



Introduction

YouthLink Scotland is the national agency for youth work. We are a membership organisation, representing over 100 regional and national youth organisations from both the voluntary and statutory sectors. We champion the role and value of youth work and represent the interests and aspirations of both the voluntary and statutory sector. Our vision is of a nation which values its young people and their contribution to society, where young people are supported to achieve their potential.

Scotland's youth work sector reaches in excess of 380,000 young people in youth work opportunities each week. Youth work has three essential and definitive features:

- Young people choose to participate
- Youth work must build from where young people are
- Youth work recognises the young person and the youth worker as partners in a learning process.

While the activities, venues, and approaches utilised to deliver youth work are varied – and include youth clubs, youth projects, specialist or targeted provision, social activism, outdoor learning, awards programmes, uniformed organisations, and democratic participation – youth work in all its forms provides fundamental support to young people across Scotland's Local Authorities and the Voluntary Sector.

The United Nations Convention on the Rights of the Child (UNCRC) is an internationally recognised framework of children's rights. This consultation provides an opportunity to increase our understanding of what children and young people's rights are and how we can embed those rights into the fabric of law in Scotland.

The ethos of the Treaty is already compatible with the youth work approach. Whilst, the National Youth Work Outcomes are impacted on by a wide range of local, national and international policies, strategies and key areas of policy focus, it is the UNCRC that provides the overarching framework.

Overview

At the Third annual Cabinet meeting with children and young people held on 5 March 2019, one of the issues raised by the young people present was the legacy of the year of young people 2018, particularly around budget cuts to youth work services. One of

the actions agreed by the Cabinet Ministers was that: *“We will consider resourcing for participation of children and young people, including examining current funding streams, to ensure that participation is sustainable. In doing so, we will consider how national approaches to participation are reflected in the local structures which can facilitate participation”*¹. The consultation provides an opportunity to explore these points and take relevant action in relation to budgeting and planning of local and national youth work services. It crucially provides a legislative avenue for review when the views of young people have not been taken into account in policy formulation. If the rights of young people are breached and UNCRC is embedded into the fabric of the law of Scotland, we believe that the role of youth workers (as key in the relationship chain with young people) puts them in a uniquely capable position to help provide information at one end and advocate for young people to facilitate redress at the other end. We therefore welcome the commitment made by the Scottish Government to incorporate the UNCRC into Scots law before the end of this session of parliament in 2021. We are committed to working with the Scottish Government to give practical effect to the UNCRC in a way that demonstrates international leadership and works for every child and young person in Scotland².

YouthLink Scotland would like to this opportunity to acknowledge the work of Together for Children’s Rights in Scotland who have provided great technical expertise and detail in their response to the consultation. Their open approach to collaboration in this field has a set a new bar in partnership working and set a positive and ambitious tone to strengthening and upholding the rights of children and young people. We are pleased to support their formal response to the consultation and to have signed their recent letter to the Minister for Children and Young People, along with 35 of their members highlighting the importance of meeting the international ‘gold standard’ for incorporating the UNCRC into Scots law before the end of this session of parliament in 2021³. We look forward to continued discussions about how youth workers and the youth work sector can be a fundamental part of this process.

Engagement on the UNCRC Incorporation into Scots Law

On Thursday the 18th of July, we ran an engagement event with young people aged 12-18 to get their views on Incorporation of UNCRC into Scots Law. Each organisation brought along one youth worker and two young people to the event, totalling 31 young people, representing a range of Local Authority and voluntary organisations from all over Scotland. Young people were asked to imagine what a perfect world would look like where their rights had to be taken into account. They explored the theme of what should happen when their rights are not respected and they were asked to consider the timing of incorporation of UNCRC into the Law of Scotland.

¹ <https://www.gov.scot/publications/third-annual-cabinet-meeting-with-children-and-young-people/>

² Scottish Government (2019). Children’s Rights: Consultation on incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland, p.11

³ https://togetherscotland.org.uk/media/1352/letter_todd_27-08-2019.pdf Letter from Together sent to The Minister for Children and Young People on 27/08/19

The key points to emerge from young people's responses were:

- Young people face discrimination due to their age as well as an intersection of identities
- Young people want to be equal, included, listened to and valued
- Young people favour direct incorporation
- Young people want to have equal rights to children and young people across the world
- Young people want Scotland to be world leaders to improve children and young people's rights across the world⁴.

