

## CONSULTATION RESPONSE TO INCORPORATING THE UNCRC INTO DOMESTIC LAW

Children's Health Scotland (CHS) welcomes the commitment made by the Scottish Government to incorporate the UNCRC into Scots law before the end of this session of parliament in 2021 and would like to see greater visibility given to the **health rights** of children and young people.

At CHS our aim is for all children and young people to have the best possible start in life, so that they grow up happy, healthy and safe with the opportunity to fulfil their potential. We are responsible for continually driving awareness of children's health in Scotland. How we do this is informed by our Vision, which is *"for every child and young person in Scotland to realise their right to the best quality healthcare"* and our Purpose, which is *"to make sure children and young people get the treatment they need"*.

CHS is the only charity in Scotland dedicated to informing, promoting and campaigning on behalf of the needs of all children and young people within our healthcare system. We work to inform children and young people, and their parents and carers of:

- Health rights and responsibilities.
- Where to access information and support.
- What they should expect from health service providers.

Ultimately, we want to empower children and young people to participate in decisions about their treatment and care. To achieve this, we work in partnership with children and young people, the Scottish Government, NHS, the voluntary sector and health professionals so that health services are planned in child-focused environments that are equipped with appropriate ratios of trained staff. We actively promote the use of evidence-based practice to provide high quality healthcare services at home and in hospital, while working to obtain equality of services and access across Scotland.

Please note that comments made by our young volunteer are noted separately.

## **Theme 1: Legal mechanisms for incorporating the UNCRC into domestic law**

### **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?**

Children's Health Scotland (CHS) supports an approach to the incorporation of the UNCRC that ensures children's human rights are binding and not just guiding and that all children and young people receive the highest attainable standard of health. With a firm focus on the right of children and young people to receive the best quality healthcare, elements of the HRA framework that we believe should be included in the model for incorporation of the UNCRC in domestic law include:

- Article 2 of the European Convention of Human Rights (ECHR) which provides that "Everyone's right to life shall be protected by law". The provisions of the Human Rights Act 1998 (HRA 1998) ensure the protection of this right and provides a domestic remedy for its breach. CHS believes there is no circumstance where it is acceptable for the state to use force against a child that results in his or her death.
- Article 5 declares the right to liberty and security. This has resonance for the mental health and wellbeing of children and young people, particularly those who may be in secure accommodation, and where their right to dignity and respect may be compromised. NHS boards and staff training could be usefully revised to include examples of what upholding a child's right to liberty and security means in practice. This will ensure that improvements can be made through the implementation of appropriate policy and practice.
- Article 14 of the HRA states the prohibition of discrimination - people have the right not to be treated differently because of their sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status in relation to the securing of the fundamental rights and freedoms set out in the ECHR. This is not a free-standing right but can be cited in relation to other rights. CHS aims to ensure that every child has the right to the highest attainable standard of health and this right is reinforced with a free-standing article on the prohibition of discrimination and the additional protections afforded via the UK's Equality Act 2010. Children and young people should have equal access to rights whatever their status. This has implications for reserved and devolved areas.

CHS agrees that there are particular facets of the Scottish legal system that will need to be borne in mind in the context of incorporation of the UNCRC, for example:

- The Children's Hearings System is Scotland's unique care and justice system for children and young people. One of its fundamental principles is that children and young people who commit offences, and children and young people who need care and protection, are supported through the same system.

The Children's Hearings System exists to ensure the safety and wellbeing of vulnerable children and young people. At its heart are three fundamental guiding principles:

- The welfare and best interests of the child are paramount.
- The voice of the child - consideration should be given to the child's views.
- No order principle - no court should make an order relating to a child and no children's hearing should make a supervision requirement unless the court or hearing considers that to do so would be better for the child than making no order or supervision requirement at all.

In many respects, this is a successful embodiment of the rights enshrined in the UNCRC, so the method of incorporation will need to be mindful of the unique judicial context in Scotland, where rights under the UNCRC will often have to be applied, in the first instance, by a children's hearing.

CHS also agrees that the constitutional setting also raises particular issues in Scotland, especially concerning the operation of the Scotland Act 1998 and the HRA and how these Acts would interact with the Bill. There are areas covered by the UNCRC where the Parliament's ability to legislate will be restricted and it will also be important to consider how to provide as much clarity as possible to rights holders and duty bearers as it is they who will, in the first instance, have to navigate the interaction between the rights set out in the UNCRC and existing legislation, and also, in some circumstances, to determine whether the rights at issue relate to reserved or devolved matters under the Scotland Act 1998.

