



Together briefing

Rights of Children and Young People bill

October 2011

Summary

The Scottish Government is currently consulting on a Rights of Children and Young People Bill which proposes to place a duty on Scottish Ministers to have 'due regard' to the rights enshrined in the UNCRC and its Optional Protocols when exercising their functions. This briefing is to inform Together's members and supporters on the proposed bill, to help them prepare their response to the consultation and to promote discussion to guide Together's response.

Together welcomes the Scottish Government's focus on the rights of children and young people. This briefing discusses the following key areas where the Bill could be strengthened to better ensure that all children in Scotland are able to enjoy the rights enshrined in the UNCRC:

- Incorporating the UNCRC into domestic law;
- Extending the scope of the Bill to include public bodies;
- Providing a clear channel of redress for breaches of children's rights;
- Clearing showing the process for ensuring compliance with the UNCRC;
- Including a duty to promote awareness and understanding of the UNCRC.

Together will be holding a series of seminars with members and supporters to discuss these issues.

1. Introduction

The Scottish Government's legislative programme for 2011/12 included two bills for children and young people. The first is a Rights of Children and Young People Bill which aims to establish in law a duty upon Scottish Ministers to have due regard to the rights and obligations in the United Nations Convention on the Rights of the Child (UNCRC). The second will be a wide-ranging Children's Services Bill that will offer further scope for embedding children's rights in local and national government processes.¹

This briefing is to inform Together members and supporters as they consider the Rights of Children and Young People Bill. Together actively encourages its members to inform Scottish Government directly by submitting their own response to its consultation. Together will be holding a series of seminars in early November 2011 to consult face-to-face with our membership and inform our response to the Scottish Government's consultation.

November 2011

Together consultation seminars

9th Nov – Edinburgh. 11th Nov – Glasgow. 24th Nov - Aberdeen .

Book a place by emailing mirka@togetherscotland.org.uk or call 0131 225 8864

1st December 2011

Close of The Scottish Government consultation

Details of consultation at: www.scotland.gov.uk/Publications/2011/09/07110058/0

¹ The Children's Services Bill is likely to include a review of the Children (Scotland) Act 1995, early years duties, and legislating for GIRFEC (including extending it to local authorities, health boards and third sector organisations).

2. The Rights of Children and Young People bill

The Rights of Children and Young People Bill, aims to establish in law a duty upon Scottish Ministers to have due regard to the rights and obligations in the UNCRC and its Optional Protocols when exercising any of their functions. The duty, if passed, will come into force in 2014.

The Scottish Government states the benefits of the Rights of Children and Young People Bill as being:

- Increased prominence of the UNCRC
- Providing greater consistency and clarity on Ministerial obligations with regard to the UNCRC
- Improved transparency and increased Parliamentary scrutiny
- Increase accountability to the Scottish people.

The Scottish Government's consultation document for the Rights of Children and Young People Bill is very clear that the Bill as proposed does **not** amount to full incorporation into domestic law (i.e. Scots law) as recommended by the UN Committee.

As the proposal currently stands, the Bill will have four elements:

- Scottish Ministers must have due regard to the UNCRC and its two Optional Protocols when exercising any of their functions
- The duty will be subject to a five-year reporting process to the Scottish Parliament, coinciding with international reporting obligations
- The duty will extend to those aged under-21 who have been looked after
- The Bill will be future-proofed against changes to the UNCRC and its Optional Protocols.

The Bill will not:

- Achieve direct and full incorporation of the UNCRC
- Relate to the General Comments of the UN Committee on the Rights of the Child
- Be retrospective (although opportunities will be taken through new legislation to amend existing legislation in related areas)
- Extend to public authorities (e.g. local authorities, health boards).

The duty will be additional to that under the Scotland Act to observe and implement obligations under international human rights conventions.² It will require Scottish Ministers to demonstrate 'due regard' to the UNCRC in the exercise of their functions, and this will be reviewable through the courts by means of Judicial Review. Much of the detail is still to be worked out.

