



15 November 2019

## **Response to the call for views on the Children (Scotland) Bill as introduced by the Scottish Government on 2 September 2019**

### **About Children in Scotland**

Giving all children in Scotland an equal chance to flourish is at the heart of everything we do.

By bringing together a network of people working with and for children, alongside children and young people themselves, we offer a broad, balanced and independent voice. We create solutions, provide support and develop positive change across all areas affecting children in Scotland.

We do this by listening, gathering evidence, and applying and sharing our learning, while always working to uphold children's rights. Our range of knowledge and expertise means we can provide trusted support on issues as diverse as the people we work with and the varied lives of children and families in Scotland.

### **Our Response to the Call for Views**

We welcome the opportunity to contribute to this call for views on the Children (Scotland) Bill. Children in Scotland previously responded to the Scottish Government's consultation on the Review of Part 1 of the Children (Scotland) Act 1995 and the creation of the Family Justice Modernisation Strategy.

We recognise the importance of this legislation and the significant impact it will have on many children, young people and their families. Children in Scotland welcomes the overall aims of the Bill. However, we believe certain areas need to be strengthened or require greater clarity in terms of their practical implementation. These areas include capturing the voices of children and young people, communicating decisions to children and young people, and the role of advocacy/support workers. We will return to these issues in more detail below.

Children in Scotland does not deliver direct support services to families. We therefore refer to other responses from our members, including Scottish Women's Aid and Children 1st, where we consider them to be better placed to comment on the practical implications of the Bill. For example, we believe that there needs to be greater recognition within the Bill of the impact of domestic abuse on women, children and young people and we would like to refer to the response by Scottish Women's Aid with regards to this matter.

#### **1) Voice of the child: Do you agree with the approach taken in the Bill to remove the presumption that a child aged 12 or over is of sufficient age and maturity to form a view? Do you agree that it should be left to the court to decide the most suitable way of obtaining a child's views? How do you think children should be given the opportunity to express their views? Are there other measures that you think should be in the Bill to ensure that the voice of the child is heard?**

Children in Scotland supports the removal of the presumption that a child aged 12 or over is of sufficient age and maturity to form a view. We recognise that age is only one indicator of capacity, and believe that, with the right support, many children aged under 12 would be able to form a view within the context of contact and residence cases. This is consistent with the views of other children's organisations in Scotland. We believe the removal of presumption is an important recognition of young children as rights holders, and will support younger children under 12 to have their voices heard in important decisions that affect them.

Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) states that 'State 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, and that the views of the child are given due weight in accordance with the age and maturity of the child.<sup>1</sup> Article 12 is one of the General Principles of the UNCRC which underpins the interpretation and implementation of all other rights.

In the Programme for Government 2019-20, the First Minister reasserted her commitment to deliver legislation to incorporate UNCRC into Scots Law by the end of this parliamentary term.<sup>1</sup> The incorporation of the UNCRC is a significant step forward and has implications on the reading of this proposed legislation. Removal of the presumption places a duty on decision-makers to ensure all children are able to give their views in a meaningful way.

*General Comment No. 7 (2005)* highlights the importance of seeking children's views in early childhood and encourages State parties 'to take all appropriate measures to ensure that the concept of the child as rights holder with freedom to express views and the right to be consulted in matters that affect him or her is implemented from the earliest stage in ways appropriate to the child's capacities, best interests, and rights to protection from harmful experiences'.<sup>2</sup>

We are pleased to see that the wording of the Bill reflects the language of the UNCRC by ensuring that the decision-maker is required to "have regard to any views expressed by the child, taking into account the child's age or maturity". However, while we welcome this alignment with the UNCRC, it is unclear from the Bill or the supporting information how a child's maturity and capacity will be assessed and given due weight. We have significant concerns that without this clarity inconsistent assessments of a child's maturity could arise.

The Bill also states that under the 1995 Act, the 2007 Act and the 2011 Act, decision-makers must 'give the child an opportunity to express the child's views in a manner suitable to the child'.

