

Response from the National Carer Organisations to
“Consultation on incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland”

About the National Carer Organisations

The National Carer Organisations are brought together by a shared vision that all Scotland’s unpaid carers will be valued, included and supported as equal partners in the provision of care and will be able to enjoy a life outside of caring. They are Carers Trust Scotland, the Scottish Young Carers Services Alliance, Carers Scotland, the Coalition of Carers in Scotland, Shared Care Scotland, Minority Ethnic Carers of Older People Project (MECOPP and Crossroads Caring Scotland.

Questions

- 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.**

As National Carer Organisations we want to see legislation for young carers and all other children and young people in Scotland that reflects a rights based approach. We are in agreement with the Scottish Government Advisory Group convened by Together and CYPCS and believe that the Human Rights Act (1998) framework which already delivers imperative protections for a number of human rights under the European Convention on Human Rights is the most appropriate framework for the incorporation of the UNCRC into domestic law in Scotland. We further believe that incorporation of the UNCRC in domestic law should take place within this Parliamentary term.

We agree with and echo the Scottish Youth Parliament that *“children and young people’s rights should be fully respected, protected and fulfilled in Scotland”* and must be *“legally binding, not guiding, in courts and tribunals across Scotland”*. We equally agree that all *“public authorities including Councils and quangos etc. should be legally obliged to act in a way which is compliant with the UNCRC and the Optional Protocols (OP) which the UK has signed up to”*.

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

Young carers and other children and young people’s rights must take precedence. The UNCRC must supersede existing laws and policy in Scotland which has less protection on children’s rights. This will require changing any existing law or policy in Scotland which does not encompass and uphold the UNCRC rights. Future legislation must also incorporate and recognise the UNCRC and must not supersede this legislation.

Taking account of devolution arrangements, the UNCRC incorporation into domestic law in Scotland should only apply when the Scottish Government is acting in devolved areas and using devolved powers.

We agree that Scottish Ministers should be required to publish a Children's Rights Scheme as stated in the Draft Children's Rights (Scotland) Bill, Sections 22 and 26. Additionally all future Scottish Government and other public body policy development should be required to produce and publish a Child Rights and Wellbeing Impact Assessment to ensure the UNCRC and children's rights, including young carer's rights, are at the forefront of all future legislative and policy decisions.

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

Yes. Our preferred approach, which is modelled on the Human Rights Act (1998) framework, is that a “duty to comply” should ensure the relevant protections so that public authorities could not act in a way which is incompatible with the UNCRC. Lessons can be learnt from the preventative approach in Wales and we would also support introducing a “due regard” duty so that duty bearers must think about possible UNCRC and Optional Protocol violations in advance, requiring them to reduce the chance of these occurring.

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?

Due diligence should be given to the General Comments by the UN Committee, their insightful guidance should be helpful to duty bearers and rights holders to best comprehend the UNCRC Rights.

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

The UNCRC rights are clear and comprehensive but lessons can be learnt internationally from other countries that have incorporated these rights into their domestic law and how this has been actioned through courts.

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, as previously noted we want to see the incorporation of the UNCRC within this Parliamentary term as committed to by the First Minister on 28 April 2019. There is currently strong support for UNCRC incorporation into domestic law and it is essential that this is harnessed and is not delayed or deprioritised in the policy agenda.

As highlighted by the First Minister's Advisory Group on Human Rights Leadership the UNCRC incorporation is a “separate process” and although we welcome a Statutory Human Rights Framework for Scotland, we strongly think that the UNCRC incorporation into domestic law should not be delayed due to the development of this. Earlier incorporation of the UNCRC could be beneficial as a building block for a framework of Statutory Human Rights for Scotland.

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 strongly support and agree with the model presented by the advisory group convened by the Commissioner for Children and Young People in Scotland and Together. We believe that direct incorporation of the UNCRC into Scots law is the best approach to ensuring children and young people’s rights are paramount in Scotland.

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

There should be no differentiation between self-executing and non-self-executing rights therefore preventing a pecking order among the UNCRC rights. Incorporation is the method to execute these rights. As stated previously we believe that fully and directly incorporating the UNCRC into Scots law is the best approach.

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?

For clarity to be provided to rights holders and duty bearers then the implementation of the legislation and awareness raising must be fully resourced. There should be a duty on local authorities to provide an information and advice service for young carers and all other children and young people about their rights, broadly similar to the duty in the Carers (Scotland) Act 2016. We would like to see targeted UNCRC rights information and advice to young carers and this being provided by young carer services and adequate training and resources provided for these services to carry out this function.

