

United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill
Call for Views
Submission by For Women Scotland, 16 October 2020

For Women Scotland welcomes this opportunity to respond to the Call for Views on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill. FWS is a grassroots women's rights organisation composed of ordinary women from across Scotland: the primary motivation for forming was concern about the Scottish Government's proposal to reform the Gender Recognition Act 2004 and the potential impact on the hard won rights and protections for women and girls.

We welcome the incorporation of the UN Convention of the Rights of the Child (CRC) into Scots Law and in particular the opportunity this presents to ensure that all children are treated equally, that their rights are respected, and their best interests considered, no matter their circumstances. We believe that the Bill will make it easier for children to access their rights in principle but have a number of concerns when it comes to children accessing their rights in practice. Our response will focus in particular on the needs of female children, and of children who are victims of abuse.

On **Question 2**, the ability to take public authorities to court to enforce children's rights, we note that neither the Bill itself, nor the explanatory notes or the Policy Memorandum¹ mention the most substantial barrier many children and their parents or carers experience when seeking a legal remedy against public authorities: the often prohibitive cost of legal proceedings. Giving children the legal right to challenge a violation of their rights under the CRC is an important milestone, but in not setting out how children can access these legal remedies without facing the associated, substantial and often insurmountable costs, it is unclear how this will improve the situation for Scottish children in practice.

This is already particularly evident where the rights to education of children with disabilities are concerned. It would therefore be helpful, if the Scottish Government could set out what it plans to do to enable children from all backgrounds to access legal proceedings where this becomes necessary. The Policy Memorandum does mention a planned Legal Aid Reform Bill in the context of the national children's hearings advocacy scheme (p.28), but it is unclear whether this will also address this particular issue.

Furthermore, we note that the time limit specified in Part 2, *Remedies for unlawful acts*, Section 7, Subsection 7 is unrealistic where the victim of an unlawful act under this Bill is a victim of childhood abuse. A one-year limit from the time the child turns 18 does not take into account the particular needs of victims of childhood abuse and their specific vulnerabilities. Given the barriers victims of sexual violence in particular face in seeking to access justice in general, a stronger protection for victims of childhood abuse would be welcome. Although Subsection 10 allows the court to ignore the time limit at their own discretion "if it considers it equitable to do so", we believe there could be a more specific allowance made for abuse victims.

¹ *United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill Policy Memorandum*

On **Question 3**, what more the Bill could do to make children’s rights stronger in Scotland, we would wish to see a much firmer stance on Children’s Rights Impact Assessments and policymaking.

The Scottish Government believes that undertaking rigorous impact assessments at all levels of government and public administration will be an important part of how public authorities demonstrate their compliance with the compatibility duty in section 6 and demonstrate how they respect, protect and fulfil children’s rights in practice. The Scottish Government is mindful that it is the quality not quantity of CRWIA undertaken which is important. The Scottish Government considers there is a careful balance to be struck between mandatory provision for CRWIA and ensuring that these are undertaken effectively in practice. The Scottish Government believes the Bill strikes the right balance by placing mandatory duties on the Scottish Ministers and allowing for more flexibility for public authorities, ensuring that capability and capacity can be built within public authorities rather than adding potentially overly administrative requirements on all public authorities.²

We believe that this particular decision may present problems in protecting the rights of all children in practice wherever ambiguity arises over who ultimately is responsible for policy decisions. Our ongoing dispute with John Swinney, the Cabinet Secretary for Education, over the LGBT Youth Scotland Guidance provides a case in point:³

A Children’s Rights Impact Assessment⁴ (CIA) written with the assistance of the office of the Commissioner for Children And Young People in Scotland and published in January 2019 by *Women and Girls in Scotland* demonstrated unequivocally that the rights of children under the CRC, in particular those of female children, would be adversely impacted should this policy document be used in schools. As it was commissioned, funded and initially endorsed by the Scottish Government, the Commissioner for Children and Young People reminded the Scottish Government of its duty to ensure that all policy guidance used in Scottish schools must be legal. In response to this, the Scottish Government initially denied any responsibility for the guidance, but eventually announced in June 2019, that they would “replace the LGBT Youth work with guidance from the Scottish Government”. (Guidance which has now been indefinitely postponed due to the ongoing COVID-crisis.)

