

4. Background

In analysing your response, it would be helpful to know your background. Please indicate the area which best describes your involvement with children from the options below.

Please tick box as appropriate:

| | |
|------------------------|-------------------------------------|
| Early Years | <input type="checkbox"/> |
| Education | <input type="checkbox"/> |
| Health | <input type="checkbox"/> |
| Justice | <input type="checkbox"/> |
| Parent/Carer | <input type="checkbox"/> |
| Police | <input type="checkbox"/> |
| Social Work | <input type="checkbox"/> |
| Sport and Leisure | <input type="checkbox"/> |
| Voluntary Organisation | <input type="checkbox"/> |
| Other | <input checked="" type="checkbox"/> |

Professor of Child and Family Law at the University of Stirling and a Professor of Law at Lewis and Clark Law School, Portland, Oregon, teaching and writing on child and family law in Scotland and Internationally.

GENERAL COMMENTS

Unlike many previous Scottish Government and Scottish Law Commission consultations, this Consultation Paper does not invite 'other comments', relating to matters not readily encompassed within the questions asked. Thus, the opportunity is taken here to make some general observations.

A. Physical punishment of children

A glaring omission from the proposal for a Bill addressing children's rights is a prohibition on all physical punishment of children. Overall, Scotland has a strong record in showing respect for children's rights. However, in world terms, the country lags behind many others in failing to protect all children from physical violence in all circumstances, something required by the UN Convention. This is not the place to restate the arguments based on that instrument and other sources, but it would be a missed opportunity not to address this crucial issue in the Bill.

B. More detail required

The Consultation Paper combines discussion of policy with proposals for legislative reform. In respect of the latter, since the text of the draft legislation is not yet available, comments herein should be read subject to the caveat that further comments may be appropriate once the draft Children and Young People (Scotland) Bill is available.

C. *Early intervention*

Early intervention, designed to maximise the life chances of every child and to prevent problems arising later, makes great sense for the reasons noted in the Consultation Paper. However, care must be taken not to divert resources away from the significant number of children and young people in Scotland who are already experiencing disadvantage and are (or may become) troubled or troublesome. Social policy and professional thinking can fall prey to grasping at 'solutions *du jour*' at the expense of the tried and tested. Disproportionate focus on early intervention might lead to insufficient assistance being provided to the many Scottish children who, through no fault of their own, have already received inadequate support and help from the system.

D. *Complexity of legislation*

If passed, it appears that the Bill will contain some free-standing provisions while others will amend existing legislation: a familiar pattern with current reform of Scots child and family law. The result is a proliferation of provisions requiring extensive cross-referencing, something that is 'the source of frustration to lawyers and renders aspects of the law almost impenetrable to all but the most determined lay person.' (Elaine E. Sutherland (ed), *The Future of Child and Family Law: International Predictions* (2012), para 12.8). As the legal system requires (non-affluent) individuals to rely increasingly on the assistance of non-lawyers, whether in other professions or the voluntary sector, the need to present the law in a clear and comprehensible manner becomes more pressing. In short, there is a crying need for a comprehensive Child and Family Law Code, drawing the whole of the relevant law together in a single instrument, something recommended by the Scottish Law Commission in 1992.

E. *Minimise the use of jargon*

If all stakeholders are to participate in any meaningful way in the consultation process, the less jargon that is used, the better. While all professions find the use of terms readily-understood by their members to be a useful way of speeding up discussion, the effect is often to exclude or intimidate non-members. The Executive Summary goes some way towards making the Consultation Paper accessible, but it might be worth considering publication of a shorter paper as well.

CONSULTATION QUESTIONS

1. A SCOTLAND FOR EVERY CHILD

More effective rights for children and young people

1. Do you feel that the legislative proposals will provide for improved transparency and scrutiny of the steps being taken by Scottish Ministers and relevant public bodies to ensure the progressive realisation of children's rights?

No.

While any attempt to raise the profile of the United Nations Convention on the Rights of the Child ('the UN Convention') is to be welcomed, this proposal does not go far enough and, indeed, does nothing to increase the responsibility of Scottish Ministers and public bodies beyond that already incumbent on them as a result of the United Kingdom having ratified the UN Convention. This point was made by myself and many others in our responses to the previous consultation, something glossed over this Consultation Paper in the reference to 'a diversity of views' (para. 49). To recap on what was said before, the Scottish Ministers

- (i) are already under an obligation to respect and ensure rights under the Convention by virtue of the United Kingdom having ratified it and, indeed, requiring them to have 'due regard' to these rights implies a lesser obligation; and
- (ii) are already under a duty to promote and raise awareness of children's rights in terms of article 42 of the UN Convention.

