



Access to justice for children

Together (Scottish Alliance for Children's Rights)

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1. Introduction

Together (Scottish Alliance for Children's Rights) seeks the full implementation of the UN Convention on the Rights of the Child (UNCRC) in Scotland. With over 230 members throughout Scotland, we provide a focal point for non-governmental organisations in Scotland on children's rights issues. In consultation with our members, Together prepares NGO alternative reports to the UN Committee on the Rights of the Child on Scottish and UK government progress in implementing in the UNCRC.

This response to the Office of the United Nations High Commissioner for Human Rights' consultation on access to justice for children is drawn from Together's *State of Children's Rights* reports 2010-2012¹ which provide a non-government perspective on the progress made in Scotland towards implementing the UNCRC. It also draws from Together briefings on specific issues published between 2011-13. It sets out good practice with regards to access to justice in Scotland on the specific themes identified in paragraph 57 of Resolution 22/32 adopted by the Human Rights Council. It also identifies where further steps could be taken to improve access to justice for children in Scotland. It is not proposed to be a definitive briefing outlining all areas of good practice around access to justice for children in Scotland, nor claim to outline all areas where improvements could be made.

2. Access to justice for children in Scotland

2a. Existence and availability of child-friendly justice procedures and mechanisms under criminal, civil and administrative law

Scotland's Children's Hearings system

The Children's Hearings System is Scotland's unique care and justice system for children and young people. It aims to ensure the safety and wellbeing of vulnerable children and young people through a decision making lay tribunal called the Children's Panel. Children and young people who face serious problems in their lives may be asked to go to a meeting called a children's hearing. The Children's Panel makes decisions at a hearing about the help and guidance necessary to support the child or young person. Decisions are made in the best interests of the child or young person to help and protect them. One of the fundamental principles of the Children's Hearings System is that children and young people who commit offences, and children and young people who need care and protection, are dealt with in the same system – as they are often the same children and young people.

- More information available at: <http://www.chscotland.gov.uk/the-childrens-hearings-system/>

¹ Together (2010). State of Children's Rights report. Together (2011). State of Children's Rights report. Together (2012). State of Children's Rights report.

Giving evidence in court

The Vulnerable Witnesses (Scotland) Act 2004 ensures that all child witnesses under 16 are automatically regarded as vulnerable witnesses and can use special measures to assist them to give their best evidence.

Special measures can include:

- live television link in another part of court building
 - giving evidence from behind a screen
 - a supporter accompanying the witness
 - live television link from out of court building
 - evidence on commission
 - greater use of prior statements of vulnerable witness
- More information available at: <http://clanchildlaw.org/factsheets/giving-evidence/>

2b. Specific obstacles/barriers faced by children in accessing justice

Legal aid for children

From 31 January 2011 the way that a child is assessed for civil and children's legal assistance was changed.² Previously, a child would be assessed in the same way as an adult, on the basis of their own personal disposable income and capital. However, this change now means that a solicitor assessing a child or young person who applies for any civil or children's legal assistance must take into account the financial circumstances of anyone who owes a duty of 'aliment' to that child or young person. A obligation of 'aliment' rests on the mother and father of the child, or any person who has accepted a child as a member of their family (other than a child who has been fostered to a family by a local or other public authority or a voluntary organisation).³ Since this change came into place, applications for civil legal aid for children have reduced significantly, as have the proportion of applications assessed and granted by the Scottish Legal Aid Board (SLAB).

- More information available at: <http://clanchildlaw.org/2013/05/legal-aid-for-children/>

Availability of legal representation

There are significant concerns about the availability of legal representation to asylum-seeking children. Children's organisations are calling for specific funding to be made available by the Scottish Government to provide legal representation for asylum-seeking children, alongside calling for the Law Society Scotland to introduce an accreditation scheme similar to the Immigration and Asylum Accreditation scheme run by the Law Society in England, in order to ensure a quality standard among legal professionals.⁴

Appeals to Additional Support Needs Tribunal

The Additional Support Needs Tribunals for Scotland consider appeals made by parents and young people against decisions of Education Authorities regarding the provision of educational support. Such educational support is provided to children who face barriers to learning and require additional support to make progress. This could be as a result of a range of issues from being bullied through to having

² By the Advice and Assistance (Scotland) Amendment Regulations 2010 and the Civil Legal Aid (Scotland) Amendment Regulations 2010

³ The Civil Legal Assistance Handbook (March 2013) states that for this provision the obligation of aliment applies to those parties defined in section 1 (1) (c) or (d) of the Family Law (Scotland) Act 1985, which are: (c) a father or mother to his or her child; (d) a person to a child (other than a child who has been boarded out with him by a local or other public authority or a voluntary organisation) who has been accepted by him as a child of his family.

