

# NSPCC Scotland response to the Scottish Government consultation on Rights of Children and Young People Bill

November 2011

## Introduction

NSPCC Scotland welcomes the opportunity to respond to the consultation on the Rights of Children and Young People bill. This is an extremely important piece of legislation which we welcome as a positive step to ensuring that children and young people's rights are better promoted and respected.

However, we think that there are areas where the proposed Bill could be strengthened in order to meet better the aims of the legislation, as set out in the consultation document. These suggestions are set out below.

## About NSPCC Scotland

The NSPCC aims to end cruelty to children. Our vision is of a society where all children are loved, valued and able to fulfil their potential. We are working with partners to introduce new child protection programmes to help some of the most vulnerable and at-risk children in Scotland. We are testing the very best intervention models from around the world, alongside our universal services such as ChildLine<sup>1</sup>, and the NSPCC Helpline. Based on the learning from all our services we seek to achieve cultural, social and political change – influencing legislation, policy, practice, attitudes and behaviours so that all children in Scotland have the best protection from cruelty.

## NSPCC Scotland response

### 1. Do you agree that legislation to embed the UNCRC within the Scottish Government's decision-making and day-to-day business is necessary and appropriate?

The development of a Children and Young People's Rights bill presents a unique and very welcome opportunity for increasing the protection of children's fundamental rights and freedoms. While we welcome the proposals as a step forward in promoting children's rights, our preferred method of providing this distinct protection for children's rights would be to fully incorporate the UNCRC and its optional protocols into Scots law.

Full incorporation is supported by the UN Committee on the Rights of the Child in their 2008 Concluding Observations<sup>2</sup> about the UK, the Committee commented that:

*"The Committee remains concerned that the principles of the Convention are not duly taken into account in all pieces of legislation throughout the country and that*

<sup>1</sup> Until March 2012, ChildLine in Scotland will be delivered by Children 1<sup>st</sup>, on behalf of the NSPCC.

<sup>2</sup> <http://www2.ohchr.org/English/bodies/crc/docs/AdvanceVersion/CRC.C.GBR.CO.4.pdf>

*the State party has not incorporated the Convention into domestic law nor has it ensured the compliance of all legislation affecting children with it.”<sup>3</sup>*

The UN Committee is clear that it expects governments to take all appropriate measures to give the UNCRC legal effect within domestic law. We recognise that the proposals do seek to give statutory weight to the UNCRC but this falls short of full incorporation of the Convention, as is recognised in the consultation document. We strongly feel that this would be a missed opportunity.

Incorporating the UNCRC into domestic law would mean ensuring that new policies and legislation are ‘child rights proofed’ and that public bodies are fully accountable for upholding children’s rights. The UN Committee has twice called for the UK Government to incorporate the rights, principles and provisions of the UNCRC. The Committee is clear that incorporation “should mean that the provisions of the Convention can be directly invoked before the courts and applied by national authorities”.<sup>4</sup>

Children and young people in Scotland currently have no mechanism to enforce their rights under the UNCRC. Many rights in the UNCRC are beyond those provided by the Human Rights Act and are not entrenched rights because Scottish courts do not have the power to strike down incompatible legislation.

Currently, children’s rights are often dependent on a child’s circumstances - whether at home, school, looked after by the state or in custody - rather than belonging to the child directly. For example children have full legal protection from physical chastisement in school, in care and in health settings, but not in the family home. Incorporating the UNCRC into Scots law would give children entrenched and enforceable rights, which would belong to the child regardless of context.

## **2. Do you agree that “due regard” is the appropriate level of regard for the duty on the Scottish Ministers? If not, why not?**

In its consultation paper, the Scottish Government states that it aims to establish “a clear accountability of the Scottish Ministers to the Scottish people to respect and take account of the rights of children and young people as set out in the UNCRC”.<sup>5</sup> However, the UN Committee comments that “for rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the convention and consistently referred to in the other six major international human rights treaties.”<sup>6</sup>

NSPCC Scotland agrees with Scotland’s Commissioner for Children & Young People, Together, ChildLine and others, that the level of regard currently in the bill, ‘due regard’, although significant, will not have an effect on judicial remedies and would not give a child facing a rights violation an opportunity to access redress through Scottish courts.

