibility of judicial review of a Scottish Government decision is of limited value in terms of actual service delivery;
- The Scottish Government's policy is already to reflect the provisions of the Convention in the development of policy and legislation; and
- The Scottish Government have reported and intend to continue to report on the implementation of the Convention in Scotland.

¹ The Faculty notes in passing that at present, the ability or otherwise of the Scottish Ministers to take any steps to promote the "Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict" in Scotland is likely be constrained by the fact that defence is a reserved matter in terms of Schedule 5 of the Scotland Act 1998. In any event, the main thrust of the Optional Protocol is to prevent compulsory recruitment of persons under 18 into the armed forces as well as their direct involvement in hostilities. Regulation 4 of the Armed Forces (Enlistment) Regulations 2009/2057 provides that a person cannot be enlisted under the age of 16 and regulation 5 provides that a person cannot be enlisted under the age of 18 without the consent of a person with parental responsibilities. Furthermore, a person cannot be enlisted unless they 'offer' to do so which militates against compulsory recruitment. In practice, members of the armed forces do not see active service until they are 18 years of age.

² See ZH (Tanzania) [2011] 2 WLR 148

³ A Report on the implementation of the UN Convention on the Rights of the Child in Scotland 1999-2007

6. Clause 1(3) imposes an obligation on the Scottish Ministers to lay a report before the Scottish Parliament every three years setting out in essence, how they have complied with their obligations under sub-clauses 1(1) and 1(2). There is of course already a requirement in section 10 of the Commissioner for Children and Young People (Scotland) Act 2003 to lay an annual report before the Scottish Parliament. That report must include a review of the steps taken to fulfil each of the functions of the Children's Commissioner for Scotland (the "Commissioner") (section 10(2)). The general function of the Commissioner to promote and safeguard the rights of children and young people (subsection 4(1)) is subject to particular requirements in subsection 4(2) to:
 - promote awareness and understanding of the rights of children and young people;
 - keep under review the law, policy and practice relating to the rights of children and young people with a view to assessing the adequacy and effectiveness of such law, policy and practice
 - promote best practice by service providers; and
 - promote, commission, undertake and publish research on matters relating to the rights of children and young people.
7. In addition section 5 of the Commissioner for Children and Young People (Scotland) Act 2003 provides at subsection 5(2), that: "The Commissioner must have regard to any relevant provisions of the United Nations Convention on the Rights of the Child."
8. There would seem therefore to be a high degree of overlap between the report proposed in terms of clause 1(3) of the Bill and the report which the Commissioner is charged with laying before the Parliament.
9. Indeed, the way in which the Scottish Ministers comply with their obligations in terms of clause 1 including the very production of the triennial report proposed by the Bill, would it seems to us, also be subject to the scrutiny of the Commissioner.
10. As well as overlap there seems to be a certain circularity in these provisions and it is not immediately clear to us what mischief they seek to remedy given the role of the Children's Commissioner.
11. Further, in terms of Article 44 of the Convention, the United Kingdom has undertaken to submit a report to the UN Committee on the Rights of the Child every 5 years. That report is to inform the UN Committee on measures adopted by the United Kingdom to give effect to Convention rights and progress made on the enjoyment of those rights. That being so, to avoid duplication of effort, if there is to be any such report submitted by the Scottish Ministers, it would make sense for that report to be timed so as to feed in to the report of the United Kingdom Government to the UN Committee.
12. Clause 2 of the Bill obliges each of the authorities listed in Schedule 1 (per clause 3) to publish (separately or jointly) a report of "what steps it has taken in that

period to secure better or further effect within its areas of responsibility of the UNCRC requirements.”

13. In the first place, the basis for inclusion on the list in Schedule 1 as presently drafted is unclear. Secondly, the Faculty cannot understand why a Schedule 1 authority is required to publish a report on what steps it has taken to secure better or further effect of UNCRC requirements, yet there is no corresponding duty imposed to take such steps. This too seems to us to lack coherence.
14. The list of authorities in Schedule 1 may be modified by the Scottish Ministers (subclause 3(2)) to include what is described as a ‘publicly owned company’. A publicly owned company is defined as any company which is either wholly owned by the Scottish Ministers or is itself a person “listed or a person within a description listed in schedule 1” (subclause 3(5)). The categorisation of a publicly owned company as suitable for inclusion in schedule 1 by reference to the fact that it is already so included lacks coherence.
15. In addition, given the role of the Commissioner set out in subsection 4(2)(c) of the Commissioner for Children and Young People (Scotland) Act 2003 (*supra*) and having regard to the definition of ‘service providers’ therein, this provision again seems to us to create an area of overlap with and repetition of the role of the Commissioner. Instead of assuring the gradual absorption of the principles of the Convention into Scottish public policy, the Faculty is of the view that the effect of the Bill as drafted can only lead to a confusion of responsibilities which will delay or prevent its assimilation or at the very least, lead to an inconsistency of approach by different schedule 1 authorities.
16. As presently drafted, this part of the Bill is unnecessary, lacks coherence and seems instead to promote an over-complicated, uncertain and fragmented approach to ensuring that the Convention is intrinsic to Scottish public life going forward.

