



# Criminal Justice (Scotland) Bill

## Stage 1 Written Evidence – August 2013

### Introduction

Together welcomes the opportunity to respond to this Stage 1 Call for Evidence on the *Criminal Justice (Scotland) Bill*. This response specifically focuses on the extent to which the provisions in the Bill will succeed in achieving the Scottish Government's policy aim of *'making rights real'* for children and young people, as outlined in the Children & Young People (Scotland) Bill currently being scrutinised by the Education and Culture Committee. In producing this response, Together is drawing from its 2012 State of Children's Rights report and consultation with children's organisations through its 2013 State of Children's Rights seminars. The 2012 report is based on research evidence, views and opinions gathered from over 100 professionals working with and for children who attended Together's 2012 seminars and seventy-nine children's organisations who completed an online survey.

Together would like to concentrate on three specific issues in this response: the best interests of the child, equal protection from assault for children and the age of criminal responsibility. Together's key messages to the Justice Committee are that:

- **The policy intention of section 42 to place a duty on constables to consider the best interests of the child when holding, arresting, interviewing or charging a child is welcome. Together seeks assurance that the use of the word 'wellbeing' in the Bill would achieve this policy intention.**
- **Together also urges the Justice Committee to ensure that the best interests of the child are also taken into consideration when holding, arresting, interviewing or charging a parent.**
- **Together calls on the Justice Committee to take heed of international calls to give children equal protection from assault and bring this forward through the Bill.**
- **The Bill provides an opportunity for the Scottish Government to fulfil its commitment to consider raising the age of criminal responsibility. Together urges the Justice Committee to take this forward through the Bill.**

### The best interests of the child

1. Together welcomes the policy intention of section 42 of the Criminal Justice Bill to place a duty on constables to consider the best interests of the child when holding, arresting, interviewing or charging a child. However, Together notes that the wording of the duty in section 42 (2) is to *"treat the need to safeguard and promote the wellbeing of the child as a primary consideration"* and seeks assurance that the use of the word 'wellbeing' would achieve the policy intention of considering the 'best interests' of the child.
2. Considering the best interests of the child helps to progress a recommendation made by the UN Committee of the Rights of the Child to the UK in 2008 to *"take all appropriate measures to ensure that the principle of the best interests of the child, in accordance with article 3 of the Convention, is adequately integrated in all legislation and policies which have an impact on children, including in the area of criminal justice and immigration"*<sup>1</sup>. Article 3 of the UNCRC states that *"the best interests of the child shall be a primary consideration in all actions affecting children"*<sup>2</sup>.

<sup>1</sup> Committee on the Rights of the Child (2008). Concluding Observations: United Kingdom of Great Britain and Northern Ireland (CRC/C/GBR/CO/4). No 27.

<sup>2</sup> United Nations (1989). Convention on the Rights of the Child. Article 3.

3. Together would be keen that the Scottish Government takes into consideration the best interests of the child throughout the Criminal Justice (Scotland) Bill and not only within section 42. The adult criminal justice system can often fail to acknowledge the wider impact that decisions can have on children. For example, the decision to send a parent to prison is likely to have a tremendous impact on a child. Together would like to bring the Justice Committee's attention to a recommendation made to the UK in the 2012 Universal Periodic Review process by Slovenia to *"ensure that the best interests of the child are taken into account when arresting, detaining, sentencing or considering early release for a sole or primary carer of the child..."*<sup>3</sup>
4. Each year in the UK, more children experience a parent's imprisonment than a parent's divorce. Children's experience of a family member's imprisonment can be similar to experiencing bereavement, and its effects may include the child 'acting out' or becoming withdrawn, deterioration in performance at school, being bullied or becoming the bully, and increased risk of substance misuse. Children with a family member in prison suffer from serious mental health issues at three times the rate of other children and are at higher risk of offending and of ending up in prison themselves.
5. Following its Day of General Discussion in September 2011, the UN Committee on the Rights of the Child reiterated that children of prisoners have the same rights as other children and that State parties should *"...ensure that the rights of children with a parent in prison are taken into account from the moment of the arrest of their parent(s) and by all actors involved in the process and at all its stages, including law enforcement, prison service professionals, and the judiciary"*<sup>4</sup>. Decisions that have a direct impact on children, such as the imprisonment of a parent, fail to take the child's best interests into account as a primary consideration. **Together would urge the Justice Committee to consider ensuring that the best interests of the child are also taken into consideration when holding, arresting, interviewing or charging a parent.**

