



**Scotland's Commissioner
for Children & Young People**

Children and Young People (Scotland) Bill Briefing ahead of Stage 3 Debate, 19 February 2014

Throughout the parliamentary proceedings on this Bill, I have stated my support for its principles and direction of travel, and urged the Scottish Government to be more ambitious about children's rights within the Bill. At stage 3, it is clear that some significant advances have been made through the parliamentary process, most notably in respect of 'continuing care' for young people.

I welcome the Ministerial duty to promote public awareness and understanding of children's rights. If assertively implemented and adequately resourced, this could provide longer-term benefits for Scotland's approach to children's rights. Overall, however, progress in terms of the children's rights provisions has been limited. I therefore support amendments to strengthen the legal protection of children's rights and ministerial accountability for their realisation in this Bill and beyond.

I welcome the provisions amending this office's power of investigation to extend to individual cases brought by children and young people or on their behalf, and I am confident that this function will make a positive difference to children's lives and respect for children's rights in Scotland once it 'goes live' in April 2016.

I am happy to restate my support for *Getting It Right for Every Child*, and the 'named person' provisions and urge that sufficient resources are made available for their implementation – especially in the case of Health Visitors. Some of my concerns regarding the sharing of children's personal information have been allayed, but I support further amendments to ensure that the right balance is struck between the need to share information for the purpose of the promotion and protection of children's wellbeing, and the child's right to privacy and to exercise gradually increasing autonomy over their lives. Much reliance has been placed on the forthcoming guidance, and I would urge the Government to ensure that the views of all relevant stakeholders, including children and young people, are heard in its development.

Overall, it is my view that the Children and Young People (Scotland) Bill is a positive development for children and young people in Scotland, extending free childcare provision, increasing support for care leavers, advancing the implementation of GIRFEC, and establishing a new route for children to claim the rights guaranteed by the UNCRC.

However, a commitment to making children's rights meaningful in reality is about more than making supportive statements. It is action, including legislative action that really counts, and in this Bill the Scottish Government could have gone a lot further. So far the opportunity has been missed to be ambitious for children's rights and to systematically embed children's rights in Scotland's governance and public services. I therefore urge members to take the remaining opportunities to make a difference at stage 3 and to engage in the debate about the legal protection of children's rights in Scotland beyond this Bill.

Tam Baillie
Scotland's Commissioner for Children and Young People

COMMENTARY ON SELECTED AMENDMENTS

116 Jean Urquhart: Body to Consider Legal Protection of Children's Rights

The Commissioner **SUPPORTS** this amendment. This office has consistently called for a longer-term vision and a 'road map' setting out tangible steps the Scottish Government intends to take towards giving full legal effect to the rights guaranteed by the UNCRC. Its incorporation into Scots Law would fundamentally change the terms of the conversation about children's rights, and elevate children's status and place in society. Over time, it would lead to major positive changes in law, policy and practice and bring significant benefits to children, families, and society as a whole. The body envisaged by this amendment would enable a focused piece of work on the legal protection of children's rights in Scotland to be undertaken, with the active involvement of government, Parliament, and (it is hoped) a wide range of stakeholders including children themselves.

117 Liam McArthur: Ministerial Duty relating to Children's Best Interests

The Commissioner **SUPPORTS** this amendment. It proposes a practical, meaningful and well-tested means of giving greater effect to the rights of children and young people: a duty on ministers that builds on the ongoing extension of established principles and provisions of Scots Law, based on article 3 of the UNCRC. Similar provisions have featured in Scots child and family law for decades, and are now increasingly prevalent in other areas of law, including in immigration and criminal justice¹.

Article 3, according to the Deputy First Minister, encapsulates the simple principle that 'all adults should do what is best for children'². The duty proposed in amendment 117 would require all Scottish Ministers to do just that. In doing so, they would have to treat the best interests of children who are likely to be affected by ministerial action as a 'key consideration' (*not* the only or the 'paramount' consideration that trumps all others). This provision would simply require that in the country that aspires to be 'the best place for children to grow up in', everything done by central government that concerns children is done with their best interests at the forefront of decision-making.

In contrast, the duty in s. 1 (1) could be discharged by simply 'conducting a fairly high level overview, perhaps on an annual basis, of how [Ministers] might secure better or further effect of the UNCRC'³. Without the rigour brought to the Bill by amendment 117, it will fall far short of matching the high ambition to 'make rights real', often stated by Ministers.