A real commitment to children's rights requires **incorporation**, by statute, of the UN Convention into Scots law. The issue of reserved matters must be addressed, of course, and any incorporating statute would have to exclude matters reserved to the UK Parliament (at least for the time being).

2. On which public bodies should a duty to report on implementing children's rights be applied?

It might be appropriate to include any Scottish public authority as defined in section 19 of the Scottish Commission for Human Rights Act 2006 whose function relates directly or indirectly to the creation, promotion, protection or monitoring of children's rights. That might be a very long list of bodies and if there is to be a sanction for failure to report, the list would have to be specific. As we have seen in other contexts (e.g. freedom of information), the need for constant amendment can be a problem with such lists.

3. Do you agree that the extension of the Children's Commissioner's role will result in more effective support for those children and young people who wish to address violations of their rights?

Yes.

It was a flaw in the original legislation that the Commissioner could not pursue an investigation in respect of an individual child. The removal of the unnecessary restriction is to be welcomed.

It is assumed that the Commissioner would have all the same power in an investigation in respect of a single child as are in place for investigations at present.

Undoubtedly, this would result in an increase in the Commissioner's workload and thought needs to be given to a corresponding increase in the Commissioner's budget so that additional staff, at least some of them legally-qualified, could be employed. If public expectations are raised by expanding the Commissioner's powers without this corresponding increase in resources, there is a danger that the Commissioner will not be able to follow through – something that could only undermine the Commissioner's credibility.

A new focus on wellbeing

4. Do you agree with the definition of the wellbeing of a child - or young person - based on the SHANARRI Wellbeing Indicators, as set out in the consultation document?

It is submitted that the wrong question is being asked here.

The proposal, at least in respect of Part II of the Children (Scotland) Act 1995, appears to be either

- (i) to replace the term 'welfare' with the term 'wellbeing', or
- (ii) to define 'welfare' in terms of 'wellbeing'.

In order to assess whether this is a desirable course of action, it is necessary to step back and examine the absence of a comprehensive statutory definition of welfare in the 1995 Act.

It is not wholly accurate to say that the Children (Scotland) Act 1995 does not define welfare at all. Certainly, in the private family context, the original version of the 1995 Act did not do so. That was no accident. In its *Report on Family Law* (Scot Law Com No 135, 1992), the Scottish Law Commission recommended that a 'welfare checklist' should not be provided in the legislation since it saw a danger in any checklist being incomplete, with the risk that relevant factors might be ignored, and in order to avoid the courts taking 'a mechanical approach' to decision-making (paras 5.20-5.23). As a result, courts are able to tailor-make decisions based on the circumstances and needs of the individual child – the very approach being

promoted in the Consultation Paper.

However, the Family Law (Scotland) Act 2006 amended the Children (Scotland) Act 1995, Part I, to provide what amounts to a partial 'welfare checklist' (protection from exposure to abuse and the likelihood of parental co-operation), something that is arguably worse than having either no checklist at all or one that aims at completeness. That is a debate for another day, perhaps. In addition, 'unofficial welfare checklists,' drawn by commentators from an analysis of judicial decisions, are readily available in a number of legal textbooks on child law and family law.

The academic literature around the world is replete with discussions of whether and how to define welfare. Put in a nutshell, one person's ambiguity is another person's flexibility. Many jurisdictions, including England and Wales, do have welfare checklists, but most do not avoid a degree ambiguity/flexibility since the final item on the checklist is usually something along the lines of 'and all other relevant circumstances'.

As the Consultation Paper points out, there is no statutory definition of 'welfare' in the public law context: that is, in Parts II and III of the 1995 Act. That does not prevent courts from addressing the concept in that context. Nor does it explain why other professionals would have difficulty in working with the concept in a contextually-appropriate manner. The Consultation Paper notes that 'welfare' is associated with court decisions and the like, as well as with support by local authorities, and seems to imply that this is undesirable but does not explain why. Surely courts, children's hearing and those offering services to a child are all aiming to ensure a broadly similar goal – the welfare of the child.