3. Background

3.1. The UK's obligations under the UNCRC

The United Nations Convention on the Rights of the Child (UNCRC) sets out the basic civil, political, economic, social, health and cultural rights of children. In ratifying the UNCRC in 1991, the UK government agreed to undertake all appropriate legislative, administrative and other measures for needed for its full implementation. The UK Government has also ratified the two optional protocols to the UNCRC: the Optional Protocol on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. As such, the UK government has a binding obligation under international law to ensure that the terms

² Section 57 and Schedule 5 paragraph 7, Scotland Act 1998

of the UNCRC and its optional protocols are honoured. The UN Committee on the Rights of the Child (the UN Committee) monitors the progress made by governments in implementing the UNCRC.

The UN Committee is clear that it expects governments to take all appropriate measures to give the UNCRC legal effect within domestic law. Incorporating the UNCRC into domestic law would mean that all new policies and legislation are child rights proofed and that public authorities would be fully accountable for upholding children's rights. The UN Committee states that incorporation "*should mean that the provisions of the Convention can be directly invoked before the courts and applied by national authorities.*"³ The UN Committee has twice recommended that the UK Government incorporate into domestic law the principles and provisions of the UNCRC.⁴ To date, the UK nor any of the devolved governments have incorporated the UNCRC into domestic law.

3.2. The Welsh Measure

In early 2011, the National Assembly for Wales unanimously passed the Rights of Children and Young Persons (Wales) Measure, demonstrating its commitment to strengthening rights protection for children in Wales. From 2014, the Measure will impose a duty upon Welsh Ministers to have due regard to the rights and obligations set out in the UNCRC and its Optional Protocols when exercising any of their functions. This will have the effect of embedding children's rights in the strategic and day-to-day work of the Welsh Assembly Government, although it does not amount to direct incorporation.

3.3. Scotland's position

Since devolution, the Scottish Government has had a responsibility under the Scotland Act to observe and implement obligations under international human rights conventions.⁵ It is well established in domestic law in Scotland that the welfare of a child is paramount⁶. There is already a commitment from the Scottish Government to improve the implementation of the UNCRC, as demonstrated by its inclusion as an underlying principle in key policies such as *Getting It Right for Every Child* and the *Early Years Framework*. Despite the responsibility on the Scottish Government to observe and implement international human rights conventions and the prominence of the UNCRC in key government policies, Together's members report great variation across Scotland in terms of children accessing and experiencing many of their rights.⁷

4. Together's initial comments on the Bill proposals

Together welcomes the Scottish Government's focus and commitment to the rights of children and young people, the introduction of this bill and the number of legislative changes already made in recent years to enshrine elements of the UNCRC into Scots law. However, there is concern that the introduction of the UNCRC into top-level policy has not yet been matched by a consistent understanding of its purpose, content or implementation across regions, public bodies and professions.⁸ Although the UNCRC already imposes binding obligations on Scottish Ministers, we do still believe that there is a need for legislation to impose

³ UN Committee on the Rights of the Child (2003) General Comment no 5 General Measures of Implementation para 6.

⁴ UN Committee on the Rights of the Child (2008) and (2002) Concluding Observations on the UK of Great Britain and Northern Ireland

⁵ Schedule 5, para 7 of the Scotland Act 1998 states that international relations are reserved matters but 'observing and implementing international obligations, obligations under the Human Rights Convention and obligations under Community Law' are not.

⁶ Section 16 Children (Scotland) Act 1995

⁷ Together (2011) State of Children's Rights report.

⁸ Together (2011) State of Children's Rights report.

a duty upon the Ministers (and furthermore, public bodies) to act compatibly with the rights and obligations in the UNCRC and its Optional Protocols.

Together is concerned that the Scottish Government's current proposal outlined in the consultation paper represents a missed opportunity for Scotland's children. Together would urge the Scottish Government to use this opportunity to set the leading benchmark for children's rights in the UK and take forward the UN Committee's repeated recommendation to fully incorporate the UNCRC into Scots law.

