

JUSTICE COMMITTEE

CHILDREN (SCOTLAND) BILL

SUBMISSION FROM CHILDREN AND YOUNG PEOPLE'S COMMISSIONER SCOTLAND

Established by the Commissioner for Children and Young People (Scotland) Act 2003, the Commissioner is responsible for promoting and safeguarding the human rights of all children and young people in Scotland, giving particular attention to the United Nations Convention on the Rights of the Child (UNCRC). The Commissioner has powers to review law, policy and practice and to take action to promote and protect rights.

The Commissioner is fully independent of the Scottish Government and Parliament.

Introduction

The Children and Young People's Commissioner Scotland welcomes the introduction of the Children (Scotland) Bill. We have made a number of recommendations which will serve to strengthen the provisions within this Bill and ensure that they comply with the UNCRC, in line with the Scottish Government's commitment to incorporation of the UNCRC into Scots law and their aspiration for Scotland to be the best place for children to grow up.

We acknowledge that this Bill represents the first stage in the Scottish Government's Family Justice Modernisation Strategy. Our office contributed to the formal consultation on proposals in November 2018¹ and to the earlier informal consultation which informed it². We will continue to engage with the Scottish Government as they bring forward additional legislation to implement the strategy.

Recommendations for this Bill

- Create an explicit presumption, in sections 1, 2 and 3, that all children, regardless of age are presumed to be capable of forming a view.
- Amend sections 1, 2 and 3 to read: "ensure that all children have the right to express their views and have those views taking into account" or words to that effect.
- Remove all exceptions and exemptions based on a child being incapable of forming a view.
- Redraft section 1, to ensure that new sections 11ZA and 11ZB of the 1995 Act reflect a children's rights perspective, conform to the UNCRC. Remove section 1, (new sections 11ZB(1)(2)(3) and 11ZB(1)(2)(4)) Amend Section 10 to remove "whether of the half blood or of the whole blood" from s10 (2)(a)(b).
- Amend Section 15 to place a duty on the court to explain to the child the reasons for their decision and to include explaining where an order has not

¹ <https://www.cypcs.org.uk/ufiles/1995-Act-Final-response.pdf>

² [https://www.cypcs.org.uk/ufiles/Review-of-Part-1-of-the-Children-\(Scotland\)-Act-1995.pdf](https://www.cypcs.org.uk/ufiles/Review-of-Part-1-of-the-Children-(Scotland)-Act-1995.pdf)

been made or a where a substantive decision has not been made or the case continued

Recommendations for Scottish Government

- Undertake further research to inform the Courts' understanding of the best way to ensure that children's rights are realised.
- Include in registration criteria for Child Welfare Reporters training in human rights, child development, seeking the views of children and supporting children in expressing their views.
- Undertake further exploration of the most effective means of realising children's right to participation where they are the subject of any judicial or non-Judicial decision making
- Consult with children and young people of all ages to determine whether Contact Centres ought to be renamed.
- Create inspection and monitoring criteria for Contact Centres to be developed with input from children and young people with experience of supervised and supported contact.
- Ensure that regulations for Contact Centres must require inspection of individual Contact Centres, whether publicly or privately funded.
- Further explore the role of Contact Centres, with the participation of children and young people with experience of supported and supervised contact.

Human Rights Context

The Universal Declaration of Human Rights (UDHR) is the foundation of our understanding of human rights, including the rights of children, setting out the basic rights that all human beings are entitled to.

The rights enshrined in the UDHR have been extended, clarified and developed through the adoption of range of human rights treaties by both the United Nations and by regional human rights bodies including the Council of Europe³. In 1989, the particular vulnerabilities of children were recognised with the adoption of the UNCRC, which complements the universal rights contained in other treaties. Other international treaties with particular relevance to the issues contained within the Bill include:

- European Convention on Human Rights (ECHR)⁴
- International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵
- International Covenant on Civil and Political Rights (ICCPR)⁶
- UN Convention on the Elimination of Discrimination Against Women (CEDAW)⁷

In terms of the ECHR, which is incorporated into Scots law via the Human Rights Act 1998 and the Scotland Act 1998, the present Bill should give consideration to the following rights:

³ For further details see: <https://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> and <https://www.coe.int/en/web/portal/home>