As highlighted in our consultation response, we believe the best method for obtaining a child's views will differ on a case-by-case basis, recognising that children are individuals and have individual needs. Children and young people should be asked about their preferred way of sharing their views and offered opportunities to do so using a combination of different methods. These include speaking directly to a decision maker, talking to a support/advocacy worker, completing a child-friendly form, or submitting a drawing or letter. We also welcome the use of pre-recorded videos to allow children to share their views. Creative, flexible approaches should be central to ensuring that a child's views are heard.

When children and young people are being asked for their views within the context of contact and residence cases, it is essential that they understand why their views are being asked for and who will see them, regardless of the different ways their views might be sought. It is also important that they know how their views have been considered by decision-makers and have affected any decisions made.

We recognise the importance of a supportive, trusted and impartial adult in these circumstances and advocate for the use of Child Support Workers. This is covered in our response to Question 2.

*General Comment No. 12 (2009) – The right of the child to be heard* recognises that achieving meaningful opportunities for the implementation of Article 12 requires 'a preparedness to challenge assumptions about children's capacities, and to encourage the development of environments in which children can build and demonstrate capacities. It also requires a commitment to resources and training'.<sup>3</sup>

While we recognise the positive intent of the Bill, practicalities need to be addressed to ensure we can create environments where children and young people are able to successfully express their views. This includes making sure decision-makers and support workers have that right training, guidance and resources at their disposal to fully support them.

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<sup>1</sup> <https://www.gov.scot/publications/protecting-scotlands-future-governments-programme-scotland-2019-20/>

<sup>2</sup> <https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment7Rev1.pdf>

<sup>3</sup> <https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

**2) Child's best interests: To what extent does the Bill meet one of its key policy aims of ensuring that the best interests of the child are at the centre of contact and residence cases and Children's Hearings?**

Children in Scotland believes that taking a rights-based approach in line with the UNCRC will ensure that the child's best interests are at the centre of contact and residence cases and Children's Hearings.

Children in Scotland recognises the importance of an independent, supportive adult in these cases. The benefits of support/advocacy workers have been highlighted in the *Power Up/Power Down*<sup>4</sup> project and through the *Advocacy Matters* report by Who Cares? Scotland.<sup>5</sup>

We believe child support/advocacy workers could play an important role in supporting children to give their views and explaining decisions to children involved in contact and residence cases and Children's Hearings. Currently Child Support Workers operate in some areas of the country. However, if this was to be adopted more widely it would require the Scottish Government to establish clear standards for training and experience.

We have seen advocacy workers used successfully in the Children's Hearing system. However, we agree with the Family Justice Modernisation Strategy<sup>6</sup> that it would not be in the child's best interest to have multiple advocacy/support workers assigned to them for different cases.

We would like the Scottish Government to prioritise further investigative work into this issue.

**3) Child welfare reporters and curators ad litem: Do you agree that child welfare reporters and curators ad litem should be regulated? Do you have any views on how this should work in practice?**

Yes. We agree that Child Welfare Reporters and curators ad litem should be regulated.

We believe that Child Welfare Reporters and curators ad litem should receive mandatory training, Continual Professional Development and annual appraisals. In the financial Memorandum, four days has been allocated for Child Welfare Reporter training to cover topics such as domestic abuse, coercive control and report writing. We question whether this is sufficient time dedicated to training in order to fully understand the range of issues faced by children, young people and their families.

Children in Scotland is not best placed to comment on the practicalities of delivering a regulated service. We would like to refer to other organisations' responses, including Children 1st and Scottish Women's Aid who provide direct support services to families.

**4) Factors to be considered by the court when making contact and residence orders: The Bill would require the court to consider the effect of an order on the involvement of the child's parents in bringing up the child and the effect on the child's important relationships with other people. This is in addition to statutory factors relating to protecting the child from abuse and other factors appearing in case law. Do you agree with this approach? Should any other factors be listed in the Bill?**

We generally agree with this approach, however, we believe that extending this section to include the child's identity, the child's right to health and the child's right to education would more closely align the legislation with the UNCRC and 'General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration'.<sup>7</sup>

We know that a child's health, development and education can be negatively affected by contact and residence orders. Although we have seen some improvement in recent years, annual Scottish