The Consultation Paper notes that "“wellbeing” can mean different things, ranging from mental health to a wider vision of happiness, but the term captures the idea that a child's and a young person's condition depends on a range of different factors.' (para 62). This suggests that the term is every bit as ambiguous or flexible (depending on one's point of view) as is 'welfare'. Whether the SHANARRI Wellbeing Indicators reflect all of the factors that contribute to a child's wellbeing is more properly the province of a specialist in child development than of a lawyer and, thus, I am not in a position to offer a view. However, they do look more like a therapeutic tool than something that can offer clear measurement (see question 10, below).

I can offer a view, however, on the wisdom of replacing one ambiguous/flexible term with another or of defining one such term by reference to another. It is a very bad idea that produces no gains whatsoever. Arguably, to do so makes the legislation more complex and adds a layer of difficulty for those seeking to apply it. Were the proposal to be adopted, there is a very real danger of much time in courts and children's hearings being taken up with debate over whether the terms were the same, different or similar.

5. Do you agree that a wider understanding of a child or young person's wellbeing should underpin our proposals?

Please see response to question 4.

Better service planning and delivery

6. Do you agree that a duty be placed on public bodies to work together to jointly design, plan and deliver their policies and services to ensure that they are focussed on improving children's wellbeing?

For individual children, this duty already exists under (or is implicit in) the *Guidance on Child's and Young Person's Plan* (2007). If that is not working either in respect of an individual child or because the services available to children across Scotland are uneven, the issue arises of enforcing this duty. It is unclear whether this proposal – a more general duty on public bodies – would be any easier to enforce. Indeed, it might be doubted that an individual would have an enforceable right at all. That being the case, the creation of such a duty may be no more than a cosmetic exercise.

7. Which bodies should be covered by the duties on joint design, planning and delivery of services for children and young people?

Please see response to question 6.

8. How might such a duty relate to the broader Community Planning framework within which key service providers are expected to work together?

Please see response to question 6.

Improved reporting on outcomes

9. Do you agree that we should put in place reporting arrangements making a direct link for the public between local services and outcomes for children and young people?

It would certainly be desirable for members of the community to know what services were being provided, to how many children and to what effect. The first of these elements can be identified, while the second can be measured. However, how outcomes would be assessed presents a problem.

10. Do you think that these reporting arrangements should be based on the SHANARRI Wellbeing Indicators as set out in this consultation paper?

Please see response to question 4.

11. On what public bodies should the duty for reporting on outcomes be placed?

Please see response to question 2.

2. A SCOTLAND FOR EACH CHILD

Improving access to high quality, flexible and integrated early learning childcare

Please note: Questions 12-14 and 16 are more appropriately answered by professionals from disciplines other than law and the comments below made in respect of them should be read in that light.

12. Do you agree that the Scottish Government should increase the number of hours of funded early learning and childcare?

Were this question asked in the abstract, it would be hard to imagine anyone answering 'No'. However, the reality is that funding of one service does not operate in isolation. Often increased funding for X results in decreased funding for Y. Thus, it is not possible to answer this question without knowing what is likely to be cut in order to provide additional funding for early learning and childcare.

13. Do you agree that the Scottish Government should increase the flexibility of delivery of early learning and childcare?

This would seem sensible.

14. Do you think local authorities should all be required to offer the same range of options? What do you think those options should be?

It would seem reasonable that the range of options should meet local needs rather than applying a cookie-cutter approach across the country. For example, the needs of children and parents living in a rural area may not be the same as those of families living in cities. If actual needs and any regional variations are not known already, they could be ascertained fairly easily by research.

15. How do you think the issue of cross-boundary placements should be managed, including whether this might be through primary or secondary legislation or guidance?

Given that all local authorities face strained resources, primary or secondary legislation seems preferable to guidance since properly drafted legislation can be enforced more easily.

16. Do you agree with the additional priority for 2 - year olds who are 'looked after'? What might need to be delivered differently to meet the needs of those children?

This question is more appropriately answered by professionals from disciplines other than law.

The Named Person

17. Do you agree with the proposal to provide a point of contact for children, young people and families through a universal approach to the Named Person role?

The idea of every child in Scotland having a person outside his or her own family to whom he or she can go for information and assistance appears to be very child-centred and can be seen as empowering for the child. That parents should also have a single source of information and that the Named Person would hold a 'watching brief' in respect of the child are also positive features.