On August 28 we were delighted to welcome a range of excellent speakers on the UNCRC incorporation into Scots Law and youth work. Attendees heard from a range of contributors in the rights field and from youth groups, where we encouraged input and reflection on the principles of the UNCRC and the role of youth work, as well as any potential impacts as we move towards incorporation. The detail on this highly energised event will be reported separately.

It is from both these events, engagement with partners, and feedback from our own members which has helped formulate our response to the consultation.

The UNCRC Journey

The UNCRC journey of travel goes beyond this period of legislative change. We must build staff and volunteer capacity, knowledge and understanding of the UNCRC in Scotland. Organisations can help shape knowledge within teams, encouraging people and groups to sign up for relevant newsletters, which can provide support and information on children's rights. Local Authority and Voluntary Organisations should identify who is taking the lead within their respective groups for this process, including engaging children and young people, building relationships and understanding about youth work's contribution to Children's Rights, ensuring existing youth work planning and recording tools reflect the clusters of the UNCRC reporting and/or the General Principles of the UNCRC. Organisations should be getting ready to develop engagement plans of how services might contribute to the participation element of the Child Rights Reporting process, passing it to those who can influence this happening in reality and share messages around how full and direct incorporation of UNCRC into Scots Law can strengthen local, regional or national children's rights networks, identifying areas for collaboration and improvement so children's rights are realised with support from youth work workers and the youth work sector. The Scottish Government should commit to an awareness raising campaign before, during and after the consultation to ensure young people are fully aware of their rights. We would be excited to support such a campaign to assist the Scottish Government to make the commitment to UNCRC incorporation a reality for children and young people across Scotland.

⁴ <https://www.youthlinkscotland.org/media/3802/young-peoples-response-to-consultation-on-uncrc-incorporation-facilitated.pdf> Full report from UNCRC engagement event with young people and youth workers at Edinburgh Zoo on 18/07/19.

Budgeting for Youth Work and Incorporation of the UNCRC

YouthLink Scotland recently announced its #InvestInYouthWork campaign to show the value of youth work in Scotland. Our recent survey of youth workers highlighted perceived reductions to youth work services, budgets and staffing across Scotland over the last three years and this is a serious concern. The response summarises the main arguments for prioritising investment in youth work – how it changes the lives of young people (the most crucial point of all), the value of youth workers, and the wider social and economic benefits. It concludes with the key outcomes we would like to see in relation to budgeting and resourcing of local authority and voluntary youth services. We believe that full incorporation of UNCRC in Scots Law would help deliver for young people and the youth work sector⁵ and that local and national resourcing should be commensurate with ambition in this area.

YouthLink Scotland’s Position in Brief

Our position is that the entire UNCRC should be incorporated in full in order to ensure the indivisible and interdependent character of human rights protections and should be directly incorporated. There is ample precedent in Scots Law and guidance from the United Nations and national jurisprudence to help give effect and interpret the UNCRC in Scotland. This should happen within this term of the Scottish Parliament

Above is YouthLink Scotland’s position statement on the consultation. However, below we have answered the questions set by Government to enable consistency of reporting.

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.

The Human Rights Act framework should be included in the model of UNCRC incorporation for Scotland.

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

Yes.

Proactive duties and measures to promote rights-based decision-making should be included to complement the reactive duties and measures from the Human Rights Act framework. The ‘due regard’ duty provides an opportunity to hold Ministers to account

⁵ Link to summary of YouthLink Scotland’s response to the call for evidence on the long term financial sustainability of local government. Link to full response contained within.

<https://www.youthlinkscotland.org/news/august-2019/youthlink-scotland-response-to-the-call-for-evidence-on-the-long-term-financial-sustainability-of-local-government-local-government-committee/>

to help protect children's interests and influence policy outcomes, promoting rights-based decision-making and preventing breaches from occurring⁶.

The benefits of a 'due regard' duty has been recognised in a recent report by the Equalities and Human Rights Commission, concluding that the duty has 'potential to lead to positive actions to enhance the status of treaty rights'⁷.

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

Yes.

Incorporation must make children's human rights binding. We must oblige public authorities to respect and protect children's rights - allowing children to challenge breaches of their rights in domestic courts.

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?

The framework for incorporation must ensure that the UN Committee's jurisprudence is given consideration by public authorities and the courts. This should include General Comments, Concluding Observations and opinions made by the Committee in relation to Optional Protocol 3. This will ensure that Scotland keeps pace with developments in international human rights law and practice whilst being able to apply learning in a way that can be adapted to fit the Scottish context⁸.

