

Children's rights working group briefing - September 2012

Summary:

This briefing is to inform responses to the *Children and Young People Bill* consultation. It specifically looks at the questions contained in Chapter One of the consultation and the Scottish Government's proposals around children's rights and wellbeing. It has been put together following wide discussion with a range of organisations across the voluntary and public sector and through the Together/Children in Scotland children's rights working group. It also takes into account feedback from the Scottish Government's original consultation on the *Rights of Children and Young People Bill*. Together and Children in Scotland actively encourage their members to consider the issues raised in this briefing when submitting their responses to the consultation.

Members of Together and Children in Scotland have welcomed the Scottish Government's ambition and its proposal to embed children's rights across public services. The *Children and Young People Bill* provides a once-in-a-generation opportunity to ensure that the principles of the UNCRC become a reality for all children and young people in Scotland. To achieve this, Bill must successfully introduce an overarching children rights framework across all areas of national and local government. The proposed definition of 'wellbeing' should be contained within this overarching children's rights framework.

More effective rights for children and young people (*consultation questions 1 – 3*)

A duty on Scottish Ministers to further progress the realisation of children's rights should:

- Be extended to include public bodies.
- Ensure processes are put in place to ensure children's rights are considered in both decision-making and the final outcome of any decision.
- Confer rights directly on children by providing a means of legal redress for those facing rights violations.

The duty on Scottish Ministers promote and raise awareness of the rights of children should be widened to raise '*awareness and understanding*' of the UNCRC. The proposed reporting duty on Scottish Ministers and relevant public bodies to report on implementing the rights of children should be integrated with the duty to report on outcomes. There should be one common national set of indicators which should be rights-based, include the participation of children and be capable of being disaggregated to assess outcomes.

The powers of SCCYP should be extended to allow investigations on behalf of children and young people. This extension must be seen as one of a range of options for children seeking redress for violations of their rights. Specific emphasis needs to be put on the participation of children and young people, listening to their concerns at earliest stage possible and ensuring that there are effective, child-sensitive procedures available to children and their representatives at all level of public services.

A new focus on wellbeing (*consultation questions 4 – 5*) The definition of 'wellbeing' should be contained within the wider context of children's rights. Scottish Ministers should be empowered to supplement the definition of 'wellbeing' through guidance and cross-reference SHANARRI indicators with the UNCRC.

Better service planning and delivery (*consultation questions 6 - 8*) A duty should be placed on all public bodies to work together to jointly design, plan and deliver their policies and services to ensure they are focused on improving children's rights. This duty would form part of an overarching children's rights framework that would, in turn, improve children's wellbeing.

Improved reporting on outcomes (*consultation questions 9 - 11*) The proposed duty to report on outcomes should be integrated with the duty on Ministers and public bodies to report on implementing the rights of children to avoid duplication and improve effectiveness and transparency by use of one overarching reporting framework.

1. Introduction

In July 2012, the Scottish Government launched a consultation on the new *Children and Young People Bill*. This Bill brings together earlier plans for separate legislation on the *Rights of Children and Young People* and *Children's Services*. The consultation is clear that the Scottish Government wants Scotland to be '*the best place in the world for children to grow up*' and that a key aim of the proposed *Bill* is to '*make rights real for children and young people*'. It aims to achieve this through a programme of change which will include the culture and practice of all services that affect the lives of children, young people and their families.

Members of Together and Children in Scotland have welcomed the Scottish Government's ambition and its proposal to embed children's rights across public services. The *Children and Young People Bill* provides a once-in-a-generation opportunity to ensure that the principles of the UNCRC become a reality for all children and young people in Scotland. It has the potential to initiate a culture change whereby children's rights are at the heart of every decision made from national to local government and from teachers to parents.