⁴ https://www.echr.coe.int/Documents/Convention_ENG.pdf

⁵ <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

⁶ <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

⁷ <https://www.ohchr.org/documents/professionalinterest/cedaw.pdf>

- Article 6 – particularly regarding the involvement of children in the justice system;
- Article 8 – the right to respect for private and family life;
- Article 13 – the right to an effective remedy;
- Article 14 - prohibition of discrimination

The Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice (“CoE Guidelines”) apply whenever a child engages with any element of the justice system, including the Children’s Hearing System. The Guidelines’ fundamental principles are participation; best interests of the child; dignity; protection from discrimination and rule of law. They identify the following general elements that cover all interaction with the justice system: *“information and advice; protection of private and family life; safety (special preventative measures); training of professionals; multidisciplinary approach...”*⁸

Within the European Union (EU), family law arrangements are subject to the Brussels II Regulations⁹, which govern conflict of law issues in family law between EU member states. These measures are currently under review in light of the UK withdrawal from the EU and we note that the Scottish Government have consulted separately on this issue.

Children’s rights under Article 8 of the ECHR (and Article 16 of the UNCRC) are qualified. It is recognised that, at times, it will be necessary for the State to intervene in family lives, including where parents are in dispute or where the child is at risk of harm. Indeed, the UNCRC, in Article 19, requires the State to take action if it is necessary to protect the child from abuse or harm. Any such interference must be lawful and compatible with the child’s human rights, as outlined in Article 20 of the UNCRC.

Voice of the Child

In our responses to the Scottish Government’s consultations, we highlighted the right of all children to express their views when decisions are made affecting them, as outlined in Article 12 of the UNCRC. This is one of the four general principles of the UNCRC. The importance of this right is echoed by the CoE Guidelines.

Article 12 of the UNCRC states:

1. *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
2. *For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

The CoE Guidelines state:

⁸ <https://www.coe.int/en/web/children/child-friendly-justice>

⁹ Brussels II Regulation No 2201/2003, also called Brussels IIA or II bis

“Children have the right to express their views and opinion on any issue or case that involves or effects them. They should be able to do so regardless of their age, in a safe environment, respectful of their person”¹⁰.

We are therefore pleased to see that the Scottish Government proposes amending the 1995 Act to strengthen provisions relating to the rights of children to express their views and have them taken into account by the Court, in making the decision. Research into children’s participation in family actions has recently been undertaken by Professor Kay Tisdale of Edinburgh University and Dr Fiona Morrison of the University of Stirling, together with Clan Childlaw. This highlighted significant gaps in current Scots law, policy and practice, including:

- Courts deciding if and how a child participates
- Participation is largely indirect and mediated by adults
- Concerns by professionals that increased participation may be detrimental to children
- A lack of infrastructure to prepare and support children for participation in family actions
- No routine mechanisms to explain decisions
- No accountability of mechanism through which children can complain or disagree with a report.

This research was informed by children with experience of participating in family actions and draws on a range of evidence from Scotland and from other jurisdictions on effective participation of children in family law.¹¹ Paragraph 20 of General Comment 12 (GC12) makes it clear that States should presume that all children have the capacity to form their own views and the right to express them and that they do not first have to prove they have capacity¹². Given the cultural legacy of the previous presumption, we recommend that the Bill be strengthened by the creation of an explicit presumption that all children, regardless of age, are presumed to be capable of forming a view.

We do not believe the exception in new s1(1B)(a) of the 1995 Act relating to the child being incapable of forming the view is necessary or helpful. By definition, a presumption is rebuttable, and the inclusion of this exception may inadvertently result in it being applied excessively. The Court should only very rarely conclude that a child is incapable of forming a view. We recommend that this section be removed.

In October 2019, Yello (the young expert group in the Improving Justice in Child Contact project), met with the Minister for Community Safety and made recommendations on improving children’s participation in Court processes, based on their experiences. The group highlighted the importance of being able to raise their

¹⁰ <https://www.coe.int/en/web/children/child-friendly-justice> Part 2 para 112

¹¹ Interim findings, shared at conference: “Reforming the Children (Scotland) Act 1995, 1st October 2019, co-hosted by Universities of Edinburgh, Stirling and Napier and Clan Childlaw, See also the response to this call for evidence submitted by Dr Fiona Morrison, Professor Kay Tisdall and Dr Ruth Friskney.

