



## FACULTY OF ADVOCATES

### **Response from the Faculty of Advocates**

#### **to the Consultation on Children's Rights and Services Planning**

The Faculty of Advocates welcomes the opportunity to respond to the Consultation on Children's Rights and Services Planning. The Consultation seeks views on two matters, namely i) non-statutory guidance for Part 1 of the Children and Young People (Scotland) Act 2014, which covers duties on public authorities to publish a report every three years on steps it has taken to give better or further effect to the requirements of the United Nations Convention on the Rights of the Child 1989 (UNCRC), and ii) statutory guidance on Part 3 of the 2014 Act which covers arrangements for children's services planning. We have the following views in relation to these matters.

(i) Non-statutory guidance for Part 1 of the 2014 Act

The Faculty does have some suggestions designed to make this document more effective in its stated aim of assisting with the implementation of legal duties in terms of Part 1 of the 2014 Act.

The purpose of the document is to assist public authorities to give better or further effect to the UNCRC. We suggest that the essential starting point should therefore be to set out the terms of the UNCRC. The first and most helpful step towards achieving the statutory aim must be to inform the relevant authorities what the UNCRC actually says.

It appears to us that the practical examples in the document could better reflect the requirements of the UNCRC. To give an example, we refer to page 28 of the document. Article 9 of the UNCRC requires States Parties to ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine that such a separation is necessary for the best interests of the child. The article goes on to require respect for the right of the child to maintain personal relations and direct contact with both parents on a regular basis unless contrary to the child's best interests. This is an important aspects of the rights of the child. The focus of article 9 is not reflected in a passage that says "Children and young people who are looked after have access to the services they need and have a say in decisions about where they live." That is not what article 9 says. It rather misses the point of article 9.

The document could also be strengthened by including a reflective analysis of the strengths and weaknesses of Scottish implementation of the UNCRC. If the aim of the legislation is to promote the effect of the UNCRC then it would be logical to draw attention to the areas where some deficit has been identified. For example, the need to take the views of children into account over "all matters affecting the child" in accordance with article 12 has been a weakness in Scotland. There would be positive benefit in identifying this and exploring the ways in which public authorities should be taking account of the views of children. The point mentioned in our last paragraph might be taken up under implementation of article 12, where it is clearly relevant.

The Faculty is concerned that the attempted synthesis between “welfare” and “wellbeing” risks diverting the focus from the UNCRC, which carries its own concepts, towards other aspects of the Scottish Government programme which, albeit laudable in themselves, are based on different concepts. It appears that many references in the document confuse and interchange the concepts of “wellbeing” of children and “welfare” of children. The two concepts are different. There is a long history and jurisprudence in Scots law and international law about welfare of children. This is the concept used in the UNCRC. It is noted that technically Getting It Right for Every Child (GIRFEC) deals with welfare and not wellbeing. We are conscious that there is now a new notion of “wellbeing”, defined in the Children and Young People (Scotland) Act 2014, section 96. While the Scottish statutory concept of “wellbeing” may be related to the general and well-understood notion of “welfare”, it is not the same. In the context of the UNCRC it is the general notion of “welfare” that is relevant. It would be unfortunate were the imperative towards implementation of UNCRC to be lost by a synthesis with a different agenda arising in domestic rather than international circumstances from a different Part of the 2014 Act.

The proposal in the document is that implementation of the UNCRC is to some extent measured in a Child Rights and Wellbeing Impact Assessment (CRWIA), based on the constructed notion of “wellbeing” and the criteria of “SHANARRI” (safe, healthy, achieving, nurtured, active, respected, responsible and included). These are all worthy aspirations for children, but the point of this part of the legislation is to direct attention to the requirements of the UNCRC. If the Scottish government is aiming to implement the UNCRC then the Faculty submits that it is necessary to start with the articles of the UNCRC, rather than wellbeing and SHANARRI.

- (ii) Statutory guidance for Part 3 of the 2014 Act which covers arrangements for children's services planning

This part of the consultation document relates to policy and planning for local authorities. We have no comment to make on the matters discussed. The only role for us in planning and policy would relate to how the Courts and Tribunal Services should contribute. We are unable to ascertain that from the document.