

Children and Young People (Scotland) Act: Reflections on the passage of the Act

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The Children and Young People (Scotland) Act was passed by the Scottish Parliament on 19th February 2014 and received Royal Assent on March 27th 2014. It has been an interesting journey and not without its challenges. This article provides an overview of the Bill's progress through Parliament, details the Act's provisions, with particular attention given to the measures affecting looked after children and care leavers, and provides some reflections on the process.

Context

The Scottish Government had originally intended to introduce two Bills: a free standing 'Rights of Children and Young People (Scotland) Bill' (which had been consulted upon from September - December 2011); and a separate 'Children's Services Bill'. Subsequently, a decision was taken to bring the two Bills together to form a larger Children and Young People (Scotland) Bill, as it was felt that such an approach would enable those parts of the proposed legislation dealing with children's services to be underpinned by measures advancing children's rights. The new proposals were elaborated in *A Scotland for Children: A Consultation on the Children and Young People Bill* (Scottish Government, 2012) with the aim of 'making Scotland the best place in the world for children to grow up' (p.3).

The Children and Young People (Scotland) Bill was subsequently introduced to the Scottish Parliament on 17th April 2013, with the Education and Culture Committee designated lead Committee. Prior to its passing in February 2014, the Bill was significantly amended, notably in relation to the provisions for looked after children and care leavers. The rationale for having one Bill was reasonable, but one could argue that this was not achieved: there are few explicit linkages between the proposed measures on children's rights and the remaining legislative proposals. Moreover, the Bill was not accompanied by a Children's Rights Impact Assessment (CRIA), nor was there any reference to any CRIA having been undertaken to ensure that the children's services proposals were informed by a full appreciation of their potential impacts on children's rights.

Key words: children's rights: continuing care; aftercare; kinship care; GIRFEC and named person.

Overview of the Act's provisions

There are 12 parts to the Act. Part 1 makes provision for the rights of children and young people and places duties on Scottish Ministers and Public Bodies in relation to the United Nations Convention on the Rights of the Child (UNCRC); Part 2 extends the investigatory powers of the Children's Commissioner; Part 3 details the requirements for children's services planning and implementation and Part 4 relates to provisions for a 'named person' and information sharing.

(The 'named person' is a key element of GIRFEC ensuring that there is a point of contact for every child and their parents/carers to enable wellbeing concerns to be considered in the round and appropriate early support and early intervention to be delivered if required)

Provisions for a child's plan in Part 5 include the content of the plan, who should receive one and how it should be delivered and managed. Part 6 covers early learning and childcare, the much vaunted flagship policy of the SNP (Scottish National Party): all eligible pre-school children will receive a mandatory amount of early learning and childcare (i.e. up from 475 hours to 600 hours a year). This provision will also cover children aged two or over who are or have been looked after by a local authority (since the child's second birthday) or are subject to a kinship care order. Parts 7 and 8 relate to duties to plan and consult with regard to school education, day care and out of school care.

Parts 9 - 13 of the Act relate to looked after children and care leavers. Part 9 places the concept of 'corporate parenting' (i.e. the duties of local authorities and other public bodies) on a statutory footing and now includes Health Boards as corporate parents, which is important as they have a critical role in securing positive outcomes for looked after children. The Act sets out the responsibilities of corporate parents, their planning and reporting duties and how they should collaborate. Clarity is also provided about who is a corporate parent and some bodies have been removed from the duty to comply with Ministerial direction. For example, Scotland's Commissioner for Children and Young People is exempted from the duty to comply with directions issued by Scottish Ministers in S. 64 because of the office's established status as independent from Ministers, Government and the Scottish Parliament; There is also flexibility should Ministers wish to add new bodies to the list and the means with which to exempt others from Ministerial direction, if required. The Act also provides for specific duties to be applied to an individual or groups of corporate parents, allowing the government to refine the responsibilities of specific organisations. Despite the availability of guidance and training on what it means to be a corporate parent, this concept is inconsistently understood. The Bill will help to clarify organisations' roles and responsibilities, but success will depend on continued efforts over the coming years.

