



Response to Scottish Government's Consultation on Rights of Children and Young People Bill

December 2011

Introduction

ENABLE Scotland is the largest voluntary organisation in Scotland of and for children and adults who have learning disabilities and their families. We have a strong voluntary network with around 4000 members in 68 local branches as well as 500 national members throughout Scotland. Around a third of our members have a learning disability. ENABLE Scotland campaigns to improve the lives of people who have learning disabilities and their families and carers.

ENABLE Scotland operates a range of initiatives which support young people who have learning disabilities to work, campaign and participate in community life. In addition we support young people to develop self-advocacy skills and to be consulted about policy developments at a local and national level that affect their lives. We believe that young people should have the opportunity to lead ordinary lives, to develop friendships and natural networks of support.

The UN Convention on the Rights of the Child (UNCRC) sets out certain basic rights to which all children and young people up to the age of 18 should be entitled. These include the right to life, survival and development, the right to have their views heard, the right to an inclusive education and the right for a disabled child to lead as full and independent a life as possible. However, although they enjoy these rights, the reality can be quite different for children and young people who have learning disabilities. Equality of opportunity and the right to an ordinary life are not always available to children who have learning disabilities. For example many young people endure bullying and discrimination as a direct result of their disabilities. Others cannot enjoy the right to play because of a lack of suitable play facilities and/or lack of support to access these. Still others do not receive the right level of additional support they need in school to achieve their full potential.

ENABLE Scotland welcomes the Scottish Government's recognition of the importance of children's rights and hopes that this consultation will mark the next step on the journey towards equal rights and opportunities for children and young people who have learning disabilities in Scotland.

This response has been prepared following consultation with parents as well as practitioners and managers working with children and young people who have learning disabilities.

Responses to Consultation Questions:

Question 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?

ENABLE Scotland welcomes the Scottish Government's commitment to children's rights and agrees that it is necessary for a rights-based approach to decision-making to be put on a statutory footing within the Scottish Government. The Scottish Government should lead by example therefore it is right and appropriate that they are seen to be upholding the rights of children in their own day-to-day business.

As it stands the legislation focuses solely on the obligations of Scottish Ministers. We believe that decision-making by public bodies, for example local authorities and health boards, should also take account of the rights set out in the UNCRC.

We would like to see the UNCRC incorporated into domestic law. This would ensure that the rights of every child in Scotland are respected and upheld in line with the principles set out in the UNCRC and ratified by the UK Government in 1991.

Question 2

Do you agree that "due regard" is the appropriate level of regard for the duty on Scottish Ministers.

No, ENABLE Scotland does not believe that "due regard" goes far enough with respect to the duty on Scottish Ministers. "Due regard" amounts to a requirement to *consider* the UNCRC but not necessarily to *comply* with it. Therefore it would be possible for a Scottish Minister to have due regard to the UNCRC but decide to give it no weight. This duty could be strengthened by requiring Scottish Ministers to "act compatibly with" the rights and principles set out in the UNCRC.

There needs to be a clear mechanism for demonstrating how Scottish Ministers have shown "due regard" to the UNCRC in their decision-making process.

Question 3

Do you agree that the duty should apply to all the functions of the Scottish Ministers?

Yes, this duty should apply to all the functions of Scottish Ministers, and not just to those relating directly to children and young people. Children and young people's lives are impacted by their whole life experience, cutting

across a number of Ministerial portfolios. One example is that where a child lives can have an effect on their life expectancy, their health, their play opportunities, their schooling, their ability to remain safe and secure etc. Therefore, housing policy, for example, needs to embed a child-rights based approach.

ENABLE Scotland strongly believes that the duty should extend to all public bodies such as health boards and local authorities. The Concordat has largely devolved decision-making to local authorities. If the duty to show due regard to the UNCRC does not apply to them, we are concerned that this will be left down to local interpretation.