Part 2 - Commissioner for Children and Young People in Scotland

17. Part 2 of the Bill amends the Commissioner for Children and Young People (Scotland) Act 2003 to extend the investigative powers of the Commissioner. In terms of the Bill the Commissioner is empowered to carry out investigations into the decisions made or actions taken by service providers which affect not just children and young people in general (a “general investigation”) but also a particular child or young person (an “individual investigation”).
18. In addition, the Commissioner will now be empowered to require a response from service providers to recommendations he may make in a report to Parliament. That power is subject to a requirement on the Commissioner to publish any service provider statements made in response although that requirement is discretionary in respect of individual investigations.
19. The Faculty understands the reasons for the broadening of the Commissioner’s remit in this regard and have no overarching concerns about Part 2 of the Bill which seems to us to make sensible and coherent proposals for the protection of

Scottish children. It is not clear why then, responsibility for the monitoring of the implementation of the provisions of the Convention has not also been given to the Commissioner rather than relying on the fragmented approach set out in Part 1 of the Bill.

Part 3 - Children's Services Planning

20. The Faculty understands the aim to ensure integrated planning for all children and that such integrated planning results in children receiving a better service from all those involved in the provision of services.
21. It is understood that the provisions of Part 3 are intended to replace the existing duty on local authorities to prepare and publish a plan for children's services contained in section 19 of the Children (Scotland) Act 1995 and the supporting duties in sections 20 and 21 of that Act. The services for children covered by the present duty are limited (in terms of section 19 (2)) to services provided under Part II of the 1995 Act and in terms of the enactments mentioned in section 5 (1B) of the Social Work (Scotland) Act 1968.
22. Clause 7 defines "children's service" much more broadly and expressly includes services provided wholly or mainly to, or for the benefit of children with a need for additional support in learning (at sub-clause (1) (b) where (b) first occurs in that sub-clause). Services for children with such a need are provided by local authorities and health boards in a variety of ways. The primary duty for such services rests on an education authority (in terms of the Education (Additional Support for Learning) (Scotland) Act 2004 amended in 2009). Services may be required from a local authority in exercise of functions in terms of the 1995 Act. Services may be required from a health board in terms of, for example, speech and language therapy and occupational therapy. The clause 7 definition of "children's service" would also include all services provided by a local authority in its education function in terms of duties imposed by the said 2004 Act and by the Education (Scotland) Act 1980. If it is intended that the children's services plan include education services provided by a local authority, the Faculty considers such intention should be clearly and expressly included.
23. Part 3 imposes a duty to prepare such a plan every three years with consultation with each of the other service providers on the content of the plan with a requirement for agreement on the content of the plan from each other service provider. In addition, an annual duty to report on provision, achievement of aims and outcomes for children is imposed. This will impose onerous obligations on the other service providers. For example, consultation will be required from each of the 32 local authorities with the Scottish Court Service on the preparation of 32 plans. Each of those 32 local authorities will require to consult with and obtain reports from the Scottish Court Service on the provision of service, whether the aims in clause 9 have been achieved by the Scottish Court Service and the outcomes for children who have used Scottish Court Service provision on an annual basis. Such onerous obligations can only be met with the provision of sufficient resources to both provide the services to children and provide the reporting on such provision.