Dr Kasey McCall-Smith ameliorated the concerns of the Scottish Government after they highlighted that rights are not specific to the Scottish context. She outlined in great detail the body of global jurisprudence, describing the Common Law of Scotland as adept at interpreting and adapting laws to specific context⁹. Whilst the detail of future discussions of compatibility of direct incorporation is unclear, there is precedent

6

⁷ The benefits of a 'due regard' duty have been recognised in a recent report by the Equalities and Human Rights Commission, which concludes that the duty has 'potential to lead to positive actions to enhance the status of treaty rights'

⁸ Together for Children's Rights in Scotland – response to Scottish Government Consultation on UNCRC incorporation into Scots Law (page 6)
https://togetherscotland.org.uk/media/1342/uncrc_incorporation_response_final.pdf

⁹ Dr Kasey McCall-Smith speaking at YouthLink Scotland Policy Seminar (Radisson Blu Hotel in Glasgow) on the UNCRC 28/08/19.

to adjust laws in specific circumstances¹⁰. As just one example, since incorporation, the Norwegian Supreme Court's case law has increasingly referred to General Comments as a source of interpretive guidance. We believe Scotland could do the same and as such, the UN Committee's interpretive guidance should be included in the framework for UNCRC incorporation in a way that ensures it must be given consideration by public authorities and the courts.

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

There is a body of jurisprudence through caselaw from countries that have already incorporated the UNCRC - such as Norway and Iceland and indeed, the common law of Scotland routinely interprets laws in line with the intention of legislation. Where there is will to interpret the law in the progressive manner it is intended then it can be done. There is a growing range of international materials and jurisprudence for solicitors and courts to deal with in recent times. Indeed, a report from the Swedish Government into preparations for UNCRC incorporation recognises the value of courts already having experience in interpreting the ECHR domestically and becoming "*used to applying rights based legislation*"¹¹. This could equally be applied to Scotland. Further, countries like Belgium, Norway and Spain are developing detailed case law which could be used by courts in Scotland to guide interpretation¹².

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.

The campaign for UNCRC incorporation has been building over a period of time, garnering interest and support at a civil society and governmental level and significant interest from young people, as evidenced by a range through a range of consultations, culminating in Members of the Scottish Youth Parliament (MSYP) focusing all their energies on the rights of young people through their "*Right Here, Right Now*" campaign¹³, aimed at empowering young people to understand and take action to protect their rights. We have also seen the political will contained with the Programme

¹⁰ Dr Kasey McCall-Smith – Lecturer in Public International Law speaking to "*jurisprudence*" and "*precedent*" at YouthLink Scotland Policy Seminar on UNCRC Incorporation into Scots Law on 28/08/19.

¹¹ Government Office of Sweden (2016) English summary on proposals for an act on incorporation the UN Convention on the Rights of the Child (CRC) into Swedish domestic law (from SOU 2016:1.9).

¹² See, for example, Bårdsen, A. (2015). Children's Rights in Norwegian Courts: Seminar on Children's Rights, Kathmandu.

¹³ For further information about this campaign, see here

for Government 2018/19, which includes a commitment to incorporate the principles of the UNCRC into domestic law¹⁴.

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 (Scottish Alliance for Children’s Rights).

For this question we support Together (SACR) response in full which is noted below:

“The Children’s Rights (Scotland) Bill is informed by international best practice as well as experience gained within the UK through the implementation of the Human Rights Act 1998 and the Welsh Measure. It provides a comprehensive legal framework to proactively promote children’s UNCRC rights whilst also providing remedy and redress if these rights are breached. We believe it offers the ‘gold standard’ model of UNCRC incorporation that meets the First Minister’s aspiration for children in Scotland.

In partnership with the Children and Young People’s Commissioner Scotland, we established an Expert Incorporation Advisory Group in autumn 2018. This group comprises of international and Scottish experts with extensive academic and practical knowledge of UNCRC incorporation. The group drafted a Children’s Rights (Scotland) Bill to demonstrate the most effective model through which Scotland could incorporate the UNCRC into law. Alongside Mikiko Otani, a member of the UN Committee, the Incorporation Expert Advisory Group presented the Bill to the Deputy First Minister on Universal Children’s Day in November 2018.