To make the most of this opportunity, members of Together and Children in Scotland are clear that the *Children and Young People Bill* must successfully introduce an overarching children rights framework across all areas of national and local government. Although the full incorporation of the UNCRC into Scots law is unlikely to happen immediately, members of Together and Children in Scotland would nevertheless urge the Scottish Government to use the opportunity presented by the Bill to outline concrete steps it can take towards full incorporation.

This briefing is to inform responses to the *Children and Young People Bill* consultation. It has been put together following wide discussion with a range of organisations across the voluntary and public sector and through the Together/Children in Scotland Rights Working Group. It also takes into account feedback from the Scottish Government's original consultation on the *Rights of Children and Young People Bill*.

Together and Children in Scotland actively encourage their members to inform Scottish Government directly by submitting their own response to the consultation.

2. The Children and Young People Bill

The bill is split into the following sections:

- *Chapter 1, "A Scotland for Every Child"* looks at children's rights and well being
- *Chapter 2, "A Scotland for Each Child"* looks at Early Years, GIRFEC and Care

The proposals are based on the ideas of:

- a shift in emphasis to early years and early intervention;
- focussing on how services can work together;
- and '*making rights real*' for children and young people.

This briefing concentrates on Chapter 1 of the consultation paper and the Scottish Government's proposals around children's rights and wellbeing. The consultation on the Children and Young People Bill will close on the 25th September 2012.

3. Initial comments on the Bill proposals

Members of Together and Children in Scotland broadly welcome the proposals outlined in the Children and Young People Bill. The Scottish Government has taken on board many of the views expressed in the initial consultation on the Rights of Children and Young People Bill, including the need to raise awareness and understanding of the UNCRC and embed a children's rights approach within public bodies.

There is concern among Together and Children in Scotland's members that the Scottish Government's current proposals could represent a missed opportunity for Scotland's children. However, in responding to the consultation, there is still an opportunity to outline the steps that the Scottish Government should take to strengthen their proposals and achieve their aim of '*making rights real*' for children. This paper discusses the key steps that should be taken by the Scottish Government to ensure the Bill is successful in providing an overarching children's rights framework that influences all areas of policy and practice, and puts what is best for children at the centre of how Scotland is governed.

3.1. 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 to fully implement the UNCRC. As such, the UK government has a binding obligation under international law to ensure that the terms of the UNCRC and its optional protocols are honoured. The UN Committee on the Rights of the Child has twice recommended that the UK Government incorporate the principles and provisions of the UNCRC into domestic law.¹ This would mean that all new policies and legislation would be child rights proofed and that public authorities would be fully accountable for upholding children's rights. To date, neither the UK nor any of the devolved governments have fully incorporated the UNCRC into domestic law.

Despite the existing responsibility on the Scottish Government to observe and implement international human rights conventions² and the prominence of the UNCRC in key government policies, children's organisations report great variation across Scotland in terms of children accessing and experiencing many of their rights. Although the UNCRC already imposes binding obligations on Scottish Ministers, non-compliance cannot be tested in the courts. Therefore, there is a need for domestic legislation to impose a duty upon Ministers (and furthermore, public bodies) to act compatibly with the principles and provisions of the UNCRC. Where the UNCRC has already been introduced into top-level policy, it has not yet been matched by a consistent understanding or promotion of its purpose, content or implementation across regions, public bodies and professions.³

3.2. Incorporation of the UNCRC into Scots Law

The Scottish Government's proposals in the Rights of Children and Young People Bill consultation fell far short of committing to the full incorporation of the UNCRC into Scots law. A statement in the consultation paper for the Bill was clear that "*the Scottish Government is not proposing to incorporate the UNCRC into Scots law*"⁴ suggesting that directly incorporating the UNCRC would conflict with the Scottish Government's obligations under the European Convention on Human Rights (ECHR) and the Equality Act. This controversial assertion was

¹ UN Committee on the Rights of the Child (2008) and (2002) *Concluding Observations on the UK of Great Britain and Northern Ireland*
² 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.

³ Together (2011) *State of Children's Rights report*.

