

Equalities, Human Rights and Civil Justice Committee Non-implementation of Acts of the Scottish Parliament Submission of the Children and Young People's Commissioner Scotland

December 2024

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

The Commissioner is fully independent of the Scottish Government.

Thank you for the invitation to contribute to your work on the above issue. We note that you are looking at the implementation of three Acts.

We had extensive involvement in the development of what became the Children (Scotland) Act 2020 (“the 2020 Act”), including a response to both the Scottish Government pre-consultation¹ and consultation²; written³ and oral evidence at Stage 1⁴, participation in a roundtable on children’s participation in the justice system hosted by the then Justice Committee⁵; and Stage 2⁶ and Stage 3⁷ briefings.

As we had only limited involvement in the development of the Female Genital Mutilation (Protection and Guidance) (Scotland) Act 2020 and Domestic Abuse Protection (Scotland) Act 2021, providing Stage 1 evidence only on the latter⁸, our focus in this submission is on the Children (Scotland) Act 2020.

¹ CYP/CS/Scottish Government, 2017. *Response: Review of Part 1 of the Children (Scotland) Act 1995 – notes of interview*. <https://www.cypcs.org.uk/resources/review-part-1-children-scotland-act-1995/>

² CYP/CS, 2018. *Consultation response: Review of Part 1 of the Children (Scotland) Act 1995 and creation of a family justice modernisation strategy*. <https://www.cypcs.org.uk/resources/scottish-government-consultation-response/>

³ CYP/CS, 2019. *Evidence to the Justice Committee: Call for Views on the Children (Scotland) Bill*. <https://www.cypcs.org.uk/resources/justice-committee-views-children-scotland/>

⁴ Scottish Parliament. Official Report – 7 January 2020. <https://webarchive.nrscotland.gov.uk/20220808043044/https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=12445>

⁵ Scottish Parliament. Official Report – 17 December 2019. <https://webarchive.nrscotland.gov.uk/20220808043140/https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=12433>

⁶ CYP/CS, 2020. *MSP Briefing: Children (Scotland) Bill (Stage 2)*. <https://www.cypcs.org.uk/resources/msp-briefing-children-scotland-bill-stage-2/>

⁷ CYP/CS, 2020. *MSP Briefing: Children (Scotland) Bill (Stage 3)*. <https://www.cypcs.org.uk/resources/children-scotland-bill-msp-briefing-stage-3/>

⁸ CYP/CS, 2020. *Stage 1 Evidence to the Justice Committee: Domestic Abuse (Protection) (Scotland) Bill*. <https://www.cypcs.org.uk/resources/stage-1-evidence-dapo/>

Children (Scotland) Act 2020 – Bill development and commencement

We experienced very positive engagement with Scottish Government officials from the Justice Directorate (up to Director level) and with the Scottish Government Legal Department (on both the 2020 Act and the Domestic Abuse (Scotland) Act 2018). We met with officials a number of times to further realise children’s human rights under the UNCRC.

It was a positive example of the legislative process that we still highlight as good practice, not only for our own experience but the extent to which children and young people with lived experience (particularly Yello) were able to participate in the process. To quote one of the young people involved: *“Overall I think everything went great and everyone is really kind, willing to listen to your ideas without judging and really caring”*.⁹

Our office’s work on this Bill represented the culmination of almost a decades work on children’s ability to participate when decisions are made about who they live with and what contact they have with non-resident parents and (in the case of looked after children) their siblings. Our focus in this work was on the experiences of children with experience of domestic abuse, who are disproportionately involved in contested contact and resident proceedings, as well as children referred to a Children’s Hearing. A summary of our work on this issue, which involved our research, participation and policy teams, is available on our website¹⁰.

The result was a landmark piece of legislation which represented a potential transformation of children’s experiences of court hearings regarding child contact and residence disputes. It also significantly improves the capacity for decisions to be made in a way which fully respect children’s right to participate in decision making and their best interests. The 2020 Act led the way for the sort of change we hope to continue to see following incorporation of the UNCRC into Scots law.

We are obviously extremely disappointed by the fact that much of the 2020 Act has not been commenced. The process of commencing and implementing legislation is often poorly understood by adults, let alone children, and many have the impression that change happens when legislation is passed. The three Acts under consideration by your Committee are just three examples of a lengthy pattern of delayed commencement of important legislation that furthers realisation of the UNCRC in Scots law.

For children, delayed commencement of any legislation has a disproportionate effect, simply because a period of time that is brief by adults’ standards can be a large portion of their childhood and consequent impact on their development. In the case of section 122 of the Children’s Hearings (Scotland) Act 2011, which provided a right to advocacy services for children referred to a children’s hearing, the delay in commencement was almost 10 years – more than half of a child’s life.