4.1. Incorporation of the UNCRC into Scots law

The UN Committee is clear that it expects governments to take all appropriate measures to give the UNCRC legal effect within domestic law. Incorporating the UNCRC into domestic law would mean ensuring that new policies and legislation are 'child rights proofed' and that public bodies are fully accountable for upholding children's rights. The UN Committee has twice called for the UK Government to incorporate the rights, principles and provisions of the UNCRC.⁹ The committee is clear that incorporation "*should mean that the provisions of the Convention can be directly invoked before the courts and applied by national authorities*".¹⁰

Together strongly disputes the Scottish Government's reasoning for not incorporating the UNCRC into Scots law. The Scottish Government states that "*when considering the rights of different persons, it is inevitable that there will be circumstances where those rights come into conflict*" and gives parents rights under Article 8 of the ECHR as an example.¹¹ However:

- Article 8 of the ECHR is not an absolute right and recognises that there will be individuals with competing rights.
- An Article 8 right can only be enforced by the court if the court has balanced the rights of others.¹²

Discussion point

Should the Scottish Government should use this opportunity to rethink its position on incorporation of the UNCRC into domestic law? Would this better ensure that the rights enshrined within the UNCRC can be within the reach of all children living in Scotland all of the time?

4.2. Extending the scope of the Bill to include public bodies

Policy affecting children is fragmented between departments, public bodies and different levels of government. The Concordat and the removal of ring-fenced funding has substantially devolved decision-making to local authorities. Together is concerned that the 'due regard' duty will not be effective in tackling patchy implementation of the UNCRC unless it is extended beyond the functions of Scottish Ministers to public bodies more broadly.

Discussion point

Would taking forward the UN Committee's recommendation to fully incorporate the UNCRC into domestic law¹³ help ensure consistent implementation across public bodies, regions and professions?

⁹ UN Committee on the Rights of the Child (2008) and (2002) Concluding Observations on the UK of Great Britain and Northern Ireland

¹⁰ Paragraph 11, General Comment No 5, UN Committee on the Rights of the Child 2003

¹¹ The Scottish Government (2011) Paragraph 73, Consultation on the Rights of Children and Young People bill.

¹² ECHR Article 8 (Right to respect for private and family life)

¹³ UN Committee on the Rights of the Child (2008) and (2002) Concluding Observations on the UK of Great Britain and Northern Ireland

4.3. Allowing a channel of redress for children facing rights violations

The Scottish Government states in its consultation paper that it aims to establish “a clear accountability of the Scottish Ministers to the Scottish people to respect and take account of the rights of children and young people as set out in the UNCRC”¹⁴ However, the UN Committee comments that “for rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties.”¹⁵

The level of regard currently in the bill, ‘due regard’, will not have an effect on judicial remedies and would not give a child facing a rights violation the opportunity to access redress through Scottish courts. It does allow for judicial review in relation to a failure to comply with the ‘due regard’ duty but this is a very cumbersome legal mechanism. Judicial review avoids the addressing substantial issues at stake as it looks at the decision making process rather than the decision reached (i.e. simply whether the process was flawed rather than any violation of a child’s rights). Even if a child or family succeed, the law would have to be changed before there was a change in policy and then filter down to the child in question. In such circumstances, Scottish Ministers could review a policy with ‘due regard to the UNCRC’ and still reach the same conclusion.

The UN Committee recommend that a clear channel of redress for breaches of children’s rights should include provision of child-friendly information, advocacy, and access to independent complaint procedures and the courts when necessary with legal and other assistance. The ‘due regard’ duty does not meet this standard.

Discussion point

‘Due regard’ does not allow a clear channel of redress for breaches of children’s rights in line with the standards of the UNCRC. Should the duty be strengthened to ‘act compatibly’ to allow a child facing a rights violation to bring a claim to court?

4.4. Evidencing compliance with the UNCRC

The duty on Ministers to report on implementation every 5 years is a process that Scottish Ministers already undertake as part of the UK’s report to the UNCRC. The proposed reporting arrangements will not add anything substantial that will help to evidence the Scottish Government’s compliance with the UNCRC. The five year reporting cycle is too long to properly assess the impact of the Bill.