There should be mandatory training for duty bearers, public authorities and the Third Sector working with children and young people. There should be a national campaign so that young carers, and all other children and young people, and society at large are aware of the UNCRC rights and changes to domestic law. There should be resources developed which are concise, clear and simplify the information regarding UNCRC incorporation. This needs to be made available to rights holders and also staff working with children and young people across Scotland. This should include rights as part of the Curriculum for Excellence as standard, it could be through PSE lessons in schools. Therefore, highlighting that rights are universal and unchangeable and should not be confused or misused with concepts of responsibility. Considerate regard needs to be made to reach and inform children and young people in Scotland who do not access education, so that they are also empowered and knowledgeable about their rights.

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

We agree, incorporating the UNCRC solely by making specific changes to domestic legislation is not our preferred approach. In our current political and social landscape where there is a number of uncertainties, direct incorporation into our domestic law in Scotland would be the

strongest method to protect and best incorporate the UNCRC rights for young carers and all other children and young people in Scotland.

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

We do not agree with the transposition model approach, as this may create a pick and mix effect which could result in some key aspects of the rights being missed out. As previously stated, we support a direct incorporation approach of the UNCRC into domestic law in Scotland. We also advocate that young carers and all of the other children and young people in Scotland need to have meaningful opportunities to shape the model as well as being involved in implementation planning.

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

As highlighted and explained throughout this response, our preferred model is to directly incorporate the UNCRC and Optional Protocols 1 and 2 into our domestic law in Scotland.

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.

As explained earlier in this response, we support a requirement for the Scottish Government to produce a Children's Rights Scheme and this should be included in this legislation. This scheme not only creates accountability processes but also establishes monitoring and information on the progress undertaken by Scottish Ministers in relation to the legislation.

Furthermore, there should be a statutory duty for Child Rights and Wellbeing Impact Assessments to be undertaken as standard in the development of future policy and there should be regular reporting and accountability to Parliament on this.

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

No, we do not agree, legislation should be brought forward and come into effect without delay. This year marks 30 years since the UNCRC was ratified by the UK. Public bodies and authorities should have ongoing work around implementing the UNCRC and should already be compliant with their duties to young carers and all of the other children and young people in Scotland.

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.

N/A

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.

We would support a multifaceted cross sectoral approach - including but not limited - to local and national government, third sector and across society as a whole, particularly targeting young carers and the other children and young people of Scotland who are the rights bearers and need to know about the legislation that impacts them. It is essential that the incorporation of the UNCRC is known widely and awareness is raised across Scotland about children and young people's rights. A Charter, similar to that developed following the Carers (Scotland) Act 2016 should be considered to further implement children's rights in Scotland.

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, we believe that any legislation to be introduced in the Parliament should be accompanied by a statement of compatibility with children's rights. Further, as explained in this response previously, we think a duty should be introduced for Scottish Government to produce a Child Rights and Wellbeing Impact Assessment in future legislative developments also.

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, the rights need to be directly incorporated and must be binding and not guiding. Young carers and other children and young people in Scotland should be able to challenge acts of public authorities in order to prevent or resolve violations of UNCRC rights.

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.

Yes, we agree in principle that awards of financial compensation should broadly follow the approach taken to just satisfaction damages under the HRA.

Personalisation is crucial, violations can result in financial and non-financial loss - such as injury and abuse - and courts should have discretion over awarding compensation on a case by case basis. But it is important, as much as possible, to ensure victims are in the same position they would have been if the violation hadn't taken place. Violations of rights should also result in legislation being amended or developed to prevent similar violations in the future and therefore reducing the likelihood of future financial compensation being required.

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 that the UNCRC should follow the same approach as the HRA and ECHR and should take precedence over provisions in secondary legislation. This legislation incorporates the vital rights for young carers and all of the other children and young people in Scotland into domestic law and these rights must be paramount.

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.

Yes. We agree with this approach as it minimises the risk that the legislation will be found incompatible with the UNCRC rights. This also provides the ability to correct any incompatibility between the legislation and the UNCRC rights.

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.

Yes, we agree that in order to protect the rights of young carers and all of the other children and young people in Scotland, it is therefore necessary that courts are able to declare an ASP is incompatible with the UNCRC rights, if in violation. However, the courts should be able to provide the Scottish Government with reasonable timescales to make the legislation compatible with UNCRC rights.

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

No, we consider that the ordinary test of standing in Scots law which applies to challenges on judicial review should apply. Young carers and all of the other children and young people in Scotland often face many complexities and difficulties in bringing their case to court, it is essential that they are appropriately supported and able to exercise their rights when violations occur to reduce barriers that they may experience.

Law Officers should be able to participate in and to initiate proceedings. Furthermore, in line with current rules, a young person should be adequately and fully supported if they take a case to court. Consideration should also be given to a range of advocates and representatives, such as - but not limited to - Children and Young People's Commissioner Scotland, a representative organisation or charity, a trusted professional etc.

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