⁴ www.lawsociety.org.uk/productsandservices/accreditation/accreditationimmigrationasylum.page

emotional, behavioural or learning difficulties or being bereaved. However, children under the age of 16 have no independent right of appeal to the tribunal and have to appeal through their parents. Restricting the right to appeal to children aged 16 years and over excessively and unduly limits the number of children who are able to benefit from being granted the right to appeal. It should be open to all children who are affected by the decision and who have the capacity to make a decision to initiate an appeal, not just those children in the 16+ age group. This would ensure that, where parents are unwilling or unable to initiate an appeal, a child or young person would be able to do so.

- More information available at: <http://www.asntscotland.gov.uk/asnts/535.25.246.html>

2c. Systems in place to channel complaints by children, including helplines, school system, social services, police stations, health system, etc.

New powers for Scotland's Commissioner for Children & Young People

The Children & Young People (Scotland) Bill currently under scrutiny by the Education and Culture Committee of the Scottish Parliament includes a proposed power for Scotland's Commissioner for Children & Young People (SCCYP) to undertake investigations on behalf of children and young people⁵. This has been largely welcomed by the children's sector as 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 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 the earliest stage possible before they become a formal complaint. It is preferable that any complaint from a child around a violation of their rights is addressed as close to the source as possible and that particular 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. In addition, Together is clear that this proposed extension of SCCYP's powers does not replace the need for redress through the courts which is needed as a last, yet essential resort to enable children to enforce their rights.

2d. Legal standing, legal capacity and legal representation for minors under criminal, civil and administrative law, the issue of potential conflict of interest with legal representatives

Scotland's Children's Hearings system

The Children's Hearings (Scotland) Act 2011, which came into force on 24 June 2013 made a number of changes to legal representation for minors within the Children's Hearings System. A child and relevant person are each entitled to a representative who can come with them to a hearing⁶ and court⁷. A representative can be anyone that the child or relevant person wishes. There is no age limit on who can be a representative. The new rules state that the role of the representative is to assist the child or relevant person to discuss any issues arising for discussion before the hearing or pre-hearing panel. The right to a representative is without prejudice to the right to have a legal representative. A relevant person's representative can be excluded from all or part of a hearing where the representative's presence is preventing obtaining the child's views or where it is or is likely to cause significant distress to

⁵ Scottish Parliament (2013) Children & Young People (Scotland) Bill (Part 2)

⁶ Children's Hearings (Scotland) Act 2011 (s.78)

⁷ Children's Hearings (Scotland) Act 2011 (s.104)

the child. After the exclusion, the representative now must be told what has taken place⁸, rather than the substance of what has taken place in his or her absence.

The 2011 Act makes provision for the Scottish Legal Aid Board to administer the appointment of legal representatives rather than the local authorities or courts. A lawyer continues to be able to attend a hearing as a representative but payment would only be received if they were appointed by the Scottish Legal Aid Board and the criteria apply. The Act sets up a new registration scheme for lawyers with a Code of Practice. Legal aid will automatically be made available in certain circumstances for children wishing to be legally represented at children's hearings, including where it might be necessary to make a compulsory supervision order with a secure accommodation authorisation. Full information as to how these new provisions will work in practice will be available once the regulations and Code of Practice are finalised.

Age of criminal responsibility

As reported in the 2011 and 2012 *State of Children's Rights* reports,⁹ the age of criminal responsibility in Scotland currently remains one of the lowest in Europe. The introduction of a minimum age for prosecution set at 12 through the Criminal Justice and Licensing (Scotland) Act 2010 reflects a 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.

In the Scottish Government's UNCRC action plan progress report, the *Do the Right Thing* progress report, it commits to give '*fresh consideration to raising the age of criminal responsibility from 8 to 12.*¹⁰ 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. However, Together is disappointed to see the steps have not been proposed to raise the age of criminal responsibility in the Criminal Justice (Scotland) Bill which is currently being scrutinised by the Scottish Parliament's Justice Committee. This omission from the Bill is a missed opportunity to fulfil the Scottish Government's commitment. Together is urging the Justice Committee to consider raising the age of criminal responsibility through this Bill.