Incorporating the free-standing rights into Scottish law may future proof children's rights and focus their application.

The incorporation of the UNCRC into domestic law is complex. CHS would encourage a simple, quick, responsive, flexible, reflective, understandable and accessible approach to implementation and application.

## **2. Are there any other aspects that should be included in the framework?**

Article 1 of the UNCRC defines a child as anyone under the age of 18. However, there is no single law that defines the age of a child across the UK. Specific age limits are set out relating to different areas of policy. For example:

- 13/14 years old for part-time employment;
- 16 years for full-time employment, pay tax and – with parental consent – leave home, get married or join the armed forces;
- 17 years able to drive a car or motorbike; and
- 18 years able to serve on a jury.

It is however commonly agreed that a child is up to the age of 18.

CHS would agree with the UNCRC definition of a child to their 18th birthday and to extend the UNCRC age protection to vulnerable young people older than 18 years old. For example, looked after and accommodated children and young people and disabled children and children living with long term conditions. CHS notes that young people up to the age of 21 and 26 are already provided for (continue to be supported) under the Children and Young People Scotland Act. How will Article 1 be treated if the UNCRC is successfully incorporated?

To achieve the aim of a Scotland “*where policy, law and decision making takes account of children’s rights and where all children have a voice and are empowered not just to know and understand their rights, but also to assert and defend those rights and the rights of others*” CHS would like children (including infants) and young people to have access to independent advocacy with relevant free legal advice offered directly to them.

The HRA and EHRC ask States to give “further effect to” these rights. As a children’s health rights defender, we would like to see this intention strengthened through the incorporation of the UNCRC into Scottish domestic law. This would increase accountability and provide a clear direction for action. The following points were also raised as we considered the consultation and what the incorporation of rights will look like in practice:

- A rights-based culture embedded in a robust legal framework must not only rely on the “voice” of children and young people to defend it. There needs to be a legal responsibility for the implementation for children’s rights that will sit with Scottish Government, public bodies, and the private and third sector. Children, young people, families and third parties can raise concerns where rights are not being upheld and use the law justifiably when children’s rights are breached. (Justification is used within the Equality Act 2010. <https://www.citizensadvice.org.uk/law-and-courts/discrimination/what-are-the-different-types-of-discrimination/justifying-discrimination/>)
- Current approaches and existing legislation have helped to move towards a rights-based approach but are not sufficiently robust to ensure organisations change the way they currently work towards children’s rights, particularly in relation to the right to the highest attainable standard of health. Therefore, an approach that moves from giving “effect to” to full and direct legal incorporation is supported.
- A commitment to funding advocacy and support for children and young people would be welcomed to ensure all children can claim their rights.
- Article 24 - the right to the highest attainable standard of health is undermined by poverty and disadvantage that threatens, survival, protection and development. It is important that the incorporation of rights into domestic law addresses the barriers, inequality and disadvantage, that undermine the rights it aims to support. ‘Knowing your rights’ and UNCRC legislation may make little difference to a child’s day to day experience.

Consideration of the barriers, attitudes and treatment that undermine its universalism should be stated and remedying actions included.

There needs to be:

- A clear statement and a national promotional campaign that explains how the UNCRC is a tool to achieve tangible outcomes for children beyond the process of embedding a rights-based approach.
- Clear guidance on the role of: government; parent and carers; and medical specialists who are acting in the “best interests of the child”.
- Clear guidance to differentiate “a want” from “a right”. How as adults and institutions can we drill down into children’s rights if the “best interests of the child” defence is used? Where will the lines be drawn as recent English legal cases raise, for example, Charlie Gard, Ayesha King and Alfie Evans cases?

CHS would like to see information on how rights will be balanced or justified and the implications for implementation. How will decisions be made and by whom, for example? e.g. Muslim parents in Birmingham challenging rights to what education is or isn’t and a child’s right to education (article 28); be safe (article 19), an identity (article 15,17,8); parental roles and duty bearers act in the best interests of the child; and what “best interest” means, and who decides?

<https://www.bbc.co.uk/programmes/m00057m8>

What are the implications for universalism and conditionality in areas of devolved and reserved legislation? For example, health is a devolved responsibility, immigration is reserved. What are the implications for Asylum seeker, refugee and migrant children’s health? (Article 22). The UK Government and NHS inform set out who can, based on their status, access health services. Asylum seekers and refugees can access as if an “ordinary resident” but other migrants who do not or cannot pay the surcharge or have not paid enough to access secondary care may impact their child’s health and their right to it. In this situation a child’s right to the highest attainable standard of health is conditional upon their parents’ status and their ability to pay.