24. Clause 9 provides for planning for children's services to include the achievement of prescribed aims including the aim to provide services in a way which is most integrated from the point of view of recipients. The reviewing and reporting obligations imposed by Part 3 include reporting of the level of achievement of the aims prescribed in clause 9. This will require significant annual consultation with service users as to their perceptions of the integration of services. The Faculty considers this to be a policy aim and not one which is suitable for inclusion in legislation.
25. The Faculty is concerned that the terms of clause 17 are both wide and far reaching and appear to misunderstand the nature of the functions conferred on a local authority, a health board or any other service provider by Part 3 of the Bill. Part 3 imposes duties in relation to planning, publishing and reporting. Part 3 does not impose duties to provide particular services. For example Part 3 does not impose a duty on a local authority in respect of the education of children. It does not confer the education function on a local authority. That function is conferred by the Education (Scotland) Act 1980.
26. Clause 16 provides for the making of directions by the Scottish Ministers about the exercise of functions conferred by Part 3. That would mean that the Scottish Ministers had the power to make directions about the planning, publishing and reporting functions conferred by Part 3.
27. Clause 17 applies where the Scottish Ministers consider that a local authority and each relevant health board are not exercising a function conferred on them by Part 3 of the Bill. Accordingly, clause 17 applies where the Scottish Ministers consider that a local authority is not exercising the planning, publishing and reporting functions imposed by Part 3. Clause 17 then goes on to give powers to the Scottish Ministers to make directions and then includes provision (at sub-clause 6) that the Scottish Ministers may constitute a joint board of a local authority and a health board to exercise those functions. However, sub-clause (7) provides that the Scottish Ministers may order the transfer of property, staff and the provision of services to such a joint board. The Faculty considers that clause 17 purports to allow the Scottish Ministers to transfer the delivery of services to such a joint board. As noted above the primary responsibility for delivery of services is not conferred by Part 3, but by other legislation. Clause 17 has the potential for confusion and legal challenge, which is likely to result in the expenditure of considerable public resources, thus diverting attention and funds from the primary object, namely the provision of services to children.

Part 4 – Named Persons

28. The persons principally responsible for carrying out the functions mentioned in clause 19(5) of the Bill are a child's parents. They are charged with safeguarding and promoting a child's health development and welfare and with offering direction and guidance (Children (Scotland) Act 1995, section 1(1)). It is primarily the responsibility of a parent to seek assistance if required by their child. This part of the Bill dilutes the legal role of parents, whether or not there is any difficulty in the way that parents are fulfilling their statutory responsibilities. It undermines

family autonomy. It provides a potential platform for interference with private and family life in a way that could violate article 8 of the European Convention on Human Rights.

29. The Faculty accepts that there may be cases where a 'named person' will be of assistance. The difficulty with this Bill is that the provision is not focused on the children for whom the measure would be helpful and it does not cohere with other similar measures for such children.

30. As the Bill is drafted it results in duplication and risks causing confusion in the provision of services. For example there is already a person named in a co-ordinated support plan under the Education (Additional Support for Learning) (Scotland) Act 2004, to co-ordinate services for the child, including social work, health, or other services. When social work services are provided to children and families there will be a key worker. This will apply whether a child is subject to compulsory measures under the children's hearing, or in receipt of services following an assessment under the Children (Scotland) Act 1995. No attempt is made in the Bill to integrate the role of a named person with similar roles when other services are provided.

Information sharing

31. The issue of whether these provisions are article 8 compliant is exacerbated by clauses 26 and 27. It is understood that in the past failures to share information have resulted in failures to protect children, but this has arisen from failure to understand that there are circumstances in which data sharing is necessary, appropriate and lawful. The Information Commissioner has issued helpful guidance on 28 March 2013, indicating that where a professional believes that there is a risk to a child or young person that may lead to harm, proportionate sharing of information is unlikely to constitute a breach of the Data Protection Act 1998. It is not therefore necessary to violate the right to privacy and abrogate the data protection rights of all children and families in Scotland. The open transfer of data in the manner contemplated in the Bill represents a serious intrusion on individual rights.

32. The data protection principles set out in the Data Protection Act 1998 were developed to secure an appropriate balance between the need to process information and the need to protect the rights of the subject or source of the information. It is not clear how that balance is achieved in these proposals. For example:

- If a child or parent visits a health professional with a confidential medical query, will that be shared via the named person with all those involved with the child? Is this the end of confidential provision of birth control for a young person, or the end of confidential help for a parent seeking treatment for a mild mental illness?
- If a spurious allegation is made against a parent, how will the parent know and what will be the facility for putting the record straight? Such situations arise in connection with contact disputes between separated parents and

information sharing adds the potential for a further layer of complexity to an already fraught situation.