After considering the detail of the Scottish Government’s consultation, we continue to believe that the Children’s Rights (Scotland) Bill (‘the Bill’) provides the ‘gold standard’ model of UNCRC incorporation that meets the First Minister’s aspiration for children in Scotland. The Bill includes three key elements:

1. Drawing down the Preamble, Articles of the UNCRC (1-42) and the First and Second Optional Protocols to make them part of Scots law. 2. A duty to ‘act compatibly’ which follows the Human Rights Act model. This means the State must comply with the UNCRC and may be held accountable in law for breaches of children’s UNCRC rights. 3. A duty to have ‘due regard’ to the UNCRC which follows the Welsh Measure. This means the State must actively think about how to give effect to children’s human rights when making policy decisions.

¹⁴ Scottish Government (2017). A nation with ambition: The Government’s Programme for Scotland 2017-2018.

The Children's Rights (Scotland) Bill provides a model of full and direct incorporation, making it clear that all the substantive articles of the UNCRC and Optional Protocols should be part of Scots law. This is in line with the UN Committee's clear statement that:

"States Parties are required to implement the CRC as a whole, in recognition of the status of children as rights holders and in light of the indivisible and inter-dependent nature of CRC provisions".

This approach was strongly supported by the majority of attendees at Together's consultation events. In including the Preamble of the UNCRC, it sends a clear message to children that the rights enshrined into Scots law help to ensure children grow up in a 'family environment of happiness, love and understanding'. This has been raised by care experienced children and young people as being of particular importance to them. It also reflects the holistic nature of the UNCRC in that all rights are universal, interrelated and indivisible. There is a growing evidence base that full and direct incorporation helps to ensure a rights based approach to decision-making and encourages a more positive human rights culture. Children and young people have spoken about the importance of this culture change to them.⁶⁴ They have raised the importance of being equal to the rest of society and being included in decision making, setting out the need for everyone to feel "included within society" and for young people to be "addressed as citizens".

The First Minister's Advisory Group on Human Rights Leadership highlighted the challenge of how: "to find a way to bring out the best of the 'due regard' duty and the 'duty to comply' while recognising that the right to an effective remedy for a rights-holder is indispensable and is an international obligation".

The Bill meets this challenge by including the two complementary duties: a duty to act compatibly, and a duty to have due regard to children's rights. This provides both proactive measures to encourage positive steps to further children's rights and prevent rights violations, alongside reactive measures to ensure remedy and redress if a violation does take place.

Scottish Government says that without a section 30 order or similar provision, "it would not be possible to include certain articles or aspects of certain articles of the UNCRC and the Optional Protocols in the Bill". Whilst we agree that some aspects of the UNCRC are outwith the competence of the Scottish Parliament, we do not agree with this statement. In recognition of the limited powers of the Scottish Parliament, the Bill is clear that the duties would only apply when government is exercising devolved powers or acting in devolved areas. The Bill does not seek to extend the powers of the Scottish Parliament or Scottish Ministers. Those involved in Together's consultation events were clear that while issues surrounding devolution may be a concern, this should not overshadow the aims and ambitions behind incorporation.

Any concerns should be dealt with as they arise, rather than designing a weaker tool, such as Scottish Suite of Rights.

The Scottish Government sets out an aspiration to “go further” than the UNCRC where possible. Young people have endorsed this ambition and many would like to see Scotland push the boundaries and become a world leader. The UNCRC is clear that where there is a higher standard set in domestic law than that in the UNCRC, then the higher standard must prevail. The framework provided by the Children’s Rights (Scotland) Bill would support this ambition, by providing a strong foundation for further progress across all devolved areas and encouraging the Scottish Government to continually ‘push the boundaries’ and put forward legislation and policy that far exceeds the standards required by the UNCRC”¹⁵.

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

n/a

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?

UNCRC incorporation could only apply and be exercised within those areas that fall within the responsibility of the Scottish Parliament.

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.

Incorporation must include an all-encompassing legal framework embedded across all levels of government. However, making ongoing changes to domestic legislation will be a fundamental part of implementing the UNCRC and should include a comprehensive process of legislative review, alongside incorporation to ensure that the provisions of the UNCRC are given direct legal effect.

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

¹⁵ https://togetherscotland.org.uk/media/1342/uncrc_incorporation_response_final.pdf (page 9).

We do not support the transposition model of incorporation.