However, it must be remembered that Article 8 of the European Convention on Human Rights guarantees the right to respect for private and family life, subject to proportionate and lawful intrusion for specific purposes. The European Court has, quite rightly, long permitted intrusion on family privacy for the purpose of protecting a child from abuse or other harm. With this in mind, the precise role of the Named Person requires clarification in respect of different categories of children. Where a child has already been identified as being 'at risk' (or, possibly, that process is in progress), then a proactive role would be unobjectionable. However, where there has never been any cause for concern over a child's welfare, care should be taken to ensure that the Named Person is not given powers that would amount to undue intrusion on family privacy. Were he or she simply a first stop for information, again, the role of the Named Person appears unobjectionable.

A separate concern relates to the way in which it is proposed to implement the system. For this to be done properly, the Named Person would require at least some of the skills of a curator, a safeguarder, a health care professional, a social worker and a teacher – and there may be other skills required in respect of a child in special circumstances. There is no reason to expect that the professionals proposed in the Consultation Paper as Named Persons would have all of these skills. In addition, these people already have full-time jobs. Simply adding to their existing workload will place yet another administrative burden on them and there is a very real danger that, in the attempt to keep on top of their workload, the role of the Named Person would become something of a 'form-filling' exercise.

In addition, the people proposed in the Consultation Paper for the role of Named Persons may be required to question the adequacy of services being provided by the very health boards or local authorities that employ them. Thus, their independence (or the appearance thereof) may be questioned, leading to families losing faith in the system.

Remedying these shortcomings of the scheme proposed in the Consultation Paper requires the following steps:

- (a) The precise role of the Named Person requires clarification. As the Consultation Paper accepts (para 115), a variety of roles may be involved and there may be very real human rights concerns over permitting a proactive role where there has never been cause for concern in respect of a child.

- (b) Depending on the role(s), the skills required of a Named Person should be identified and appropriate training provided.
- (c) The Named Person needs to be independent of local authorities and other agencies whose service provision he or she may be monitoring.
- (d) The Named Person needs to have sufficient time to do the job properly and this cannot be guaranteed by giving this responsibility to busy professionals who have other responsibilities to which they may give priority.

In short, the while there is merit in the concept behind the proposal, the scheme will be undermined if the proposal is not implemented properly. A far better way to implement the system would be to **create a new service**, the Named Persons Service, which would **employ and train** persons **dedicated to the role, independent of local authorities** and other agencies. Named Persons would then have the **appropriate range of skills** for the job and **be sufficiently independent** of the agencies whose responses they would be overseeing.

18. Are the responsibilities of the Named Person the right ones? Are there any additional responsibilities that should be placed on the Named Person?

The responsibilities require clarification in respect of different groups of children. Please see response to question 17.

19. Do you agree with the proposed allocation of responsibilities for ensuring that there is a Named Person for a child at different stages in their lives set out in the consultation paper?

No.
Please see response to question 17.

20. Do you think that the arrangements for certain groups of school-aged children as set out in the consultation paper are the right ones? What, if any, other arrangements should be made? Have any groups been missed out?

The list of children in para 118 is reasonably comprehensive.

However, no provision appears to have been made for children (other than those in gypsy/traveller families) who move home over local authority boundaries. A number of enquiries into the avoidable deaths of children who were already known to local authorities have identified this problem as contributing to a child 'falling through the cracks' and protection being ineffective.

The Child's Plan

21. Do you think a single planning approach as described in the consultation paper will help improve outcomes for children?

GIRFEC was supposed to address this problem, but I have no first-hand knowledge of how existing arrangements for the Child's Plan are working in practice. However, from discussions with professionals working in the field, I have been left with a strong impression that the scheme is not working at all in some areas and not as well as it should in others.

The proposal in the Consultation Paper is unclear. If it is proposed to create a statutory obligation on local authorities to implement the existing arrangements for a Child's Plan (or something similar), then it may address the problem of this not being done or being done inadequately. However, thought must be given to how the statutory obligation would be enforced since creating a statutory obligation without an adequate enforcement mechanism is simply cosmetic.

22. How do you think that children, young people and their families could be effectively involved in the development of the Child's Plan?

This question is more appropriately answered by someone other than an academic.

Right to support for looked-after children

23. Do you agree that care-leavers should be able to request assistance from their local authority up to and including the age of 25 (instead of 21 as now)?

Yes, this would put care-leavers in the same position as children entitled to support from family members and the like.

