

## **Incorporating the UN Convention on the Rights of the Child into Scots Law: Scottish Government consultation, August 2019**

### **Theme 1: Legal mechanisms for incorporating the UNCRC into domestic law.**

#### **1. Are there particular elements of the framework based on the HRA as described here, that should be included in the model for incorporation of the UNCRC in domestic law? Please explain your views.**

Yes. As a children's charity, our priority is that the incorporation of the UNCRC in Scotland should be transformative in how as a country we promote, protect and enable children rights. The model of incorporation should make a demonstrable difference to the lived experiences of children. Therefore we believe that the model must:

1. Include the fundamental mechanisms that ensure legislation is compatible with the United Nations Convention on the Rights of the Child (UNCRC) and provides a means of address and remedy when UNCRC rights are not upheld either within the formation or implementation of legislation.
2. Contain a duty on public authorities to act compatibly with the UNCRC.
3. Place a duty on public authorities to have 'due regard' to the UNCRC when exercising any of their functions.

We agree with Together (Scottish Alliance for Children's Rights) in their view that a 'due regard' duty will lead to pro-active rights based decision making, but we are clear that the 'due regard' duty cannot operate effectively in isolation and the model must also include a duty for public authorities to act compatibly with the UNCRC. Including only a 'due regard' duty would not be sufficient in enabling transformational change in the realisation of children's rights.

#### **2. Are there any other aspects that should be included in the framework? Please explain your views.**

As outlined in Q1 we would be supportive of the inclusion of a 'due regard' duty on public authorities.

We would welcome measures within the framework to assess over time the impact that the incorporation of the UNCRC is having on children's lived experiences in Scotland. Experience highlighted by Barnardo's Cymru would suggest while government activity can be measured, the impacts on the lived experiences of children in Wales brought about by the 2011 Rights Measure remain largely anecdotal, and would benefit from a more robust reporting framework.

**3. Do you agree that the framework for incorporation should include a "duty to comply" with the UNCRC rights? Please explain your views.**

Yes. Experience gathered from Barnardo's work in Wales suggests that the Children's Rights Scheme and Children's Rights Impact Assessment (CRIA) process has produced inconsistent CRIA's which in some instances appear to be a process of measuring compliance with the UNCRC articles, rather than the necessary analysis of the impact of potential decisions on the human rights experiences of children. While the CRIA's produced have improved significantly, they remain largely an assessment of a situation and evidence of compliance rather than a process that enables a cultural shift in the understanding and implementation of children's rights in a given context. Therefore it is imperative that a duty to act compatibly or comply with the UNCRC is included alongside a 'due regard' duty as outlined in Q1&2. It is our view that if the framework does not include a 'duty to comply' then this should not be viewed as incorporation.

**4. What status, if any, do you think General Comments by the UN Committee on the Rights of the Child and Observations of the Committee on reports made by States which are party to the UNCRC should be given in our domestic law?**

As an organisation that promotes and protects children's rights, we have found the General Comments and the Concluding Observations by the UN Committee to be valuable in implementing our approaches to the UNCRC and assessing the state of children's rights in Scotland. The Concluding Observations should be seen as an 'independent monitoring' process and critical friend in relation to ensuring that children's rights practice in Scotland remains consistent with international human rights standards. We therefore believe that the General Comments and Concluding Observations should be included in the framework for incorporation of the UNCRC in Scotland.

**5. To what extent do you think other possible aids would provide assistance to the courts in interpreting the UNCRC in domestic law?**

**6. Do you agree that it is best to push forward now with incorporation of the UNCRC before the development of a Statutory Human Rights Framework for Scotland? Please explain your views.**

Yes. While a more general Statutory Human Rights Framework for Scotland would be a useful development (not least in detailing the interaction between children's rights and human rights for young people), it is imperative that the current momentum around incorporation of the UNCRC is not lost. We also believe that having a specific Children's Rights Act on the Statute books gives a positive signal to the importance placed on embedding children's rights within Scottish society.