In our extensive experience of working with the families of children who have learning disabilities, we have found that unintentional infringements of children's rights are largely committed by local authorities, not by Scottish Ministers. In recent years, much legislation has been passed and policy guidance written that should protect the rights of children and young people e.g. the Education (Additional Support for Learning) Act, the Early Years Framework, Getting It Right For Every Child, etc. However, there appears to be a wide gap between policy/legislation and practice 'on the ground'. This is usually due to a widespread lack of knowledge and understanding of the policies among public bodies which in turn forms a barrier to effective implementation. Therefore, the duty must also apply to public bodies otherwise infringements of the rights of children and young people will continue to take place.

Question 4

Do you agree with the proposed arrangements for reporting?

We feel that the proposed 5 year reporting process is too long. Scottish Ministers already provide a report to the UN Committee every 5 years as part of their periodic UK reporting process. More frequent (possibly annual) reporting on progress towards implementation of the Bill should be undertaken to ensure that there is no failure to show due regard to the UNCRC.

There should also be independent monitoring and evaluation of the Scottish Government's progress by bodies such as Together, Scotland's Commissioner for Children and Young People (SCCYP) and children and young people themselves.

Children's Rights Impact Assessments must be used to allow scrutiny of decision-making by Scottish Ministers and to demonstrate compliance with the Bill.

Question 5

Do you agree with the extension of the duty in respect of UNCRC to young persons aged under 21 who have been looked after?

ENABLE Scotland agrees with the extension of the duty for this group of young people but would like to see the extension apply also to young persons with disabilities.

The transition from children's to adult services can be a difficult, even traumatic time for young people who have learning disabilities and their families, causing much uncertainty and inconsistency. This transition period can extend beyond the age of 18; in fact some young people who have learning disabilities remain in formal schooling until age 19. In addition, chronological and developmental age can be at odds for young people who have learning disabilities. For these reasons, it makes sense to extend the duty in respect of the UNCRC to young persons who have learning disabilities up until at least the age of 21.

Question 6

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

Yes, and the process for how 'future-proofing' the Bill will be achieved should be clarified.

Question 7

Is there any other provision which should be made in the Bill?

- i) The Scottish Government may wish to consider a duty on Scottish Ministers to promote awareness and understanding of children's rights not just within the Scottish Government but also among the general public and within public bodies. Article 42 of the UNCRC makes it clear that States Parties have an obligation to make the principles and provisions of the Convention widely known. While SCCYP has considerably increased knowledge and understanding of children's rights among children and young people themselves, it does not have the resources to promote widespread awareness of the UNCRC among the general public. The Scottish Government needs to take the lead in this initiative, supported by SCCYP, Together, UNICEF and all public bodies.
- ii) ENABLE Scotland believes that the UNCRC should be incorporated into domestic law. This would mean that the UNCRC could be directly invoked in legal proceedings and applied by Scottish authorities. If the UNCRC became part of Scots law, it would make public bodies and Scottish Ministers fully accountable for upholding children's rights. The Scottish Government's reasons for not

proposing incorporation is that they are concerned that the rights in the UNCRC might conflict with the European Convention on Human Rights (ECHR). However this would only be relevant if ECHR rights were absolute rights which could not be weighed up against other competing rights e.g. those of children. Since this is *not* the case, there is no reason why the UNCRC should not be incorporated into Scots law.

- iii) The UN Committee recommends that there should be an effective and accessible channel of redress for young people who believe that their rights have been violated. This should include the provision of child-friendly, accessible information, advocacy support and access to individual complaints procedures as well as legal assistance if necessary. ENABLE Scotland agrees with this recommendation and urges the Scottish Government to comply with it. We would suggest that SCCYP are well-placed to undertake work of this nature.

The Bill proposes judicial review as a means of redress. However judicial review is a costly and complicated legal process, which only looks at the decision-making process not the actual decision taken. It might be possible for a parent or young person to succeed in establishing through a judicial review that 'due regard' had not been demonstrated in a particular case, without this having any impact on the outcome for the young person. It is not clear whether legal aid or advocacy support would be available if families wished to pursue judicial review.

Question 8

Do you have any comments on implementation costs or how they should be estimated?

No.

Question 9

Do you have any other comments?

ENABLE Scotland wishes to re-state its support of the Scottish Government's clear commitment to ensuring that the rights of children and young people in Scotland are respected and upheld. The Rights of Children and Young People Bill is a step in the right direction and sends out an important message about the value the Scottish Government places on children's rights. It is also right that Scottish Ministers are being required to take the lead in showing due regard to the UNCRC in everything they do. However, if it is to be effective and achieve its aims, the Bill needs to go further than this in the ways outlined in our response above.

