

PE1513/N

**Public Petitions Committee
Written Submission on PE1513
Scotland's Commissioner for Children and Young People**

I welcome the opportunity to submit comments on petition PE1513: 'Equal Rights for Unmarried Fathers'. The petition's subject matter engages a number of children's rights concerns and is therefore of interest to my office.

My submission will briefly consider the relevant rights under the United Nations Convention on the Rights of the Child (UNCRC)¹ before commenting on the petitioner's three proposals for legislative change.

The UNCRC has been cited, to different extents, by the petitioner and in various submissions. This is welcome and essential to properly consider the full implications of the issues that should be at the centre of this debate. It is unfortunate that the petition and its supporting statements are in my reading mostly concerned with the rights of parents, from the petition's title down to the detail of the policy proposals, which tend to be framed in terms of the 'exclusion' of fathers or men. I would suggest that this is the wrong vantage point.

The UNCRC and Parental Responsibilities and Parental Rights

The UNCRC is an international children's rights instrument which was drawn up with the specific objective to create a body of children's rights that build on existing human rights protections but take account of children's particular status, vulnerabilities and 'evolving capacities'. It is a central interpretive principle that the Convention's articles are not seen in isolation, but that it is read as a whole². Each article must be read in that light, and particular regard must be had to its four 'general principles':

- non-discrimination (art. 2),
- the principle that in all actions affecting the child, the child's best interests must be a primary consideration (art. 3),
- the right to life, survival and development (art. 6), and
- the child's right to be heard in all decisions that affect the child (art. 12).

The Convention explicitly recognises the role of families and the central role of parents in children's lives³, but it confers rights primarily on children as individual rights-holders.

The questions at the centre of PE1513 engage a number of the UNCRC's provisions. The principle that the child's best interests must be a primary

¹ The text of the Convention and related material can be accessed on the Office of the High Commissioner for Human Rights' website: <http://www2.ohchr.org/english/>.

² Newell, Peter & Hodgkin, Rachel (2007), *Implementation Handbook for the Convention on the Rights of the Child, 3rd Edition*, Geneva: UNICEF, p. 37.

³ Preamble to the UNCRC, and articles 5 and 18.

consideration in all matters affecting the child (art. 3) is critical to every aspect of the petition. Scottish child law has applied a stronger version of this maxim in respect of certain decisions for decades⁴ – one of its noted strengths.

Article 7 requires registration of the child ‘immediately after birth’, and confers other related rights upon the child, including ‘as far as possible, the right to know and be cared for by his or her parents’. Article 8 includes the child’s right to his/her identity, which is connected to knowledge of their family and heritage. Article 9 (3) requires state parties to ‘respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests’. Article 18 obliges the state to use its ‘best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child’, and locates primary responsibility for children’s upbringing with parents, with the state in a supporting role, explicitly stating the expectation that ‘[t]he best interests of the child will be their basic concern’. Finally, article 19 requires the effective protection of children from all forms of violence, abuse, neglect and exploitation, by taking ‘all appropriate legislative, administrative, social and educational measures’ to that effect.

Two key points should be made in summary: (1) it is unhelpful to consider individual UNCRC articles in isolation and treat certain aspects of them as absolute, or to try to deduce parental rights from the protections it confers upon children. Further, there may be tensions between different rights considerations, and the task is to strike the best balance within the framework of options that are acceptable under the UNCRC. (2) Compliance with children’s rights obligations most often requires decision-making focused on the individual child’s specific situation, within the parameters set by a national legal framework based on children’s rights principles. Blanket presumptions must be approached with caution.

The petitioner’s proposals

By definition, considerations of child and family law gain greatest prominence when children have to be protected from the actions of another, by a parent or by the state, or where there are disputes in how, where and by whom children should be raised. Unfortunately, they also frequently come into play where there is a breakdown in communication or acrimony between parents, or where parents are unable to prioritise their child’s interest above their own. In relation to the matters raised in the petition, the children’s rights implications of the current law on parentage and parental responsibilities and parental rights (PRPR) have to be considered against those of their alternatives.

Parentage and birth registration

⁴ This has been a principle in Scottish child and family law since at least 1925, see Wilkinson, A. B. & Norrie, Kenneth McK. (2013), *The Law Relating to Parent and Child in Scotland*, 3rd Edition, Edinburgh: W. Green, para 1.31f.

