

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

Professor Kenneth McK. Norrie

1. This commentary is split into two sections: General Comments, and Comments on Particular Sections.

GENERAL COMMENTS

Definition of “Child”

2. The UN Convention on the Rights of the Child (UNCRC) defines “child” for its purposes as follows: “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. 18 is rather later than, traditionally, the law of Scotland has regarded childhood coming to an end. For the purposes of UNCRC, it is unclear what is understood by “majority” – though we do of course have the Age of Majority (Scotland) Act 1969 which sets the “age of majority” at 18, that has little practical effect. Since 1995 it has been clear that (virtually all) parental responsibilities and (all) parental rights cease when the child attains the age of 16, and from that age we have traditionally referred to “young persons” (as in, for example, the Children and Young Persons (Scotland) Act 1937). 16 (roughly) is the school leaving age, and the age of marriage/civil partnership (a definitional feature of adulthood – you can’t, for example, adopt a person who has been married or civilly partnered). Notice also that while England, Wales and Northern Ireland each have a “Children’s Commissioner”, in Scotland we have a “Scotland’s Commissioner for Children and Young People”. Children in Scotland have a veto over adoption from age 12 and can make wills from that age (unlike children in England in both respects). Our effective age of adulthood is probably 16 and not 18.
3. The point is that defining a person as a “child” increases the protections that the law offers them, but decreases their own personal freedoms. Section 75 of the Bill defines “child” as a person who has not attained the age of 18 years. I should have been more comfortable if the limit of childhood were set at 16, with the Bill imposing whatever duty it imposes on authorities and agencies on “children and young people” (as the title rather suggests). I accept, however, that “young people” in the Bill might be people between 18 and 26, over whom lesser duties are appropriate.
4. In a sense contrary to what I have argued above (that childhood should not be extended beyond 16 because of its infantilising effect), – and entirely understanding that this is a reserved matter – I am made very uncomfortable to read (for example in sections 21 and 31) that the duties owed to “children” are not to be applied to “children” in the armed forces. Children should not be serving in the armed forces. Article 38 of the UNCRC, of course, prohibits anyone under 15 from serving in the armed forces, so there is no breach of UNCRC for the UK to continue to enlist at an earlier age than most other western countries, but it does illustrate that the very concept of “child” is an artificial construct which we as a

society are happy to change when it suits us (when they become soldiers, or when they marry).

Why the Decision not to Incorporate UNCRC into Scots Domestic Law is Good Thing

5. I *strongly* support the policy decision of the Scottish Government not to seek to incorporate UNCRC into Scots domestic law, for the following reasons:

- (i) The UN Convention was not drafted as enforceable law – unlike the European Convention on Human Rights which has a whole judicial process behind it to tell us what it means, how to resolve its ambiguities and how to balance its conflicting principles. There are enormous dangers in taking a document designed for one purpose and using it for a purpose as powerful as legal regulation. The ECHR only works because the guidance given by the Court can be applied throughout the member states. Yet without any such court, we are left without any guidance as to what some of the more aspirational statements in the UNCRC actually mean. Take Article 4, for example: “With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.” There are at least two problems with that. First, what are “economic, social and cultural rights”? Secondly, do we really want judges to be determining “the maximum extent of [states’] available resources”?
- (ii) Many of the rights in UNCRC are simply not within domestic law’s competence. Take Article 10, for example, which provides that a child in a different state from their parent shall have the right to leave any country and enter any other. That is fine as an international aspiration, but the domestic law of the UK (far less of Scotland) cannot – is not competent to – require that a child be allowed to enter any other country in the world – again, the Article was not drafted as an enforceable domestic right, and it would not be sensible to attempt to convert it into one.
- (iii) Many of the rights in UNCRC are simply not justiciable (ie it is not appropriate for judges to make the decision as opposed to policy-makers). Take Article 24, for example, which imposes a duty on states to take appropriate measures to reduce infant mortality, and to develop primary health care. All good and well, and important aspirations, but who would you allow to sue the state if the state fails to reduce infant mortality? And once reduced, but not to zero, is there a breach when no further efforts are taken? This may sound all very pedantic, but it is in the nature of law to be pedantic – at least hard law contained in domestic legislation. Soft law, such as UNCRC does not need to be pedantic because it is not designed to raise justiciable issues, but to give guidance to states as to the social policies they should be adopting. The Children and Young People (Scotland) Bill contains

statements of policy and is designed to create a cultural mindset far more than it is designed to provide hard legal rules that judges can rule upon: it reflects the approach of UNCRC more than incorporation would.