Part 10 amends the Children (Scotland) Act 1995 to provide young care leavers with the opportunity to receive local authority support up to and including the age of 25. Care leavers will have a right to request advice, guidance and assistance from a local authority and the authority will be under a duty to assess the individual's needs. If the child is found to have eligible needs, the local authority has to provide support to meet those needs. It is important to note that care leavers will still have to *request* assistance and then be assessed as eligible. Local authorities will have discretion as to what is eligible and provide what they deem necessary. Part 8 also clarifies when a young person can qualify for aftercare support. Currently some 16 year-old care leavers are not eligible for this, because they leave care at certain times of the school year. The Bill changes the eligibility criteria to include all young people who leave care after their 16th birthday.

Part 11, Section 67 'Continuing Care' is a new provision, introduced at Stage 2.¹ It defines continuing care, and sets out when the duty would not apply and when it might cease. The effect will be that from 2015 a child in care at 16 years old who ceases to be looked after will have the right to stay in their kinship care, foster care or residential placement, subject to certain exceptions. The intention is to roll out this entitlement to additional cohorts of young people over the coming years. This means that, as is the case with their non-looked-after peers, those not ready to leave home will be entitled to remain with their carers until age 21. Effective aftercare is built on young people having the opportunity to 'stay put' in placements they feel comfortable and secure in until they are ready to move on, so these proposals will make a real difference to the lives of these young people. The transition to independence is challenging for many care leavers and corporate parents must ensure that

¹ A new Section 26A will be inserted into the Children (Scotland) Act 1995 act to specify eligibility for continuing care.

the right support is in place. It is important therefore that this provision should link into forthcoming guidance on corporate parenting.

This part of the Act also places a duty on local authorities to notify Scottish Ministers and the Care Inspectorate about the death of a young person in receipt of continuing care, replicating a provision for the notification of deaths of looked after children in Regulation 6 of the Looked After Children (Scotland) Regulations 2009. The government will also revise the 2007 Guidance to Child Protection Committees to include the death of a young person receiving aftercare in the suggested criteria for child protection committees to consider when deciding whether to conduct a significant case review.

Part 12 relates to services in relation to children at risk of becoming looked after. It replaces what was referred to as ‘counselling services’ in the draft Bill with the term ‘relevant services’ and details which services should be made available for eligible children and qualifying persons. The provisions will be wide enough to ensure that local authorities can provide a range of services and address varying circumstances. Amendments at Stage 2 make clear that support can be provided to members of the child’s family or the child, (not just parents or those with parental rights and responsibilities). An ‘eligible child’ is defined as a child the local authority considers to be ‘at risk of being looked after’ if relevant services are not provided. The risk need not be imminent, as the support is intended to involve early intervention to offset or reduce the risk of the child becoming looked after. Local authorities will judge whether a child meets the test and Ministers will issue guidance to assist with this. The definition ‘eligible pregnant women’ was also introduced at Stage 2 and clarity provided as to who is a ‘qualifying person’. A pregnant woman will be considered eligible if a local authority considers that she will give birth to a child who will be eligible. The government agreed that expectant parents would be a good target for an early intervention approach. Inclusion of the antenatal period is a major improvement upon the draft which simply required that counselling services be available to parents of looked after children.

Part 13 of the Act details the support available for kinship care assistance and the kinship care order. A concern for many of the witnesses was to ensure that local authority support provided under this order should be based on the needs of the child, rather than on resources or a child’s legal status. The assistance to be provided will be prescribed by Ministers in secondary legislation. Part 14 places Scotland’s Adoption Register on a statutory footing which we hope will help to speed up the process by which a young person can be adopted.

Part 15 covers school closure proposals, Part 16, amendments to the Children’s Hearings (Scotland) Act 2011. The remaining parts of the Act (17 - 18) cover miscellaneous provisions (‘other reforms’): detention of children in secure accommodation, children’s legal aid, provision of school meals, the licensing of school meals and wellbeing provisions. These are minor provisions which were introduced to address anomalies and/ or update previous legislation. There are also five schedules to the Act.

It is worth noting that the Bill was introduced to the Education and Culture Committee shortly after members had conducted inquiries into the educational attainment of looked after children and decision making on whether to take children into care². It is clear that the evidence and the recommendations from the Inquiries were fresh in the minds of Committee members as they deliberated on the Bill.