- If a child misbehaves at school will that information be passed on to all professionals involved with the child, to his/her embarrassment and potential future detriment?
- Who will decide whether information about parents' political or religious affiliations should be shared?

33. There is a need to ensure that if there is to be data sharing there are protections for the data subject. This applies to sharing between service providers. Also, the prohibition on passing on information in clause 27(3) does not sufficiently assert the necessity to prevent data being released to persons or organisations who are not bound by the data protection principles of the 1998 Act.

34. The Faculty notes that data protection is a reserved matter under the Scotland Act 1998. To the extent that the proposed measures interfere with protection for individuals in this area they are open to question on the basis that they fall outwith the legislative competence of the Scottish Parliament.

Part 5 - Child's Plan

35. The Faculty notes that the purpose of the Bill is to ensure the integrated provision of services for children. Part 5 makes no reference to the integration of the "child's plan" with existing plans and statutory orders which provide for both targeted intervention and are designed to meet a child's needs including but not limited to compulsory supervision orders, Co-ordinated Support Plans, and plans arising from assessments in terms of section 23 of the Children (Scotland) Act 1995. The effect of the failure to anticipate that children with "wellbeing needs" may be the subject of existing plans will give rise to confusion over delivery of services to the child.

36. The Faculty suggests that such a child's plan should only be made where no other statutory plan is in place for the child.

37. The Faculty considers the definition of "wellbeing need" to be so wide as to apply to every child in Scotland. Please see the Faculty's comments in relation to clause 74.

38. Part 5 provides no mechanism for assessment of whether a child has a wellbeing need. Clause 33 (2) provides for the preparation of a child's plan as soon as reasonably practicable but does not specify the event after which the plan is to be prepared as soon as reasonably practicable. Where there is no period for assessment, no provision for request for assessment and no provision for ongoing assessment of every child in Scotland, the time limiting provisions of clause 33 (2) are meaningless.

39. The Faculty respectfully questions whether, if Part 5 is to be made law, it is necessary to exclude children who have a parent who is a member of the regular forces. This appears to be to avoid serving soldiers etc. being subject to child's

plans. Co-operation already exists between local authorities, the Reporter to the Children's Hearing and the armed forces in cases where a prospective member of the armed forces is subject to a compulsory supervision order. It should be possible for future policy and legislation to build on that existing co-operation.

Part 6 - Early Learning and Childcare

40. The Faculty respectfully queries the necessity for this Part of the Bill. Section 1(1A) of the Education (Scotland) Act 1980 already allows the Scottish Ministers to prescribe the children for whom pre-school education must be made available. Section 1(1B) allows the amount to be prescribed. Using the Bill to achieve these objects fragments the provision over different legislation. It has the appearance of making a political, rather than a practical, point.
41. Equally the facility to offer alternative arrangements for pre-school children is already met by section 27 of the Children (Scotland) Act 1995 which relates to provision of day care for children in need.
42. This part of the Bill, in common with other parts, suffers from imposing an overlay on existing legislation, without co-ordinating the provision. It results in greater complexity and less clarity about services for children.
43. The provisions in relation to children who are eligible for the various types of provision are also complex and confusing. In contrast to the provision itself, eligibility is to be established by reference to other legislation (the 1980 Act) and other parts of the Bill (Part 10 relating to kinship care). If this is designed to give greater rights to parents and children then the criteria for eligibility should be transparent, otherwise members of the public will not be able to test whether their children are receiving what is due.

Part 7 – Corporate Parenting

44. Children do not need “corporate parents”. These provisions are equating parents with corporate entities. This may be thought to be an intrusion on families’ lives and on natural parenting.
45. It is difficult on the basis of the content of the bill to appreciate how the statutory framework proposed is going to provide a basis for the stated policy goals to be achieved.
46. The duties of corporate parents are broadly defined. The specific duties corporate parents are to have are listed in clause 52 of the bill. Many are vague in their terms. An example being the duty in terms of clause 52(c) “to promote the interests of these children and young people.” It is on any view very difficult to discern in practical terms what is meant by this.
47. It is not clear how the public bodies listed have been chosen. For example, it is not clear why The Scottish Fire and Rescue Service should have any more or less of a duty towards a looked after child or young person than they have to any child or young person, or to any person.