¹² https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f12&Lang=en paragraphs 20-21

concerns about contact directly with the Court and their concerns; the importance of making the best interests and views of children at the heart of deciding to make a contact order; the importance to them of confidentiality when expressing their views; and the importance of advocacy and support when they are participating in decision making. Further details of this work will be presented to the Committee by Yello.

Paragraph 19 of GC 12 explains that “shall assure” means that states are under a strict obligation to undertake appropriate measures to implement this. It also explains that this obligation contains two parts – both to solicit views and then to give those views due weight. We are pleased to see that the Scottish Government proposes to amend the 1995 Act to introduce a two-part duty to that effect. However, we recommend that it be strengthened by amending new section (1)(1A)(a) of the 1995 Act to read “ensure all children have the right to express their views and have those views taken into account” or words to that effect and by strengthening this Bill by creating an explicit presumption that all children are capable of forming a view, in line with Article 12 of the UNCRC. The equivalent parts of section 2 and 3 should also be amended accordingly.

General Comment 12 also provides the UN Committee’s views on the meaning of “due weight in accordance with the age of maturity of the child” in the context of taking children’s views into account and we are pleased to see this reflected in the Bill as a requirement to have “due regard” to the child’s views. Whilst the capacity of the child should not be a factor when deciding whether or not their views should be sought, the UN Committee acknowledges that the views of the child are only one of a range of factors to be considered (of which best interests must be a primary consideration). General Comment 12 states that “age alone cannot determine the significance of a child’s views” as levels of understanding vary even within similarly aged children. As such the views of children must be considered on a case-by-case basis¹³. Due regard should also be considered in the context of the concept of the evolving capacities of the child. As Gerison Lansdown explains in the UNICEF Innocenti Research Centre report on *The Evolving Capacities of the Child*, even very young children are capable of forming and expressing a view and the greater the age and capacity of the child, the more seriously their views should be considered. However, ultimately the matter is informed and influenced by the views of the child but decided by adults¹⁴.

Other requirements on the Court – explanation of decisions

An important part of the participation of a child in decisions being made about them, is explaining to a child how their views were taken into account. This is particularly important where no action is taken or where an order is made which goes against the views of the child. We are therefore pleased to see that in s15 the Scottish Government has introduced a duty on the Court to explain decisions to the child. We believe this could be strengthened by extending the duty to situations where a case is continued or where a decision is taken not to make an order. It is also important that the reasons for the decision are provided. We are pleased to see the Scottish Government providing flexibility in who can provide that explanation, this needs to be

¹³

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f12&Lang=en

¹⁴ <https://www.unicef-irc.org/publications/pdf/evolving-eng.pdf> p4

someone who is neutral and should usually be someone the child already knows if possible. The most appropriate person will vary from child to child and we recommend that further research is undertaken to inform the Court's understanding of the best way to ensure that rights are realised. We are concerned that the Court is given discretion not to comply where it is not in the best interests of a child to give an explanation and would hope this exception is rarely used. Section 15 would be strengthened if it were more explicitly linked to section 1.

Best Interests of the Child

Proposed new section 11ZA relates to the paramountcy of the child's welfare, and to the non-intervention principle. We feel that while the provisions of this section are positive, reflecting the welfare principle as outlined in the original legislation, it would be significantly strengthened, particularly in light of the Government's commitment to incorporation of the UNCRC, if sections 11ZA and 11ZB were redrafted from a children's rights perspective. In particular, 11ZA(2) is effectively a best interests test, however this terminology is not used, despite the child's right, under Article 3 of the UNCRC, for their best interests to be a primary consideration in all actions and administrative procedures concerning them, including those in Courts. One of the strengths of the current legislation is that it provides children with greater protections than required by the UNCRC, by making best interests paramount. The UN Committee has made it clear that it welcomes States exceeding minimum requirements in this way,

Child Welfare Reporters

There is scope for child welfare reporters to play an important role in assisting the Court in realising children's rights to participate and to have their views taken into account when decisions are being made for them. On this basis, we support the establishment of a register of Child Welfare Reporters by s8 of the Bill. We are pleased to see that registration will be subject to minimum standards of training and qualification and that the legislation provides flexibility over who can be a Child Welfare Reporter, which will enable the role to be further developed to better meet the rights of children. We recommend the requirements include training in: human rights (particularly children's rights), child development, seeking the views of children and supporting children in expressing their views if they choose to do so in person. At present Child Welfare Reporters are appointed by the Court and funded by the parties (ordinarily the parents) which produces inequality of access for some families, particularly those with moderate incomes who do not qualify for legal aid. We therefore welcome the proposal to centralise funding to ensure that where a Child Welfare Reporter is appointed, parental income does not present a barrier, particularly given that the role of the Child Welfare Reporter is to assist the Court in determining the child's best interests.

