

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

**The Law Society of Scotland**

**Introduction**

1. The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes. The Family Law sub-committee (“the committee”) has examined the Children and Young People (Scotland) Bill and has the following comments to make.

**General Comments**

2. While the policy aims are undoubtedly laudable, the committee does not think that this legislation is the best way to achieve them. In order to be effective, legislation must be clear, proportionate and enforceable. It must also be future-proofed as far as possible, which is difficult when trying to reflect a multi-faceted policy agenda.
3. As the policy memorandum sets out, the Scottish Government is already pursuing a range of policy initiatives and alternative approaches as part of its agenda to improve the lives of children and young people. These have the benefit of being tailored to the needs and level of understanding of the groups to which they apply. Tying various strands together in legislation runs the risk of producing a bill that is unclear in its overall intent and its intended audience.

**Part 1: Rights of children**

4. Turning specifically to the provisions in the bill, we support the aim of raising the profile of the UNCRC however the committee is still of the view that the duty placed on Ministers in respect of the UNCRC is a diluted version of the existing obligations that they have currently, namely:
  - to respect and ensure rights under the Convention by virtue of the United Kingdom having ratified it; and
  - to promote and raise awareness of children’s rights in terms of article 42 of the UN Convention.
5. That is not to say that the government should not provide guidance to Scottish Ministers to help them identify ways in which to meet these obligations but primary legislation is not the appropriate place for this.
6. We are also of the view that if Scottish Ministers are to be placed under a duty to report on their UNCRC-related activities, the duty should correspond with the existing reporting duty under the UNCRC (i.e. to report every 5 years instead of 3) to allow coordination of effort and to assist the Children’s Commissioner.

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

7. We have no comments to make on this part, other than to say that we support the extension of the Commissioner's role.

## **Part 3: Children's Services Planning**

8. The correlation between "wellbeing" in the bill and "welfare" as contained in existing child and family legislation is unclear. "Welfare" is a necessarily flexible term that if defined (as it is in some other jurisdictions) will still usually incorporate a catch-all (such as 'and all other relevant circumstances') in recognition of the fact that factors affecting a child's welfare are going to be different in each case.
9. Again, for the sake of the overall consistency of reporting obligations, we would suggest that Children's Services Plans are prepared every 5 years.
10. There is a "the" missing at the beginning of section 10(5) (page 8 line 28).

## **Part 4: Provision of Named Persons**

11. The committee has a number of concerns about the proposal to introduce a named person for every child in Scotland.
12. There is a lack of specification in section 19 in relation to who can be identified as a named person, which includes a very wide discretionary power for Scottish Ministers.
13. Despite how widely this section is framed, the policy memorandum explains that the named person will usually be a practitioner from a health board or an education authority, and someone whose job will mean they are already working with the child. Leaving aside the fact that this is not clear from the legislation, the committee has the following concerns:
  - it will add an additional layer of responsibility to people who already have full-time jobs in sectors that are notoriously under-resourced.
  - It could present a considerable dilemma where a named person might feel obliged to point out a failure on the part of his/her employing local authority in relation to a child.
  - It runs the risk of diverting services away from where they are needed most, as the role of named person is going to be more onerous in some parts of the country than in others, resulting in potential gaps in provision.
  - In relation to the information-sharing provisions, the policy memorandum explains that these provisions potentially engage Article 8. Leaving aside the EU implications, we would point out that data protection is reserved to the UK parliament and that legislation affecting data protection rights is outwith the competence of the Scottish Parliament.
  - In practice, although the government considers that the provisions are compliant with the ECHR as they have a legitimate aim, children and young

people are entitled to confidentiality and may seek the services of a service provider on the basis that their right to confidentiality will be respected. We are concerned that widening the scope of information-sharing could affect the level of trust between older children and young people and their named person, undermining the function of the role.

14. The committee is also concerned that article 8 could be engaged in respect of the parent's right to respect for private and family life, as there is scope for interference between the role of the named person and the exercise of a parent's rights and responsibilities.
15. The committee would also point out that there is the potential for gaps in named person provision in respect of home-schooled children, looked-after children who are placed in accommodation in other parts of the UK and children who are in secure accommodation.
16. Overall, while the committee does not think that the purpose of the named person provisions is to grant control to the state over the development of children in a manner that is intrusive; taking the bill out of context, we think it could be interpreted as disproportionate state interference.