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<sup>4</sup> [https://issuu.com/scottishwomensaid/docs/final\\_print\\_pupd\\_binder](https://issuu.com/scottishwomensaid/docs/final_print_pupd_binder)

<sup>5</sup> <https://www.whocarescotland.org/wp-content/uploads/2019/06/WCS-Advocacy-Matters-an-analysis-of-young-peoples-views-Oct-2016.pdf>

<sup>6</sup> <https://www.gov.scot/publications/family-justice-modernisation-strategy/>

<sup>7</sup> [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

Government data identifies the divide in education outcomes for looked after children when compared with all pupils.<sup>8</sup>

It is vital that a child's identity and individual needs are considered when making contact and residence orders. Recognising children and young people's identity is essential in supporting their resilience and emotional wellbeing, and ensuring that a child-centred approach is taken.

General Comment No.14 states: 'Children are not a homogeneous group and therefore diversity must be taken into account when assessing their best interests. The identity of the child includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality.'<sup>9</sup>

We support the wording in section 12(2)(e)(ii) which covers important relationships with other people. This reflects the complexity of family relationships and the important role that siblings and grandparents can play in a child's life. It also covers other important relationships, which may include significant attachment figures that act as a protective factor in a child's life.

**5) Other requirements on the court: Do you agree that the court should ensure that certain decisions are explained to the child? Do you have any views on the provision in the Bill which would require the court to consider the risk to the child's welfare of any delay in the proceedings?**

Section 15 of the Bill includes the provision that 'the court must ensure that the decision is explained to the child in a way that they can understand'. We support this. Decisions and reasons for decisions should be explained to a child, in an accessible way, by an impartial individual. Where possible, decisions should be explained to a child by someone with whom they have an established relationship.

The Bill includes a provision which means that not all decisions would have to be communicated to the child or young person involved. The court can decide not to give an explanation when it considers that it is not in the best interests of the child. We disagree with this approach.

Firstly, it is unclear how this assessment would be made, which could lead to an inconsistent approach to implementation. Secondly, we believe it is always in the best interests of a child to explain decisions that will affect their life and their wellbeing. It is essential that all decisions are communicated in a sensitive way, taking into account the age and capacity of the child or young person.

As highlighted in our consultation response, it is important that children and young people are supported to understand the reasons why certain decisions have been made, especially if these are not compatible with the child's wishes. Children should be supported to ask questions and respond to decisions to ensure that their views on outcomes are heard.

From our experience working with children and young people on a range of participation and engagement projects, we understand how important it is to close the feedback loop when undertaking any activity to seek children's views.

The importance of explaining decisions to children and young people was highlighted in the *Power Up/Power Down* project: "*Children need to be told what the decisions made are, why they have been made and what that means for the child.*"<sup>10</sup>

This was also reflected in the *If an adult just listens...*, a report on consultation work undertaken by the Children's Parliament for the Family Law Committee: "*It's really frustrating because people are making decisions about you and you don't know the outcome.*" – Boy, 12<sup>11</sup>

In addition, UNCRC 'General Comment No.12 (2009) – The right of the child to be heard' provides clear guidance around providing feedback when asking children and young people for their views. It

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<sup>8</sup> <https://www.gov.scot/publications/education-outcomes-looked-children-2017-18/>

<sup>9</sup> [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

<sup>10</sup> [https://issuu.com/scottishwomensaid/docs/final\\_print\\_pupd\\_binder](https://issuu.com/scottishwomensaid/docs/final_print_pupd_binder)

<sup>11</sup> <https://www.childrensparliament.org.uk/wp-content/uploads/Family-Law-Report-2017.pdf>

states, 'children are also entitled to be provided with clear feedback on how their participation has influenced any outcomes'.<sup>12</sup>

We understand however, that some children and young people may not want decisions to be communicated to them. Children and young people should be able to lead the way in deciding what information they receive.