We are of the view that the registration of Curators ad litem and local authority reporters, as well as others tasked with assisting the Court to determine a child's best interests and/or to seek their views, should be consistent with that of Child Welfare Reporters, as outlined in section 8 of the Bill and that all these roles be regulated and developed, taking account of an assessment and review of the effectiveness of the implementation of a panel of Safeguarders in Children's Hearings proceedings.

Whilst we welcome the changes initiated by this Bill, we believe that significant further work needs to be done to fully realise children’s rights to participation in decisions made about them, to ensure that they are compliant with UNCRC Article 12 and General Comment 12 and with paragraph 37 of the CoE Guidelines, which states “*children should have the right to their own legal counsel and representation*”.¹⁵ This would require independent access to legal advice, support to ensure they know their rights and advocacy to enable them to express them, separately from the Child Welfare Reporter. We therefore recommend that the Scottish Government continue to explore how to realise children’s right to participation where they are the subject of all judicial and non-judicial proceedings.

In Power Up Power Down, a participatory project carried out by our office in partnership with Scottish Women’s Aid, children and young people with experience of domestic abuse explored how their interaction with the Court could be improved. The result was the creation of the Super Listener, which was presented to the First Minister together by the young people involved together with their recommendations¹⁶.

Power Up Power Down was informed by previous work carried out by Dr Kirsteen Mackay on behalf of our office, which showed significant differences in decisions around contact, depending on whether or not the child had been able to express their views and in particular that younger children were both less likely to have their views considered and more likely to have contact ordered in relation to them¹⁷.

Factors to be considered – extended family

Children have a right to continued contact with their extended family and other people important to them, as part of the right to family life enshrined by Article 8 of the ECHR and article 16 of the UNCRC. Recognition of a child’s right to maintain these relationships is therefore welcomed, however it is important that any decisions made are grounded in the best interests and take account of the views of the child. We suggest any presumption be centred on the child and not be linked to any category of adult relation.

Vulnerable Witnesses

We recommend that any child witness in any proceedings be afforded the same protections and special measures across all settings (including Children’s Hearings). This is to ensure that anything which may inhibit them expressing their views, including their presence or the presence of others can be addressed.

Regulation of Contact Centres

The use of these centres can be an important means of initiating or re-establishing contact between a child and a non-resident parent, particularly where there is a history of parental conflict and therefore their use can help realise children’s rights to family life under Article 8 of the ECHR and Article 16 of the UNCRC, their right under Article 9 of the UNCRC to maintain contact with a parent from whom they are separated.

¹⁵ <https://www.coe.int/en/web/children/child-friendly-justice> Part 1 para 37

¹⁶ <https://womensaid.scot/project/power-up-power-down/>

¹⁷ <https://www.cypcs.org.uk/ufiles/views-of-children-and-domestic-abuse.pdf> page 22

Contact Centres may also facilitate realisation of children’s right for both parents to remain involved in their upbringing, if that is in their best interests. We are aware of concerns that the role and remit of Contact Centres and the difference between supervised and supported contact is not always well understood. We believe that registration will assist not only in ensuring Contact Centres meet minimum standards but also in clarifying when they are, and are not, appropriate for individual children and their families.

It is important that the use of Contact Centres to facilitate contact is only for the minimum period necessary as they are not appropriate for long term contact arrangements. In research on behalf of our office on children’s experience of contact where there were allegations of domestic abuse, Dr Kirsteen Mackay found that in a significant majority of cases where supervised or supported contact was ordered, contact did not progress to unsupported contact¹⁸. In situations where contact is unlikely to progress to unsupported contact due to ongoing concerns about safety, it may not be in the best interests of the child for contact to be ordered at that point in time.