⁴ Scottish Government (2011). *Consultation on the Rights of Children and Young People bill*, Paragraph 73.

challenged by children's organisations in their responses to the consultation. In a more recent legal opinion from Aidan O'Neill QC, commissioned by UNICEF UK,⁵ he is clear that:

- It is within the powers of Scottish Government and Scottish Parliament to directly and fully incorporate the CRC into domestic Scots law in relation to devolved issues⁶ and:
- The direct incorporation of the CRC into domestic law would not run contrary to the requirements of the European Convention on Human Rights.⁷

Support for incorporation continues to be widespread across Scotland among members of Together and Children in Scotland and with children themselves. This was reflected in responses to the *Rights of Children and Young People Bill*⁸ consultation in December 2011. Despite there being no question in the consultation paper around the incorporation of the UNCRC into domestic law, 40% of all responses from children's organisations and 25% of all responses from public bodies (including several local authorities and NHS Boards) voiced their support for the full incorporation of the UNCRC into law. Only 6% of children's organisations and 4% of public bodies specifically expressed an opinion against full incorporation.⁹ 86% of children taking part in the Children's Parliament's consultation on the Bill said that the UNCRC should '*be like a law that people have to obey*'.¹⁰

Within the legal community, there is generally a strong opinion that it is important to push for incorporation of the UNCRC into Scots law. Incorporation is necessary to enable Scotland to give full domestic legal effect to the existing ratification of the UNCRC. It would ensure a more systematic and comprehensive approach to law reform, and raise the profile of UNCRC and children's rights across the board.

The decision to integrate the *Rights of Children* and *Children and Young People Bills* could result in the children's rights focus being lost among the wider consideration of children's services, particularly as the Bill goes through the parliamentary process. Members of Together and Children in Scotland recognise that incorporation of the UNCRC into Scots law is unlikely to happen immediately. However, they would urge the Scottish Government to use the opportunity presented by the *Children and Young People Bill* to outline concrete steps it can take towards incorporation of the UNCRC into law. These steps should include:

3.3. A duty on Scottish Ministers to take appropriate steps to further the rights of children and young people

- **In the absence of full incorporation of the UNCRC, a duty on Scottish Ministers to further progress the realisation of children's rights should:**
 - **Be extended to include public bodies.**
 - **Ensure processes are put in place to ensure children's rights are considered in both decision-making and the final outcome of any decision.**
 - **Confer rights directly on children by providing a means of legal redress for those facing violations of their rights.**

⁵ UNICEF UK (2012) *Advice from Aidan O'Neill QC, Matrix Chambers, to UNICEF UK on the ability of the Scottish Government under current devolved arrangements (Scotland Act 1998) to fully and directly incorporate the United Nations Convention on the Rights of the Child (CRC) into domestic law.*

⁶ Paragraph 7(2)(a) of Schedule 5 of the Scotland Act 1998 puts it within the legislative competence of the Scottish Parliament to 'observe and implement international obligations'.

⁷ Scottish courts also already have an obligation to interpret domestic legislation in line with the UK's international treaty obligations, at least where the domestic legislation is unclear or ambiguous. As such, the *Children (Scotland) Act 1995* and the *Equality Act 2010* should already be interpreted and applied consistently with the CRC.

⁸ Scottish Government (2011). *Consultation on the Rights of Children and Young People bill*

⁹ <http://www.scotland.gov.uk/Publications/2012/02/8619/downloads> (accessed July 2012)

¹⁰ *Children's Parliament (2011) Rights of Children and Young People Bill: A response from children facilitated by the Children's Parliament*

The Scottish Government proposes a duty in the Bill that requires Scottish Ministers *'to take appropriate steps to further the rights of children and young people'*. It states that *'such a duty would explicitly recognise Ministers' responsibilities towards the implementation of UNCRC whilst allowing them to pursue the progressive realisation of UNCRC rights.'*

It is unclear from the consultation paper what this duty would look like or how it would achieve the desired outcomes for children and young people. In the previous consultation on the *Rights of Children and Young People Bill*, the Scottish Government had proposed a duty on Ministers of *'due regard'* to the UNCRC. Although this duty was perceived as weak in legal terms, the children's sector recognised in their responses to the consultation that it could make a significant difference politically and administratively. It would raise the profile and status of children's rights and the UNCRC across government departments and also more widely among the public.