Doctors take the Hippocratic oath which does not differentiate children on their status but acts to ensure health in all cases. In England, Doctors of the World, World Health Organisation and the UK Equality and Human Rights Commission (EHCR) already see the implications of immigration legislation on access to health services and implications for children’s health. <https://www.equalityhumanrights.com/en/our-work/news/asylum-seekers-britain-unable-access-healthcare>

CHS asks the consultation to consider:

- Using section 30 of the Scotland Act 1998 - is it possible for children’s rights to be considered, agreed and placed outside of reserved and devolved matters?
- The implications and protections for NHS and other staff who act to uphold universal UNCRC against other laws?

- Approach and protections for rights defenders such as the use of ‘firewalls’ and safe surgeries being used in England against a hostile immigration approach. What will Scotland’s approach be?

### **3. Do you agree that the framework for incorporation should include a “duty to comply” with the UNCRC rights?**

Yes, CHS believes the framework should include a “duty to comply” which imposes duties on public authorities to ensure that UNCRC rights are worked into policy and practice and enforceable in the courts. It should be unlawful for a public authority to act in a way which is incompatible with the UNCRC rights and there should be a legal mechanism designed to promote deliberative, proactive processes to achieve implementation of the UNCRC rather than providing redress for UNCRC violations if they occur. This will ensure that non-negotiable and legally binding standards and obligations in respect of all aspects of children’s lives are upheld - from respecting and promoting fundamental principles such as the best interests of the child and the child’s right to be heard, to rights in areas such as our area of the health of children and young people.

CHS supports an approach which goes beyond lip service to ensure tangible rights-based outcomes for children’s health and ensure certainty of legal recourse when they do not.

For example, CHS raises the following examples and questions for consideration:

- A child’s right to receive education when absent from school or college due to illness either at home or hospital and additionally to ensure a child’s right to an education is not breached when schools are unable to provide health management, care and treatment to keep a child at school.
- The “duty to comply” should protect the specific needs of particular groups of children and young people who may experience discrimination. For example, children from ethnic minority populations including Gypsy Travellers and Asylum seekers and refugees, disabled children and young people, looked after and accommodated children, and LGBTQi children and young people etc. as well as consideration of the interplay of intersectionality across religion, culture and sex etc.
- As children and young people are not a homogeneous group, the Equality and Human Rights Commission could have a role to monitor the fair and equitable application of the UNCRC.
- The Equality Act 2010 places duties on public bodies and a legal requirement to produce Equality Impact analysis using evidence and consultation. This has facilitated change towards improved outcomes. A similar approach to place a duty on the UNCRC duty bearers could be a tested and understood approach that can be quickly applied.

- A “duty to comply” could usefully be underpinned by Child Rights and Wellbeing Impact Analysis (CRWIA), to facilitate a whole system approach. This would provide transparency: encourage children and young people, and support learning and development amongst duty bearers.
- Specialist organisations like CHS in collaboration with the European Association for Children in Hospital (EACH), the Royal College of Paediatrics and Child Health (RCPCH), the Scottish Child Law Centre and CLAN Childlaw, etc. could inform the health rights into practice discussion. Our health e-learning tool and other resources are already available.
- There needs to be clarity for children and young people and their families regarding legal redress and the support available. This should be produced in plain English, with access to interpreters and accessible formats.
- The Equality Act 2010- reasonable adjustment defence accepts consideration of budget and resources as justifiable for non-action, depending upon the organisation or business. Will a justifiable defence be a function of the incorporation as it passes into law? Could NHS Boards, in this instance, fail on a child’s right to the highest attainable standard of health because of a lack of resources for treatments and medicines. Will health rights also be inequitable depending upon postcode? How will organisations show due process and accountability?
- On a related point will some children be unable to access their right to the highest attainable standard of health because of the health premium and the status of their parents? How will this be managed to ensure a child’s right to health?

**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 party to the UNCRC should be given in our domestic law?**

As the UN Committee on the Rights of the Child is a body of independent experts, nominated and elected by states which are parties to the UNCRC, CHS would like their General Comments to have a legal status, if relevant to Scottish Law. Learning from others will help build understanding and help to identify perhaps unintended consequences regarding the UNCRC’s application. CHS endorses an approach that involves the knowledge and expertise of third sector organisations and Human Right legal specialists to interpret and inform the law too.

