



## **Response to Equalities and Human Rights Committee's Call for Evidence on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill**

*October 2020*

Children 1st is Scotland's national children's charity. We have over 130 years of experience of working alongside families to prevent problems from escalating to the point of crisis, to protect children from harm and to help children and families to recover from the trauma associated with childhood adversity by providing relationship-based practical, financial and emotional support.

Together with the children and families we work alongside, Children 1st strongly, passionately and joyfully welcomes and supports the introduction of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill to the Scottish Parliament. We are delighted to see that this important legislation will incorporate the United Nations Convention on the Rights of the Child (UNCRC) into Scots law to the full and maximum extent within the competence of the Scottish Parliament. We warmly welcome the cross-party support across the Chamber.

Children 1st has, along with many other organisations and individuals, been campaigning for this change for many years. Although we are clear that incorporation of the UNCRC is not a 'magic bullet' to fix the complex and challenging issues that affect children and their families lives, we strongly believe that introducing legally binding rights for children will help to ensure that their rights are respected, protected and fulfilled across Scotland.

The Bill is one of the most significant pieces of legislation that Children 1st, in our 135 year history, has ever seen. Once implemented it is a powerful tool to change culture and practice and implement and embed a children's rights-based approach across all parts of children and families' lives. We believe that incorporation of the UNCRC provides an essential backdrop to the important policy changes that are intended to help support recovery from coronavirus and to safeguard children's right to be loved, safe and supported at home with their family, where they can. This includes the implementation of the calls to action identified in The Promise and the pilot of a Barnahus in the West of Scotland (by Children 1st and partners) followed by a national approach to Barnahus across Scotland.

Too often we have created policy and passed legislation that is innovative and intended to safeguard and protect children that does not translate into practice. This is simply not good enough. When children have legally binding rights, can raise issues when their rights are not being upheld, have accessible mechanisms for their voices to be heard and—as a very last resort—can seek legal redress in the Courts, they can no longer be ignored.

Children 1st is a member of Together (Scottish Alliance for Children's Rights) and we encourage the Committee to consider our response alongside the response from Together.

### **1. Will the Bill make it easier for children to access their rights?**

Yes. There are a significant range of measures included in the Bill which will make it easier for children to access their rights and for rights-holders to uphold children's rights. We warmly welcome the measure that makes it unlawful for public bodies to act in a way which is incompatible with the UNCRC requirements.

For the children and families that Children 1st work alongside, we believe the Bill will help them to understand their rights and how to access them and we will work hard alongside them

to hold rights- holders to account when children and families tell us their rights are not being upheld. In Scotland as we begin to consider how to implement the independent calls to action in the Care Review, upholding children's right to be at home safe and loved with their families where possible, and right of families to access to early help and support when they need it (article 18 of the UNCRC) is increasingly important. Ensuring that children and families have binding rights means that there will be a strong accountability framework to hold public authorities and the Scottish Government to account for realising these rights.

Given the impact of coronavirus and the necessary but devastating measures to restrict its spread, including the likely significant increase of child poverty, ensuring that children can access their rights is important now more than ever. Proactive measures seen through the Children's Rights Scheme, the Children's Rights and Wellbeing Impact Assessments and the reporting duties will ensure that children's rights are front and centre of decision- making. Policy makers and those making decisions that affect children and families' lives will be required to consider how these decisions will impact on children and their rights and what the consequences of these decisions will be. This will necessitate the type of culture change seen in other countries who have also incorporated the UNCRC where children are more likely to be perceived as rights- holders and have a broader context of respect for children's rights.<sup>1</sup>

In Scotland we have a lot of progressive legislation and policy relating to children, but Children 1st is concerned that much of this is not implemented in the way that was originally intended. This legal reform will give children and families ways of highlighting to public bodies, through the courts if necessary, when they are not able to claim the rights or services that they are entitled to. For example, for many years Children 1st has called for no life- changing decision to be made about a child without a Family Group Decision Making meeting. Part 12 of the Children and Young People Act (Scotland) 2014 was intended to lead to wider adoption of this approach but as yet significant progress has not been made. We hope that as local authorities and the Scottish Government review existing policies and legislation in line with the requirements in this Bill they will consider how they can resource and make real some of the commitments that were intended to improve children's lives and families' lives.

Although reactive measures such as children having the ability to challenge breaches of their rights in court is a last resort and for courts to assess whether legislation is compatible with the UNCRC is a last resort, we strongly welcome this inclusion in order to ensure children and young people are truly able to access their rights.

## **2. What do you think about the ability to take public authorities to court to enforce children's rights in Scotland?**

As stated above, we believe that taking public authorities to court should be a last resort. Nevertheless, this is an important and essential part of the Bill to ensure the culture change required takes place and that public authorities always take children's rights seriously.