There was a general consensus in the views expressed by children's organisations that their responses to the *Rights of Children and Young People Bill* consultation should be used to inform the discussion around the duty in Children and Young People bill consultation.

1. Any duty on Ministers should be extended to include other public bodies.

The majority of decision-making that affects the lives of children takes place at a local level through health boards, local authorities, the police, Children's Reporters and other public bodies. As such, there is a concern that a duty on Ministers alone would affect only high level policy-making and fail to be effective in tackling patchy implementation of the UNCRC. Members of Together and Children in Scotland are clear that any duty on Ministers should be extended to public bodies more broadly. The need to extend the duty is further reinforced through the proposal to extend the powers of SCCYP to investigate infringements of children's rights. The Bill consultation paper states that this proposal will draw *'attention to the rights and point out where public bodies are failing to implement them fully'*. For this additional power to be effective, it is essential that there is a duty on public bodies in domestic law to comply with the UNCRC in the first place. Extending the duty to include public bodies could provide them with a useful framework through which they can make better and more consistent decisions in line with the UNCRC. These benefits were recognised by a number of public bodies, including local authorities and health boards, who called for the *'due regard'* duty proposed in the Rights of Children Bill consultation to be extended.

"The duty should probably extend past that of Ministers to public bodies also, which will ensure a much more consistent approach to children's rights. ...A consistent application of children's rights across Scotland is the only way to ensure that all Scotland's children enjoy equal access to their rights"

Stirling Council¹¹

¹¹ Stirling Council (2011) *Rights of Children and Young People consultation response*

2. Any duty should ensure that a process is put in place to ensure that children’s rights are considered in both the decision-making process and the final outcome of any decision.

The proposed duty should be strengthened to ensure that decision-making processes not only have to take children’s rights into account, but that the final decision must comply with the UNCRC. Doing this would enable the Scottish Government to maximise the impact of the duty in areas of policy that are not solely child focused and ensure the duty achieves the aim of ensuring that children’s rights are *‘at the heart of the design and delivery of policy and services’*.¹²

3. Confer rights directly on children by providing a means of legal redress for those facing violations of their rights.

The UN Committee recommends 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. It is unclear whether or not the proposed duty would have an effect on judicial remedies. It would certainly not give a child facing a rights violation the opportunity to access redress through Scottish courts. In order to meet the Scottish Government’s objective to *‘make rights real’* for children, the rights and principles contained within the UNCRC must be justifiable and children must have the option of being able to go to court to enforce their rights. Although members of Together and Children in Scotland recognise that redress through the courts should only be seen as a last resort, it can play an essential role in allowing the most vulnerable in society to claim and protect their rights and entitlements. More importantly, legal liability can be a powerful incentive for decision-makers to avoid violations of rights without the need to go to court.

3.4. Scottish Ministers would promote and raise awareness of the rights of children and young people

- **This proposal is welcome but should be widened to raise *‘awareness and understanding’* of the UNCRC.**

In the responses to the consultation to the Rights of Children and Young People bill, the children’s sector were clear for the need to promote and raise awareness and understanding of the rights of children and young people. It was felt that only through promoting wider knowledge and understanding of the UNCRC that it could be translated into practice in all work with and for children. In response, the Scottish Government proposes to place a duty on Ministers similar to that passed recently in the Rights of Children and Young Persons (Wales) Measure 2011.