Together has commented that a duty to have ‘due regard’:

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<sup>3</sup> <http://www2.ohchr.org/English/bodies/crc/docs/AdvanceVersion/CRC.C.GBR.CO.4.pdf>

<sup>4</sup> [http://www2.ohchr.org/english/bodies/crc/docs/GC5\\_en.doc](http://www2.ohchr.org/english/bodies/crc/docs/GC5_en.doc)

<sup>5</sup> <http://www.scotland.gov.uk/Publications/2011/09/07110058/5>

<sup>6</sup> Paragraph 24, General Comment No 5, UN Committee on the Rights of the Child 2003

*“does allow for judicial review in relation to a failure to comply with the ‘due regard’ duty but this is a very cumbersome legal mechanism. Judicial review avoids the addressing substantial issues as it looks at the decision making process rather than the decision reached.”<sup>7</sup>*

As the Bill is currently envisaged, if a child or family succeed in challenging a decision, it would be open to Ministers to make exactly the same decision again, as long as they are able to demonstrate that, in the repeat process, ‘due regard’ had been taken of the UNCRC. As SCCYP has commented, *“the omission of individual remedy limits the potential impact of the proposals.”<sup>8</sup>*

NSPCC Scotland supports the UN Committee recommendations that a clear channel of redress for breaches of children’s rights should include provision of child-friendly information, advocacy, and access to independent complaint procedures and the courts when necessary with legal and other assistance.

The ‘due regard’ duty does not meet this standard and should therefore be strengthened to ensure that Ministers ‘act compatibly’ with the UNCRC. Similarly, the duty should be extended to public bodies and others who interface with children, as discussed in more detail below, to allow a child who is prevented from accessing his/her rights to bring a claim to court.

### **3. Do you agree that the duty should apply to all the functions of the Scottish Ministers? If not, why not?**

NSPCC Scotland agrees that the duty should apply across all Ministerial functions. The message this sends to Scottish ministers and officials is clear, straightforward and avoids unnecessary confusion: in all actions, and across all portfolios, Ministers must ensure that activity is planned and undertaken in a way that fully considers the implementation of the UNCRC.

However, the consultation document states that executive agencies will be covered by the duty, but non-departmental public bodies (NDPBs) will not. Many NDPBs perform ministerial functions, albeit while not under direct ministerial control. We believe that for this provision to have the desired impact, non-departmental bodies should also be covered by the duty.

### **4. Do you agree with the proposed arrangements for reporting?**

The duty on Ministers to report implementation every five years is a process that the Scottish Ministers already undertake as part of the UK’s report to the UNCRC.<sup>9</sup> The proposed reporting arrangement will not add anything substantial that will help to evidence the Scottish Government’s compliance with the UNCRC. NSPCC Scotland would prefer a bi-annual reporting cycle which we feel would properly assess the impact of the bill. This also matches with the suggested reporting cycles for reporting on equality

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<sup>7</sup> Together briefing: Rights of Children & Young People bill. Oct 2011

<sup>8</sup> Briefing SCCYP Consultation on Rights of Children and Young People (Scotland) Bill

<sup>9</sup> Commissioner for Children and Young People (Scotland) Act 2003

outcomes under the draft regulations for the public sector equality duty specific duties, where there will inevitably be overlap.

