

Aberlour's response to the Scottish Government's consultation *Children's Rights: Consultation on incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland*

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Introduction

Aberlour works with vulnerable children, young people and families throughout Scotland, providing services and support in over forty locations around the country across a range of settings. We help to overcome significant challenges, like growing up in and leaving care, living with a disability, poor mental health, or the impact of drugs and alcohol on family life. We aim to provide help and support at the earliest opportunity to prevent problems becoming intractable or spiralling out of control. As an organisation that has children's rights at the heart of the work we do every day with children, young people and families, we are committed to supporting, promoting and protecting children's rights. Therefore, we welcome the commitment by the Scottish Government to incorporating the United Nations Convention of the Rights of the Child (UNCRC)¹ into Scots law.

The UNCRC has been understood and acknowledged within domestic law since it was ratified by the United Kingdom in 1991 and since the advent of the Scottish Parliament in 1999 has been further developed and recognised as a legal concept within Scots law, with all subsequent legislation and policy in Scotland pertaining to children and young people informed and guided by the UNCRC. This international framework of children's rights, which continues to develop and evolve to recognise and reflect our further understanding of what children and young people's rights are and how they should continue to be supported, promoted and protected, is the central tenet that establishes universal rights for all children and young people around the World. Incorporation of the UNCRC into Scots law, which is to ensure that those universal rights of children and young people are enshrined and protected in our domestic law, is essential if the Scottish Government is to fulfil its "*vision of a Scotland where human rights are embedded in all aspects of society*"².

To inform this response and ensure young people's views on incorporation of the UNCRC are represented in this consultation, Aberlour hosted four participation and engagement sessions with young people we work with from Dundee, Edinburgh, Glasgow and Moray. Young people aged between 12 and 20 years old participated representing the broad range of young people we work

¹ <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

² <https://www.gov.scot/policies/human-rights/childrens-rights/>

with. The focus of each session was on those parts of the consultation which consider implementation of the UNCRC, redress when children's rights are violated and whether or not incorporation of the UNCRC should mean full and direct incorporation of the UNCRC articles or, alternatively, a Scottish suite of children's rights. The views and opinions of the young people who participated are reflected and outlined in our response below.

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.

We believe that incorporation should mean the law is binding and not just a guide to what public authorities or wider civil society should do to support and promote children's rights. The "*act compatibly*" provision within the Human Rights Act 1998³ (HRA) ensures that the law in relation to human rights is binding, and therefore a similar provision should be included within the model of incorporation of the UNCRC which the Scottish Government proposes.

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

Yes.

We also believe the inclusion of a "*due regard*" duty, such as exists within the Welsh framework for children's rights⁴, to promote rights-based decision making should be included in any Scottish framework. A model of incorporation which includes both an "*act compatibly*" and "*due regard*" duty would guarantee a framework which provides an exceptional or 'gold standard' for supporting, promoting and protecting children's rights, and would further progress the Scottish Government's ambition of Scotland being "*the best place in the World to grow up*".

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

Yes.

It is our opinion that the framework for incorporation of the UNCRC should insist that children's rights are not only considered in all decision making, but that any decisions must then comply with the UNCRC when they are put into practice. We believe that such a duty is necessary to ensure children's rights are not only recognised within law but acted upon and safeguarded by all public authorities and duty bearers.

³ <https://www.legislation.gov.uk/ukpga/1998/42/contents>

⁴ <https://www.childcomwales.org.uk/wp-content/uploads/2017/04/The-Right-Way.pdf>

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?

We believe that General Comments and Concluding Observations should be part of any framework of the UNCRC which is incorporated into domestic law. General Comments provide clarification on the intent and interpretation of individual articles and therefore ensure individual countries' approach to incorporation is consistent and free from misinterpretation, and that they are up to date with further and future developments not considered at the time of drafting of the original UNCRC articles. Concluding Observations provide commentary on the progress of incorporation of children's rights in individual countries and can be useful for countries in measuring their own progress and identifying how to improve or strengthen incorporation. It is our opinion that any framework of the UNCRC proposed by the Scottish Government must recognise the Convention in its entirety, including all 54 articles, General Comments and Concluding Observations, in order that children's rights in Scotland are promoted, supported and protected in a way which is consistent with the most up to date and internationally agreed and accepted understanding of the UNCRC.

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.

We believe there is no reason to further delay incorporation of the UNCRC in Scotland. The United Kingdom has been a signatory to the Convention since 1991 and legislation passed by the Scottish Parliament over the last twenty years has been informed and guided by the UNCRC. The commitment from the Scottish Government to incorporation of the UNCRC has been clear and unequivocal that it will happen within this Parliament, with the First Minister stating: *"by the end of this Parliament we will have incorporated the UN Convention on the Rights of the Child into Scots law."*⁵ It is our opinion that Scotland is ready and equipped for incorporation of the UNCRC, and that it should happen without further delay.