**6) Vulnerable witnesses: The Bill would prevent a party from personally conducting their case in contact and residence cases and Children's Hearings in certain circumstances, for example, where the witness is a victim or complainer of domestic abuse. A solicitor could be appointed by the court to represent the party who is prevented from conducting their own case. Do you agree with this approach? The Bill would also allow the court to order the use of other special measures, such as the use of a live TV link or screen, in contact and residence cases. Do you have any views on this provision?**

We are in favour of restricting self-representation and broadly agree with the approach outlined in the Bill, however we are not best placed to provide detailed comment.

We believe that a child attending court should be avoided at all costs and agree with the use of special measures to support children to safely express their views. Children should have an opportunity to have their say whilst being supported by a trusted adult in a safe environment.

As highlighted in our consultation response, we support the principles of the Barnahus approach which has been adopted in a number of European countries. This model enables children to have their voices heard in a supportive environment, without fear of cross-examination. The Barnahus model aims to ensure a child-centred approach and to minimise trauma, thereby putting the best interests of the child at its heart.

**7) Contact centres: What role should child contact centres play in maintaining contact between children and family members they do not live with? Do you agree with the proposal in the Bill to regulate child contact centres and for there to be a system of independent inspections? The Bill would only require the use of regulated contact centres where referral is made by the court, although the Family Justice Modernisation Strategy suggests solicitors could also be encouraged to refer to regulated centres. Do you agree with this approach? Do you have any views on the practical or resource implications of the regulation of contact centres?**

Contact centres should provide a safe venue for supported and supervised contact when necessary. We welcome the proposal for the regulation of child contact centres, ensuring minimum standards for staff training and regulating the quality of the buildings.

We agree that there is a need for regular independent inspections to ensure that contact centres meet required minimum standards. The new regulatory body should also have the power to investigate complaints.

We are aware that some of our colleagues in the children's sector have raised concerns regarding safety of contact centres and are worried about the delay in bringing proposed new regulatory processes into force. We urge the Scottish Government to look at how it can make immediate improvements to ensure that children, young people and their families are safe when using contact centres.

**8) Enforcement of orders: The Bill would require the court to investigate the reasons for a person's failure to comply with a court's order relating to, for example, contact. Do you have any views on this approach? Are there any other options which should be included in the Bill to ensure orders are enforced?**

We agree with the proposal that the court would be required to investigate a party's failure to comply with a court order. An investigation by a Child Welfare Reporter, or other relevant professional, could help to understand the reason for non-compliance and may highlight unsafe contact arrangements.

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<sup>12</sup> <https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

We believe the wording of the Bill should be amended to ensure that a child's views are always sought in any case where there has been a failure to comply with an order. It is essential that a child has an opportunity to have their voice heard in any investigation into non-compliance. However, Children in Scotland recognises that a child may decide not to give their views. The proposed approach would ensure the legislation fully aligns with Article 12 of the UNCRC.

As identified in the Policy Memorandum, the child's views could assist the court in identifying whether the order is in the best interests of the child. In addition, seeking the views of the child in every case of non-compliance would ensure that the child involved is at the very centre of the process.

We recognise that in some cases, a child may be too young to express a view or unable to do so because of a disability. In these instances, an investigation should still be carried out to review contact arrangements and a party's failure to comply.

**9) Contact with siblings: Do you agree that local authorities should be required to promote contact between a child and any siblings or other people with whom the child has a sibling-like relationship?**

Yes. Sibling relationships can be some of the strongest and most enduring relationships in a child's life. As highlighted by the Stand Up For Siblings alliance<sup>13</sup>, a range of research has demonstrated that siblings can be important attachment figures and sources of emotional security. Positive sibling relationships can support resilience when children face periods of change and adversity.

Under the Human Rights Act (1998), public authorities already have a duty to act compatibly with rights set out in the European Convention on Human Rights (ECHR). Article 8 of the ECHR protects a person's right to respect for their private life, family relationships, home and correspondence without interference from government. ECHR guidance<sup>14</sup> recognises the relationship between siblings as a key component of family life.

Children and young people also have a right to maintain family links under Article 8 of the UNCRC. Article 8 says, 'State Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference'. Sibling and sibling-like relationships clearly provide an important link for a child in understanding his or her cultural identity.