The process for ensuring the Scottish Government's compliance with the UNCRC should include clearly showing the bill has visibly integrated the rights of children into policy making and, importantly, how this is improving trajectories for children and young people. Without a consideration of the impact the duty has had for children and young people in Scotland, there is a real danger that the implementation of the duty becomes overly process-focused. We would like to see the Scottish Government mirroring the Welsh Measure which will demonstrate compliance by building a continuous process of child impact assessment and child impact evaluation into government at all levels.<sup>10</sup> The purpose of such an assessment would be to identify the likely impact of the provision on the promotion and realisation of children's rights. It should measure the extent to which the provisions meet children's rights standards as set out in the UNCRC.

In addition, NSPCC Scotland supports the Children's Commissioner's call for independent monitoring and evaluation of the Scottish Government's progress via parliamentary committees, SCCYP, academics and voluntary organisations.

#### **5. Do you agree with the extension on the duty in respect of the UNCRC to young persons aged 21 who have been looked after?**

The definition of the child according to the UNCRC is contained in Article 1 of the convention:

*"A child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier."* The UNCRC gives additional human rights to under 18s in recognition of their lack of formal capacity, their vulnerability, their evolving capacities and for the principles necessary for children's development.

There is recognition in Scotland that many young people under the age of 21 may still struggle to access their rights as chronological and developmental ages are not always in tandem. This can particularly be the case when a child has experienced significant difficulties in the early years.

We support the extension of the duty with respect to young people who have been looked after, which mirrors the remit of Scotland's Children's Commissioner. We would also suggest that the government considers whether there are other groups of children and young people for whom the applicability of the duty could extend. One possible consideration might be to link this duty to children who are regarded as children in need under the Children (Scotland) Act 1995.

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<sup>10</sup> Wales UNCRC Monitoring Group (2010) Proposed Rights of Children and Young Persons (Wales) Measure

## 6. Do you agree with the proposals for handling future amendments to the Convention or Protocols or new Protocols?

NSPCC Scotland welcomes the Scottish Government's proposal to ensure that the Bill is future-proofed against subsequent changes to the UNCRC and its optional protocols. However, it is unclear from Scottish Government's consultation paper how it intends to do this. It is essential that the Scottish Government seeks to influence the UK Government position on any future changes to the UNCRC to ensure that all children in Scotland are able to realise their rights in accordance with the UNCRC and all optional protocols.

NSPCC Scotland would welcome more information from the Scottish Government on how it intends to future-proof the bill to ensure that it keeps pace with any changes in its obligations imposed via the UK Government as the State Party.

## 7. Is there any other provision which should be made in the bill? Section 3.3

### Physical punishment

Article 19 of the United Nations Convention on the Rights of the Child sets out the right of the child to protection from all forms of violence by parents or other carers. The Committee on the Rights of the Child, which monitors implementation of the Convention, has insisted that corporal punishment, however light, in the family or in schools or other institutions, is incompatible with the Convention.<sup>11</sup>

*"Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse... while in the care of parent(s), legal guardian(s) or any other person who has the care of the child." (Article 19)*

*It also states that:*

*"No child shall be subjected to torture or other cruel, inhumane or degrading treatment or punishment." (Article 37)*

NSPCC Scotland believes that any initiative to protect and promote children's rights must seek to provide children with the same protections as adults under the law against physical abuse. We believe the Children & Young People's Rights bill presents a real opportunity for the Scottish Government to reconsider full legal protection for children from physical chastisement in the home, or any other setting. Additionally, we feel that it is vital that the forthcoming National Parenting Strategy promotes non-violent parenting..

### Raising awareness of children's rights

The Committee has acknowledged that both legal reform and education are necessary to change attitudes and practice. Indeed the purpose of legal reform is educational rather than punitive. It has observed that such reforms tend to lead to fewer prosecutions of parents, rather than more, because of the change in attitudes that they promote.<sup>12</sup>

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<sup>11</sup> Implementation Handbook (IH), p. 265.

<sup>12</sup> IH, p. 266.