The Education and Culture Committee took oral evidence over six sessions from a range of witnesses and its Stage 1 report supported the Bill’s general principles with only one

² The reports are available on the Scottish Parliament website:
<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/29804.aspx>

Committee member dissenting over the creation of a named person for every child and young person in Scotland. It agreed that further detail was needed to ensure that the measures in the Bill (e.g. the named person, the children's services planning requirements and the child's plan) worked in practice and highlighted areas for improvement (e.g. information sharing). It endorsed the early intervention and preventive approach, but acknowledged the challenges associated with estimating how such an approach would result in future savings. The Committee also felt that the case had not been made for incorporating the UNCRC into Scots law, which the children's sector had called for, but asked the Government to detail the practical actions it would take to increase awareness of children's rights. The Committee noted the strong support from witnesses for the proposal to extend aftercare and recommended that this go further. It recalled its two Inquiries, both of which had flagged up the need for further work to improve outcomes for looked after children and invited the government to respond to suggestions that the Bill should include a right for care leavers to return to care up to 26 and allow young people who have spent time in care, but are not in care at school leaving age, to be eligible for aftercare.

The Stage 1 debate took place on 21st November 2013. The Minister for Children and Young People agreed that UNCRC incorporation into domestic law was not the best way to progress the rights agenda, but that there was scope for the ministerial duties to be strengthened. She also acknowledged concerns about resourcing the named person and information sharing which she saw as 'a critical and difficult area'³. With regard to the looked after provisions, the Minister spoke of a 'strong commitment to ensure that we get things right for our looked-after children who are moving on to independent living. Our engagement with Who Cares? Scotland and others can ensure that we get things right in the final draft of the bill and that the bill works for our looked-after children'⁴. The Minister was true to her word as can be seen in the content of the Bill as passed at Stage 3. The changes to Parts 7-10 were in no small part due to the campaigning efforts of organisations such as Who Cares? Scotland, Barnardo's and Aberlour, as well as looked after young people, who met with MSPs, Committee members, civil servants and the wider children's sector. [Editor's note: an account of Who Care's Scotland's campaigning in this respect was contributed by Duncan Dunlop [Children and young people in care until age 26: A must for improved outcomes](#) in a previous issue of SJRCC.] CELCIS also held a round-table discussion on Part 8 of the Bill and brought together these organisations to discuss possible government amendments at Stage 2.

The general principles of the Bill were voted on and passed at Stage 1: 104 members voted for, 14 abstained (all Conservatives) and none voted against. The Bill then returned to the Education and Culture Committee for detailed scrutiny at Stage 2. Although any MSP can propose and speak to amendments at this stage, only Committee members can vote. Four Stage 2 sessions were held and the SNP exerted strong party discipline, voting for all government amendments and opposing opposition ones. Explanations were provided by the Minister as to why proposed amendments could not be supported and in some cases a commitment was given to work with the MSP at a later stage or that issues would be addressed in guidance. The opposition amendments which fell (or were not moved) covered sibling contact, children's rights and disabled children. Siobhan McMahon MSP (Labour) had sought to include a reference to the United Nations Convention on the Rights of the Child (UNCPRD) to ensure that disabled children had additional recognition on the face of the Bill. The Minister repeatedly said that she was keen not to single out particular groups, stressing the importance of universality.

^{3&4} Aileen Campbell, Minister for Children and Young People, Children and Young People (Scotland) Bill (21st November 2013) <http://www.scottish.parliament.uk/parliamentarybusiness/28862.asp>

There were, however, some improvements in relation to UNCRC reporting, information sharing and a significant amendment proposed by Joan McAlpine, MSP (SNP) which added text to the aims of children's services plans at Section, 9 (2) to ensure that 'any action to meet needs is taken at the earliest appropriate time and that, where appropriate, action is taken to prevent needs arising'. The effect will be to require local authorities and health boards when preparing their children's services plans to set out how services will work towards early intervention and preventive action over the period covered by the plans. Amendments were also made to the kinship care section to remove the exclusion of a guardian from being a qualifying person and therefore from being eligible to receive kinship care assistance. The government agreed that the status of guardians was not sufficiently different from that of kinship carers to justify their exclusion from being eligible for kinship care assistance. The highlight at Stage 2 was the amendments passed on the provisions for care leavers. The Minister spoke about the commitment to measures to support care leavers over the next 10-12 years, stating:⁵ 'This significant package of amendments represents a uniquely Scottish solution to tackle some of the most pressing issues that some of our most vulnerable young people face. Not only⁵ is it a huge step forward for Scottish teenagers in care, but it is ground-breaking in policy terms.'