- (iv) In any case, while UNCRC as policy aspirations may be unchallengeable, not all of its implications are necessarily good. A “child” under the UN Convention is a person under the age of 18, and “incorporating” childhood until 18 in our domestic law will have a number of unexpected and probably unwanted consequences, including raising the age of marriage, because of course we don’t like child-marriages, and increasing the age of lawful sexual activity, because we don’t want children having sex – and the Parliament recently decided with the Sexual Offences (Scotland) Act 2009 that when they do they should both be criminalised, with all the problems of Disclosure that go with that. Another thing that we would do well to remember is that incorporating UNCRC will actually downgrade the place of welfare. Our law says that, in children cases before courts and children’s hearings, the welfare of the child is to be the paramount consideration. This is reflected in Article 21 of UNCRC in adoption proceedings, but in any other matter Article 3 states that welfare is merely a primary consideration. Incorporation would therefore actually weaken at least some aspects of the protections we currently give children.

Rights of Children

6. Part 1 of the Bill (sections 1 – 4) is headed “Rights of Children” and it defines that phrase to “include the rights and obligations set out in” UNCRC and its protocols. Scottish legislation has traditionally (if unfortunately) been very reticent about setting out the “rights” that children have, though since devolution the concept has been given rather more teeth. So while the Education (Scotland) Acts 1980 and 1981 impose duties to educate children, it is only since the Standards in Scotland’s Schools etc Act 2000 that children have had a statutory “right” to be educated. There are no “rights” for children (as opposed to parents) in the Children (Scotland) Act 1995, though there are rather more in the Children’s Hearings (Scotland) Act 2011. The fact that the definition in section 4 of the present Bill “includes” UNCRC rights implies that other “rights” are covered but it gives no indication of what these rights are. It might be more accurate to change the definition in section 4 to read “rights’ ... means” instead of “rights’ ... includes”.
7. The word “right” is in itself ambiguous, as is clear from an examination of the rights contained in UNCRC. Some are aspirational but have no legally enforceable content (such as in art 24, the right to the highest attainable standard of health); some reflect general human rights as contained in the ECHR (such as in arts 14 – 16: freedom of thought, of association and from arbitrary arrest); some are directed to particular circumstances (such as arts 22 and 23: refugees

and disabled children); some provide general principles that have long since been given effect to in our law (such as art 12: right of the child to express views).

8. Part 1, in fact, notwithstanding its heading does not confer rights on children: rather, it imposes duties on public bodies. Now, few duties imposed on public bodies will give any individual a right in the sense of an action to sue the body that fails in its duties. There have been a series of cases in the Supreme Court (involving English law) in which the nature of the public duty is explored and the very limited circumstances in which an individual acquires a statutory “right” are identified. Part 1 does not confer rights of that nature.
9. The language of “rights” may reflect that in the UNCRC, but in legal terms it may well be regarded as being misrepresentative. Part 1 of the Bill would be more accurate – and less open to the charge that it promises more than it delivers – if it were headed something like: “Duties in Relation to the UN Convention on the Rights of the Child”.