Nonetheless, we recognise that the 2020 Act was ultimately passed in a context which could not have been anticipated, even at the beginning of 2020 when Stage 2 evidence was being heard. The Covid-19 pandemic had a major impact on capacity

⁹ Improving Justice in Child Contact project blog post. 2019. *My experience of being part of Yello! – view from a young expert*. <https://blogs.ed.ac.uk/ijcc/2019/07/my-experience-of-being-part-of-yello-view-from-a-young-expert/>

¹⁰ CYPSC, 2020. Our Positions: Domestic Abuse <https://www.cypsc.org.uk/positions/domestic-abuse/>

in all the agencies affected by its provisions – which include Scottish Government, the courts, the Children’s Hearings system, local government (particularly children’s services) and third sector organisations which support children and their families. We acknowledge the impact that other changes, particularly The Promise, are having on capacity across all agencies, but would comment that the 2020 Act also addresses issues raised by The Promise and that the sections of the 2020 Act applying to private law disputes should be treated with equivalent urgency.

We feel that, over four and a half years (a quarter of a childhood) since it passed, it is legitimate to criticise the delays to commencement. We believe that there are sections (or subsections) of the un-commenced parts of the 2020 Act which could represent significant progress in realising children’s rights with relatively little resource implication. In some cases, they involve solidifying in law practice that has already developed. In other cases, whilst provisions such as the register of Child Welfare Reporters and availability of advocacy would strengthen realisation of children’s rights, commencement of Part 1 and section 18 (discussed below) ahead of these being implemented will still address significant incompatibilities with the UNCRC.

Provisions already in force

We welcome the prompt commencement of section 13 and 14 (on sibling contact) and 25 and 26 (which provides greater opportunity for siblings to participate in Children’s Hearings). We engaged with Scottish Government during the passage of the 2020 Act to ensure that these represented children and young people’s experiences of family life and were not restricted to specific categories of siblings but to anyone with whom the child had enjoyed a sibling-like relationship.

Part 1 – Regard to be had to child’s views

Sections 1, 2 and 3 of the 2020 Act contain provisions which strengthen compatibility with children’s rights in the Children (Scotland) Act 1995, Adoption and Children (Scotland) Act 1995 and the Children’s Hearings (Scotland) Act 2011. In particular, Part 1 changes the presumption that children are only able to provide their views from age 12 to a presumption that all children are able to provide their views. Our evidence was that the existing presumption had resulted in children under 12 not being given the opportunity to give their views. We believe this was due to a conflation of the legal capacity to make decisions with an ability to provide a view which a judicial decision maker will take account of. The reality is that children can express a view, often quite clearly, from a very young age.

Whilst the UN Committee on the Rights of the Child, in their General Comment 12 on the right of the child to participate (GC12) are clear that Article 12 is a right to participate in decision making, they are clear that although children have a right “*to an opportunity to be heard in any judicial and administrative proceedings affecting the child*”¹¹, children’s views are only one aspect which inform decisions, with them being given “*due weight in accordance with the age and maturity of the child*”.¹²

The UN Committee on the Rights of the Child reinforced their concern that children’s views were not systematically taken into account in decisions affecting them,

¹¹ UNCRC Article 12(2)

¹² UNCRC Article 12(1)

specifically recommending that UK governments “Ensure the right of all children, including younger children, children with disabilities and children in care, to express their views and to have them taken into account in all decisions affecting them, including in courts and relevant judicial proceedings and regarding domestic violence, custody, placement in alternative care...”¹³.

Although other parts of the 2020 Act (detailed below) strengthen the capacity in the system to support the provisions of Part 1, we believe a pragmatic approach is possible, where Part 1 is not further delayed simply because of the resource implications of other elements of the legislation. For example, we note that Child Welfare Reporters are already in place for many children and that they are often funded by the state through legal aid. The 2020 Act merely ensures that Child Welfare Reporters can be appointed for any children, whether or not their parent(s) receive legal aid.

Even at the time the 2020 Act was passed the Courts and Children’s Hearings were undertaking considerable work to improve the ways in which they gathered children’s views and many children are already able to be well supported to provide their views. This means that there is already flexibility to provide children with an opportunity to express their views in a manner they prefer (or a manner suitable to them as appropriate) as required by Part 1. There has been investment in training for both the judiciary and legal profession and the consideration of children’s views is becoming better embedded in Children’s Hearings.

Part 2 – Vulnerable Witnesses and Parties.

Our understanding is that these provisions have largely been overtaken by the Victims and Witnesses Bill, which is currently at Stage 2. We responded to the Scottish Government’s consultation ahead of this bill’s introduction.¹⁴

Part 3 – Register for child welfare reporters

We responded to the Scottish Government’s consultation on this in June 2022¹⁵. In our response we re-iterated that there needed to be an open and transparent process which ensured that those appointed as Child Welfare Reporters (and curators as litem) had appropriate qualifications and ongoing training to fulfil their role. We stated that training must include knowledge of the UNCRC and children’s rights and ways in which to engage with children and young people and gather their views). We were disappointed that training in children’s rights was not included in the consultation proposals.

