

Joint briefing on the Stage 1 debate of the Children (Scotland) Bill: protecting children's rights in the civil justice system

May 2020

As a group of organisations and academics working with and on behalf of children and families, we warmly welcome the introduction of the Children (Scotland) Bill. We support the general principles of the Bill, and its provisions aiming to improve compliance with the UN Convention on the Rights of the Child (UNCRC), in particular ensuring that children's participation rights are upheld and their best interests are promoted and protected by our family courts.

Our collective experience shows that the current civil justice system often fails to put children's best interests at the centre and to implement their participation rights when making decisions that affect them. Children and young people have shared their experiences of not being listened to in the family courts, and the impact this has.¹ Transformative reform is urgently needed to ensure that children's rights are not continually eroded in this damaging way.

The Bill provides an opportunity that should not be missed to re-frame the existing family law system by taking a rights-based approach to children's participation and safeguarding their best interests in legal decisions. As it is currently drafted, we do not believe the Bill is yet compliant with the minimum entitlements and freedoms for children as set out in the UNCRC. We have identified a number of areas to address this. This view is supported by recent research on the compliance of family law with children's human rights.² We seek support from MSPs to:

- Amend the Bill to ensure children's views are heard in the decisions that affect them, including: a **'positive presumption'** that all children are capable of forming a view; ensuring there is **no age limit** on children's right to express their views; and putting in place an **advocacy system** to further protect children's right to express their views.
- Amend the Bill to ensure that children and young people are able to **raise concerns and feedback on, and challenge, decisions made by the courts.**
- Protect the existing provision in the Bill for a **nationally held register of Child Welfare Reporters** to uphold children's rights consistently across Scotland.
- Amend the Bill to ensure **children's best interests are a primary consideration when their confidential information is requested or shared.**
- Ensuring that there is **adequate financial and human resource to ensure effective implementation of the provisions** within the Bill.

Children's views

Children's views must be systematically and routinely sought when civil courts make decisions that affect children and the important people in their lives. Children's views must be taken seriously, and their best interests placed at the centre of decisions, as outlined by the UN Committee on the Rights of the Child.³ Though the Bill does begin to address some of these issues, our experience of working alongside children and families is that much more must be done to transform the existing system. We therefore recommend:

1. All children must **be presumed capable of forming a view**, and to have their right to express a view in a manner suitable to them upheld, regardless of age. Our organisations have called for a **'positive presumption'** in the Bill to comply with directions of the UN Committee on the Rights of the Child.⁴ We were pleased to see this echoed in the Justice Committee's report and welcome the commitments set out in the Scottish Government's response to progress this.

¹ Scottish Women's Aid and Children and Young People's Commissioner Scotland (2017) Power Up/Power Down; <https://bit.ly/2ZCeFrA>; YELLO! (2019) Response to the call for views on the Children (Scotland) Bill <https://bit.ly/3bOz8Mv>

² Morrison, F, Tisdall, E. K. M., Warburton, J., Reid, A, Jones, F (2020) Children's Participation in Family Actions – Probing Compliance with Children's Rights Research Report <https://bit.ly/2VMMWqhl>

³ UN Committee on the Rights of the Child (2009) General. Comment 12

⁴ Ibid.

2. Children have highlighted the need for skilled and individualised support to facilitate their participation and the UNCRC states that where possible, children must be given the opportunity to have their views heard directly.⁵ We therefore welcome the Justice Committee's recommendation for support and advocacy in contact cases. We agree with the point made in the Scottish Government's response that consideration must be paid to how best to do this. However, to ensure the infrastructure, funding, and safeguards are in place to facilitate children's views being heard directly, we are calling for an amendment to the Bill to embed this commitment to children's support and advocacy.
3. We support the Justice Committee's recommendation that the Scottish Government should amend the Bill to make it clear that decision-makers should ask children how they wish to express their views. We urge MSPs to support an amendment in this area.

Methods of redress

Children have told us that they want to be able to provide feedback on decisions made through the Courts, and to challenge decisions if they feel their rights have been breached.⁶ The Bill must be amended to establish a child-friendly system of redress and complaint so that participation is meaningful, and to ensure the Bill's compliance with directions given by the UN Committee on the Right of the Child.⁷

Child Welfare Reporters

Our organisations are strongly supportive of the provision within the Bill for a nationally held register of Child Welfare Reporters and welcome the Scottish Government's continued support for this. We believe that this will be effective in upholding the rights of children consistently across Scotland, in regards to training, standards and a complaints system. We agree with the Scottish Government that a nationally held, as opposed to a locally held, list of Child Welfare Reporters is the best way to achieve consistency and transparency in relation to training, qualifications and the appointment process.

Similarly, Section 16 (the court's duty to investigate non-compliance with court orders) must remain in the Bill if we are to address the inconsistencies currently experienced by children across Scotland in how courts address non-compliance with contact orders.

Confidentiality

Our organisations have raised concerns that children are not always aware of what information has been requested about them and shared with the court. Sometimes information held by third sector or statutory family support services, specialist domestic abuse services, counselling or other therapeutic support is requested by a court to help with decision making. We believe that children and young people who access these services should be able to share information about their experiences safe in the knowledge that this personal information will not be shared without them being informed or when it is not in their best interests. This is particularly important to ensure that children's personal information is not shared with a person who may have perpetrated abuse against them without it being in their best interests or without it being discussed with the child, in line with their evolving capacity.

We believe that an amendment is required to ensure that current processes in this regard uphold children's rights under article 16 of the UNCRC and article 8 of the ECHR.

⁵ Morrison, F, Tisdall, E. K. M., Warburton, J., Reid, A, Jones, F (2020) Children's Participation in Family Actions – Probing Compliance with Children's Rights Research Report <https://bit.ly/2WMMWqhl>; UN Committee on the Rights of the Child, General Comment on Article 12 (2009) par 34

⁶ YELLO! (2019) Written response to the call for views on the Children (Scotland) Bill. <https://bit.ly/3bOz8Mv>

⁷ UN Committee on the Rights of the Child, General Comment 5 published in 2003 states that children must have access to effective remedy for their rights to be meaningful (para 24)



Implementation of the legislation

As highlighted in the Justice Committee's report, the passing of a necessarily ambitious bill is meaningless without resource to implement it. As outlined in the [joint response by Children 1st and Scottish Women's Aid on the Bill's Financial Memorandum](#), additional financial provision is particularly required to meaningfully facilitate the participation of children, including associated training costs.

This briefing has been submitted on behalf of Children 1st, Scottish Women's Aid, NSPCC Scotland, Professor Kay Tisdall (University of Edinburgh) and Dr Fiona Morrison (University of Stirling).

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