Since then, our correspondence with local authorities across Scotland has established that the LGBT Youth Scotland guidance continues to be used to this day. Local authorities defend the use of this guidance by saying that the Scottish Government has not officially withdrawn it. Even when they are informed that the Scottish Government has publicly conceded this guidance is not legal, and may lead to female pupils being treated unfairly, the education representatives of local authorities across Scotland merely repeat that as this is national guidance, they will continue to use it until the Scottish Government officially withdraws it. After initially denying all responsibility for the guidance because it was written by an organisation independent of the Scottish Government, John Swinney then stated in correspondence with us that he will not withdraw guidance he knows is not legal – guidance that adversely impacts the rights of Scottish girls – because

² Policy Memorandum, page 42f.

³ <https://forwomen.scot/20/07/2020/letter-to-cabinet-secretary-for-education/>

⁴

<https://wgscotland.org.uk/wp-content/uploads/2019/01/Childrens-Rights-Impact-Assessment-by-Women-and-Girls-in-Scotland.pdf>

“The Scottish Government does not determine the resources which education authorities and schools use. Therefore we are unable to control the use of this particular resource. Any attempt to ask LGBT Youth Scotland to withdraw the guidance would damage the reputation of the guidance.”

As we have written in our article on the issue, this “suggests that it is within the Scottish Government’s powers to ask LGBT Youth Scotland to withdraw the guidance, but it is not doing so to avoid damaging the reputation of the guidance.” Before the guidance was implemented in schools, neither the commissioning partner – the Scottish Government – nor the publisher – LGBT Youth Scotland – nor the end users – local authorities and/or Scottish schools – assessed its impact on the rights of all children. None of the above have yet undertaken their own Children’s Rights Impact Assessment of this guidance, none have accepted responsibility for doing so.

If the Scottish Government can refuse to withdraw guidance that has been shown to adversely impact on the rights of Scottish children, because its reputation matters more than the rights of children and local authorities can refuse to withdraw it because they trust the Scottish Government to fund and endorse only lawful guidance, where does this leave the children whose rights are affected?

Although the Policy Memorandum mentions policymaking in a number of paragraphs (10, 25, 27, 63 and more) the Bill does not lay out clear responsibilities for policymaking that will affect children or who is responsible for assessing their impact when ownership of policies is ambiguous. It could address such ambiguity by asking all who will implement policies to carry out impact assessments, but it does not require Children’s Rights Impact Assessments as mandatory, because it does not wish to add “potentially overly administrative requirements on all public authorities”. As these assessments require a clear understanding and working knowledge of the CRC as well as the Equality Act and *Getting it Right for Every Child*, Scotland’s safeguarding framework for children, this may be understandable, but our experience shows that such ambiguity around policymaking and responsibility for assessments is detrimental to the declared aims of the Scottish Government to ensure that the rights of all children are upheld in Scotland.

On **Question 4**, anything else we would want to say about the Bill, we wish to note our concern about the recent direction that legislative efforts and policymaking by the Scottish Government have taken that adversely impact the rights of women and girls in Scotland by misrepresenting or misusing the protected characteristic of sex in legislation or by replacing it entirely with the concept of gender.⁵ We are particularly concerned that this will undermine or slow down any progress made in protecting female children from discrimination, inequality and abuse.

Article 2 of the CRC states that children are protected from discrimination

irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Sex is also mentioned in Article 29 (d) in regard to educating children

⁵ As relating to the sex stereotypes and sex role stereotypes a society typically imposes on each sex.

for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin

The Preamble⁶ to the Second Optional Protocol also incorporated into Scots Law with this Bill states that “States Parties to the present Protocol” recognise that

a number of particularly vulnerable groups, including girl children, are at greater risk of sexual exploitation and that girl children are disproportionately represented among the sexually exploited

Making it clear that state parties seeking to implement this protocol must be particularly sensitive to the vulnerabilities of female children and to the fact that very many sexually abused children are female.

Such sensitivity is all but impossible to achieve without knowledge about the extent and nature of the problem in Scotland. Such knowledge however depends on accurate data collection. Data which can then be disaggregated by sex for analysis and planning of appropriate policies in response, but on this point the Scottish Government has shown a wholly unjustified reluctance in recent times (as seen on the matter of the Census Bill). It is unclear how the Scottish Government will be able to implement this Second Optional Protocol without rectifying this problem. We would therefore welcome a commitment by the Scottish Government to consider the responsibility of all authorities subject to this Bill to collect and publish accurate data as a basis for both policymaking and for reviewing any progress made in implementing the CRC.

⁶ <https://www.ohchr.org/en/professionalinterest/pages/opscrc.aspx>