Children 1st is aware that many children may find it difficult to speak about their experiences and to raise concerns or complaints and we therefore welcome the additional powers for the Children and Young People's Commissioner for Scotland to bring or intervene proceedings to help children to access this right (section 10).

As outlined in the response from Together, the ability to take public authorities to court will help to ensure children have access to remedy and redress as well as have broader impacts including preventing future breaches, supporting positive culture change and encouraging the

---

<sup>1</sup> Kilkelly, U. (2019). [The UN Convention on the Rights of the Child: Incremental and transformative approaches to legal implementation](#), The International Journal of Human Rights, p.17

establishment of child- friendly complaints mechanisms. In order for children to be able to adequately and appropriately access this it must be properly resourced and accessible, including with child- friendly information about how to initiate proceedings and what support is available. Children must be able to access confidential and independent legal assistance and legal aid should be available where appropriate.

We note that during the passage of the Children (Scotland) Act 2020 alongside our partners Scottish Women's Aid, Dr Fiona Morrison, Professor Kay Tisdall and Children 1st argued for a method of redress to be included on the face of the legislation. Although a Stage 3 amendment was not agreed to at that time, children and young people who are experiencing decisions being made about their lives in the civil courts continue not to have access to a child- friendly way of seeking redress if they disagree with the court's decision or decision- making process. The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill will not remedy this issue but we hope it will encourage the Scottish Government to consider how this outstanding concern can be rectified in future legislation relating to family law in light of the passage of this Bill.

### **3. What more could the Bill do to make children's rights stronger in Scotland?**

We are disappointed that the Bill does not include a duty on Scottish Ministers and wider public authorities to have 'due regard' to the UNCRC when exercising their functions, to complement the existing 'compatibility duty'. This was a recommendation that Children 1st and others, including Together, included in our response to the 2019 consultation by the Scottish Government. A 'due regard' duty is a strong mechanism to ensure children's rights are at the forefront of Ministerial decisions and ensures the UNCRC is seen as a framework for effective policy and decision- making, rather than primarily the basis for legal action.

Children 1st welcomes the duty on Scottish Government to prepare a CRWIA for new Bills but is concerned that the duty is limited in scope. However, in the absence of a 'due regard' duty, **we strongly encourage the Committee to explore extending the duty to conduct Child Rights & Wellbeing Impact Assessments (CRWIA) to include public bodies, alongside Scottish Ministers.** Expanding this duty to public bodies would ensure that policies at local level are developed and resourced in line with children's rights. It would help to realise the ambition for a pro-active approach to children's rights at all levels of government and would support better coordinated policy development which engages children as rights-holders.

We agree with Together that the two levels of discretion relating to the existing duty ("as they consider appropriate" and "in such a manner as the Scottish Ministers consider appropriate") should also be removed to strengthen this section.

Children 1st endorses the response from Together, which highlights a number of additional areas where the Bill could be strengthened. We wish to be clear to the Committee that Children 1st is strongly in support of this Bill and our comments below should be considered in this context. We provide suggestions to strengthen the provisions of the Bill, but we fully support the Bill as it stands. In particular, it would be helpful for the Committee to consider:

#### **Having due regard to the General Comments, Concluding Observations, opinions made in relation to Optional Protocol 3 and reports resulting from Days of General Discussion**

We agree that it would be important for section 4 of the Bill not only to include reference the courts considering the UNCRC and first and second Optional Protocols but also the General Comments, Concluding Observations, opinions made in relation to Optional Protocol 3 and

reports resulting from Days of General Discussion. This would strengthen this section of the Bill and mean that Courts are pointed towards a range of material that clarify the rights set out in the UNCRC. We note that this was supported by an overwhelming number of respondents to the 2019 Scottish Government consultation.

We also agree that the Bill would be strengthened by ensuring that this moves forward from asking Courts to 'consider' material to including a duty to have 'regard' to these additional elements.

### **Definition of public authorities**

We note that the Bill is clear that public authorities must not act in a way that is incompatible with the UNCRC requirements, which includes private actors whose "functions are of a public nature," unless the nature of the particular act is private. However, it appears unclear which organisations may be classed as 'public authorities' and therefore how this function may apply to them. We understand that the Scottish Parliament is currently not included in this definition, which should be rectified in order to drive forward the desired culture change and safeguard children's rights as legislation is being developed.

Given that many local authorities and Health Boards, amongst others, outsource services to other providers (including Children 1st), it is important that the section relating to public authorities is clear so that, for example, the public functions of private housing providers, childcare, private foster care, private schools and others will be included within the scope of the duty. As it stands there is the possibility of leaving unintended accountability gaps which would weaken the impact of the duty.