*“Ensure that the provisions of the convention are widely known and understood by adults and children alike, inter alia, by including the Convention in statutory national curriculum and ensure that its principles are integrated into the structures and practices of all schools. It also recommends the re-enforcement of adequate and systematic training of all professional groups working for and with children.”*  
(Concluding observation 21)

NSPCC Scotland believes that raising everybody’s awareness of children’s rights is an essential part of the child protection agenda in Scotland and must underpin strategies to address neglect and abuse. Teaching children about their rights has been shown to help children recognise and disclose abuse and to reduce bullying in schools.<sup>13</sup> Adult understanding of children’s rights – especially in relation to safety from harm – is vital to tackling the ‘tolerance’ or ‘ignorance’ of violence in children’s lives. NSPCC Scotland would therefore encourage the government to take forward concluding observation 21 to ensure that the provisions of the convention are widely known and understood by adults and children alike.

### **Extension of the duty to apply to all public bodies**

A duty focused only on Scottish Ministers will have significant limitations in terms of the impact on children’s lives. Policy development does not solely happen nationally, but also at a local level, and policy implementation and practice can vary considerably. This is particularly true given the Concordat with local government which affords local government significant autonomy in making decisions which affect local communities.

Thus considering children’s rights at a national level will not automatically lead to increased respect for children’s rights in their interface with services – e.g. with local government, the police, health boards etc. We strongly believe that for the duty to contribute to improved outcomes for children and young people in Scotland, it should apply to all public bodies. This would mirror the applicability of the public sector equality duty, which applies to all public bodies, and indeed all bodies carrying out a public function.

### **8. Do you have any comments on the implementation costs or how they should be estimated?**

It may be useful to consider how this duty links with the public sector equality duty, for which the Scottish Government has recently consulted on proposals for the specific duties. The PSED covers the protected ground of age and so all public bodies in Scotland are now required to eliminate discrimination and advance equality of opportunity on the grounds of age.

While the duty under consideration here is obviously different, there are inevitable overlaps which could be considered and elucidated. This may help to overcome concerns about the implementation costs of extending the duty to all public bodies, particularly if synthesized or parallel impact assessment and reporting frameworks are developed to meet the needs of the various requirements.

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<sup>13</sup> 18 and under; Promising Rights; UNICEF Rights Respecting Schools programme.

## 9. Do you have any other comments?

Children's rights are not currently enjoyed equally by all. A Children & Young People's Rights bill should ensure that children's rights are applicable to all children, including those who are particularly vulnerable, such as those in the youth justice system, very young children, or children who are looked after.

The Children & Young People's Rights bill should seek to take account of the rights of all children, including those who may be especially vulnerable, in order to better protect them from abuse and respect their rights as children. Children under one are particularly vulnerable to their rights being breached. They have no voice with which to speak out about maltreatment, are physically frail relative to other groups of children, and are completely reliant on their parent or carer to meet their needs. On average, babies in Scotland are twelve times more likely to be killed than older children<sup>14</sup>; 27 babies have been killed in the past decade in Scotland.<sup>15</sup>

Whilst the articles of the UNCRC can in general terms be applied to all ages of children, the specific interests and needs of babies could be better and more explicitly considered. Given the high rates of maltreatment and babies' inability to speak up for themselves, NSPCC Scotland would urge that, in the application of the duty, specific consideration is given to the need to respect and promote babies' rights. Raising awareness of the specific needs of babies could help drive broad change in attitudes and behaviours at a number of levels. NSPCC is keen to work with the Scottish Government to explore we can better respect babies' rights, particularly in terms of protecting them from maltreatment.

## Conclusion

NSPCC Scotland welcomes the opportunity to respond to the Children & Young People's Rights consultation and would like to see the bill implemented subject to the changes detailed in the above response.

We would be happy to discuss any of the points raised with relevant officials.

### For further information, please contact:

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<sup>14</sup> Figures based on the ten year average homicide rate per million population using Scottish Government statistics (2000/01-2010/11).

<sup>15</sup> Scottish Government Statistical Bulletin Crime and Justice Series: Homicide in Scotland 2009/2010, Table 5.