**7. We would welcome your views on the model presented by the advisory group convened by the Commissioner for Children and Young People in Scotland and Together (the Scottish Alliance for Children's Rights).**

We support the model presented by the advisory group as it would provide a strong foundation for the promotion, protection and enabling of children's rights in Scotland. The model also provides the scope for the Scottish Government (within current and future devolved responsibilities) to further enhance children's rights over and above the current UNCRC provisions, something which we would very much welcome.

We would highlight in particular the importance of including the Preamble of the UNCRC, as a way to recognise the holistic and interconnected nature of children's rights, including explicit reference that those rights ensure that children grow up in a 'family environment of happiness, love and understanding'; this makes an important link to commitments around love in the National Performance Framework, and reflects national conversations around love for care-experienced children and young people.

**8. How should the issue of whether particular UNCRC rights are self-executing be dealt with?**

**9. How could clarity be provided to rights holders and duty bearers under a direct incorporation approach, given the interaction with the Scotland Act 1998?**

**10. Do you think we are right to reject incorporating the UNCRC solely by making specific changes to domestic legislation? Please explain your views.**

Yes. Making changes to domestic legislation is a key part of incorporation (as outlined by the UN), but must follow on from full incorporation. Full incorporation would see a duty on the Scottish Government, as a public body, to comply with the UNCRC when creating or revising legislation.

**11. If the transposition model was followed here, how would we best enable people to participate in the time available?**

We do not support the suggested transposition model of incorporation as it does not fit with the ambition outlined by the First Minister for Scotland to meet the UN Gold Standard on children's rights. A model that seeks to embed individual provisions of the UNCRC into domestic law should not be viewed as true incorporation, and would therefore be a missed opportunity in furthering children's rights in Scotland.

**12. What is your preferred model for incorporating the UNCRC into domestic law? Please explain your views.**

We believe in full and direct incorporation of the UNRC into domestic law with the 'due regard' and 'act compatibly/comply' duties as outlined in Q3. We do not believe it would be appropriate to seek to amend or redraft the articles of the UNCRC to create a Scottish suite of children's rights.

## **Theme 2: Embedding children's rights in public services**

**13. Do you think that a requirement for the Scottish Government to produce a Children's Rights Scheme, similar to the Welsh example, should be included in this legislation? Please explain your views.**

Our priority for incorporation of the UNCRC in Scotland is that it should lead to a positive change in the lived experiences of our children. As such, a means of reporting on compliance with the Convention is vital. We would suggest, however, that simply reporting on compliance is not enough in itself. As noted earlier, experience from our colleagues in

Wales suggests that whilst there has been steady improvement in the quality of reporting against the Scheme, it remains the case that the analysis of impact is still lacking, and as such accountability through scrutiny is less effective. Colleagues in Wales also outline that the Welsh Government frequently talk of the trickle-down effect of the Duty of Due Regard on legislation, policy and decision making processes at other levels of governance, but according to our colleagues there is little or no evidence of such, citing amendment debates in relation to Social Services, Wellbeing, Domestic and Sexual Violence, Additional Learning Needs and Future Generations legislation or implementation of legislation with specific rights duties as examples.

Barnardo's Cymru colleagues do report a positive change in rights language and rhetoric, and while this is welcome it is not symptomatic of a real shift in culture and practice; this is backed up by some experiences of Children's Rights Impact Assessments for Scottish legislation, where it is clear that people are aware of the list of children's rights, but perhaps less skilled when it comes to truly analysing and interpreting the impact of legislation on those rights, as they will be experienced by children. While the legislation cannot in and of itself ensure that incorporation leads to an increase in understanding, rather than simply awareness raising, it would be beneficial for measures to monitor progress around incorporation to include measures of impact as well as basic compliance.