Members of Together and Children in Scotland welcome the Scottish Government’s proposal although would like to see the duty widened to raise *‘awareness and understanding’* of the UNCRC. This would reflect the need to promote understanding of the principles and provisions of the UNCRC. For the duty to achieve its purpose, Ministers should engage all sectors of society, from government officials, parliamentarians and the judiciary through to teachers, health care workers, the police, the media and parents and carers, with the involvement of children at the core. To support such a duty, the Scottish Government should develop a comprehensive strategy for disseminating knowledge of the Convention throughout society, including child-friendly educational resources

¹² Scottish Government (2012) *Children and Young People Bill consultation para 51.*

and learning through the school curriculum. The strategy should include further awareness-raising and competence-building measures, such as ongoing, high-quality training and development programmes for Scottish Government staff, those working for public bodies and other relevant groups of professionals.

3.5. Scottish Ministers and relevant public bodies report on how they are implementing the rights of children and young people

- **The reporting duty on Scottish Ministers and public bodies on how they are implementing the rights of children should be integrated with the proposed duty to report on a common set of high level outcomes. It should be accompanied by a process for ensuring compliance with the UNCRC on the face of the Bill.**

The Scottish Government states that *'it is as important that the key bodies that deliver rights set out what they are doing to advance rights'*, that Ministers are keen to increase transparency and accountability around the UNCRC in Scotland and that there is a *'collective responsibility for delivering rights for children and young people at the forefront of public services'*. In order to achieve this, the Scottish Government proposes a duty which requires both Ministers and relevant public bodies to report on the steps they have taken which further the rights set out in the UNCRC. The Scottish Government suggests that these reports could be part of other documents set out by public bodies or Community Planning Partnerships. It is proposed that reports are published on a 3-yearly basis. The consultation document is unclear on how the reports would fit into the ongoing monitoring and evaluation of UNCRC and other reporting processes. The Scottish Government also proposes to place a duty on *'relevant public bodies to assist the local authority in reporting on a common set of high level outcomes for children'*.¹³

Members of Together and Children in Scotland welcome these duties on Ministers and public bodies to report. However, they believe the two duties should be integrated. This would provide coherence in the reporting requirements on public bodies and ensure that children's rights are embedded across reporting structures. To ensure any combined reporting duty is effective, it should be accompanied by a process for ensuring compliance with the UNCRC on the face of the Bill. This should clearly evidence how the Scottish Government and public bodies visibly integrate the rights of children and young people into policy-making and practice. In order to show compliance, there should be a continuous process of child rights impact assessment and child impact evaluation built into government at all levels. To help embed the process and improve the decisions being made, this process must be included at as early a stage as possible in policy development.

An integrated duty would also enable the Scottish Government to set one common national set of consistent indicators across Scotland. These indicators must be rights-based, include the participation of children and be capable of being disaggregated to provide information on various groups of children (such as children living in poverty, Gypsy Traveller children, other minority ethnic children, looked after children, children with disabilities, LGBT children etc). Such a set of common, national indicators would enable the Scottish Government and public bodies to maintain systematic information on children's outcomes. This information could then be used to help plan, implement and evaluate policies and services for children as well as supporting the Scottish Government to evidence the progressive realisation of children's rights and wellbeing.

In addition, reporting should be integrated with existing reporting mechanisms including the UNCRC reporting process and single outcome agreement annual reports.

¹³ Scottish Government (2012) Children & Young People Bill para 80

3.6. Extending the powers of SCCYP to undertake investigations on behalf of individual children and young people.

- **The extension of the powers of SCCYP is welcome, but must be seen as only one of a range of options for children seeking redress for violations of their rights.**

The majority of responses to the Rights of Children and Young People bill highlighted the need to provide child-friendly means of redress to children and young people who face violations of their rights. Some responses suggested that such a means of redress could include extending the powers of the Children's Commissioner to give him powers to undertake investigations on behalf of *individual* children. The Scottish Government propose to take this suggestion forward.