General Principles

10. In 1995, both public law and private law matters relating to children were embodied in a single Act, the Children (Scotland) Act 1995. This allowed the legislation to set out general principles (which are often called “the three overarching principles”). Section 11(7) for private law matters and section 16 for public law matters require the child to be given the opportunity to express views; require welfare to be the paramount consideration; and require that minimum (or proportionate) state intervention be preferred over disproportionate intervention in family life. Child law is now much more disjointed than it was in 1995, with Part 1 of the 1995 Act surviving intact, much of Part 2 now being contained in the Children’s Hearings (Scotland) Act 2011, and adoption and permanence contained in the Adoption and Children (Scotland) Act 2007. Each of these Acts contains (if sometimes hidden) a restatement of the three overarching principles. This does not appear in the Children and Young People Bill. Most noticeable is the absence of any general requirement to consult with children about the services that are to be provided them. Absent too is a clear declaration that in determining how to fulfil their duties children’s welfare should be public authorities’ paramount consideration – or even the lesser obligation in UNCRC, that children’s welfare be a primary consideration. The nearest we get is an obligation in section 74 to assess whether the child’s wellbeing is being safeguarded. It is no answer to say that the Bill requires planning to be informed by UNCRC, since that does not make welfare paramount (and neither, as explained above, does UNCRC). A statutory statement of principle would be far stronger and should be considered. The three overarching principles might appear usefully, for example, in section 19 which sets out the “named person functions”: in carrying out these functions children should be consulted, their welfare should be paramount, and any intervention (however early) should be the minimum that is necessary. See further my comments on section 31 below.

COMMENTS ON PARTICULAR SECTIONS

11. *Section 1(1)(b)*. Section 1(1)(a) imposes an obligation on Scottish Ministers to keep under consideration what they might do to further secure UNCRC in Scotland. Good. Section 1(1)(b) imposes an obligation on them to take steps, but only if they “consider it appropriate to do so”. That qualification to their duty is so great and unlimited in its scope that it renders the duty effectively a discretion. The subsection gives and then immediately takes away.
12. *Section 12(3)*: I am very unclear that is in mind here. When will implementing a child’s services plan adversely affect the wellbeing of a child? And does the section allow the whole plan to fall when one child may be adversely affected when all other children would benefit? I suggest tightening the wording to ensure that the plan is not implemented *in respect only of the child adversely affected*.
13. *Section 26*: “might be relevant” seems a tad loose and, combined with the defence in section 27, this might give rise to ECHR issues of proportionality. Article 8 of the ECHR (right to private life) is not absolute and state action that interferes with the right is legitimate if “proportionate”, that is to say (a) is done in pursuit of a legitimate aim and (b) goes no further than is necessary to achieve that legitimate aim. The aim of sharing information is clearly legitimate – to allow early identification of potential problems in order to put support mechanisms in place to minimise the risk of greater interference in the child’s family life. So long as the sharing of information is limited to service providers and other responsible persons this is probably proportionate, but only if the information needs to be passed. The risk is that article 8 is breached if the law allows more information than is necessary to allow the service provider to make the judgment is to be shared. Section 26 imposes an obligation to share information whenever that information “might” be relevant. This sounds like an absolute obligation to share virtually everything known about the child with all service providers – for anything “might” be relevant, just as it might not be. It may be, however, that the problem is resolved by section 26(2)(b) which restricts the obligation to when a service provider thinks the information “ought to be” provided. Service providers will need proper training on how to keep that judgment within the bounds of proportionality I suggest amending section 26(2)(a) to read “it is likely to be relevant” (instead of “it might be”). (The same applies to section 23(3) and section 26(4)).
14. *Section 27*: this provides a blanket defence to the prohibition on disclosing information, and given the wideness of the obligation to share information in section 26 might be seen as going too far. For example, there are prohibitions in section 182 of the Children’s Hearings (Scotland) Act 2011 on any person publishing information that can identify a child (or his or her school) if the information concerns any children’s hearing or associated court process; there are similar prohibitions in relation to the court process for exclusion orders being created in the Bill under Schedule 4 para (3). While sharing information amongst service providers might not usually amount to “publishing” the information, the strength of the defence created significantly weakens the prohibition recently enacted in the 2011 Act (and extended to exclusion orders in the present Bill).