**14. Do you think there should be a "sunrise clause" within legislation? Please explain your views.**

**15. If your answer to the question above is yes, how long do you think public bodies should be given to make preparations before the new legislation comes into full effect? Please explain your views.**

**16. Do you think additional non-legislative activities, not included in the Scottish Government's Action Plan and described above, are required to further implement children's rights in Scotland? Please explain your views.**

Yes. Incorporation of the UNCRC will only lead to changes in the lived experiences of our children if it leads to an increase in understanding of children's rights, not simply raised awareness among professionals, children themselves and the wider public.

We have provided one case study example below, of the many we encounter through our work, where we believe that an increased understanding of children's rights would have impacted on the experience and the outcome for the child. While many of the professionals involved in this situation will have had an awareness of children's rights, it is clear that more could have been done to ensure that they were protected and enforced.

We also support the further development of and access to advocacy services for children and young people, to assist them to uptake their rights across the spectrum of the rights outlined within the UNCRC.

**'B' wants to stay at their School: Looked After Young person (age 15) in Permanent Exclusion process**

B lives in South East Scotland, and attends a secondary school. B has Looked After and Accommodated status, and has attended their school for over 2 years. B is eligible for Additional Support Needs assessment.

B experiences disruptions in school life, and becomes subject to exclusion measures in summer term. B wants to remain at this school and complete Preliminary assessments in the following term, within a familiar environment and alongside their peer group.

B is instructed by the school not to attend due to being temporarily excluded for a period. During this period B is further informed that they have been permanently excluded, and that they will be registered at a new school, to start the following day.

B is not invited to attend permanent exclusion meeting, and is not offered opportunity to appeal. B doesn't understand how or why this decision was made.

B seeks support from their Barnardo's workers, and consults some independent advocacy information on School Exclusions for people with Additional Support Needs.

Outcome: B attends their new school, and wants to complete Prelims there. B is informed by their new school that B's education records have not been received, 8 weeks since B's exclusion from previous school. B is informed that this might impact on which Prelims they are eligible to undertake.

B feels this process has been unclear and unfair, and wants to know why they were not offered the chance to appeal their exclusion.

### **Theme 3: Enabling compatibility and redress**

**17. Do you agree that any legislation to be introduced in the Parliament should be accompanied by a statement of compatibility with children's rights? Please explain your views.**

Yes. The statement of compliance should be informed by a children's rights impact assessment, completed by someone with a strong understanding of children's rights, and include an analysis of the potential impact on the lived experiences of children.

**18. Do you agree that the Bill should contain a regime which allows right holders to challenge acts of public authorities on the ground that they are incompatible with the rights provided for in the Bill? Please explain your views.**

Yes. There must be no barriers to justice for children should their rights be breached. Children should have access to age appropriate information, complaint processes, advice, advocacy and if required access to the courts with the necessary legal support/assistance.

**19. Do you agree that the approach to awards of financial compensation should broadly follow the approach taken to just satisfaction damages under the HRA? Please explain your views.**

**20. Do you agree that the UNCRC rights should take precedence over provisions in secondary legislation as is the case under the HRA for ECHR rights? Are there any potential difficulties with this that you can see?**

Yes, we agree. The rights outlined in the UNCRC are not aspirational but inalienable and therefore should be considered as preeminent. International evidence suggests that the stronger the position of the UNCRC in the domestic legal system, the more likely it is to influence policy and decision making.

We also note that the UNCRC is clear that where there is a higher standard set in domestic law than the UNCRC then that higher standard must prevail.

**21. Do you agree that the Bill should contain strong provisions requiring an ASP to be interpreted and applied so far as possible in a manner which is compatible with the rights provided for in the Bill? Please explain your views.**

**22. Should the Bill contain a regime which would enable rulings to be obtained from the courts on the question of whether a provision in an ASP is incompatible with the rights secured in the Bill? Please explain your views.**

**23. Do you consider any special test for standing to bring a case under the Bill should be required? Please explain your views.**

As outlined in Q18 there should be no barriers to children seeking justice when their rights are breached. This should include the option for relevant organisations such as the Children and Young People's Commissioner for Scotland to support individual children seeking redress and the ability for them to bring cases on behalf of individual children or in the wider interests of children.