118 Liam McArthur: Ministerial Duty relating to Children's Voices

The Commissioner **SUPPORTS** this amendment, which is based on article 12 of the UNCRC. Similar to the duty based on children's best interests above, this amendment would build on existing law requiring children's views to be sought and given due weight in a range of situations where their interests are affected. Ministers would be under an analogous requirement to ascertain children's views, which would then be given appropriate weight in the decision-making process alongside other relevant considerations. The duty provided for by this amendment would be stronger and more wide-ranging than that proposed by the Minister (amendment 93), which – albeit pursuing a welcome objective – is tied to the weak duty in s. 1 (1) and would allow very wide discretion as to whether to seek children's views and what weight to attach to such views.

119 Alison Johnstone: Child's Right to Protection from Violence, Abuse and Neglect

Violence, abuse and neglect undermine children's wellbeing. Protecting each child's right to be free from such adversity promotes it. This welcome amendment, which the Commissioner **SUPPORTS** (along with 120 and 122), reflects the requirements of art 19 of the UNCRC and strongly supports the policy objectives of the Bill⁴. The effect of this amendment would be to include a positive statement of

¹ See, for example, s. 42 of the Criminal Justice (Scotland) Bill, currently at stage 1.

² Speech by the Deputy First Minister Nicola Sturgeon MSP on child poverty, 7 March 2013.

³ Opinion of Lorna Drummond QC for SCCYP, 4 September 2013, para 2.

⁴ See the case for early intervention to promote children's wellbeing in the Introduction to *A Scotland for Children* (2012).

that fundamental right of each child in the Bill, and to require the Scottish Ministers to take all appropriate measures within their sphere of influence to ensure that freedom from violence and abuse becomes a reality in the lives of Scotland's children.

121, 123 and 124 Neil Bibby: Consultation on Reports; Responses to UN Committee Statements

The Commissioner **SUPPORTS** these amendments. They would strengthen current reporting duties by building in a mechanism that introduces a measure of robust external scrutiny and assessment of both Ministers' record and the adequacy of their forward plans to advance children's rights. The Commissioner further supports a requirement on Ministers to demonstrate how they have responded to specific statements made by the UN Committee on the Rights of the Child⁵, whether these be *Concluding Observations*⁶, *General Comments*⁷, or as a result of an Optional Protocol to the Convention. These are key interpretive pronouncements, which must be taken seriously by governments.

125 and 126 Liam McArthur: CRIAs/Compatibility Statements

The Commissioner **SUPPORTS** these amendments. Children's Rights Impact Assessments (CRIA) are recognised internationally as a key mechanism to consider the potential impacts of law, policy and practice on children and their rights ahead of enactment or implementation, and to minimise any adverse impacts⁸. The Commissioner's office's CRIA tool⁹ has been used successfully to assess law, policy and practice across a wide range of topic areas, and to highlight the power imbalances between adults and children that are among the root causes of children's rights violations. It is disappointing that the Scottish Government has failed to adopt CRIAs, despite commitments to the contrary over several years¹⁰. This indicates the need for amendment 126 which would require CRIAs by law. The Commissioner also supports amendment 125, but recognises that on its own this would require less analysis of the impact of a Bill on children's rights than a requirement to undertake a CRIA.

Parts 4, 5 and 7: Inappropriate inclusion of SCCYP in Schedules 2, 2A and 3

The Commissioner currently appears in Schedules 2, 2A and 3 to the Bill, which would make the office subject to a range of provisions relating to the 'named person' function, child's plans and corporate parenting. Following discussions, Ministers now accept that it would be inappropriate for the ministerial powers of direction attached to each set of duties to apply to the Commissioner. Indeed, they would run directly counter to the guarantee of independence contained in the Commissioner for Children and Young People (Scotland) Act 2003¹¹, which reflects guidance given by the United Nations¹². Independence is central to the credibility of the office as a scrutiny body set up to pursue concerns about children's human rights without fear or favour, especially in light of the extended complaints and investigations function in respect of individual children introduced by this Bill (Part 2).

Two alternative sets of amendments have been put to members at stage 3:

(1) 77 and 86 Aileen Campbell

These amendments would complete the partial solution commenced at stage 2¹³ by disapplying the ministerial powers of direction in relation to Parts 4 and 5 in respect of the Commissioner. This is welcome so far as it goes. However, it does not address the Commissioner's concerns beyond the direct contradiction of the independence guaranteed in the 2003 Act.

