UNCRC Consultation

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. In order to avoid misinterpretation and misrepresentation by public bodies, there must be an explicit duty to comply with the UNCRC in its totality (including the preamble which underlines the role of the family) within the limitations of devolved powers, not simply a pick and mix approach to rights which inevitably results in a hierarchy of rights and rights-holders, as has already become evident due to the selective approach of the Commissioner to upholding Convention rights. Too often a statement of compatibility with the HRA/ECHR has been a rubber-stamping exercise with no satisfactory assessment of impact on individuals' human rights, as exemplified by the embarrassing 'named person' judgment in 2016. In the absence of precisely drafted legislation and adequate parliamentary scrutiny, the proposed incorporation will be equally at risk of being incompatible with Convention rights as a whole by excluding children from realising their rights on an equal basis and perpetuating the pecking order for access to justice. Children's rights are not reserved for 'right-on' groups and there is no justification for the popularity contest approach that permits discrimination against certain rights-holders.

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

Yes. A robust enforcement regime must be included in any rights framework, given the cavalier approach by public bodies to the HRA. If adults are unable to enforce their rights due to access issues (affordability, representation, popularity with rights protection agencies) what hope is there for children and young people? We would advocate a dedicated children's rights tribunal that is easily accessible to CYP and their advocates, with all the powers of an employment tribunal, since children have no effective redress for abuse of their rights (especially to education, privacy, dignity and freedom of expression) in schools and care setting, and no protection under whistleblowing legislation so that they can report wrongdoing without adverse consequences such as permanent exclusion. Access to rights should not be conditional upon capacity tests by public bodies or other vested interests (as in the 2016 Education Act), nor subject to a double standard when it comes to having their personal data mined, recorded and shared at 12 with presumed capacity but without their fully informed (GDPR compliant) consent in power-over settings like schools. Such arbitrary interference with self-defined rights will essentially prevent meaningful incorporation of the Convention and become just another vehicle to impose subjectively assessed, state dictated 'wellbeing' outcomes on children and young people.

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

Yes. A duty to comply is vital if children's rights are to be given meaningful effect through sanctions and enforcement. 'Due regard' is weak and prevents children and

their advocates from challenging decisions quickly and accessibly before harm is compounded. Statutory guidance (which our members rely on to defend their rights) is routinely disregarded by public bodies, many of whom who are cavalier in relation to HRA compliance (or fail to read down so as to ensure compliance), since enforcement is difficult, time-consuming and largely unaffordable. GIRFEC, as an outcomes-based policy, has created insurmountable barriers to children accessing their rights (which they hold by virtue of being young human beings) if they do not happen to coincide with the government's 'desired' template for childhood that public and third sector agencies are all obliged to impose as a universal 'entitlement'. This is particularly problematic for minority groups who routinely face prejudice and discrimination, including the blatant home-eduphobia experienced by our members that is overt across public services. Given the extensive rights-inimical legislation and guidance already in existence, the duty to comply needs to be further strengthened by a duty to read all legislation and policy through a children's human rights lens. Examples include the 2011 Children's Hearings Act, the 2014 Child Protection guidance (where wrong threshold for compulsory intervention facilitates arbitrary interference), the 2016 Education Act (which embeds a double standard regarding capacity), the 2014 CYP Act (gutted by the UK Supreme Court) and the 'remedial' information sharing bill which has since hit the buffers. Any meaningful commitment to the realisation of both children's and adults' human rights will necessitate the removal of all policy and legislative anomalies.

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?

Not sure. There is potential for conflicts of interest where States parties nominate Committee members. Court and tribunal decisions already reference UNCRC, not only ECHR and ECJ rulings, with the UK Supreme Court handing down judgments that uphold children's rights. Interpretation and balancing of rights is the preserve of judges, although due regard might reasonably be given by the courts to UN Committee reports and observations.

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

Courts may be assisted by reports and observations from UN Committees and special rapporteurs, but authoritative rulings by the highest UK courts, the ECtHR, ECJ, and internationally should continue to inform interpretation of UNCRC as they do in respect of the ECHR. A full rights-proofing audit of current legislation and policy would obviously also assist by removing obvious anomalies.