15. *Section 31(5)*: in deciding *whether* a child needs a child's plan, the views of the child need to be taken into account. This seems to me to be in the wrong place. The determination of whether a children's plan is necessary is a professional judgment over which the views of the child can have little real effect. The *contents* of the plan and its *implications* are where a child's views need to be heard (as indeed is required in section 33(6) and section 37(2)).
16. *Section 51*: Corporate parenting is to apply to young people up until the age of 26. So too is section 29 of the 1995 Act extended to 26. This is good (and especially so in relation to the aftercare provisions in section 29 of the 1995 Act). The draft bill that was earlier consulted upon set the age at 25 (to reflect, I think, the alimentary obligations of parents, which can last until 25). I am unclear why (but support) the added year, though to keep the law consistent the alimentary age might also be raised from 25 to 26 – bearing in mind the increased number of young people who stay with their parents as compared with 1985 (when the alimentary age was laid down).
17. *Section 52*: These duties read like general duties applicable to looked after children as a class. It would be better, in my view, if it were made clear that the duties are owed to each individual looked after child. Instead of saying "the wellbeing of children and young people" in para (a) it should read "the wellbeing of each child and young person". Similarly in (for example) para (c) it should read "to promote the interests of each child and young person to whom this Part applies", etc.
18. *Section 73*: this adds to the existing provisions in that part of the Children (Scotland) Act 1995 that deals with local authority duties towards children in their areas. It introduces a new concept into the law: "wellbeing". This is to be compared with the existing concept that has appeared very commonly in our legislation since the Guardianship of Infants Act 1925: the "welfare" of the child. At first glance, the concept of "wellbeing" is little different from "welfare" as it presently appears, for example, in sections 11(7) and 16(1) of the Children (Scotland) Act 1995, sections 14(3) and 84(4) of the Adoption and Children (Scotland) Act 2007, and section 25 of the Children's Hearings (Scotland) Act 2011. If the intent is that the meaning of "wellbeing" is to be the same as the meaning of "welfare", then it would normally be better that the same word is to be used, because courts assume that Parliament means the same thing when it uses the same words and means different things when it uses different words. Section 25 of the 2011 Act talks of the paramountcy of the need to safeguard and promote the child's welfare; section 74 of the Bill talks of the child's "wellbeing" being promoted or safeguarded. So there are clear similarities in intent. Nevertheless, it seems to me that the two concepts *are* different and that it is therefore appropriate to use the two different words. The "welfare" test applies in the various pieces of legislation mentioned above when the state is interfering in family life: it is compulsorily stepping in and imposing an order over the child which is (usually) opposed by the parent. This is a big step and needs to be proportionate. In the case of permanent removal of the child such as by adoption then "welfare" takes on the tone of an imperative (said the Supreme Court in *S v N*, a Scottish decision last year). But the Bill, and especially the "wellbeing"

provisions, is not about compulsory intervention but about seeking to avoid the need for compulsory intervention. It is about ensuring that the child's wellbeing is protected and enhanced to such an extent – by processes that do not interfere with family life and which do not require a legal order over the child – that the child's welfare is not so compromised that compulsory intervention becomes required. We may talk about “early intervention”, but it is not early compulsion. So in my view it is helpful for the legislation to choose a different word from “welfare” to describe the processes that the Bill is establishing. The state needs to enhance all children's wellbeing by statutory means that will nearly always be co-operative with parents; and the state needs to step in to protect children's welfare when co-operation is not enough and compulsion is required. The distinction in terminology is, in my view, helpful.