48. There are certain bodies listed in respect of which it is at least dubious that there is a need to give a statutory reminder that they have duties to vulnerable children. Examples include The Commissioner for Children and Young People in Scotland and Children's Hearing Scotland.
49. The policy behind the bill appears to be diluted by the selective approach taken to identifying which public bodies are to be burdened with the corporate parenting duties. There are many public bodies that deal with children and young people that are not included. Examples of such bodies not listed in schedule 3 include The Crown Office and Procurator Fiscal Service, The Scottish Prison Service, The Royal Botanical Gardens, The National Museums of Scotland and The Scottish Ambulance Service Board.
50. It would appear that there is only very limited mechanism to monitor compliance by corporate parents with their sometimes nebulous duties. The bill is silent on how compliance is to be effected beyond the requirement to report.
51. The key phrase in clause 52 is that a corporate parent is to exercise its corporate parenting duties "in so far as it is consistent with the proper exercise of its other functions". The clause identifies the tension which will be inherent at times in relation to certain public bodies. For example, it is at least conceivable that The Scottish Legal Aid Board would be limited in its promotion of the interests of those children and young people (in terms of clause 52) by the constraint of their ever-diminishing budget.
52. There is also no provision for corporate parents to have regard to the effect that measures which they might take in relation to their various duties may negatively impact upon other public bodies. These include both those public bodies which have been identified as corporate parents and those which have not. For example, it is conceivable that The Scottish Court Service, The Scottish Police Authority and The Scottish Prison Service have overlapping responsibilities for looked after children and young people which could be brought into conflict.
53. The Bill as drafted does not make clear the extent to which corporate parenting duties are enforceable by legal action. Is it intended to extend legal liability in the context of private actions or actions for judicial review? Actions for judicial review may conceivably be brought on the basis that in some particular respect in relation to an individual a corporate parent has failed to fulfil their widely framed corporate parenting duties. It is easy to conceive of a legal battleground emerging in relation to how the statutory duties are to be interpreted in the context of the qualification that the duties are to be exercised by the corporate parents "in so far as consistent with the proper exercise of its other functions".

Part 8 – Aftercare

54. The Faculty notes that section 29 of the Children (Scotland) Act 1995 is extended to confer a discretion to provide after-care to young persons who were formerly looked after by a local authority to the age of 26. The duty and power to act following an assessment is also extended. This gives formerly looked after children an advantage over children brought up by their own parents in so far as

it extends the provision of assistance, including potentially financial assistance beyond the age at which aliment provided by parents ceases (that being age 25).

55. The new powers and duties in the Bill do however beg the question as to which local authority has the duty and power to act. The Children (Scotland) Act 1995, section 29(2) allows an authority to provide advice, guidance and assistance to persons present in their area. Section 29(5) provides for an assessment by the authority for the area where the young person is present. The Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003 (SSI 2003/608) make further provision for the exercise of these powers and duties, but assume that they are imposed on or given to the local authority that last looked after the young person. Unless the confusion as to which local authority is responsible (ie the one where the young person is present or the one which last looked after the young person) is resolved there is a risk that the new measures will be less effective than the Scottish Parliament intends.

Part 9 – Counselling Services

56. The terms of clause 61 make it an imperative for a local authority to “secure that counselling services” are made available for parents, or individuals with parental rights and responsibilities, in respect of an “eligible child”. No definition has yet been provided of who is to be considered an “eligible child”, so it is difficult to consider in any meaningful way the impact this proposed part of the legislation will have.

57. It may be a laudable aim to ensure that proper counselling services are available for parents and those with the responsibility of caring for and bringing up children. There is a concern however that where only certain types of counselling service are prescribed by order of the Scottish Ministers, the local authority in response to the imperative imposed, focusses solely on the provision of those services to the prejudice of others. That risk is particularly high when funding for local authorities is very limited, and funding for existing services is difficult.

58. The clause as presently drafted highlights the difficulty noted in the introduction where this is presently a statement of policy with indeterminate eligibility and effect.

Part 10 – Support for Kinship Care

59. The overall aim of clause 64 to 66 is to ensure that those people who are not parents, or indeed the local authority, who take on the role of looking after children, many of whom often have difficult pasts and backgrounds, receive on-going support in that role. The same criticism applies to this part as applied to clauses 61 – 63; this is presently a statement of policy with indeterminate eligibility and effect.