2e. Participation of children in the judicial process (criminal, civil and administrative), including their right to be heard and indirect methods of participation for children

Scotland's Children's Hearings system

There is a strong intention in the new Children's Hearings (Scotland) Act 2011 to ensure participation by the child or young person. This reflects the constant and consistent identification of this as an issue for children and young people themselves. Specific duties are placed on the children's hearings and in particular on the chair. There are duties on others e.g. report writers and Safeguarders in relation to their report content. There is provision for people and methods to be available to help participation to occur. There are measures of protection available where this is needed. Although specific duties are

⁸ Children's Hearings (Scotland) Act 2011 (s.77)

⁹ Together (2011). *State of Children's Rights* report. Together (2012). *State of Children's Rights* report

¹⁰ Scottish Government (2012). *Do the Right Thing* Progress Report 2012

placed on the hearing, it is everyone's duty to try and support a child participating at the hearing – in line with Getting it Right for Every Child principles¹¹.

- More information available at: <http://clanchildlaw.org/training-2/>

2g. Alternatives to judicial proceedings for children

See references in this briefing to Scotland's Children's Hearings System (sections 2a, 2d and 2e).

2i. Children's knowledge of their rights, including dissemination of adequate information; actors involved, linguistic and cultural challenge

The Scottish Government has published guides to what children can legally do at their age from 0 - 21, "What can I do at my age?" and "At what age can I...?". It includes examples such as what age a young person can be held responsible for crimes, see certain films, register as an organ donor, join the armed forces, buy a pet or get married. It also includes guidelines on how many hours can be worked at different ages.

Access "What can I do at my age?" and "At what age can I...?" here:

<http://www.scotland.gov.uk/publications/2009/04/02155040/0>

2j. Training of police officers and judicial professionals on children's rights

Part 1 (Section 2) of the Children & Young People (Scotland) Bill includes a further duty on Scottish Ministers to "promote public awareness and understanding (including appropriate awareness and understanding among children) of the rights of children". In its explanatory notes to the Bill¹², the Scottish Government states that this provision has the effect of incorporating Article 42¹³ of the UNCRC into Scots law. Together welcomes this provision and recognises the impact it could have on 'making rights real' to children if properly implemented. However, this duty alone will not ensure that police officers and judicial professionals proactively ensure they are aware of or understand the UNCRC. Together's 2012 *State of Children's Rights* report recommends that adult-focused agencies, including the criminal justice system, should receive child rights training to ensure they consider the impact of their actions and decisions on children¹⁴.

2l. Effective remedies for children

Third Optional Protocol to the UNCRC

A recommendation was made through the Universal Periodic Review that the UK "consider an early ratification of the newest international human right instrument – the third Optional Protocol to the Convention on the Rights of the Child on a communication procedure."¹⁵ In response the UK Government

¹¹ <http://www.scotland.gov.uk/Topics/People/Young-People/gettingitright/background>

¹² Para 7. Scottish Government (2013) Children and Young People (Scotland) Bill, Explanatory Notes (And Other Accompanying Documents)

¹³ Article 42 reads: "State Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike."

¹⁴ Together (2012) State of Children's Rights report

¹⁵ United Nation Human Rights Council (2012). Annex one: 110.5. Universal Periodic Review. United Kingdom of Great Britain and Northern Ireland.

stated that it would "*consider signing the Optional Protocol when it has fully evaluated its merits*". Together is urging the Scottish Government to support the UK Government in ratifying the Optional Protocol 3 at the earliest opportunity would like to see a roadmap indicating the timescale and process involved with regards to its ratification.

Legal redress for children

There is currently no legal method of ensuring that all the rights contained in the UNCRC are being upheld in Scotland. The new power for the Children's Commissioner proposed in the Children & Young People (Scotland) Bill¹⁶ that allows for investigation of cases or complaints brought by or on behalf of individual children and young people will be a useful and important tool to resolve alleged violations of children's rights (see part c). However, this is not a formal legal process that would allow children and young people to enforce their rights. Together is urging the Scottish Government to incorporate the UNCRC into Scots law so that it is applicable in the Scottish courts and requires judges to ensure cases affecting children are consistently interpreted in light of the UNCRC.

2m. Specific measures to assist particularly vulnerable groups of children to access to justice.

See section 2b Appeals to Additional Support Needs Tribunals.

3. 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 232 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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¹⁶ Scottish Parliament (2013) Children & Young People (Scotland) Bill (Part 2)