The process for ensuring the Scottish Government’s compliance with the UNCRC must be on the face of the Bill. This should include clearly showing the Bill has visibly integrated the rights of children and young people into policy-making and how this can be linked to securing better outcomes for children and young people. In order to show compliance, the Scottish Government must build a continuous process of child impact assessment and child impact evaluation into government at all levels. This process must be included as early as possible in policy development in order to there is no failure to have “due regard” to the UNCRC. In addition, it is essential that there is independent monitoring and evaluation of the Scottish Government’s progress. This should be explicitly referred to in the bill and should include parliamentary committees, SCCYP, Together, NGOs, academics and children and young people.

Discussion point

Should the process for ensuring compliance with the UNCRC be on the face of the bill? What should this process include? (e.g. a continuous process of child rights impact assessment, evaluation linked to securing better outcomes for children).

¹⁴ The Scottish Government (2011) Paragraph 16, Consultation on the Rights of Children and Young People bill.

¹⁵ Paragraph 24, General Comment No 5, UN Committee on the Rights of the Child 2003

4.5. The extension of the duty to young persons aged under 21 who have been looked after

The definition of a child according to the UNCRC is contained in Article 1 of the Convention:

*“a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.”*¹⁶ The UNCRC gives additional human rights to under 18s in recognition of their lack of formal capacity, their vulnerability, their evolving capacities and for the principles necessary for children's development. In their response to the Welsh Assembly's proposal to consult on the possible application of the Welsh Measure to young people from 18 years to 24 years, the Welsh NGO coalition raised the following questions:

*“How can the Welsh Minister apply.. []. Article 31 ‘the right to play’ to adults? Or Articles 9 and 10 on separation and reunion with parents? How does Article 37 on juvenile justice apply to a young adult? E.g. children should not be tried in adult courts or imprisoned with adults.”*¹⁷

However, the Welsh NGO Coalition acknowledged that Ministers should continue to consider the ways in which young adults over 18 could access their rights more fully, by recognising the vulnerable position many young adults are in and building on the legislation, strategic approaches and policies already put in place.

There is recognition in Scotland that many young people under 21 may still struggle to access their rights as chronological and developmental ages are not always in tandem. This can particularly be the case when a child has experienced significant difficulties in their early years. The proposed extension of the duty to young persons under 21 who have been looked after echoes the responsibilities of SCCYP, which is responsible for protecting the rights of all children and young people in Scotland under the age of 18, and those under the age of 21 if they have at any time been in the care of, or looked after by a local authority.¹⁸

Discussion point

Should the duty be extended to include young people under 21 who have been looked after? (in line with SCCYP's responsibilities). Should the duty be extended to other vulnerable groups? If so, which groups should be considered for inclusion?

4.6. Future-proofing the bill

The Scottish Government proposes to ensure that the Bill is future-proofed against subsequent changes to the UNCRC and its optional protocols. Although any future changes to the UNCRC and optional protocols are reserved to the UK Government as signatory, the Scottish Government would retain responsibility for the implementation of many of these changes under the Scotland Act.

It is unclear from Scottish Government's consultation paper how it intends to future-proof the Bill. It is essential that the Scottish Government seeks to influence the UK Government position on any future changes to the UNCRC to ensure that all children in Scotland are able to realise their rights in accordance with the UNCRC and all optional protocols. Additionally, the Scottish Government must ensure that the proposed Bill keeps pace with any changes in its obligations imposed via the UK Government as the State Party.

Discussion point

How can the Scottish Government effectively future-proof the Bill to ensure it keeps pace with changes made to the UNCRC and current and future optional protocols?

¹⁶ UN Convention on the Rights of the Child, Article 1

¹⁷ Wales UNCRC Monitoring Group (2010) Proposed Rights of Children and Young Persons (Wales) Measure

¹⁸ Commissioner for Children and Young People (Scotland) Act 2003.