She also announced that the government will put measures in place to enable care leavers to return to care if they need that support and announced that an expert group will be set up to consider how to take this forward. The expert group will also monitor implementation of the Bill's 'continuing care' provisions, playing a key role in developing the measures that will enable care leavers to return to care, should they need that support. There will be much to do over the coming months as secondary legislation and guidance is developed. Much of this work (e.g. on information sharing, aftercare provision, childcare provision and kinship care) will be done through the 'affirmative procedure' which means that key stakeholders will be consulted and Parliament will be able to debate the issues thoroughly.

Stage 3 took place on 19th February 2014. No amendments from opposition members were accepted. Jean Urquhart, MSP (Independent) wished to place a duty on Scottish Ministers to set up an Independent Commission, within a year of Royal Assent, to look at how to give the UNCRC better effect. Her views - and those of others - were that Part 1 on children's rights did not go far enough. Liam McArthur, MSP (Scottish Liberal Democrat) did not feel that the case had been made for incorporation, agreed that the Bill did not go far enough and also called for Children's Right Impact Assessments to be carried out on legislation relating to children. The Minister responded by saying that establishing a new body was unnecessary as robust structures were already in place for holding the Parliament to account and that CRIAs were already under consideration. Other amendments which fell at Stage 3 focused on the child's rights to privacy and information sharing, the named person and disabled children. Liz Smith, MSP (Conservative) suggested that in its current form the function of the named person may be open to challenge under Article 8 of the ECHR.

Reflections

There is no doubt that this is an important piece of legislation, the most significant child welfare law since the Children (Scotland) Act 1995. There has been a real commitment to improving the outcomes of looked after children and care leavers shown by civil servants, MSPs, local government and the third sector and the resulting amendments passed at Stage 2 are testament to this. Much of the detail on the looked after provisions will be fleshed out in the guidance. The success of the campaigning will only be seen in the difference it makes to the outcomes of looked after children and young people and care leavers. This calls for

⁵ Aileen Campbell, Minister for Children and Young People, Stage 2, 14th January 2014
<http://www.scottish.parliament.uk/parliamentarybusiness/28862.asp>

vigilance, a need to hold Ministers and MSPs to account and to remind them of promises made.

There were however notable disappointments, e.g. the provisions on children's rights are undoubtedly weak: the Act places duties on Ministers to keep under consideration their approach to implementing the UNCRC, which the Law Society of Scotland suggested was: 'a diluted version of existing obligations'⁶. With regard to public authorities, the Act places duties to report on what practical steps they have taken to 'secure better or further effect within its area of responsibility of the UNCRC requirements (S.2.1) and publishing a report on steps taken with regard to children's rights. It thus fails to provide local authorities with a meaningful duty to give due consideration of children's rights and to implement those rights.

The focus on the principles of Getting It Right for Every Child (GIRFEC)⁷ and well-being has also appeared to be at the expense of children's rights (a much wider concept) and witnesses raised concerns that such an approach was limited and failed to live up to the promises made around rights. There is no doubt that a tension exists between well-being and rights in the Act.

As it stands, the Act does not make provision for a child to challenge a rights violation through the Courts, an important omission from the Act and one which the children's sector had sought to remedy. Many within the children's sector also expressed regret that they had been unable to make a stronger case for UNCRC incorporation. The lead Committee had concluded in their stage 1 report that the case had not been made. This may have been due to a failure by the sector to agree a united position and have set out clear arguments at Stage 1. The Committee had relied heavily on the evidence of one legal expert who did not support UNCRC incorporation and whose views had been made very clear well before the Bill was introduced. A failure to counter his arguments in advance and produce cogent and positive arguments was seen as a missed opportunity. Jean Urquhart's amendment at Stage 3 would have committed the Scottish Government to setting up an Independent Commission to look at how to give the UNCRC better effect. The body would have been able to consider all the options, including legislative effect, and produce a report for Scottish Ministers. This would have sent out a strong message that the Government was serious about children's rights and the deliberations of such a Commission in itself would have helped to increase awareness of the subject.

A failure to amend the provisions in the Bill were also due to the limited opportunities available at Stage 2. Some children's organisations had spent considerable time preparing briefings and developing amendments with MSPs at this stage 2 and many were left disappointed. Clearly much of the scrutiny is done before a Bill reaches Stage 2 and the Stage 1 sessions were probing and informative, with uncertainties and weaknesses in the Bill exposed (e.g. funding and workforce issues in relation to the named person, the information sharing proposals, the kinship care order and the estimates and assumptions upon which the Financial Memorandum was based). Stage 2 held few surprises and provided disappointing. Voting was strictly on party lines and in a Committee dominated by SNP members, this became all too predictable. Attempts to amend the Bill by opposition MSPs at stages 2 and 3 were met with flat refusal, leading one MSP to remark'....