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. UNCRC is ready-made and ratified, and complies with the HRA so as to be uncontroversial for those who believe children have all of the rights outlined in the Convention (not just a pre-approved selection from the children's menu).

Fundamental incompatibilities can often exist between self-defined rights and state-dictated outcomes that are imposed on children via the GIRFEC policy, whose core information-sharing provisions have been found unlawful but are nevertheless being implemented in contravention of both the HRA and Data Protection Act. As long as the government denies such incompatibilities and fails to acknowledge the ruling of the Supreme Court, namely that Article 3 UNCRC (promotion of wellbeing) does not empower its interference with citizens' negative rights under Article 8 ECHR, it is likely that any statutory human rights framework for Scotland will fall foul of the same misconstrual of the overarching rights framework as occurred with the delinquent sections of the CYP Act. In other words, it is too dangerous to depart from the Convention itself, whose preamble and Article 18 affirm that: "Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be **their** basic concern." [emphasis in Supreme Court 'named person' judgment]

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).

This model has been put forward without adequate engagement or any consultation with children, young people and their families who are not on the authors' 'favourites' list. Notably, the same authors failed to stand up for children's rights when the 2014 CYP Act was pushed through parliament containing unlawful provisions that failed to protect children from state interference, and have continued to support rights-disrespecting policies and practices in the wake of the damning court ruling. Questions have rightly been asked about the independence of third sector groups, and indeed the children's commissioner who has refused to engage with children who have asked for assistance in having their Article 16 rights upheld. Our concern remains the selective approach by state funded organisations towards upholding the universal UNCRC, which has already led to a pecking order of rights, rights-holders and consultees in advance of incorporation into domestic law. Any concocted 'suite of children's rights' that is based on a rights-inimical state approved outcomes model is highly likely to dilute the Convention to benefit vested interests and appease the loudest lobby groups. This has been the case with GIRFEC, now considered a toxic brand by many of those whose children have been damaged by its implementation, most notably in Highland where children struggle to obtain advocacy, legal representation and anything resembling justice. The central belt centric nature of policy-making, and continuing failure to address the barriers faced and concerns raised by grass-roots groups and 'seldom heard' (i.e. ignored) communities, also effectively excludes a large proportion of Scots and perpetuates the blinkered approach that has already led to adverse unintended, but entirely avoidable, consequences.

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

This is a matter for the courts to determine. The statute book and all policies should be audited for UNCRC compliance as a matter of priority, given that too many people

believe that respecting and upholding rights is synonymous with enforcing state-approved outcomes.

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?

Rights-holders should have the means to enforce their rights, preferably through an independent tribunal which operates within the parameters set by the Scotland Act. It is already incumbent upon competent duty-bearers to understand and apply the law within the limitations imposed by the Scotland Act and other overarching legislation, although this has unfortunately not been the case in respect of the HRA and GDPR and has given rise to judicial reviews of legislation, including the CP Act. Once group action becomes available, more legal challenges are to be expected.

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. Direct incorporation of the UNCRC in its totality is the only way to ensure no departure or dilution, deliberate or otherwise, from the underpinning principles of universality, inalienability and self-determination. Rights, like children, are not collectively owned but individually held, self-defined and experienced, and should never be subject to state gate-keeping or authorisation. They exist for everyone, even members of unpopular minorities, by virtue of being human. As the courts have repeatedly affirmed, “the child is not the mere creature of the State”.

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

We consider that such a model is inappropriate, given the risks of erosion or dilution of both UNCRC and ECHR rights and the failure of such a model in the examples cited. It could also not be achieved within the life of this parliament if citizens were to be meaningfully involved in such a seismic shift in the underpinning framework. Given that this consultation is seen as inaccessible and exclusive by most lay people due to the complex subject matter, a great deal of work would need to be done to enable greater understanding and engagement. Most citizens are denied participation, or are discouraged from participation, by being excluded from the established ‘magic circle’ of favoured, state funded consultees, whether through geographical distance or isolation, caring responsibilities, disabilities and/or socio-economic barriers, all of which disproportionately affect members of minority communities whose rights are most often trampled. In a striking parallel with Scots public policy that continues to encourage the gathering and sharing of citizens’ personal data without lawful basis despite a court defeat, it is of particular note that the Irish data protection supervisor, in ordering the deletion of 3.2m illegally obtained citizen records via a scheme that was described as ‘mandatory but not compulsory’, has also highlighted the disproportionate detriment to the most vulnerable groups

who were forced to cede their protected Article 8/GDPR rights in order to obtain services.