19. *Section 65(1)*: “Kinship care orders” are defined to be one of two orders, either (a) an order giving “qualifying persons” (as defined in s.65(2)) the right to have the child living with them or to determine the child's residence or (b) “a residence order” the effect of which is that the child is to live with a qualifying person. The distinction between (a) and (b) is not immediately obvious (because (a) will usually be contained within (b)), but seems to be that (a) concerns a right held by the qualifying person while (b) refers to the fact of residence regulated by a residence order that does not confer a “right”. In any case “residence order” is not defined. Under the 1995 Act a residence order is defined as an order made under s.11(2)(c), so that reference could usefully be added into the Bill's section 65(1)(b), to reflect the reference to s.11(1) in section 65(1)(a).
20. *Section 65(3)*: Neither “parent” nor “guardian” is defined in the Bill (other than ss.30 and 63 which do not apply to part 10). Neither of these words is without ambiguity and they should both follow the definitions contained in the Children (Scotland) Act 1995 (as section 30 defines “parent” for the purposes of Part 4 and section 63 does for Part 9).
21. *Section 65(4)*: I am disconcerted that a draftsman today would include a reference to marriage without also including a reference to civil partnership. (Almost certainly an oversight, but a disturbing one in this day and age).
22. *Section 68*: To put Scotland's Adoption Register on a statutory basis is a very good idea, but there is some dreadful language used. In the new section 13A(2)(a)(i) there is a reference to children who “ought” to be adopted. This is an entirely inappropriate way of putting it: no child in Scotland “ought” to be adopted. Rather, a child might be described as being “suitable for adoption”, or (following s.13D(2)(a)(ii)) as a “child who is appropriate for adoption”. Far less is it for any government to make the judgment – as s.13C(1)(a) requires – that any child or class of child “ought” to be placed for adoption. And the language of “type” of child in s.13C(2)(a) is not appropriate either.
23. *Section 71*: This adds a right of appeal against a local authority's decision to detain a child in secure accommodation under s. 44 of the Criminal Procedure (Scotland) Act 1995. This is a useful reflection of the new right of appeal against implementation of a children's hearing's authorisation of secure accommodation

in the Children’s Hearings (Scotland) Act 2011. There is however a problem with title to appeal. The right of appeal in the 2011 Act vests in the child and “any relevant person” and a HUGE issue in the 2011 Act is how “relevant person” is defined: the 2011 Act definition is very different from its predecessor in the Children (Scotland) Act 1995 and includes a new “deeming” procedure. Section 71 of the Bill gives title to appeal to the child and “a relevant person”, and the new s.44A(6) gives a definition of “relevant person”. I consider it highly unfortunate and needlessly complicated to give here a *different* definition of the person who can appeal against a decision to detain a child in secure accommodation from the definition used throughout the 2011 Act: it is made especially complicated by the use of the same phrase “relevant person” to identify who has title. Secondary legislation under the 2011 Act has already amended the 2011 definition of “relevant person” and Scottish Ministers have the power to do so again. To avoid unnecessary complexities title to appeal a secure accommodation decision ought to be the same irrespective of the Act under which the decision is made. Unless the definition of “relevant person” in section 44A(6) is amended, then a parent, who is now within the definition in s. 200 of the 2011 Act, and will not therefore be “deemed” to be a relevant person, may be excluded from s.44A for no rational reason – a parent without parental responsibilities (the unmarried father of a child born before the coming into force of the Family Law (Scotland) Act 2006) will be able to appeal his child’s detention under the 2011 Act but will not have title to appeal his detention under this new s.44A. So I suggest the new section 46A(6) defining who has title to appeal, as it appears in s.71 of the Bill, should be explicitly tied to the definition of the same phrase in the 2011 Act and read as follows:

“In this section ‘relevant person’ in relation to a child means:

- (a) a relevant person as defined in section 200 of the Children’s Hearings (Scotland) Act 2011; and
- (b) any person who is deemed to be a relevant person in relation to the child by virtue of section 81(3), 160(4)(b) or 164(6) of the Children’s Hearings (Scotland) Act 2011 or Rule 55 of the Children’s Hearings (Scotland) Act 2011 (Rules of Procedure at Children’s Hearings) Rules 2013”.

24. Even if this is not accepted, the reference to the 2013 Rules should be added to the new s.44A.

Professor Kenneth McK. Norrie
Professor of Law at the University of Strathclyde
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