'It is disappointing that the Minister has, to date, not seen fit to accept a single amendment from any Opposition member, despite all our willingness to share with her and her officials the areas of concern that we have about a bill that enjoys cross-party support. Indeed, the

⁶ Children and Young People (Scotland) Bill. The Law Society of Scotland's response, July 2013. http://www.lawscot.org.uk/media/645297/fam_children_young_people_bill.pdf

⁷ GIRFEC promotes action to improve the well-being of all children and young people. See <http://www.scotland.gov.uk/Topics/People/Young-People/gettingitright> for more information.

sole exception to the Scottish Government's apparently exclusive right to amend the bill is Joan McAlpine's amendment on the theme of preventative action, which was agreed to at our previous meeting'⁸.

On occasion, one had the impression that limited time was being afforded to meaningful consideration of some amendments - those on sibling contact and preventive measures being examples. With regard to the latter, some in the Baby IN the Bath Water coalition remarked that some of the defeated amendments had actually enhanced and complemented amendments which had been previously passed. Working with a majority government brings with it considerable challenges and has implications on how organisations engage with Ministers, civil servants and MSPs and where the emphasis should be put. 'Not necessary' appeared to be the stock justification for rejecting amendments and some felt that these justifications warranted fuller explanation. However, the Minister made a commitment to work with the sector and the Baby IN the Bath Water coalition on the development of the guidance and this is significant.

Collaboration across the children's sector was extremely positive and organisations came together to share thinking and pool resources and ideas, e.g. on children's rights, information sharing and aftercare, to seek to improve the Bill's provisions. The period between stages 1 and 2 was extremely productive. Meetings were held with MSPs and civil servants, individually or as part of a group, all seeking to present their case and influence Stage 2. Briefing papers were produced and circulated, amendments developed and refined and there was ongoing discussion with MSPs who had offered to lodge the amendments in Committee. Those within the Education and Culture Committee were specifically targeted as they could vote on amendments. Some organisations focused their attention on civil servants, while others chose a Parliamentary route, through MSPs and clerks. Some of these organisations have since stated that their attentions might have been better focused on civil servants and Ministers than with MSPs, as their role at Stage 2 had been somewhat limited and at times, irrelevant. Having said that, young people from Who Cares? Scotland presented their case to various MSPs before the Stage 1 debate and were effective in putting forward their views and influencing changes.

A significant new coalition was also created: 'Putting the Baby IN the Bathwater', initiated by the Wave Trust. This grew in strength and numbers as the Bill made its progress through Parliament and represented most of the children's sector organisations, academics and significant individuals such as the former Children's Commissioner, Professor Kathleen Marshall, and John Carnochan, founder of Strathclyde's Violence Reduction Unit. The coalition made a clear case for prevention, stating that whilst primary legislation was not the only way of advancing policy, practice and positive results, the Bill was premised upon the belief that a statutory foundation was required for GIRFEC, children's rights, early learning and childcare and the care system. The argument was that this should equally apply to creating a strong statutory basis for practical, prevention-oriented policies and practice that enhance the earliest months and years of childhood. Not to do so will lead (over time) to the earliest years receiving lower priority and less support than other areas. Although most of this coalition's amendments fell at stages 2 and 3, the case was well received by MSPs and Ministers and the extent to which it was supported by so many groupings and individuals is a powerful expression of the commitment to early intervention and prevention.

The named person provisions dominated the headlines over the summer of 2013 and there was a sense across the children's sector that the Government had failed to present an effective and convincing case, allowing notions that the named person would result in 'a social worker for every child' or would 'usurp the role of parents' to take hold. Some felt

⁸ Liam McArthur, Stage 2. Day 2. 7th January 2014

that it had been left to children's sector organisations to counter these charges and their success in so doing so is an indication of a strong and well informed sector which places children's rights at the centre of their work. It is far easy to criticise the Act and be critical of opportunities missed and the process through Parliament, as there is much to commend it, not least the provisions relating to looked after children and care leavers. These measures illustrate a strong cross party commitment to improving the lives of this group of vulnerable children and a willingness and determination to build on the provisions set out in the Act.

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