'Designed and owned' by the people of Scotland and civic society means, as many of our members have already experienced (as policy victims), that only those who agree with a pre-determined outcome, or are paid to agree, will be listened to. Those who opposed unlawful universal data processing provisions in the 2014 CYP Act were wrongly maligned to the point of defamation for seeking to upholding human rights, despite the Joint Committee on Human Rights having previously stated that "if the justification for information-sharing about children is that it is always proportionate where the purpose is to identify children who need welfare services, there is no meaningful content left to a child's Article 8 right to privacy and confidentiality in their personal information". A statutory framework created by those who have already misconstrued Article 3 UNCRC to permit arbitrary interference with Article 8 ECHR and Articles 12, 16 and 18 UNCRC could well lead to further abuses of power by those sharing a ruling regime's worldview that is alien to some rights-holders. As we have seen, public bodies are failing on an industrial scale to give effect to human rights and data protection rights by applying domestic legislation and policy that do not comply with overarching laws that the Scottish Parliament has no powers to change.

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

Direct incorporation is our preferred model as there is less room for dilution, misinterpretation or mis-application of the Convention that could lead to abuses of power. There are examples of current legislation and policy that do not comply with the HRA, which does not bode well for anything less than direct incorporation of the UNCRC, and the absence of an enforcement regime would render it equally moot.

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.

No. This would be superfluous virtue-signalling when we have seen inaction on the part of those who are tasked with upholding the rights of children and have allowed a hierarchy of rights and a pecking order of rights-holders to emerge on the basis of selective consultation and/or acquiescence to well-funded lobby groups. Children's rights should not be subject to, or conditional upon, state approved outcomes, and children's rights impact assessments (CRIA) should not be hijacked to include the nebulous notion of wellbeing (CRWIA) which has no precise definition or relevance to the exercise of individual rights. Self-defined rights may legitimately not coincide with wellbeing (or more accurately well-behaving) outcomes, thus giving rise to unjustifiable constraints and denial of self-agency. Indoctrinating children according to the ruling regime's worldview is not comaptible with promoting their rights and risks being branded totalitarian.

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

Yes. Current legislation and policies will need to be comprehensively audited and amended where necessary to ensure compatibility with the UNCRC once incorporated, as well as with the HRA and GDPR which should already be guaranteed but falls embarrassingly short.

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.

This legislation is a priority for children who currently have no access to redress and are rightly impatient for a mechanism to prevent the harms inflicted on them by rights-abusing policies. Given the enormity of the task, a realistic timescale might be 18-24 months for public bodies to undertake the necessary preparations which might extend into the next parliamentary session. A legal challenge to the legislation cannot be ruled out in the event of departure from Convention rights as ratified.

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.

Don't Know. We are not convinced that the additional non-legislative activities described are essentially rights-respecting, but would argue that mandatory training for duty bearers by independent human rights experts, with specialist input from those who defend the rights of minority communities and 'seldom heard' (or routinely ignored) groups, is essential. The fundamental recognition that children do not belong to the state (or 'Scotland') but to themselves, with support from their families in keeping with their evolving capacities, is sadly lacking throughout. 'Going further' than the UNCRC into the realms of arbitrary interference with rights has already led to a crushing defeat in the Supreme Court and direct harm to children and families, so any repetition must be avoided and all public bodies must be fully cognisant of the limits of their powers over children. Schools and other state care settings represent a particular risk to children's rights, given they are founded on compulsion, as UN special rapporteur Katarina Tomasevski noted: "The objective of getting all school-aged children to school and keeping them there till they attain the minimum defined in compulsory education is routinely used in the sector of education, but this objective does not necessarily conform to human rights requirements. In a country where all school-aged children are in school, free of charge, for the full duration of compulsory education, the right to education may be denied or violated. The core human rights standards for education include respect of freedom. The respect of parents' freedom to educate their children according to their vision of what education should be has been part of international human rights standards since their very emergence."