#### **Part 5: Child's Plan**

17. The Policy Memorandum references the Highland Pathfinder and reports some success in its use of the single planning approach, as well as the use of the GIRFEC approach in both the Highland Council and Fife and Forth Valley. The proposals represent a considerable commitment both in terms of time and resources, and given the differences between local authority areas, the committee would ask whether it might be better to continue to trial this good work across Scotland before committing it to legislation, based on the limited evaluation of a few areas.
18. If not, the committee would suggest that a review is built into the legislation to monitor the progress of the proposals once they are implemented.

#### **Part 6: Early learning and childcare**

19. The committee questions whether this part of the bill is necessary. The power to prescribe the children for whom pre-school education is required and the amount of such education is already in s 1(1A) and (1B) of the Education (Scotland) Act 1980, and the power to offer alternative arrangements for pre-school children is already to be found in s 27 of the Children (Scotland) Act 1995.
20. Otherwise, in relation to the proposal to increase the amount and flexibility of free early learning and childcare from 475 hours a year to a minimum of 600 hours for 3 and 4 year olds; and for 2 year olds who are, or have been at any time since turning 2, looked after or subject to a kinship care order, this has clear resourcing issues, which we assume will be considered further in the financial memorandum.
21. In general, we would reiterate a concern expressed in response to the preceding consultation that disproportionate focus on early intervention might lead to

insufficient assistance being provided to the many Scottish children who, through no fault of their own, have already received inadequate support and help from the system.

### **Part 7: Corporate Parenting**

22. The committee is concerned that by identifying the fulfilment of duties by public authorities with the role of personal parenting risks overstating the level of responsibility that public authorities have in respect of children and young people, while diluting the parental responsibilities of those who have them.

23. Moreover the proposed duties of the corporate parents as set out in section 52 lack specification and consequently would be difficult to enforce, although public authorities may find themselves faced with challenges over perceived failures nonetheless.

### **Part 8: Aftercare**

24. The committee has previously pointed out that in relation to aftercare there is conflicting legislation over which local authority is responsible for its provision.

25. Section 29 of the Children (Scotland) Act 1995 places the obligation on the local authority where the young person is present while the Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003 (SSI 2003/608) places the obligation on the authority that last looked after the young person. This confusion needs to be resolved if the proposed extension of aftercare is to be effective.

### **Part 9: Counselling Services**

26. A lot of the detail in this Part is left to secondary legislation but the framework as set out in the bill places a considerable responsibility on Scottish Ministers in terms of defining appropriate counselling services and identifying those who are eligible to receive them. This would seem to be quite an onerous task and the resulting service potentially very resource-intensive. Furthermore, the policy memorandum provides that this service is intended for families in the “early stages of distress”. This intention is not reflected at all in the legislation. The committee is therefore of the view that some more detail on the face of the bill would help to clarify the purpose of this Part.

### **Part 10: Support for Kinship Care**

27. Section 65(3) provides that a qualifying person is not a parent or guardian for the purposes of subsection (1). The exclusion of guardians from kinship care assistance bars persons who would merit support on the basis that they have taken on a parenting role for a child whose parents have died, or have taken on guardianship by virtue of a court order, to act in place of parents who are incapable of acting or unsuitable to do so. If this is the intention, the committee would ask for clarification that alternative support is (or will be made) available for guardians on whom parental rights and responsibilities have been conferred.

**Part 12: Other Reforms**

28. In relation to section 73, the committee would reiterate its comments about the correlation between ‘welfare’ and ‘wellbeing’ (see comments under Part 3 above). Given that the 1995 Act provides that the welfare of the child should be the paramount concern, further clarification of the relationship between these two concepts would be useful.

**Part 13: General**

29. In the committee’s view, the SHANARRI indicators as set out in section 74(2) (namely *Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible, and Included*) which together define “wellbeing” – while clearly desirable attributes for Scotland’s children and young people to have – do not offer a tool with which to make a clear assessment and in the committee’s view are not appropriate for enshrinement in primary legislation.

**The Law Society of Scotland  
26 July 2013**