However, there is a world of difference between a power that **enables** the local authority to do something and placing it under a **statutory obligation** to do that thing. In times of stretched resources, many local authorities will simply not have the funds to do the things they are merely empowered to do. For this proposal to make a meaningful difference to care-leavers, a **right** to support, rather than a **power** to grant it, has to be the way forward.

Corporate Parenting

24. Do you agree that it would be helpful to define Corporate Parenting, and to clarify the public bodies to which this definition applies? If not, why not?

Since the Consultation Paper identifies a problem over their being a lack of shared understanding of what corporate parenting means (para 147), there is clearly a need for discussion aimed at arriving at a common understanding. Whether any real change would be served by embodying the result of that process in legislation serves any purpose is questionable.

25. We believe that a definition of Corporate Parenting should refer to the collective responsibility of all public bodies to provide the best possible care and protection for looked-after children and to act in the same way as a birth parent would. Do you agree with this definition?

The appropriate definition requires further discussion. To say that it requires providing the 'best possible care and protection' seems to be stating the obvious. Whether Corporate Parenting that can be the equivalent of parental care is questionable. In any event, what kind of parental care is meant here – good, bad or 'good enough'?

Kinship care

26. Do you agree that a new order for kinship carers is a helpful additional option to provide children with a long-term, stable care environment without having to become looked after?

At first glance, this appears to be an attractive option. However, further details of what support would be provided to kinship carers under the proposal is required since para. 157 is rather vague on this point. It is important to ensure that the proposal, if implemented, does not result in the child and kinship carers being denied resources provided to children being looked after outside their own families.

27. Can you think of ways to enhance the order, or anything that might prevent it from working effectively?

Nothing to add.

Adoption and permanence

28. Do you agree that local authorities should be required to match adoptive children and families through Scotland's Adoption Register?

There appears to be merit in encouraging local authorities to make use of Scotland's Adoption Register but whether matching should be mandated is questionable.

Better foster care

Please note: Professionals working in the field have specialist knowledge that makes them more appropriate respondents to questions 29-32 than an academic can offer and the comments below should be read in that light.

29. Do you agree that fixing maximum limits for fostering placements would result in better care for children in foster care? Why?

Fixing a maximum number of children that can be placed in a single home might avoid the foster carer being overwhelmed by the demands placed on him or her but one would hope that factor is part of the assessment being made already before a child is placed with a carer. The capacity of the individual carer is really the issue here since one carer may be able to cope well with numerous children while another may have more limited capacity. Clearly, any special needs of the child or children may be relevant. In addition, thought should be given to how any maximum would accommodate cases where it is desirable to place all the children from one family together.

30. Do you agree foster carers should be required to attain minimum qualifications in care?

This proposal seems attractive, at first glance, since it suggests ensuring 'quality' care (whatever that means). However, measuring the capacity to care for a child is a difficult, if not impossible, task. Such a requirement might be objected to on the ground that the law does not require any qualification for becoming a birth parent – nor is it suggested here that the legal system should (or could) do so. However, arguably, the situation is different when the state entrusts a child to an individual's care.

31. Would a foster care register, as described, help improve the matching by a local authority (or foster agency)? Could it be used for other purposes to enhance foster care?

There would appear to be efficiency gains in this proposal.

32. Do you think minimum fostering allowances should be determined and set by the Scottish Government? What is the best way to determine what rate to pay foster carers for their role – for example, qualifications of the carer, the type of 'service' they provide, the age of child?

Some kind of standardisation of fostering allowances appears to be desirable and actuarial assistance might be used in arriving at appropriate criteria and scales.

Assessing Impact

33. In relation to the Equality Impact Assessment, please tell us about any potential impacts, either positive or negative; you feel the legislative proposals in this consultation document may have on any particular groups of people?

Nothing to add.

34. In relation to the Equality Impact Assessment, please tell us what potential there may be within these legislative proposals to advance equality of opportunity between different groups and to foster good relations between different groups?

Nothing to add.

35. In relation to the Business and Regulatory Impact Assessment, please tell us about any potential economic or regulatory impacts, either positive or negative; you feel the legislative proposals in this consultation document may have, particularly on businesses?

Nothing to add.

Thank you for responding to this consultation.

Please ensure you return the respondent information form along with your response.

The closing date for this consultation is 25 September 2012. Please return to childrenslegislation@scotland.gsi.gov.uk

or

**Paul Ingram
The Scottish Government
Area 2B North
Victoria Quay
Edinburgh
EH6 6QQ**