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

Our position is that the entire UNCRC must not be changed and should be incorporated in full in order to ensure the indivisible and interdependent character of human rights protections and should be directly incorporated. There is ample precedent in Scots Law and guidance from the United Nations and national jurisprudence to help give effect and interpret the UNCRC. We believe this should happen within this term of the Scottish Parliament and that full incorporation is positive as it expands upon the existing human rights framework.

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.

As this will help to create opportunities for children, young people and wider stakeholders to inform how the UNCRC is implemented.

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

No.

The UK's ratification of the UNCRC 30 years ago places binding obligations on the Scottish Government and as such, the UNCRC has already been embedded into policy and practice in Scotland - albeit in a bitty fashion. The Children and Young People (Scotland) Act 2014 has raised awareness and understanding of the UNCRC obligations among public authorities by placing reporting duties on Ministers and public bodies to set out what steps are being taken to further children's rights. As a result, public authorities should be ready by 2021 to apply the more comprehensive duties that result through UNCRC incorporation.

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.

See answer to question 14.

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.

We must build staff and volunteer capacity, knowledge and understanding of the UNCRC in Scotland. Organisations can help shape knowledge within teams, encouraging people and groups to sign up for relevant newsletters, which can provide support and information on children's rights. Local Authority and Voluntary Organisations should identify who is taking the lead within their respective groups for this process, including engaging children and young people, building relationships and understanding about youth work's contribution to Children's Rights, ensuring existing youth work planning and recording tools reflect the clusters of the UNCRC reporting and/or the General Principles of the UNCRC. Organisations should be getting ready to develop engagement plans of how services might contribute to the participation element of the Child Rights Reporting process, passing it to those who can influence this happening in reality and share messages around how direct incorporation of UNCRC into Scots Law can strengthen local, regional or national children's rights networks, identifying areas for collaboration and improvement so children's rights are realised with support from youth work workers and the youth work sector. The Scottish Government should commit to an awareness raising campaign before, during and after the consultation to ensure young people are fully aware of their rights. We would be excited to support any such campaign to assist the Scottish Government to make the commitment to UNCRC incorporation a reality for children and young people across Scotland.

Advocacy Services and the Role of Youth Workers

Barriers to accessing justice can compromise a young person's ability to develop to their full potential. Children and young people have frequently discussed the importance of receiving help, support and advocacy to enable them to assert their rights. They have particularly mentioned the importance of youth workers, mental health workers, teachers, social workers, counsellors and independent advocates, and have said in answers to questions at consultation events that in their perfect world there would be "*lots of*" them.

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.

A Statement of Compatibility would play an important role in ensuring that any new legislation introduced in the Parliament is compatible with the UNCRC. The statement should be accompanied by a CRIA that explicitly sets out how the Bill furthers UNCRC compliance and mitigates against any negative impacts on the rights of young people¹⁶.

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 of paramount importance that there are effective procedures available to children and their representatives, for example, youth workers, to challenge breaches of their rights.

We believe that for rights to have meaning - effective remedies must be available to redress any violations. Youth workers and others who advocate on behalf of children, must be able to use and have confidence in the legal system that rights can and will be enforced.

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.

The UN Committee is clear that where there are breaches of children's UNCRC rights, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration and is enshrined in UNCRC Article 39.

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?

¹⁶ https://togetherscotland.org.uk/media/1342/uncrc_incorporation_response_final.pdf (page 22)

Yes.

The UN Committee is clear that incorporation should mean that the provisions of the Convention will prevail where there is a conflict with domestic legislation or common practice.

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.

Provisions should be included in the model of UNCRC incorporation to ensure courts give effect to primary and subordinate legislation of the Scottish Parliament in a way which is compatible with the UNCRC.

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.

We agree with Together (SACR) that 'strike down' powers should be included in the model of incorporation which would mean that any law passed by the Scottish Parliament would no longer be considered to be law if a court decided that it breached the UNCRC. The Children's Rights (Scotland) Bill includes 'strike down' powers that would allow courts to declare an Act of the Scottish Parliament to be incompatible with the UNCRC, mirroring the protections given to ECHR rights under the Scotland Act 1998, ensuring that the rights enshrined in the UNCRC are given the same status as that given to ECHR rights through the Scotland Act 1998.

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

The model of UNCRC incorporation should include provisions to enable children and those with sufficient interest to bring proceedings (such as youth workers) if and when a public authority has failed to comply with the UNCRC or Optional Protocols especially when there are currently so many barriers to young people accessing justice. This approach would allow groups of children or their representatives like a youth worker to bring a case or complaint together for the young person.

ENDS