Children 1st encourage the Committee to explore this in further detail and would support amendments at Stage 2 that aim to give clarity to this important section.

### **Test of sufficient interest**

We understand that the Scottish Government intends to apply the test of "sufficient interest" to claims brought under the Bill. We support this approach and would welcome clarity that this is the intended approach on the face of the Bill to ensure it is clear who can bring a case to court alleging a breach of UNCRC rights.

### **Remedies and availability of recovery services**

We note that the Bill currently states that where a public authority has acted unlawfully, the court "may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate." We think it would be helpful to be clear about the definition of "just and appropriate" and what remedies might be available for children. As the UN Committee on the Rights of the Child has noted, remedies other than compensation may be required. This includes measures to promote physical and psychological recovery, rehabilitation and integration. The Council of Europe Guidelines on Child Friendly Justice also highlights the importance of appropriate social and therapeutic programmes which should be available, accessible and provided free of charge.<sup>2</sup>

At present, there is a lack of widespread accessibility of both trauma- informed holistic whole family support and trauma recovery services in Scotland that might help children, and their

---

<sup>2</sup> Council of Europe (2010). [Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice](#), Guideline 80

families to recover when their rights have not been upheld.<sup>3</sup> It would be helpful for the Committee to consider how children and their families might be able to access this remedy in recognition that recovery from trauma and ensuring strong relationship- based support is often an essential component of upholding children's rights.

### **Commencement date**

Children 1st note that the commencement date does not appear on the face of the Bill. We encourage the Committee to explore the importance of having a clear commencement date, given the need for the strong framework that incorporation provides as other essential policy developments are implemented. As previously discussed, incorporation is an important backdrop whilst the calls to action set out in The Promise are implemented and a national approach to Barnahus is considered. A commencement date should be no later than six months after the Bill received Royal Assent.

### **Child- friendly complaints**

The Bill does not currently provide for child- friendly complaints mechanisms. We support calls for a new duty on Scottish Government to set out a process for child- friendly complaints as part of the Children's Rights Scheme. We believe that this will ensure that this means that all levels of Government will be held to account for their decisions and that children will be able to express concerns at an early stage, in most cases removing the need for their complaint to advance to court.

Information should be provided to children about how they can complain and what the possible outcomes could be to manage their expectations. Rights holders must be clear that children's views should be heard and taken into account—and policy development amended according to the feedback they receive.

### **Advocacy support**

For some children, it may be appropriate and important to have the support of advocacy services and additional support in order to claim their rights. It would be helpful for the Committee to explore this further, in the context of the calls to action for advocacy support outlined in The Promise and the advocacy service provided for in the Children (Scotland) Act 2020 and the Children's Hearings (Scotland) Act 2011.

#### **4. If you work for an organisation or public authority, what resources do you need to help children and young people access their rights? Will you require additional resources or training to implement the Bill, for example to make or respond to challenges in court?**

Children 1st recognises our own part in supporting the implementation of this important Bill and in helping children and families to access their rights. We plan to work hard (and indeed have already begun) to ensure all departments within our organisation know and are able to help children and families claim their rights. This includes with respect to training, developing child- friendly resources and considering our own participation, feedback and complaints policies. All children and young people and their families should have their voices heard in decisions that affect them and they should be equal partners in support, in line with a rights- based approach

---

<sup>3</sup> See, for example: <https://learning.nspcc.org.uk/research-resources/2017/right-to-recover-sexual-abuse-west-scotland>

that takes into account families' strengths. We believe that children and their families have the right to high- quality relationship- based help and support with support workers who work alongside them to discuss the challenges in their lives and work together to overcome them. We are clear that early help and support for families should include emotional, practical and financial support and that all elements of our work should respect children and families' rights.

In line with article 4 of the UNCRC and General Comment 16 (para 33/34) Children 1st believes that this rights- based approach should be a fundamental part of funders and contractors' expectations when they develop or commission a service and should not be considered as something 'separate' or new. In most cases, existing funds can be diverted from costly 'interventions' towards focusing much more on early help and support to prevent crises from escalating. For example, in our view it is much more cost- effective to invest in holistic whole- family support provided through Children 1st's Family Wellbeing Service in East Renfrewshire than it is to fund CAMHS placements or emergency mental health support for children who are in emotional distress.

There is, of course, initial investment that needs to be made in order to meet the needs of families- Family Group Decision Making, holistic whole family support, universally accessible support for all families that need it is resource- intensive, but it is possible to consider what else is being spent in the existing system that could be spent elsewhere. General Comment 16 says that "States are not exempted from their obligations under the Convention when they outsource or privatise services that impact on the fulfilment of children's rights." General Comment 19 sets out core principles of public budgeting.