4.7. Promoting knowledge and understanding of the UNCRC

The Scottish Government does not propose including a duty to promote knowledge and understanding of the UNCRC. It states that Scottish Ministers can do this without a legislative duty and that SCCYP is already under a very similar duty. The lack of a duty to promote public awareness makes the Scottish bill weaker than the Welsh measure, which includes a duty for Ministers to “...take such steps as are appropriate to promote knowledge and understanding ...of the Convention.”¹⁹

Promoting knowledge and understanding of the UNCRC is a large but necessary task. Article 42 of the UNCRC states that “States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike”²⁰ Although SCCYP has made great strides in improving the knowledge and understanding of the UNCRC among children and young people, it does not have the capacity to develop the considerable increase in public awareness needed to accompany the Bill.

Promoting knowledge and understanding is a collaborative task which should be led by the Scottish Government with support from SCCYP, Together, UNICEF and a range of public bodies. It is a task that involves engaging all sectors of society, from government officials, parliamentarians and the judiciary through to teachers, healthcare workers, the police and the media. The need to promote understanding of the UNCRC amongst government officials advising Ministers has been clearly illustrated in paragraph 73 of the Scottish Government’s consultation paper in its reasoning for not incorporating the UNCRC (see part 4.1.). It is only through promoting wider awareness and understanding of the UNCRC that the duty can be translated into practice in all work with and for children.

Discussion point

Should the Scottish Government should import Article 42 in its entirety into the Bill?

This would mean that Ministers would undertake to make the principles and provisions of the UNCRC widely known, by appropriate and active means, to adults and children alike and include an additional duty on Ministers to ensure ‘understanding’ of the Convention.

4.8. General Comments and Concluding Observations of the UN Committee

The Scottish Government does not propose that the ‘due regard’ duty should cover the General Comments and recommendations of the UN Committee.

The General Comments (of which there are currently 13) provide the UN Committee’s interpretation of the content of the UNCRC on thematic issues and elaborate on the meaning of an aspect of the UNCRC to help increase state accountability. In correspondence with the Children’s Commissioner for Wales, the vice Chair of the UN Committee, Dr Kamel Filali, has made it clear that all functions of government should:

“...always be determined within the framework of UNCRC . The obligations which should be respected by the State Party are consequently obligations for Devolved Administration and as such the Welsh Government is to apply the rights which are in the Convention and in the Optional Protocols .This is why the interpretation of Government of Wales 2006 should be in conformity with UNCRC and all other relevant CRC documents such as Concluding Observations and General Comments and Recommendations.”²¹

¹⁹ Section 5 of the Welsh Measure

²⁰ UN Convention on the Rights of the Child, Article 42

²¹ Children's Commissioner for Wales (2010) Proposed Rights of Children and Young Persons (Wales) Measure

The UN Committee's Concluding Observations (recommendations) set out how governments can improve their implementation of the UNCRC. In a Written Ministerial Statement in December 2010, the UK Government's Minister for Children and Families made:

*"...a clear commitment that the Government will give due consideration to the UNCRC Articles when making new policy and legislation. In doing so, we will **always** consider the UN Committee on the Rights of the Child's recommendations..."*²²

To demonstrate its commitment to improve its implementation of the UNCRC it may be useful for Scottish Government to give recognition of the importance of the General Comments and Concluding Observations by including them within the duty.

Discussion point

Would it improve implementation of the UNCRC if the Scottish Government was to include the UN General Comments and Concluding Observations in the duty?

5. Next steps

Together will be responding to the consultation on the Bill both formally in a written submission, and informally through meetings with the children's rights team within the Scottish Government. Together will be proactively seeking the views of its members through a series of small seminars as detailed below.

Together consultation seminars:

- 9th November – Edinburgh.
- 11th November – Glasgow.
- 24th November - Aberdeen .

Places at the seminars can be booked emailing mirka@togetherscotland.org.uk or calling 0131 225 8864.

Members and supporters who are unable to attend the seminars are encouraged to contact Juliet Harris (details below) to discuss the points outlined in this briefing and give their views.

Together – Scottish Alliance for Children's Rights

Contact: Juliet Harris, National Development Officer

Email: Juliet@togetherscotland.org.uk Tel: 0131 225 8864

24th October 2011

²² Department for Education (2010) Publication of the independent review of the Children's Commissioner Sarah Teather MP (Minister of State for Children and Families)