Every effort should be made to maintain these rights by promoting contact between siblings, provided it is safe and appropriate to do so, unless it is against the child's wishes.

We support the recognition of half-siblings, step-siblings and any other people with whom the child has a sibling-like relationship. As identified in our consultation response, sibling and sibling-like relationships can be some of the most supportive and protective relationships in a child's life.

**10) Births registered outwith the UK: Do you have any views on the provisions in the Bill that would allow parental rights and responsibilities obtained outwith the UK to be recognised?**

We agree with the approach taken in the Bill regarding the conferral of parental rights and responsibilities where births are registered outwith the UK.

The Bill allows unmarried fathers and second female parents who have obtained parental rights or responsibilities overseas through a similar process to Scotland to obtain parental rights and responsibilities in Scotland.

This approach aligns with Article 7 of the UNCRC which enshrines a child's '...right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents'.

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<sup>13</sup> <https://www.standupforsiblings.co.uk/wp-content/uploads/2018/09/Part-1-consultation-link-doc.pdf>

<sup>14</sup> [https://www.echr.coe.int/Documents/Guide\\_Art\\_8\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf)

**11) Children's Hearings: Some of the Bill's provisions, for example, in relation to ensuring that the voice of the child is heard and protecting vulnerable witnesses would apply to Children's Hearings. The Bill would also make other changes relating to Children's Hearings, for example, giving the Principal Reporter the right to appeal against a sheriff's decision in relation to deemed relevant person status. Do you have any views on these changes?**

We welcome the Bill's provisions regarding the voice of the child and protecting vulnerable witnesses in relation to Children's Hearings.

We believe there is a need for the Children's Hearings system to further embed creative approaches to managing hearings, alongside existing support mechanisms (e.g. advocacy workers), to ensure that all children and young people can meaningfully participate in hearings. We support the advancement of the Children's Hearing System Digital Strategy aimed at increasing the participation of children and young people in hearings and ensuring the voice of the child is heard.

**12) Practical, financial or other impacts of the Bill: Do you have any views on the practical, financial or other impacts, such as the equality impacts, of the Bill?**

Children in Scotland is not best placed to comment on some of the practical implications of the Bill. However, as highlighted earlier in this response, we believe significant investment in training and resources is required to ensure appropriate support mechanisms are in place for children, young people and their families and the best interests of the child are properly safeguarded.

**13) Family Justice Modernisation Strategy / issues not covered by the Bill: The Family Justice Modernisation Strategy, published alongside the Bill, sets out other actions the Scottish Government intends to take to improve the operation of family justice. It also sets out the reasons why certain areas that were previously consulted on by the Government are not being taken forward. Do you have any views on the actions set out in the Family Justice Modernisation Strategy? Are there issues which are currently not covered by the Bill which you think should be?**

### **Placing Siblings Together**

As referenced in our response to Question 9, Children in Scotland recognises the impact of positive sibling relationships for looked after children and welcomes the Scottish Government's plans to introduce amendments to the Looked After Children (Scotland) Regulations 2009. These amendments will put a duty on local authorities to place siblings under 18 years of age together when they are looked after away from home and when it is in their best interests to do so.

### **Developments to the Children's Hearing System**

Children in Scotland welcomes the items set out in Part 11 of the Family Justice Modernisation Strategy including taking forward the Children's Hearings System Digital Strategy. This includes using digital tools to improve administrative operations and enabling children to better participate in hearings through the use of remote links and sharing digitally pre-recorded views.

Children in Scotland champions participation and engagement opportunities and recognises the value of co-design when developing services for children, young people and their families. We are pleased that the Children's Hearing Improvement Partnership is funding the Our Hearings Our Voice board to ensure that children and young people's experiences and voices are central to the development of the Children's Hearing System.

### **Child-Friendly Materials and Language**

We support the plans in the Family Justice Modernisation Strategy to produce child-friendly materials for children and young people attending court and alternatives to court, including guidance for children about why their views are being sought. We are pleased to see the Scottish Government's commitment to working with key stakeholders when developing these materials.

We also welcome the Scottish Government's plans to produce a policy paper calling for simplified language used in family courts to help litigants and children.