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).

It is our opinion that the draft Children's Rights (Scotland) Bill⁶, developed by the Commissioner for Children and Young people in Scotland and Together (the Scottish Alliance for Children's Rights), proposes a clear and coherent approach to incorporation of the UNCRC into domestic law. This draft Bill reflects the fundamental principle that the UNCRC is a complete framework and that each of the individual articles are inseparable and indivisible. The draft Bill provides a mechanism for full and direct incorporation of the UNCRC in its entirety in a way that also ensures legislation can be 'future-proofed' to anticipate the possibility of further devolved powers for the Scottish Parliament in the

⁵ <https://www.snp.org/nicola-sturgeons-address-to-conference/>

⁶ <https://www.togetherscotland.org.uk/media/1200/childrens-rights-scotland-bill-2019.pdf>

future, but that does not extend beyond the current competence of the Scottish Parliament. Furthermore, the draft Bill draws on the experience of the approach used in Wales in the Rights of Children and Young Persons (Wales) Measure 2011⁷, and includes elements shown to work within a devolved legislation within the UK and which have already been implemented as part of the Welsh framework for children's rights. We believe the draft Children's Rights (Scotland) Bill proposes a workable and legally sound way to legislate for full and direct incorporation of the UNCRC in Scotland.

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

Rights are not self-executing in Scots law. Therefore, legislating to incorporate the UNCRC is required as the mechanism by which rights are executed, as is the case with any international treaty in UK domestic law. Full incorporation of the UNCRC is the only way by which all children's rights articulated within the Convention can be executed in Scots law.

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?

We believe there is already a well-developed understanding and awareness amongst duty bearers of devolved and reserved functions, and that legislating for incorporation of the UNCRC will not create any uncertainty or confusion regarding duties in relation to either devolved or reserved functions. However, this can be clarified and reinforced by an approach to direct incorporation that includes public awareness raising, professional training for duty bearers and independent advice and advocacy for rights holders.

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.

We believe that full incorporation directly into Scots law is the only way by which the UNCRC can be universally realised for children 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 believe a transposition model of incorporation is consistent with the commitment by the Scottish Government to full and direct incorporation of the UNCRC, and do not support such an approach. Full and direct incorporation would not require a time-limited exercise in participation and would ensure all articles are included within domestic law without the need to identify or select individual articles or rights to include in a specifically Scottish suite of children's rights. One young person commented on this proposal saying: "*Why would you pick and choose rights? Children's rights are connected, equally important and for everyone, so why wouldn't you keep them all together?*" We

⁷ <http://www.legislation.gov.uk/mwa/2011/2/contents>

share this view and believe the only way to ensure children's rights in Scotland are universally realised is through full and direct incorporation of the UNCRC.

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

As previously outlined, we believe the model for incorporating the UNCRC into Scots law should be through full and direct incorporation into domestic law. This approach is consistent with recommendations of the UN Committee of the Rights of the Child as the best way to ensure the UNCRC is fully realised by individual countries, as stated in their General Comment no.5: *"Incorporation should mean that the provisions of the Convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice."*⁸ Any model of incorporation which intends on selecting individual rights from within the UNCRC to create a Scottish suite of rights will have the effect of separating those children's rights from the UNCRC and international human rights framework, resulting in diminishing the universal and indivisible nature of rights for children and young people in Scotland. A model of incorporation which loses those key connections to the UNCRC and fails to keep pace with future international human rights developments would be inconsistent with the Scottish Government's stated commitments to ensuring Scotland is an outward looking and internationalist country that promotes the international human rights consensus.

Young people who participated in this consultation overwhelmingly supported the direct incorporation model, with the feeling that children and young people in Scotland should have the same rights as those in other countries – but where possible Scotland should do better and do more beyond the existing UNCRC articles.

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.

Yes.

We believe developing a Children's Rights Scheme, such as that in Wales, can help promote rights-based decision making, transparency and accountability for duty bearers, and has been shown to be effective at helping to implement a children's rights approach to policy making. Such a scheme should include a children's rights impact assessment (CRIA) model⁹ which will help to achieve such an approach to policy making, and will also ensure children, young people and those who represent them have opportunities to influence policy development across all levels of national and local government.

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

⁸ <https://www.refworld.org/docid/4538834f11.html>

⁹ https://www.unicef.org.uk/wp-content/uploads/2017/09/Unicef-UK-CRIA-comparative-review_FOR-PUBLICATION.pdf

No. Please refer to our answer to question 6.

