

Rights of Children and Young People Bill

Consultation Paper

Response Booklet

RESPONDENT INFORMATION FORM

Please complete the details below and attach it with your response. This will help ensure we handle your response appropriately:

YOUR DETAILS

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1. Are you responding as: (please tick one box)

- (a) an individual (go to 2a/b)
- (b) **on behalf of** a group or organisation (go to 2c)

INDIVIDUALS:

2a. Do you agree to your response being made available to the public (in the Scottish Government library and/or on the Scottish Government website)?

Yes (go to 2b below)

No, not at all (We will treat your response as confidential.)

2b. **Where confidentiality is not requested**, we will make your response available to the public on the following basis (**please tick one** of the following boxes)

Yes, make my response, name and address all available

Yes, make my response available, but not my name or address

Yes, make my response and name available, but not my address

ON BEHALF OF GROUPS OR ORGANISATIONS:

3. Your name and address as respondents **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government website). Are you content for your response to be made available also?

- Yes
- No (We will treat your response as confidential.)

SHARING RESPONSES/FUTURE ENGAGEMENT

4. We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Government to contact you again in the future in relation to this consultation response?

- Yes
- No

YOUR BACKGROUND

In analysing your response, it would help us to know what your background is. Please indicate using the boxes provided below the area which best describes your involvement with children and add any further comments you wish to make about this.

- Early Years Education Health
- Justice Parent/Carer Police
- Social Work Sport and Leisure Voluntary Organisation
- Other

Further comments: Academic

The Centre for Research on Families and Relationships is a cross-Scotland consortium research centre, based at the University of Edinburgh. It brings together leading researchers to explore topics relevant to children, families and older people across the lifecourse and generations. It acts as a network and hub for researchers and research users in policy and practice, across

voluntary and statutory sectors. CRFR produces, stimulates, exchanges and disseminated high quality social science research and commentary on families and relationships.

This response is from CRFR at the University of Edinburgh.

YOUR VIEWS

On the need for legislation

Q1 Do you agree that legislation to embed the UNCRC within the Scottish Government's decision-making and day-to-day business is necessary and appropriate?

Yes, in that the legislation underlines the existing requirements and commitment of the Scottish Government to implementing the UNCRC. As the consultation paper makes clear, the Scottish Government (as part of the UK Government) already has these duties as a matter of international law but the UNCRC is not currently actionable in any domestic courts (page 16). The legislation, if underlined by processes and commitments, could ensure that children's rights are given more breadth and depth in policy-making and thus practice.

However, the proposed Bill is not full incorporation of the UNCRC. This should be the ultimate goal of the Scottish Government, which recognises that "The realisation of rights is essential if children are to be successful learners, confident individuals, effective contributors and responsible citizens" (page 9, para 11 of the consultation). The reasons for not proposing incorporation (page 27, para 73) are unpersuasive:

- The UNCRC is carefully phrased, so that it balances a range of considerations and obligations. For example, Article 3 of the UNCRC requires a child's best interests to be 'a primary consideration' in all actions concerning children. Thus a child's best interests are not paramount but much be given a certain level of priority. This phrasing was chosen for the UNCRC explicitly to balance the breadth of the Article's application, with a reasonable priority for children's best interests.¹
- Children's rights are compatible with human rights and the discussion of potential problems is unhelpful.

This was underlined by our recent seminar, organised by CRFR, the Scottish Human Rights Commission and Together (the Scottish Alliance for Children's Rights) – 28th October 2011,

¹ Detrick (ed.) (1992) *The United Nations Convention on the Rights of the Child. A Guide to the 'Travaux Préparatoires*, Netherlands: Martinus Nijhoff Publishers.

<http://www.crfr.ac.uk/events/childrensrights.html> The European Court on Human Rights, for example, has increasingly made reference to the UNCRC in its decisions and has put forward ways to recognise both parental and children's rights under the ECHR.²

The proposed Bill is limited in extending the duties only to the Scottish Government. While sympathetic that this likely allows the Bill to go through more quickly and become law, this is a significant limitation to recognising children's rights. In the daily interaction with services etc., in health, education, leisure etc., children will not be able to take action under the proposed legislation when it relates to local public authorities. Further, the proposed Bill risks being a *regressive* step: i.e. such public authorities may think that, since the due regard duty is not to be extended to them, that in fact they are not obligated to implement the UNCRC. Given the stated commitment of the Scottish Government to the UNCRC, such an unintended interpretation would be problematic.

A way to deal with both issues would be for the Scottish Government to take another, substantial step, towards the realisation of children's rights in Scotland – thus firmly establishing itself as being the leader within the UK on children's rights. **A date in the future should be proposed where the Bill's duties would extend to all public authorities and/ or organisations with a public function.** This could be done on the face of the bill, in a similar way to targets for child poverty.

Proposal 1

Q2 Do you agree that "due regard" is the appropriate level of regard for the duty on the Scottish Ministers? If not, why not?

"Due regard" is a low threshold and one that primarily deals with process, rather than content.³ As such it is less than the existing requirements to implement the UNCRC, under international law, and **stronger phrasing should be found** for its obligation.

² E.g. *Glaser v United Kingdom* (2001) 33 EHRR 1

³ *R (Brown) v Secretary of State for Work and Pensions, Secretary of State for Business, Enterprise and Regulatory Reform* [2008] EWHC 3158 (Admin)

Q3 Do you agree that the duty should apply to all the functions of the Scottish Ministers? If not, why not?

Yes, the duty should apply to all of the functions of Scottish Ministers. This is one of the benefits of the Bill – ensuring the breadth of coverage the UNCRC has in fact required and has been continuously underlined as necessary by the UN Committee on the Rights of the Child.

Proposal 2

Q4 Do you agree with the proposed arrangements for reporting?