The petition firstly suggests that birth registration should be delayed or denied until a father is named. The mention of a court process prior to birth registration with one parent named suggests that lengthy delays would have to be accepted if this were to be implemented. While it is important that both parents are named on registration wherever possible, delaying registration would in my view run directly counter to the explicit requirement of art. 7 UNCRC. That right reflects the protective nature of expeditious birth registration and marks the state's first acknowledgement of the child's existence and their status under the law as well as the state's obligations towards the child⁵. The petitioner's proposal would subordinate the child's right under art. 7 to the unacknowledged parent's interests, along with the risks that delayed birth registration entails – that would be unacceptable under the principles of law, and of children's rights.

Secondly, the petitioner proposes that a mother's refusal⁶ to produce a sample of the child's DNA for analysis should be treated as contempt of court. While I acknowledge the impacts on pursuers (and, as the case may be, the child) of such a refusal, I would be concerned if prospect of criminal sanctions were to be come into play in such cases. That would be entirely unacceptable in cases in which mothers may be particular likely to refuse consent to provide samples, for instance where the mother seeks to protect the child and/or herself from abuse and violence, or where the child is the result of incest or rape. It is also difficult to see how the imposition of a fine or imprisonment on the person with whom the child will in most cases be resident could be in the child's best interests.

A further scenario would be where the child is capable of giving or refusing consent her/himself (in respect of medical treatment such capacity would normally be presumed from age 12, without prejudice to a younger child in fact having capacity) – if the child refuses consent, would the suggestion be that child should be held in contempt of court?

That said, it may well be that more should be done to remind parties to declarator proceedings of the need to act in the best interest of the child at the centre of proceedings, and for the courts to be assertive where they act otherwise. It is also important to remember that success in an action for declarator does not necessarily require a positive DNA test.

Parental Responsibilities and Rights (PRPR)

For many fathers who are not married to the child's mother, joint registration is simply an administrative requirement which is not onerous. Orders conferring (full or specific) PRPR under s. 11 are used frequently, and standing does not depend on proof of parentage, although some significant connection may have to be shown⁷ – this will cover many 'unmarried fathers', albeit not those

⁵ Newell & Hodgkin (2007), p. 98.

⁶ Presumably meaning a *parent's* refusal, as actions for declarator may be initiated by (ostensible) fathers, mothers or children seeking to legally identify the father.

⁷ Wilkinson & Norrie (2013), 8.33-8.40.

who have never had any involvement with the child. Agreements under s. 4 appear to be rare⁸.

Alternatives to the current system have been debated before⁹. The blanket retrospective conferral of PRPR on fathers of children born before 4 May 2006 has been ruled out, as it would place parental responsibilities on and vest parental rights in a potentially significant number of people who ought not to have them, or may even have been deprived of them. It is clear that is not what the petitioner contends for.

Rather, he proposes to confer PRPR on 'fit' fathers on determination of parentage, along with a presumption that the father is a 'fit' parent. For most fathers who are not married to the child's mother this may be more onerous than has been the case since 4 May 2006, as there is no 'fitness' requirement for joint registration or s. 4 agreement. For others, this proposal would introduce a new presumption in favour of granting PRPR which is not based on the best interest of the child but on the father's 'rights' flowing from parentage. That would in my view be significantly at variance with the general principles of Scottish child law¹⁰, and may put the most vulnerable children and their mothers in a position in which they would have to initiate legal action and show that the father is 'unfit', imposing a new burden on them, with likely adverse consequences for the child. This would be an ill-advised turn away from the trajectory of Scottish child law of the last two decades or so, and not one I can support.

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⁸ Wilkinson & Norrie (2013), para 6.12 (fn 60).

⁹ For example in the context of the Family Law (Scotland) Act 2006. The Scottish Executive discounted the retrospective conferral of PRPR on 'unmarried fathers' of children whose birth was registered prior to the entry into force of that Act: Policy Memorandum to the Family Law (Scotland) Bill at introduction to Parliament on 7 February 2005, at paras 48f: <http://www.scottish.parliament.uk/business/bills/36-familyLaw/b36s2-introd-pm.pdf>. This was endorsed by the lead committee: Justice 1 Committee, *8th Report 2005: Family Law (Scotland) Bill*, paras 81-110: <http://archive.scottish.parliament.uk/business/committees/justice1/reports-05/j1r05-08-vol01-01.htm>. Cf. also the evidence submitted to this Committee on PE1326.

¹⁰ The paramountcy of the child's welfare, respect for the child's views, and the no order principle, as helpfully laid out in other submissions. These principles are now firmly embedded in Scottish child law and mark a most welcome shift towards a system that puts the child at the centre, away from a system that puts parental rights first, see further Wilkinson & Norrie (2013), paras 1.26 – 1.35.