

The Views of the Child: Article 12 and the Development of Children's Rights in Scotland

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Introduction

Article 12 of the UN Convention on the Rights of the Child calls for state parties to 'assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'. This paper will discuss the rights of children to express their views in the context of the Scottish legislative system.

Children's Hearings

A vital element in the child care system in Scotland is the unique Children's Hearings. Established in 1971, the Hearings system has three principal components: the reporter, the children's panel and the Social Work Department. The Reporter is an independent official who acts as administrator to the Hearings system, advises on matters of law and procedure, and considers all referrals to the system. In acting as gatekeeper to the system, the Reporter has considerable discretionary powers and can decide whether a case should go to a children's hearing, be referred to the Social Work Department for voluntary supervision, or requires no further action. The children's panel is made up of the 1,700 lay volunteers across Scotland who provided the membership of the Children's Hearings. The Social Work Department is the agency which is responsible for carrying out the decision

of the Children's Hearing: supervision of the child at home, sometimes involving groupwork or other programmes; or provision of foster or residential care. Children's Hearings, consisting of three lay people, make decisions about the care and protection of children and consider cases which are referred on grounds of offences, child protection or non-attendance at school. The Hearing can only decide on a case if all parties accept the facts relating to the referral. If the facts are not agreed the case goes to the Sheriff Court for determination of proof but, if proven, is returned to a Hearing for a decision on the action to be taken. Children and parents have a right and duty to attend the Children's Hearing and "the full involvement of the child and his parents in the proceedings of the hearing is an important goal of the system" (Murray, 1992). The Children's Hearings system is based on a welfare principle which does not distinguish children who offend and those who are offended against, in that they are dealt with in the one system with same framework of intervention and this "contrasts with recent trends in places like New Zealand, Canada and indeed England and Wales to separate the court arrangements and orders which apply to young offenders from those for children who have been abused or neglected" (Aldgate and Hill, 1995; see also Hallett & Hazel, 1998).

Children (Scotland) Act 1995

The White Paper which presented the government's proposals for child care policy and law in Scotland set out eight clear principles to "incorporate the philosophy of the United Nations Convention on the Rights of the Child" (Scottish Office, 1993, p. 6). These were:

- Every child should be treated as an individual
- Children have the right to express their views about any issues or decisions affecting or worrying them
- Every effort should be made to preserve the child's family home and contacts
- Parents should normally be responsible for the upbringing and care of their children
- Children, whoever they are and wherever they live, have the right to be protected from all forms of abuse, neglect and exploitation
- Every child has the right to a positive sense of identity
- Any intervention in the life of a child or family should be on formally stated grounds, properly justified, in close consultation with all the relevant parties
- Any intervention in the life of a child, including the provision of supportive services, should be based on collaboration between all the relevant agencies

(Scottish Office, 1993, pp. 6-7)

However, while children's rights are included in many parts of the act, these overarching principles are not included in the Act itself (Tisdall, 1996). The Children (Scotland) Act which came fully into force in April 1997, has introduced a new concept of 'parental responsibility' whereby a parent has the responsibility to 'safeguard and promote the child's health, development and welfare'; to provide 'direction' and 'guidance'; and to act

as the child's legal representative. Along with these responsibilities, the parent has rights, including 'to have the child living with him (sic) or to otherwise regulate the child's residence'; to control, direct or guide... the child's upbringing; and to act as the child's legal representative (Children (Scotland) Act 1995).

The right of children to have their views heard is found in at least eight sections of the Children (Scotland) Act (Tisdall, 1996). It states that a person fulfilling a parental responsibility or who has 'care or control of a child' shall, in reaching any major decision, 'have regard so far as is practicable to the views (if he wishes to express them) of the child concerned, taking into account the child's age and maturity, ... and without prejudice to the generality of this subsection a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view (Children (Scotland) Act 1995).

Marshall makes the point that "while questions have been raised about the enforceability of such provisions, they are regarded as valuable statements of principle which could have some legal implications in individual cases" (Marshall, 1997, p. 35)

Similarly, Section 16 of the Act states that , a Children's Hearing or Sheriff must, as far as is practicable: give a child an opportunity to express their views and to have regard to these views; and Section 17 lays similar duties on local authorities with regard to children being 'looked after' (Children (Scotland) Act 1995).

The legislation in relation to provisions to protect children have been radically overhauled (Tisdall, 1996). Drawing on lessons learned from the 'Orkney Inquiry' where nine children were removed from their homes because of suspected sexual abuse and other cases, new Child Protection Orders for emergency situations and Child Assessment Orders have been introduced. Significantly, a new Exclusion Order means that where it is deemed necessary to protect a child from a suspected abuser, the abuser can be excluded rather than remove the child from home and "such a provision respects the child's right to remain with (the rest of) his or her family, rather than feeling doubly victimised - by the abuse itself and also from being separated from familiar and supportive surroundings" (Tisdall, 1996, p. 35).

