

## **Response from Children's Hearings Scotland to consultation on incorporation of UNCRC**

### **Background**

A children's hearing is a legal tribunal made up of trained lay members of the national Children's Panel (Panel members) who volunteer their time and skills to decide whether compulsory measures of supervision should be put in place for children and young people who are in need of care and protection, those who have committed offences, or those whose behaviour puts themselves, or others, at risk of harm.

The Children's Hearings (Scotland) Act 2011 introduced the role of National Convener to oversee the national Children's Panel. Children's Hearings Scotland (CHS) is the public body established to support the National Convener. His functions include the recruitment, selection, training and support of Panel Members and the appointment of Panel Members who make decisions at children's hearings.

Our vision is of a Children's Hearings System where everyone works together, making sure that all children and young people are cared for and protected, and their views are heard, respected and valued. Our mission is to improve outcomes for vulnerable children and young people in Scotland by enabling Panel Members to make high quality decisions about their future.

CHS believes that the incorporation, implementation, and enforcement of rights enshrined in the UNCRC in Scots law is a fundamental step in ensuring that children and young people grow up loved, safe, respected, and able to realise their full potential.

Our response to the consultation is founded on the following principles: that the fundamental rights of children should be implemented fully within the Scottish context; children's rights, and how they can be realised, should be clear and easy to understand; mechanisms should be in place to enable individuals to be aware of their rights; and that breaches of these rights should be open to challenge.

### **Responses to Consultation Questions:**

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

We consider that the HRA framework elements should be applied in any model of incorporation of UNCRC and in particular the Scottish Courts should be able to determine when a provision in primary legislation is incompatible with UNCRC and it should be unlawful (as with HRA section 6) for a public authority to act in a way that is incompatible with UNCRC. However there should be consideration of the interface between UNCRC and HRA in circumstances, such as children's hearings, where

competing human rights come into play, and how that can be resolved without causing undue delay and uncertainty in planning and care for children and young people.

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

Children's hearings are the primary vehicle in which important decisions affecting children and families' civil rights are made. The decision-making framework for children and young people in Scotland goes beyond UNCRC's requirement to have the child's welfare as the primary consideration in decision-making about them; Children's Panel Members and other legal decision-making forums must have the child's welfare as the paramount consideration when making their decisions. We consider that particular consideration must be given to the ways in which UNCRC rights can be fully integrated within the hearing system whilst ensuring that the human rights of other participants are not compromised.

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

CHS is in favour of a duty of compliance. A duty 'to have regard' to UNCRC rights risks diluting attention to specific individual rights where these entail complex and competing responsibilities or investment of additional resources, for example in ensuring family relationships are maintained and supported when children are separated from birth family members.

Nevertheless Panel Members must have the welfare of the child as their paramount consideration when carrying out their functions. They must also balance the rights of children and other family members under both ECHR and UNCRC when making decisions. A children's hearing includes everyone whose civil rights are affected in identifying how best to deal with complex family problems. The framework for incorporation should take account of the distinctive role of the children's hearing, and the complex interface between UNCRC rights, considerations of the child's welfare and the human rights of other family members. Otherwise incorporation may simply increase adversarialism within the hearing system and beyond, giving rise to more litigation without bringing about the step change in culture and practice envisaged.

**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?**

Comments from the Committee should inform how rights can be interpreted and applied by public authorities. They may be influential but, to the extent that the commentary may be designed to apply in a wide range of international contexts which may be very different from Scotland, they should not be binding on Scottish decision-making forums.

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

UNCRC sets out how international human rights should apply to children and young people who, as a category, require special consideration. ECHR jurisprudence provides guidance on how international human rights should be applied in practice. Where ECHR jurisprudence deals with equivalent rights, it provides clarity and consistency of focus.

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

We consider that progress in realising rights guaranteed for all children and young people under UNCRC must continue. Children's rights should inform, add to, and enhance, a universally applicable human rights framework for Scotland, otherwise there is a risk that children are marginalised in the wider consideration of rights rather than their distinctive needs being an integral part.

The consultation paper does not set out an assessment of Scotland's performance to date, or the priorities for change and development in fully realising children's rights. It does not specify how incorporation should and would impact upon, or change government's or public authorities' existing or anticipated policies and operational programmes before completion of a Scottish over-arching framework of rights for all, during the period of scrutiny of human rights activity. Therefore it is difficult to identify what additional impact incorporation in isolation of the work on the wider human rights framework would have on current activity.

We are attracted by the proposal from the First Minister's Human Rights Advisory Group that Scottish civic society and parliament work together to develop a discrete suite of children's rights for Scotland and then Parliament legislates to implement these ensuring that existing domestic legalisation is amended to secure overall compliance. We consider that a national and statutory Human Rights Framework for

Scotland should fully consider and integrate the rights of children and young people alongside rights for everybody else.

***7. We would welcome your view 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 consider this model focuses on enforcement of rights through the courts rather than building a commitment to realising rights through wider culture and practice change. Although neither is mutually exclusive, we consider a broader approach would have greater impact, both in the short and longer term.

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

Although the question may arise in children's hearings, in a model of direct incorporation, the question of whether rights are self-executing would not be appropriate for consideration by decision-makers within the Children's Hearings System. Whether specific rights are self-executing could be clarified within a Scottish scheme of children's rights applying the Convention.

***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?***

To achieve clarity, it is important that information and guidance be made available for both rights holders and duty bearers that explains the status of individual rights in Scotland and that guidance is understandable, widely available and authoritative.