Contact Centres must be individually inspected, to ensure that staff are appropriately trained and that physical facilities provide a safe and child friendly environment for contact. Standards should not be excessive, nor should they result in any significant impact on the availability of provision. We believe that the Care Inspectorate, which inspects a range of care settings from child-minders to secure care providers, will be able to develop a set of standards which are appropriate to this service and recommend that they develop this with input from children and young people with experience of supervised and supported contact.

We would welcome further exploration of the role of Contact Centres. This should be done with the participation of children and young people who have experience of supported and supervised contact. We note that as they are currently primarily funded by the parties, access to them is not universal and that in some areas they are under significant financial pressure.

Contact with Siblings

Children have a right to continued contact with their extended family and other people important to them, as part of the right to family life enshrined by Article 8 of the ECHR and article 16 of the UNCRC. In their Concluding Observations, published following their examination of the UK’s compliance with the UNCRC, the UN Committee on the Rights of the Child recommended that:

“the State party ... wherever possible find a placement for the child which will facilitate contact with his or her biological parents **and** siblings”.¹⁹

We welcome the progress this Bill represents in creating, in s10 of the Bill, a duty on local authorities to promote regular contact between siblings, where they are not able

¹⁸ <https://www.cypcs.org.uk/ufiles/views-of-children-and-domestic-abuse.pdf> page 26

¹⁹ https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGBR%2fCO%2f5&Lang=en paragraph 52(d)

to be looked after together, but we are concerned that the current Bill does not extend the provision to children who have previously been looked after (care experienced). We are also concerned about references to “whether of the half blood or of the whole blood”. This is not in line with how children and young people, particularly those with care experience, understand their lives and by its discriminatory nature may also breach article 2 of the UNCRC and Article 14 of the ECHR. We recommend that the text quoted above (in section 10 (2)(a)(b)) be removed.

Enforcement of Orders

We believe that Courts developing a better understanding of the views of the child on contact and giving those views due regard when making orders, and the reasons for those orders being explained to the child, should have a positive impact on the number of actions regarding failure to comply with those orders. Where an order is not complied with, we believe that it is important for the Court to consider the reasons the order has not been complied with. Importantly this must include a further consideration of the child’s views and best interests, before any action is taken against the resident parent. This would also be an opportunity, where appropriate, to explore the use of Family Group Decision Making, Mediation or other Alternative Dispute Resolution to support the parties to focus on the best interests of the child should also be considered as a means of addressing failure to obey order, where appropriate.

Whilst it is necessary that there be some sanction for failing to comply with a Court order, the best interests of the child must be a paramount consideration when applying that sanction if it will impact upon them. As we outlined in our response to the Scottish Sentencing Council’s recent consultation, it is seldom in a child’s best interests for their main caregiver to be imprisoned²⁰.

Births registered outwith the UK

Whilst we welcome proposals to simplify the understanding of who does, and does not, have PRRs in relation to a child we are concerned that the proposals in section 19 of the Bill are overly complex and may cause additional confusion. We also feel that where a child has capacity (consistent with the exception on legal capacity in relation to adoption in s2(3) of the Age of Legal Capacity (Scotland) Act 1991²¹) their consent should be required wherever PRRs are granted in relation to them.

Children’s Hearings

As outlined above in relation to vulnerable witnesses, children have a right not to be discriminated against on the basis of which part of the justice system they are interacting with. This includes where a matter has been referred to the Children’s Hearing System and children engaging with the Children’s Hearing System should be entitled to the same support and protections available to witnesses in other judicial settings.

²⁰ <https://www.cypcs.org.uk/ufiles/Sentencing-Guidelines-2019.pdf>

²¹ <http://www.legislation.gov.uk/ukpga/1991/50/contents>

Family Justice Modernisation Strategy

We are pleased that the Family Justice Modernisation Strategy outlines an ambitious programme to change the culture and practice of family law in Scotland and we recognise that the current Bill is merely one step in this process. In order to ensure children's rights are fully realised, particularly in light of the Scottish Government's commitment to incorporation of the UNCRC into Scots law, the human rights of children must underpin all policy and legislative proposals and be developed with the active participation of children and young people with relevant lived experience. Our office will continue to monitor legislative and policy developments to hold the Scottish Government to account as they progress the strategy.

Children And Young People's Commissioner Scotland
15 November 2019