No. Five years is too long to provide transparency and accountability, principles that are core to the Scottish Parliament and the new ways of government in Scotland – and identified in the consultation on page 32, para 89. Certainly, the Scottish Government should report upon and evaluate the legislation's implementation, as part of the regular report to the UN Committee on the Rights of the Child. It is appropriate that the Scottish Parliament and its Committees have a monitoring role, and an opportunity to discuss the Scottish Government's duties.

Creating processes that are transparent, accountable and accessible to children, young people and civic society more generally will be central to the legislation's success. This has been recognised by the Welsh Assembly, where laying out a 'scheme' for the Welsh Measure is required to ensure 'due regard'. Further, this includes an obligation to consult with children and young people and relevant stakeholders. **The Bill provides a particular opportunity to embed children and young people's participation within decision-making in the Scottish Government – this opportunity should be taken.**

Part of such processes should be mechanisms for children, young people and those concerned about their rights, to raise concerns as policy is developed. As underlined by the Oct 28th seminar, children and young people often do not recognise that their rights may be or have been violated, let alone know how to access legal advice and support. Judicial review can be daunting for anyone and, even with improvements, has time and resource costs. Judicial review overtly considers process rather than substance of decision-making. Judicial review is not always effective in changing practice, unless procedures are in place within the organisation to do so.⁴ **More effective and efficient means for children and young people to raise concerns and make complaints could be built into the processes of fulfilling the 'due regard' duty and afterwards, thus avoiding judicial review except in the most extreme of cases.**

⁴ Richardson, G. (2005) 'Impact Studies in the United Kingdom' in M.Hertogh&S.Halliday (eds), *Judicial Review and Bureaucratic Impact* (Cambridge: Cambridge University Press).

There have been considerable developments in complaints mechanisms, within administrative justice, and options should be considered in this regard. Further, **consideration should be given to extending the role of the Office for the Scotland's Commissioner for Children & Young People, to address individual complaints.** Examination of how this has worked for the Northern Ireland's Commissioner for Children & Young People – who does have this role – would be very pertinent to considering the potential for Scotland.

If judicial review remains as an enforcement mechanisms for the Bill, **consideration should be given to how judicial review could be made accessible and feasible for children, young people and those who might support them.** There may be ways to control legal costs, for example, and/or to ensure suitable access to legal aid. Due consideration should be given to this within the Scottish Government's and other bodies' current and forthcoming activities in regards to civil justice reform.

Proposal 3

Q5 Do you agree with the extension of the duty in respect of UNCRC to young persons aged under 21 who have been looked after?

Yes, this extension fits with the requirements on Scotland's Commissioner for Children & Young People as set out in the Commissioner for Children and Young People (Scotland) Act 2003 (s.16). The arguments for this extension for looked after children equally fit this bill.

Consideration should be given to the extension of this duty to young people with disabilities/ additional support needs. Like looked after children, as a group these young people continue to be disadvantaged in terms of socio-economic outcomes, access to services, and recognition of their rights. As a group, their transitions from children's to adult services are often extended (the opposite of looked after children) and too often problematic.⁵ Extending the duties to this group of young people could provide important attention and protection to their rights.

Proposal 4

⁵ Scottish Government (2011) *National Review of Services for Disabled Children*

Q6 Do you agree with the proposals for handling future amendments to the Convention or Protocols or new Protocols?

Yes, future proofing is appropriate. It is unclear how such future proofing will be done, by the Scottish Government.

Other matters

Q7 Is there other provision which should be made in the Bill? (See section 3.3 which sets out what the Bill would not do.)

The Welsh Measure includes a duty to promote knowledge and understanding amongst the public of the UNCRC and its Optional Protocols. This should be included in the Scottish Bill. The UNCRC recognises promotion as key to the success of children's rights (Article 42) and there continues to be low recognition and understanding of children's rights in Scotland.⁶ A legislative duty on the Scottish Government will embed the requirement and ensure it is not discretionary, over the long-term.

In response to the reasoning given on page 28, para 76, the Scotland's Commissioner for Children & Young People was set up as a statutory entity, independent of government. Thus any duty SCCYP has for promotion sits independently of the Scottish Government's duty. While it would be sensible to co-ordinate promotion, SCCYP's duty does not preclude the need for the Scottish Government to have a promotional duty.

The Scottish Government should commit itself to review law, policy and practice, for compliance with the UNCRC. This should be coupled with a power to amend legislation, to ensure compliance with the UNCRC. Ministers do have this power with the ECHR, as does the Welsh Measure.

Other additions are suggested above. To summarise:

- A target for extending the duty to other public authorities and/ or organisations with a public function
- A commitment to a supporting process that is transparent, accountable and accessible, including opportunities for involvement and to raise issues/ complaints
- Extending the duties to young people affected by disabilities/ additional support needs, up to the age of 21

⁶ UK Commissioners' Report to the UN Committee on the Rights of the Child, 2008.

Q8 Do you have any comments on implementation costs or how they should be estimated?

Q9 Do you have any other comments?

There are similarities in the proposed duties, to recent efforts to mainstream equalities within the Scottish Government and beyond. Lessons should be learned on how to do this effectively. For example, there is a risk of a ‘tick box’ mentality to undertaking children’s rights impact assessments (despite the courts saying this should not be the case⁷). Instead, children’s rights – as with equalities – needs to become a fundamental way of thinking about policy-making, embedded in the everyday practices of the Scottish Government. This would be assisted by initial and on-going training, as well as other management support and incentives.

Thank you for your time.

⁷ E.g. *R (Brown) v Secretary of State for Work and Pensions, Secretary of State for Business, Enterprise and Regulatory Reform* [2008] EWHC 3158 (Admin)