Specific guidance should also be produced for rights holders and duty bearers who are likely to have significant involvement in promoting, realising and enforcing rights in particular circumstances, and this should include the context and operation of children's hearings.

During initial implementation, we would also recommend training and/or briefing sessions for public authorities be used.

***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. As much clarity as possible on rights at an individual level is required; incorporation solely by making specific changes to domestic legislation will not enable the level of clarity provided by having a clear statement of children's rights embodied in legislation.

There is a complex network of primary and secondary legislation which applies to planning and delivery of public services affecting all aspects of family life. Attempting to amend all legislation which may have a bearing on children's lives would take a long time and is unlikely to deliver the cultural and operational changes needed to realise children's rights reliably and consistently.

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

Scotland has a tradition of bringing disparate interests together in a 'cultural conversation model' which could be utilised to discuss how Convention rights can be realised. This could comprise regional conferences, public survey and consultation on the implications of fully incorporating children's rights into every aspect of public service, to enable consensus around a framework for incorporation.

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

We are in favour of transposition of UNCRC rights by developing a clear statement about how UNCRC rights should be realised within the Scottish context. We believe this would not only create rights that best fit with the unique legal decision making system for children and young people we have in Scotland, but the development process would raise the profile of children's rights in Scotland and create a sense of public ownership of the rights guaranteed by UNCRC.

**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. Crucially, a Rights Scheme usefully can and should unite the currently somewhat disparate plans, exercises and measures across disparate legislation and agencies, to make more transparent and accessible how children's rights are embedded in services and practice.

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

A 'sunrise clause' might give both individuals and public authorities clarity and impetus towards assessment of performance against the framework of children's rights, provided that any transitional period is sufficient for public authorities to adequately prepare for any additional duties identified under the legislation. We would prefer a more considered approach with a commencement date fixed on the basis of an

assessment of readiness with delivery of guidance, training and support guaranteed before implementation.

**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.**

We believe a minimum transitional period of 2 years is required in order for the policies and practices of public authorities to undergo thorough consultation, revision, approval, and implementation.

Our own community of volunteers in both the Children's Panel and in our 22 Area Support Teams providing local infrastructure of administration and support will require adequate lead in time for considerable training, guidance and support in applying new rights-based legislation alongside planned changes in existing rules of practice and procedure in hearings whilst maintaining the focus on the welfare of the child which is at the heart of decision-making in the hearing system.

**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 welcome the suggestions made in the consultation document of an awareness raising programme, the development of a participation strategy and an evaluation of the Child Rights and Wellbeing Impact Assessment. We would encourage any implementation measures to be especially mindful of the needs of marginalised and disadvantaged children and young people.

CHS would additionally like to see a robust, structured and resourced national monitoring process to assess the effectiveness of implementation, including the collection of relevant data and evidence. Oversight for such a monitoring process should emphasise engagement with and accountability to children and young people, and direct involvement in monitoring impact. CHS would wish to involve *Our Hearings Our Voice* and other relevant representative groups in assessing children's hearings' compliance with UNCRC.

As the consultation document notes, children's hearings will likely be a significant focus for the initial application of rights under the UNCRC. Children's Hearings Scotland would therefore welcome more detailed dialogue with Scottish Government on the implications of incorporation and implementation on the hearings system.

**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 would welcome both the prominence that this would give to children's rights in the development of legislation and the clarity over how rights may be impacted by proposed legislation.

**18. Do you agree that the Bill should contain a regime which allows rights 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.**

We agree with the principle of ensuring that rights holders are able to challenge acts of public authorities and that this would help protect and enable rights, ensure compliance, and provide a systematic method of testing whether or not rights have been breached by a public body.

We do, however, encourage careful consideration of how any such process interacts with adjacent judicial procedures, for example appeals against decisions made at a children's hearing.

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

No objection in principle. We consider that there should be some assessment of the potential cost implications of the potential for increased litigation for public services and analysis of impact on delivery of support for children and their families.

**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?**

We agree in principle that UNCRC rights should take precedence over provisions in secondary legislation. However extensive secondary legislation governs all aspects of procedure and operation of children's hearings, and the delivery of support and supervision to children looked after by local authorities by virtue of Compulsory Supervision Orders. Children's Panel Members are trained and directed to comply with detailed requirements which enable the conduct of children's hearings to be consistent, fair and transparent and to achieve an effective balance between competing human rights of hearings' participants where decisions by a hearing may affect or restrict exercise of those rights. CHS considers that existing secondary legislation underpinning operation of the Children's Hearing System requires

comprehensive audit and amendment to ensure a robust framework of secondary legislation designed to be compatible with UNCRC and ECHR rights of both child and adult participants in hearings.

**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. Equivalent requirements in relation to ECHR have had a positive effect on the operation of children's hearings and other aspects of public service.

**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 right secured in the Bill? Please explain your views.**

Yes – this has provided helpful clarity and impetus for rights focused policy and practice shifts in the past.

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

No. There is a strong track record of close scrutiny by the courts of compliance with human rights in Scotland in response to challenges brought by rights holders which can be applied to UNCRC rights.

We recognise that incorporation and enforcement of UNCRC rights (including allowing rights holders to challenge acts of public bodies and potentially be awarded financial compensation) may pose challenges for the operation of CHS as a public body and to Hearings as legal tribunals. Any risk is outweighed by the importance of empowering and protecting children and young people and enabling full realisation of their rights. We consider that there should be some analysis of potential impact before finalising the framework for incorporation.