60. Particular concern arises in relation to clause 65 (3), whereby a “guardian” is excluded from being considered a “qualifying person” for the purposes of clause 65(1). It seems that the person who is a guardian, is exactly the kind of person who may benefit from access to the support being considered in this part. The

Faculty's interpretation of the term "guardian" would include those people who have been asked by either close family or close friends to step into the role of parent in the event something happens to the parent. These would be appointees under section 7 of the Children (Scotland) Act 1995. They will, as a result of having accepted the appointment as guardian, assume parental rights and responsibilities for a child, who may be an eligible child. Their appointment would not necessitate making a formal application for a section 11 order of either type set out in clause 65(1) but they are likely to be one of the class of people identified as "qualifying persons" in clause 65(2)(a) and (b).

61. There is also some confusion in the definition of "kinship care order". The right in section 2(1)(a) of the Children (Scotland) Act 1995 is not "free standing". It is one of a number of rights that exist in order to enable a person to fulfil parental responsibilities. A residence order confers all parental responsibilities and parental rights, other than contact (section 11(12)). If however an applicant wishes to be treated fully as a substitute parent, then one order that may be conferred (and on one view the appropriate order) is an order appointing that person as guardian under section 11(2)(h). If an application is made for a guardianship order then the carer and child will be excluded from the benefits of this part of the Act. An applicant may not realise that this is the case until it is too late, or may be deterred from applying for guardianship. If guardianship is in the interests of the child, it would be unfortunate were a choice to have to be made between an application for guardianship and eligibility for support for kinship care.
62. There are sound reasons to consider excluding from clause 65(3) the words "or guardian".

Part 11 - Adoption Register

63. The Faculty notes the aim of the Bill in increasing the number of children placed for adoption by the enshrining in statute of a national adoption register. The Faculty notes the increase in children placed for adoption in 2010/11 but opines that increase was more likely the result of the introduction of the Adoption and Children (Scotland) Act 2007 in 2009 and not as a direct result of the establishment of the voluntary national register.
64. The Faculty notes the prohibition on the inclusion of children without the consent of their parent or any person with parental responsibilities or parental rights in relation to the child. A person who is not a parent but who holds parental responsibilities and parental rights is not required to consent to the adoption of a child. Their views may be relevant to the making of an adoption order but their consent is not required (see sections 31 and 83 of the Adoption and Children (Scotland) Act 2007). Parental responsibilities and parental rights cover a wide range of types of involvement in the life of a child, and may be confined to some minimal contact in terms of a court order. The Faculty does not agree that the consent of a person with parental responsibilities or parental rights but who is not a parent of the child should be required before the child could be included on the register.

65. Further, the Faculty understands that adoption agencies include the details of children who they consider ought to be placed for adoption on the existing register but without identifying information. Such a practice allows for the early identification of adoption placements for children who may be the subject of contested proceedings either for an adoption order or for a permanence order with authority to adopt. In the context of such contested proceedings it is unlikely that a parent will consent to their child's details being included in the proposed statutory register as required by clause 13C (2) (a). The Faculty is concerned that delays will be caused in identifying adoption placements for such children. The Faculty agrees that the process of placing a child for adoption requires to be conducted as quickly as possible while ensuring legal rights and obligations are protected. The placing of unnecessary barriers to the inclusion of children on the register is not conducive to minimising delay.

Part 12 – Other Reforms

Clause 71

66. The Faculty notes that the definition of “relevant person” for the purposes of an appeal under section 44A of the Criminal Procedure (Scotland) Act includes persons who are “deemed” to be “relevant persons” in the children's hearing where the child is subject to a compulsory supervision order, but does not include the full range of persons who fall within the statutory definition of “relevant person” in section 200. This may be of material importance given the recent extension to the definition contained in article 3 of the Children's Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Person) Order 2013/193, which includes all parents, other than those deprived of parental responsibilities and rights by court order. Also the new section 44A(6)(b) applies only when a compulsory supervision order has been made. Should it extend to cases where there is an interim compulsory supervision order, or even simply a referral to the hearing?

Part 13 - General

Clause 74

67. The Faculty appreciates the policy underpinning clause 74, but respectfully questions whether enshrining the policy of Getting it Right for Every Child is necessary or appropriate. There is little that can be said to be certain or enforceable about the list of objectives in clause 74(2). The important function of legislation is to put in place mechanisms through which the interests of children can be served, rather than to state objectives that are vague and uncertain.

68. Further the use of “wellbeing” to signify these objectives, risks detracting from the standard and well-understood test relating to welfare or best interests of children. There is a well-developed case law on welfare and best interests which is found in areas such as family law, child law and immigration law. Introducing a new, but related concept may cause confusion.