CASE STUDY – Mum Tracy and Ariana’s Story, West Lothian.

“Ariana's time at mainstream school affected her greatly. Whilst the staff all looked out for her and helped her, no one was able to teach her. They do not have specialised teaching or the resources. She was looked after by a pupil support worker who had to follow her about. Steps were slow and small and the whole of P2 she did not learn anything. Her school report I ripped up as Ariana had not done anything all year. At parents evening in October I knew she shouldn't be in that school- she was diagnosed as autistic the following May and in August moved to an autistic unit. She was in turmoil and it was not nice to see this. Ariana exited the building a lot when she was stressed and upset. I had to fight with the local authority to implement a risk assessment and a restraining plan to protect her. I think when teachers see this the local authority should come in and see what they are doing to a child who clearly needs specialised help. The teachers seriously need training courses. I had passed in books for them to read. Although it was a fab school who tried a lot with Ariana- i wonder now she's left if they read the book at all.

Ariana loves her new school. Yes the teachers are trained and she is learning and she is happy. She misses the old school for the fun things for the familiar routine but she is in the best possible place to learn. She is bonding with two boys, the staff are so patient, so vigilant, fantastic parent to parent support and the school promote that. Communication is fabulous and a few minutes with her teacher when I first met her and I knew I was placing Ariana in the best hands.

I know I made the best decision and I am glad I kept fighting for it. I knew I was right and the Authority were wrong in not providing her with a place. It had went to tribunal and I knew it would go in Arianas favour. I didn't know a lot about autism or sensory issues but I knew Ariana was suffering.”

Comments on Case Study:

Although the UNCRC underpins the Curriculum for Excellence, this case study illustrates one of many examples of where a rights-centred approach does not trickle down into everyday teaching practice and results in great stress, turmoil and upset for a young vulnerable child. The UN Committee on the Rights of the Child reiterated the relevance and importance of the child's right to education and has attached particular importance to the right of the child to be heard and to play an active part in decisions regarding his or her education (Article 12). Although Ariana was clearly showing signs of stress and upset, it took her mother advocating strongly on her behalf before her needs began to be recognised by her local authority. Article 29 of the UNCRC details the aims which education should fulfil, and identifies the primary aim of education as the development of the child's personality, talents and mental and physical abilities to their fullest potential. Without specific

training in additional support needs and in the rights-centred approach to education as defined in the UNCRC, the teachers did not have the skills to effectively provide support for Ariana and meet her educational needs.

The Rights of Children and Young People Bill must be strengthened to ensure better outcomes for children such as Ariana. The following steps should be taken to ensure the right to education as defined by the UNCRC by even the most vulnerable children:

- Extending the scope of the Bill to include public bodies to ensure that local authorities pay due regard to the UNCRC when assessing the needs of children with additional support needs;
- Including a duty to promote awareness and understanding of the UNCRC to ensure that teachers are fully aware of the importance of listening to the views of the child and of seeking support of other specialists as soon as reasonably practicable when a child's right to education is not being effectively met.

RESPONDENT INFORMATION FORM

Please complete the details below and attach it with your response. This will help ensure we handle your response appropriately:

YOUR DETAILS:

Name: Linda Whitmore, Development Officer for Children and Families

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1. Are you responding as: (please tick one box)

(a) an individual

(b) on behalf of a group or organisation

ON BEHALF OF GROUPS OR ORGANISATIONS:

3. Your name and address as respondents will be made available to the public

(in the Scottish Government library and/or on the Scottish Government website). Are you content for your response to be made available also?

Yes

SHARING RESPONSES/FUTURE ENGAGEMENT:

4. We will share your response internally with other Scottish Government policy

teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Government to contact you again in the future in relation to this consultation response?

Yes

YOUR BACKGROUND:

In analysing your response, it would help us to know what your background is. Please indicate using the boxes provided below the area which best describes your involvement with children and add any further comments you wish to make about this.

Voluntary Organisation