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.

Non-legislative activities are essential in order to make children's rights 'real' and to translate what the law says into action to embed and implement children's rights so that they exist and are recognisable in children and young people's day-to-day lives and across wider society. Such activities that would help further implement and embed awareness and knowledge of children's rights and the UNCRC in Scotland include: public awareness raising; children's rights education in schools for children, young people and parents; independent advocacy for children and young people; children's rights training for professionals who work with children and young people; children's rights training for policy makers at both a local and national level.

Young people Aberlour works with suggested a variety of ways in which their rights can be supported, promoted and protected beyond those duties outlined in legislation, with one young person noting: *"The difficulty would be changing the attitude of adults in the world and making them understand us [young people] better. It's ok putting our rights into law but what if nothing changes?"*. Another commented: *"these things should be happening naturally anyways... [and it is] important that everyone knows that these are actual rights so that everyone can make sure they get treated the same"*. Young people's suggestions for how the Scottish Government, public authorities and others can actively promote and implement children's rights in Scotland included: the Scottish Government, local councils, the Scottish Youth Parliament and other children and young people's organisations and Police Scotland working together to address rights-based issues; a children's rights panel in each local area run by children, young people and local councillors; a public information campaign on television and social media to inform everyone across Scotland about children's rights.

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 this would ensure any future Bill introduced in the Scottish Parliament is compliant with the UNCRC. International evidence has shown that a statement of compatibility or compliance has ensured greater accountability and oversight in those countries which have introduced such a provision within their own domestic legislation, as they have done in Australia¹⁰, to ensure parliamentary and legislative compliance regarding children's rights.

¹⁰ <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility-Templates.aspx>

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.

It is our opinion that there must be a mechanism for redress within law that allows children and young people, and those who represent them, to challenge in circumstances where rights have been violated. Children and young people face additional barriers to accessing justice and therefore a regime which allows children and young people to challenge instances of violations of their rights by public authorities is essential. Any regime must also be child-centred and ensure that its processes and procedures must not present further barriers to children and young people challenging rights violations.

Young people consulted proposed various ways in which enforcement and redress should occur to compel public authorities and others to comply with children's rights, including: independent local committees made up of young people and adults who can consider rights-based issues or concerns and have powers to hold public authorities to account; agencies based in communities, which would support children, young people and families to make complaints and seek redress if their rights have been violated; the Scottish Government and local authorities to publicly advertise how and where to get help and advice on children's rights violations; public authorities and other organisations should be compelled to remedy issues which are in violation of children's rights; children's rights should be 'built' into processes to prevent rights being violated; all public authorities and other organisations should make it easy for children and young people to say when their rights have been violated.

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.

Effective examples of financial compensation already exist in relation to the Human Rights Act 1998¹¹, and we see no reason to make any distinction between the violation of human rights against the violation specifically of children's rights. We believe that financial compensation should also be consistent regardless of the particular right which has been violated, whether that is children's civic, cultural, economic or social rights.

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.

¹¹ <https://www.legislation.gov.uk/ukpga/1998/42/section/8>

As we have already outlined the UN Committee on the Rights of the Child General Comment no.5 states: *“that the Convention will prevail where there is a conflict with domestic legislation or common practice”*¹². Norway has also established a precedent in law where, alongside ECHR, the UNCRC takes precedence over secondary legislation¹³, as well as where there is a conflict with other domestic legislation, and we believe this is the example which Scotland should follow.

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 believe provisions should be included in any Bill that allows courts in Scotland to interpret legislation in a way that is compatible with the UNCRC, as is already the case in relation to the Human Rights Act 1998 and the ECHR.

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 believe provisions should be included in any Bill which enable courts in Scotland to rule on whether legislation is incompatible with the UNCRC and to declare that legislation to be unlawful. The use of ‘strike down’ powers can be used by Scottish courts in relation to ECHR and human rights violations, and therefore any Bill should enable that similar powers can be used by the courts in relation to legislation passed by the Scottish Parliament which is incompatible with the UNCRC.

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 believe a broader interpretation of ‘standing’ than exists within the Human Rights Act 1998 should be applied in any Bill. Children and young people can encounter multiple additional barriers to challenging violations of their rights and seeking legal remedies, therefore any Bill should ensure that others can bring a case on their behalf if required whilst still ensuring that those who have the capacity to can bring a case in their own name.

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¹² <https://www.refworld.org/docid/4538834f11.html>

¹³ https://www.idunn.no/childrens_rights_in_norway/9_incorporating_the_convention_in_norwegian_law