The Children (Scotland) Act, however, is not without its critics, in some areas it is felt that the Act has not gone as far as it should, in others that it has taken a backward step from previous legislation. For example, although courts, children's hearings and local authorities have a duty to ensure that the welfare of the child is their paramount consideration, this duty is set aside 'for the purpose of protecting members of the public from serious harm (whether or not physical harm)' (Children (Scotland) Act 1995). The Act did not include measures to limit parental punishment of children, despite the fact that the UK had been criticised by the UN Committee on the Rights of the Child because corporal punishment is still legal (Tisdall, 1996). There is also concern that the Children (Scotland) Act has taken a backward step by restricting local authorities 'duty to safeguard and promote the welfare of children to those 'who are in need' and "the category is profoundly disagreed with by a significant proportion of those working with

and representing children and their families for being stigmatising and static, crisis-driven and negative" (Tisdall, 1996, p. 34).

Participation

In an earlier study of social work department child care reviews, parallel meetings often to Children's Hearings, participation of children and young people was seen as important, both by social work staff and the young people themselves. At that time, young people aged over 12 attended three-quarters of their reviews (Kendrick and Mapstone, 1991). They stressed the idea of reviews giving the children the opportunity to tell people if there were any problems:

"They are important to me because it gives me a chance to say anything I want to say. It gives them the chance to ask me the things they want to know." (Young person)

However, a good deal of ambivalence was also expressed about the importance of reviews. Those children who did not think they were important were influenced by the decision of the review or did not think that the review did anything:

"Not really, no... We deal with it as it comes up. I wouldn't mind if there weren't any reviews. It wouldn't put me up nor down." (Young person)

Children rated their satisfaction with reviews in 45 interviews. They were satisfied or very satisfied with three-quarters of the reviews. Where children were less than satisfied with the review they gave either non-specific reasons: "Well it was alright. Not the best of British." Or they made reference to a specific aspect of the review such as the disagreement with the decisions of the review, matters not having been discussed fully, feelings of exclusion within the review, or the presence of someone at the review who they did not wish to be there. All refer in some way to the child's lack of control of the review situation.

Preparation before the meeting is very important for both parents and young people to ensure that they are able to participate fully in the meeting. Although social workers and/or carers considered that they had done preparation work for all the review meetings in the study, we found that young people did not always think that they had been prepared for the meetings. Those young people who were given the opportunity to write a report for the meeting found this useful and it acted as a focus in preparing them for their own participation in the meeting

In more recent research on Children's Hearings (Hallet & Murray, 1998; Waterhouse et al, 2000), similar themes have emerged. Children and young people attended a high proportion of the meetings (87 per cent). We saw above that children and young people have a duty, as well as a right, to attend Children's Hearings, which explains the high

attendance rate and the main reason for their not attending was that they were very young (Hallet & Murray, 1998). However, Hallet & Murray found that even though there was high attendance of children and young people at the Hearings, their contribution was limited. Again, young people thought it important to attend, they "were concerned to be proactive and also thought it important that the panel members were acquainted with their opinions and feelings." (Hallet & Murray, 1998, p. 67). However, this research also found that young people "identified feeling nervous, overawed or frightened as the most important factors inhibiting their participation as well as not wanting to speak in front of strangers or a large group of people" (Hallet & Murray, p. 68)

Waterhouse et al (2000) found that children perceived the system as "generally 'fair' and felt that their views were listened to by the Reporter and at the hearing" (Waterhouse et al, 2000, p. 109). However, in a minority of cases there were gaps in communication or lack of clarity about the roles of different meetings, and for some involvement was a source of anxiety. The "the failure of some social workers to provide adequate information or explanation may, in some cases, also serve to reinforce stereotypes and fears some individuals clearly had about social workers and their perceived role" (Waterhouse et al, 2000, p. 100)

It should be said, that there is not the same concern for the participation of children across different agencies. In current research being undertaken by the author and colleagues on inter-agency initiatives to prevent school exclusion, some education representatives are much less positive about the attendance of children in meetings. Marshall (1997) noted that the UN Committee, with regard to the UK Government's initial report, "made... a specific recommendation relating to children's rights within the education system" (Marshall, 1997, p. 29).

Conclusion

The Children's Hearings system in Scotland placed the views of the child as central well before the UN Convention on the Rights of the Child. This principle has had a significant impact on the way social work agencies in Scotland approach the rights of children and young people to express their views. Two major reviews of the safeguards for children living away from home (Kent, 1997; Utting; 1997) saw an important role for child care reviews (and in Scotland Children's Hearings). In relation to England, however, Utting expresses concern about a lack of progress in children's participation in reviews (Utting, 1997, p. 109). Sinclair highlights that "the right of children to participate is closely linked to their rights to protection" (Sinclair, 1996, p. 91). Across all countries, it is crucial to make every effort to make sure that children and young people are empowered to participate and express their views

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