We believe that when the Scottish Government local authorities, health boards and ourselves in the third sector take a rights- based approach to budgeting different decisions will be made. Children 1st's hope is that these decisions will be much more in line with the intentions set out in The Promise to help families stay together, where they can. The 'Follow the Money' report<sup>4</sup> produced by the independent Care Review identified the vast amounts of money being spent on the existing care system while 'The Money' was clear that shifting the approach to measuring impact and focusing on prevention is economically viable when account is taken of the costs of getting it wrong.<sup>5</sup> The reports show that the money is currently in the system, but needs to be spent in a different way to uphold children's rights and improve longer term outcomes.

## **5. Are there any relevant equalities and human rights issues related to this Bill, or potential barriers to rights, that you think we should look at?**

It is important that UNCRC incorporation provides a framework for incorporation of broader rights protections which will further the rights of children and their families. There is a clear intersectionality between children's rights, women's rights, the rights of disabled people, ethnic minorities and other protected groups. We welcome the work of the National Taskforce for Human Rights Leadership and support the subsequent incorporation of other relevant treaties and conventions (such as UNCRC and CEDAW).

Recent End Child Poverty statistics demonstrate that child poverty has risen in nearly every Scottish local authority since 2014/15. Even before the coronavirus pandemic, levels of child poverty in Scotland ranged from one in seven children in the Shetland Islands to nearly one in three in Glasgow.<sup>6</sup> Poverty is a significant barrier to ensuring children and families can claim their rights and is set to rise following the coronavirus pandemic. Urgent action is needed to

---

<sup>4</sup> <https://www.carereview.scot/wp-content/uploads/2020/02/Follow-the-money.pdf>

<sup>5</sup> <https://www.carereview.scot/wp-content/uploads/2020/02/The-Money.pdf>

<sup>6</sup> <https://cpag.org.uk/topic/child-poverty-statistics>

help families realise their right to an adequate standard of living and to ensure that they have the emotional and practical help and support they need.

As stated above, one of the significant barriers to ensuring that families can access their rights is the availability of high- quality, trauma- informed whole family support and trauma recovery support. Given the number of families in Scotland who have experienced childhood adversity it is important that there is sustainable investment in supporting families in line with the calls to action in The Promise as a matter of urgency.<sup>7</sup>

## **6. What are your views on the provisions in the Bill that allow the courts to strike down legislation judged to be incompatible with the UNCRC?**

Children 1st supports the provision that allows courts to strike down legislation judged to be incompatible with the UNCRC prior to the Bill. This will ensure that the rights enshrined in the UNCRC are given the same status as that given to ECHR rights through the Scotland Act 1998.

## **7. What are your views on the Child Rights Scheme and the requirement on public authorities to report?**

We are pleased to see the inclusion of a Children's Rights Scheme in the Bill, noting the successful model in Wales. It is clear from the experience of the Welsh children's rights measure that a Children's Rights Scheme will help to create opportunities for children, young people and wider stakeholders to inform how the UNCRC is implemented.

In order to strengthen the measures relating to the scheme we recommend that the duty to prepare the Scheme under section 11(3) which currently says "may" include arrangements should be replaced with "shall" include arrangements to ensure children's participation in decision- making, awareness- raising, rights- based budgeting and the preparation of the CRWIA.

We welcome the reporting requirements, which are intended to replace those replicated in the Children and Young People (Scotland) Act 2014. We note the importance of scrutinising the reports and ensuring that there is a high level of accountability once the reports have been produced. We also note the importance of having baseline data and indicators to compare progress when public authorities have reported.

Children 1st agrees with colleagues that it would be helpful to include the Scottish Courts and Tribunals Service in the list of reporting bodies. We encourage the Committee to consider whether there are any similar omissions.

## **8. Is there anything else you want to tell us about the Bill?**

Children 1st strongly supports the list of measures that Together has identified should happen once the Bill has passed. In particular, we wish to highlight the importance of a comprehensive and ongoing review of existing legislation, improving data collection and child rights indicators, a comprehensive understanding of and use of child rights- based budgeting within both local and national government, effective mechanisms to ensure children and young people's meaningful participation in decisions that affect them and efforts to increase awareness and understanding of children's rights amongst children and families including investment in professional training.

---

<sup>7</sup> <http://www.healthscotland.scot/population-groups/children/adverse-childhood-experiences-aces/overview-of-aces>



Please contact our Policy Manager, Chloe Riddell, if you have any questions or comments about our response: [chloe.riddell@children1st.org.uk](mailto:chloe.riddell@children1st.org.uk)