### Equal protection from assault

6. In Scotland, the continued acceptance of hitting children is detrimental to attempts to protect children from physical abuse. The current acceptability of physical punishment within Scots' law means that children do not have the same level of protection from violence under the law as adults. Section 12(i) of Children and Young Persons (Scotland) Act 1937 preserved the rights of parents, teachers and others with lawful charge of or control over the child to administer punishment. The Children (Scotland) Act 1995 requires that, in exercising this right, adults must act in 'the interests of the child'. While outlawing the assault, ill-treatment or neglect of a child, the 1937 Act therefore permitted the physical punishment of children as 'reasonable chastisement'. In 2003, the Scottish Parliament passed the Criminal Justice (Scotland) Act . Section 51 of that Act prevents adults using implements, delivering blows to the head and shaking children as a physical punishment. While these specific practices are now prohibited, parents are still protected by the law when they physically punish a child.
7. Together would like to bring the Justice Committee's attention to one of the UN Committee on the Rights of the Child's recommendations to the UK in 2008 to *"prohibit as a matter of priority all corporal punishment in the family, including through the repeal of all legal defences"*<sup>5</sup>. This recommendation has recently been repeated by a number of countries through the 2012 review of the UK through the Universal Periodic Review:

<sup>3</sup> United Nation Human Rights Council (2012). Report of the Working Group on the Universal Periodic Review United Kingdom of Great Britain and Northern Ireland.

<sup>4</sup> UN Committee on the Rights of the Child (2012). Report and Recommendations of the Day of General Discussion on Children of Incarcerated Parents, para 33.

<sup>5</sup> Committee on the Rights of the Child (2008). Concluding Observations: United Kingdom of Great Britain and Northern Ireland (CRC/C/GBR/CO/4). No 42a,

*"Take measures to ensure the freedom of children from physical punishment in accordance with the Convention on the Rights of the Child."* (Norway)

*"Introduce a ban on all corporal punishment of children as recommended by the CRC and other treaty bodies"* (Finland)

*"Reconsider its position about the continued legality of corporal punishment of children"*<sup>6</sup>. (Sweden)

In addition, in May 2013, the UN Committee Against Torture recommended that *"the State party prohibits corporal punishment of children in all settings...repealing all legal defences currently in place, and further promote positive non-violent forms of discipline via public campaigns as an alternative to corporal punishment."*<sup>7</sup>

8. Despite these repeated calls from UN treaty bodies and the UK's examination under the Universal Periodic Review, children in Scotland still do not have the same protection from assault as adults in law. Children's organisations continue to raise the need for the removal of the defence of 'justifiable' assault' and for the promotion of positive, non-violent parenting methods. Together's 2011 State of Children's Rights report recommended that any form of physical violence against a person under 18 should be a criminal offence and that the Scottish Government should remove the defence of 'justifiable assault'.<sup>8</sup> Together's 2012 State of Children's Rights report recommended that children be given equal protection from assault in law.<sup>9</sup>
9. The current 'justifiable assault' defence undermines the work that professionals are doing with families on positive parenting. The Scottish Government needs to promote positive approaches to discipline within their ongoing policy programmes and public information campaigns. Parents and carers need to be equipped with alternative forms of behaviour management techniques in order to allow them to support and manage difficult behaviour.
10. More than half of the Council of Europe's 47 member states have either achieved full prohibition or committed themselves to do so soon. Among the 27 EU states, just four – the UK among them – have neither prohibited nor committed themselves to do so.<sup>10</sup> If the Scottish Government is serious about its commitment to make Scotland "the best place to grow up", it needs to give children equal protection from assault in law.