We are sceptical about some of the well-meaning examples of 'going further' in the wake of the Supreme Court's ruling against the government's previous efforts to do so. There is a distinct lack of clarity as to what might be considered 'demonstrably beneficial' and by whom. Similarly, 'co-production' is simply shorthand for enforcing pre-determined outcomes, and 'wellbeing' has no place in a children's rights impact

assessment when its inclusion effectively denies children's agency and autonomy. The identification and touting of 'young leaders' as being somehow representative of all children and young people in Scotland is also problematic, given the barriers to participation, especially among those from minority groups and those at socio-economic disadvantage. Strategic 'mainstreaming' also appears to relate to imposing outcomes rather than respecting individual rights, which form the basis of the Convention. Unfortunate acronym aside, the children's rights action plan is not considered helpful. While the aspirations appear laudable, the actions described are open to wide and subjective interpretation and implementation that may infringe rather than support **every child** regardless of background in realising Convention 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. However, simply making a statement of compatibility will be inadequate without thorough consideration of all the potential impacts on children's rights, including those of marginalised groups. Children's rights and equality impact assessments should be undertaken and evidence produced to support any such statement. Formal representations from concerned groups who warned of HRA and data protection incompatibility went unheeded in respect of the 2014 CYP Act, demonstrating the flimsiness of such a 'safeguard' without additional scrutiny and robust evidence.

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. Unless such a regime is included, incorporation would be as meaningless as the 'rights-respecting' status boasted by organisations, including schools, which are in fact outcomes-focused and largely immune from challenge. Moreover, some of those who seek to defend their rights and report infringements are likely to experience victimisation and suffer further harm as a direct result.

The creation of an independent children's rights tribunal with availability of legal aid advocacy and representation would, in our view, facilitate the hearing of complaints and access to remedies in a timely manner and should treat victimisation as an aggravated assault on children's rights along similar lines as enhanced employment tribunal remedies for findings of discrimination and victimisation. In order to ensure inclusivity, there should be no denial of access to justice through invoking exemptions such as a wellbeing clause or any other discriminatory measure.

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. Financial compensation should be awarded in similar terms, but access to justice should be more straightforward and affordable for all children and young people who wish to seek redress. A dedicated children's rights tribunal could feasibly set aside decisions and award compensation for infringements of any Convention rights by public bodies, including by schools and care settings. The current complaints system is unwieldly, while regulatory bodies and 'watchdogs' are seen as partial with little appetite for enforcement action.

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. UNCRC rights must take precedence if they are to be practically realised, given that there are so many examples of secondary legislation that are fundamentally incompatible. While the HRA affords similar protections for human rights in principle, and clearly also applies to children, the lack of accessible means to enforce these rights is a difficulty that is equally likely to be encountered in relation to UNCRC rights. There is also strong cultural resistance to children exercising their rights in settings such as schools, which are founded on compulsion and outcomes-based education as opposed to respect for children's autonomy.

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. Unfortunately, legislation is not currently read and applied in such a way as to be compatible with non-negotiable ECHR-derived rights under the HRA, which does not bode well for the realisation of UNCRC rights. By way of example, the 2016 Supreme Court ruling that definitively interpreted Article 8 in relation to the 2014 CYP Act is still not being applied by public bodies or government three years on, and the defective legislation and policy have not been remedied, leaving children's and families' rights unprotected. Even more concerning is the fact that these rights have been systematically breached since 2013, which has prompted a parliamentary petition for a public inquiry into the human rights impact of the underlying policy and lack of accountability for the enactment of defective legislation.

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. Existing authoritative rulings by the highest courts which reference UNCRC rights should apply to all ASPs, and the courts should determine compatibility where this is uncertain or is challenged by rights holders and advocates.

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

No. The AXA test of sufficient interest should apply equally to those bringing cases to secure UNCRC rights, with both individuals and organisations permitted to initiate

and intervene in actions. Consideration might also be given to extending time limits for children and young people to bring cases as they should not face unnecessary barriers or discrimination on the basis of their age to challenging breaches of their rights as they attain maturity and their capacity to do so evolves.