We also highlighted the importance of training on domestic abuse and quoted YELLO’s evidence to the Justice Committee on this issue:

The child welfare reporters should spend a lot of time training and working with experts on domestic abuse. They should be specialised in that area. It is not good enough to only have a few days training. These people are paid to

¹³ UN Committee on the Rights of the Child, 2023. Concluding Observations. LINK para 23(a).

¹⁴ CYPCS, 2022. *Improving victims’ experiences of the justice system: consultation*. <https://www.cypcs.org.uk/resources/victims-consultation/>

¹⁵ CYPCS, 2022. *Scottish Government Consultation – Register of Child Welfare Reporters, Curators ad litem etc.* <https://www.cypcs.org.uk/resources/register-of-child-welfare-reporters/>

*help children and they need to be aware of children's rights, and to help children be aware of their rights.*¹⁶

This is one of two provisions in the 2020 Act which have potentially significant cost implications, however as we note that Child Welfare Reporters are available to many children via Legal Aid.

Contact Centres

We also responded to the Scottish Government's consultation on the regulation of Contact Centres in 2021 and were largely supportive of their proposals¹⁷. We emphasised the importance of ensuring that contact centres meet minimum standards to ensure they provide a child-friendly, age appropriate and safe environment and have in place appropriate child protection and safeguarding policies. It is also essential that staff and volunteers receive compulsory training, appropriate to their role, which includes children's rights, child protection and domestic abuse.

We understand that the Scottish Government is currently exploring details of registration and we would urge them to progress the register as a matter of urgency. We continue to have concerns about unregistered contact centres, particularly where the Courts have decided a parent requires to be supervised during contact.

Section 18 - Duty to consider child's best interests when allowing access to information

This is an important section which will provide protection to children's rights when information is shared with parties in Court proceedings. It was included following concerns about large amounts of private information, including support and counselling notes, having to be released to estranged parents, against the express wishes of the child. It requires any such request for information to be balanced with the child's best interests.

As with the provisions of Part 1, the children's views requirements in section 18(3), 18(4) and 18(5) could be implemented within current support arrangements, with further improvements made when Part 3 and section 21 come into force.

Section 21 – Duty to ensure availability of child advocacy workers.

We welcome this provision which will ensure that children who are the subject of civil court proceedings the same access to advocacy support as children referred to a Children's Hearing.

During the Bill's passage it was recognised that children could be supported to express their views in a number of ways and that involvement with the Court process was likely to be discrete opportunities to express views, with no requirement for them to actually attend the Court. This is in contrast to the ongoing process of Children's Hearings. In other cases, appointment of a Child Welfare Reporter could provide a child with an opportunity to be supported to give their views.

¹⁶ YELLO/University of Edinburgh, 2019. *Call for views: Children (Scotland) Bill*
<https://www.ed.ac.uk/files/atoms/files/mh-ijcc-yello-evidence.pdf>.

¹⁷ CYPCS, 2021. *Register of Child Contact Centres*. <https://www.cypcs.org.uk/resources/register-of-child-contact-centre-services/>

Many children, particularly those with experience of domestic abuse, will already be receiving support from third sector organisations. We (and others) encouraged the Scottish Government to explore different options and we viewed the s21 advocacy provisions not as a replacement for this support but as a means to ensure all children had access to advocacy if they were not otherwise receiving support.

Our understanding is that the Scottish Government is continuing to explore the existing capacity in the system and the provision of this service.

Future legislation

Should Parliament wish to ensure that commencement is not excessively delayed, commencement dates can be set in the legislation, either when drafted or as an amendment at Stages 2 or 3. Options include the Act, or sections of it coming into force either immediately upon Royal Assent or a set period after Royal Assent.

The Children (Equal Protection from Assault) (Scotland) Act 2019 included in section 4 (at introduction) that parts of the Act come into force immediately upon Royal Assent, with the remainder coming into force 12 months after Royal Assent¹⁸.

Likewise, section 47 of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 brought most¹⁹ of the Act into force, automatically, 6 months after Royal Assent whilst providing the option for Scottish Government to bring it into force earlier, by regulations, if they wished.

For further information, please contact Megan Farr, Policy Officer at megan.farr@cypcs.org.uk or 07803 874 774

¹⁸ Scottish Parliament, 2019. Children (Equal Protection from Assault) (Scotland) Act 2019. <https://www.parliament.scot/bills-and-laws/bills/s5/children-equal-protection-from-assault-scotland-bill>

¹⁹ Four sections, plus s47 itself, came into force the day after Royal Assent. <https://www.legislation.gov.uk/asp/2024/1/contents/enacted>