## Age of criminal responsibility

11. Together would like to bring the Justice Committee's attention to one of the UN Committee on the Rights of the Child's recommendations to the UK in 2008 to *"raise the minimum age of criminal responsibility in accordance with the Committee's General Comment n° 10."*<sup>11</sup> This recommendation has recently been repeated by a number of countries through the 2012 review of the UK through the Universal Periodic Review:

*"Consider the possibility of raising the minimum criminal age"*. (Belarus)

*"Consider the possibility of raising the age of criminal responsibility for minors"*<sup>12</sup>. (Chile)

12. As reported in the 2011 State of Children's Rights report, the age of criminal responsibility in Scotland currently remains one of the lowest in Europe.<sup>13</sup> The introduction of a minimum age for prosecution set at 12 through the Criminal Justice and Licensing (Scotland) Act 2010 reflects a

<sup>6</sup> UN Human Rights Council (2012). Report of the Working Group on the Universal Periodic Review United Kingdom of Great Britain and Northern Ireland

<sup>7</sup> Para 27 <http://www2.ohchr.org/english/bodies/cat/cats50.htm>

<sup>8</sup> Together (2011) State of Children's Rights report

<sup>9</sup> Together (2012) State of Children's Rights report

<sup>10</sup> Within the EU, 17 states have banned it completely and another 6 are committed to doing so. Only four countries in the EU have neither achieved this reform nor committed to it: France, Belgium, the UK and Malta.

<sup>11</sup> Committee on the Rights of the Child (2008). Concluding Observations: United Kingdom of Great Britain and Northern Ireland (CRC/C/GBR/CO/4). No 78a-h.

<sup>12</sup> UN Human Rights Council (2012). Report of the Working Group on the Universal Periodic Review United Kingdom of Great Britain and Northern Ireland

<sup>13</sup> Together (2011) State of Children's Rights report

recognition that the children's hearings system is the appropriate place to do so, rather than the criminal justice system. However, Scotland's very low age of criminal responsibility remains in statute and the 'criminal justice consequences' of referral to the children's hearings system on the offence ground, such as a criminal record, will persist for a number of children as young as 8 even after further changes made in the Children's Hearings (Scotland) Act 2011 come into force.

13. In the Do the Right Thing progress report, the Scottish Government has committed to give 'fresh consideration to raising the age of criminal responsibility from 8 to 12.'<sup>14</sup> This proposal, which addresses a recommendation from the UN Committee, is strongly supported by children's organisations. It is hoped this change could lead to an increased emphasis on addressing the specific needs of children within the justice system which can often include issues such as neglect or abusive treatment. It is therefore welcome that the Scottish Government has pledged to take a fresh look at the issue, and Ministers should take action now.
14. Together was one of a number of children's organisations to write a joint letter to the Minister for Children & Young People following the Bill's publication to raise concern about the omission in the Bill to raise the minimum age of criminal responsibility. The Scottish Government's commitment to give fresh consideration to raising age of criminal responsibility is with a view to bringing legislative change within the lifetime of this Parliament (2016). Its omission from this Bill would be a missed opportunity to fulfil the Scottish Government's commitment. **Together urges the Justice Committee to consider raising the age of criminal responsibility through this Bill.**

## About Together

Together (Scottish Alliance for Children's Rights) is an alliance of children's charities that works to improve the awareness, understanding and implementation of the UN Convention on the Rights of the Child (UNCRC) in Scotland. We have 233 members including large international and national non-governmental organisations (NGOs) such as UNICEF UK, Save the Children, Barnardo's and CHILDREN 1st through to volunteer-led playgroups and after school clubs. Our activities include:

- Collating an annual *State of Children's Rights* report to set out the progress made to implement the UNCRC in Scotland.
- Working in partnership with the Scottish Government and Scotland's Commissioner for Children and Young People (SCCYP) on the *Scottish Children's Rights Implementation Monitoring Group* to develop a common understanding on progressing the UNCRC.
- Submitting the NGO alternative report to the UN Committee on the Rights of the Child to provide an independent NGO perspective on the extent to which Scotland is meeting its UNCRC obligations.

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<sup>14</sup> Scottish Government (2012). Do the Right Thing Progress Report 2012