⁵ The UN Committee is an international expert panel overseeing the implementation of the Convention globally.

⁶ *Concluding Observations* are the outcome documents of the periodical reporting process undertaken by states.

⁷ *General Comments* are authoritative interpretive guidance issued by the Committee.

⁸ UN Committee on the Rights of the Child (2013), *General Comment No. 14: The Right of the Child to have his or her Best Interests taken as a Primary Consideration*, CRC/C/GC/14, para 35.

⁹ Paton, L & Munro, G (2006), *Children's Rights Impact Assessment: The SCCYP Model*, Edinburgh: SCCYP.

¹⁰ For example, the Scottish Government's UNCRC action plan *Do the Rights Thing* (2009) and progress report (2012).

¹¹ Schedule 1, para 2.

¹² For example, the UN's *Paris Principles* and the UN Committee on the Rights of the Child's *General Comments* 2 and 5.

¹³ Amendment 303 in the name of the Minister, agreed without division at stage 2.

(2) **198, 199 and 200 Liam McArthur** (and consequential amendments 176, 77A and 86A)

The Commissioner therefore urges members to **SUPPORT** this alternative set of amendments, and is grateful to Liam McArthur MSP for agreeing to lodge these amendments at this late stage, once it had become clear that they would be necessary. These amendments reflect the fact that even if the provisions for a ministerial power of direction is disapplied in respect of the Commissioner, the office's inclusion in Schedules 2, 2A and 3 would result in an unprecedented executive interference with the model that Parliament chose and reaffirmed¹⁴ for bodies such as the Commissioner.

Inclusion in the Schedules would enmesh the Commissioner in a network of close institutional relationships with statutory children's services providers, all of which are potentially subject to investigation by the Commissioner. This would undermine the perception of independence and therefore the trust in and credibility of the office in the context of complaints-handling and investigations. For example, the Commissioner would owe a duty to share information about individual children with a range of statutory services that will provide 'named persons'¹⁵. It is only a question of time until the Commissioner will be required under this duty to disclose sensitive information about a child complainant to the service provider under investigation, which also provides the named person service to the child, thereby giving the service provider a degree of power over the Commissioner in terms of the investigation – precisely what Parliament sought to avoid by choosing the institutional setup of the 2003 Act. The Act will require investigations into individual children's cases to be 'conducted in private'¹⁶ which will be important to many complainants, but inclusion in Schedule 2 compromises this central tenet of the investigatory power as extended under Part 2.

The Commissioner's inclusion in Schedules 2A (child's plan) and 3 (corporate parenting) would require the office to actively participate in care planning for individual children. Such duties assume service-level involvement in the day-to-day care for and decision-making about children and young people, which are plainly not among the Commissioner's statutory functions. Crucially, any such involvement by the Commissioner would be likely to interfere with the perception of independence and impartiality in relation to the service providers with whom the Commissioner would have to align closely to perform the roles envisaged by Parts 5 and 7 effectively. It is important to recognise that the children concerned – those with a child's plan and those who have 'corporate parents' – will be the very children who are most vulnerable to infringements of their rights. With very little by way of positive impact in return, inclusion in the Schedules would therefore effectively foreclose some of Scotland's most vulnerable children's recourse to the complaints/investigatory mechanisms created by Part 2 of the Bill (arguably with precisely those children in mind).

166 and 170 Liam McArthur: Consent to Information-Sharing with/by Named Person

The Commissioner **SUPPORTS** these amendments, which would help ensure that the Bill strikes the right balance between children and young people's right to be protected from harm and their right to privacy, a breach of which may itself cause harm to the child. The effect of these amendments would be to give a level of control and appropriate autonomy to children and young people in relation to their confidential¹⁷ information, while enabling the proportionate sharing of information where this is necessary to protect their wellbeing under the terms of the statutory guidance.

¹⁴ The Review of SPCB-Supported Bodies in 2009 supported the 2003 Act model. The Review's recommendations were subsequently implemented through the Scottish Parliamentary Commissions and Commissioners etc. Act 2010.

¹⁵ Sections 25 and 26 of the Bill respectively.

¹⁶ Section 5 (3) of the Bill.

¹⁷ A helpful starting point in terms of the meaning of 'confidential information' may be Perth & Kinross Council's information-sharing guidance, which defines it as 'Information that is considered confidential is usually of some sensitivity; is neither lawfully in the public domain nor readily available from another source; and is shared in a relationship, where the person giving the information understood that it would not be shared with others (p. 15).