Members of Together and Children in Scotland welcome this proposal. A power for SCCYP to undertake investigations on behalf of children and young people would be a welcome step forward in having the voices of children and young people heard with regard to their own rights. It could help to inform policy and practice at a local and national level and assist in the progressive realisation of children's rights. However, it is essential that the Scottish Government ensures the extended powers are properly resourced. It is recognised that the extension of the power raises many complex practical issues, as outlined in SCCYP's briefing paper, and members of Together and Children in Scotland would encourage the Scottish Government to continue working closely with the SCCYP to explore them in more detail.

It is essential that the extension of the powers of SCCYP is seen as only one of a range of options for children seeking redress for violations of their rights. More emphasis needs to be put on the participation of children and young people and on listening to their concerns at earliest stage possible before they become a formal complaint. It is preferable that any complaint from a children around a violation of their rights is addressed as close to the source as possible. Particularly attention needs to be given to ensuring that there are effective, child-sensitive procedures available to children and their representatives at all level of public services. Child-friendly complaints mechanisms should include:

- **Public bodies**, which should review existing complaint mechanisms to complement existing 'adult' mechanisms. These should be introduced across local authorities, health boards and other public bodies and be supported by information, advice and advocacy for children where needed.
- **Scottish Public Services Ombudsman (SPSO)**, which should introduce a child-friendly mechanism to address complaints that have been through the formal complaints mechanisms of public bodies.
- **Additional powers of SCCYP** to address violations of children's rights that cannot be addressed through SPSO.
- **Redress through the courts** as a last, yet essential resort to enable children to enforce their rights.
- **Optional Protocol to the UNCRC** on a complaints mechanism for violations of children's rights. The Scottish Government should urge the UK Government to ratify the new Optional Protocol. This would enable children and their representatives to bring complaints to the UN Committee on the Rights of the Child when all domestic remedies have been exhausted.

3.7. A focus on wellbeing

- **The definition of ‘wellbeing’ should be contained within the wider context of children’s rights**
- **Scottish Ministers should be empowered to supplement the definition of ‘wellbeing’ through Guidance and cross-reference the SHANARRI indicators with key principles of the UNCRC.**

The Scottish Government proposes to include a definition of wellbeing to underpin the provisions in the Children and Young People Bill. This would include making selective amendments to the Children (Scotland) Act 1995 to ensure consistency with the approach. The definition of wellbeing would be based on the GIRFEC SHANARRI wellbeing indicators.

Whilst members of Together and Children in Scotland welcome a duty on public bodies to work together to focus on children, the emphasis on a child’s ‘wellbeing’ does not necessarily fulfil the Scottish Government’s commitment to *‘make rights real’* for children. The Children and Young People Bill offers the opportunity to embed children’s rights across the design and delivery of policy and services. To achieve this, the definition of ‘wellbeing’ needs to be contained within the overarching framework of children’s rights.

To give definition of wellbeing meaning, the proposed guidance to supplement the definition should include cross-referencing the SHANARRI indicators with the UNCRC. This will ensure that the SHANARRI indicators can contribute towards an overarching children’s rights framework underpinned by the key principles of the UNCRC.

3.8. Better service planning and delivery

- **A duty should be placed on all public bodies to work together to jointly design, plan and deliver their policies and services to ensure they are focused on improving children’s rights.**

The Scottish Government proposes to promote wellbeing through a duty to be placed on public bodies to *‘work together to jointly design, plan and deliver their policies and services to ensure they are focused on improving children’s wellbeing’*,¹⁴ suggesting that this could include areas such as joint service design, financial planning and training. This offers yet another opportunity to ensure that the rights enshrined in the UNCRC are at the heart of public body decision-making and service delivery. Echoing the comments made above around the definition of wellbeing, this duty should also be extended to ‘improving children’s rights’. This duty would form part of an overarching children’s rights framework that would, in turn, improve children’s wellbeing. This duty could be reinforced through updated guidance for Community Planning Partners.

4. Next steps

Together and Children in Scotland 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.

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

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¹⁴ *Scottish Government (2012) Children & Young People consultation para 75.*