General Comments are issued to help states with their implementation of the UNCRC and provide authoritative guidance, which if applicable, should become legally binding in Scotland. General Comments will give weight and support legal practice and their application in service provision should achieve better outcomes for children and young people. It will ensure children’s rights are consistent across the world. [http://www.euro.who.int/\\_data/assets/pdf\\_file/0004/392773/ermh-eng.pdf?ua=1](http://www.euro.who.int/_data/assets/pdf_file/0004/392773/ermh-eng.pdf?ua=1)

Our understanding of the Observations of the Committee is that it is not a judicial body. Its function is to examine the progress made by State Parties towards achieving the realisation of the obligations undertaken in the UNCRC. Observations are not themselves legally binding in international law and therefore in Scotland we think they should only be used as guidance and not given legal status.

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

The Children (Scotland) Act 1995 which provides a major part of the legal framework for child welfare and protection in Scotland could be a possible aid to provide assistance to the courts. There are three main themes that run through the Act:

- The child's views should be taken into account in decisions that affect their lives;
- The welfare of the child is the paramount consideration;
- No court or hearing should make an order, unless the court or hearing considers that to do so would be better for the child than making no order at all.

Criminal law protects children as it does adults, and some legislation specifically protects children, for example section 1 of the Children and Young Persons Act 1933 or the Protection of Children Act 1978. These could be other possible aids to provide assistance to the courts. Where services for children are inspected, the inspection programme serves to protect children.

There is also the possibility of complaint to the appropriate ombudsman where there appears to have been maladministration.

A child should be able to receive legal aid to fund their representation if they have the ability to do so. This includes directly instructing a solicitor to represent them in court, without the need for a guardian. In such cases legal aid should not be subject to a means and merits test for children.

Guidance already exists to address the question of “what children’s rights look like in practice” – a steer towards good practice and thoughtful consideration for professionals. The EACH Charter, eLearning, other resources reinforce rights respecting practice.

CHS has developed an eLearning resource on Children and Young People’s Health Rights which has been endorsed by both the Scottish Government’s Rights Team and the GIRFEC Team.

[www.enetlearn.com/childhealthscot](http://www.enetlearn.com/childhealthscot)

Other possible aids to provide assistance to courts might be: contextual case studies; EHRC developed guidance; decision, question, thinking, flow charts; case studies; and an approach similar to CRWIA to ensure robust consideration of the “right” and cross-cutting rights.



As well as aids to assist the courts, CHS would like to see the development of information to support children and young people and their families to understand the legal system/process to which they may take a rights-based case.

**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?**

Yes.

Although the creation of a new statutory human rights framework for Scotland would incorporate rights from the United Nations and its human rights treaties and conventions, including the UNCRC into Scots Law, it will not be legislated until the commencement of the next term of the Scottish Parliament in 2021. Right now, there is a willingness to incorporate the UN's 'gold standard' for children's rights into Scots law to improve the lives of children and young people and further the promise to make Scotland the best place to grow up in. Therefore, CHS would like the Scottish Parliament to "push forward" with incorporation and, when possible, ensure it dovetails with the new statutory human rights framework for Scotland. CHS would like to see measures in place to ensure that all children and young people regardless of background and circumstances are supported and empowered to input their views into this incorporation.

**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).**

CHS commends the work of the Children and Young People's Commissioner for Scotland and Together on producing the Draft Children's Rights (Scotland) Bill. We support its objectives of: the desire to incorporate the UNCRC in Scotland; the aim of ensuring a proactive culture of children's rights across government at all levels in Scotland; the aim of providing redress where children's rights are breached; and the need to ensure that the Scottish Government at all levels is able to act in the best interests of all children in Scotland.

CHS agrees that in order to effectively incorporate the UNCRC in Scotland, legislation needs to:

- a. Regulate policy and legislative decision-making at an early stage in development (a proactive approach).
- b. Provide an effective mechanism for redress where children's rights are breached (a reactive approach).

CHS would like to see the health rights of children and young people given greater visibility in the model when incorporating the UNCRC into Scots law.

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

Every child and young person is unique and because rights are framed in general terms we know it will not be easy to predict the conclusion courts may reach in any particular case. This will lead to greater uncertainty for rights holders and duty bearers. However, CHS believes that incorporating the UN's 'gold standard' for children's rights into Scots law will provide a robust legal status for decision making and action, which are key to making a difference to children's lives. Therefore we think courts should be given the power to decide whether or not particular rights are "self-executing" and to decide authoritatively, on a case by case basis, on the correct interpretation of the rights and duties set out in the UNCRC so that they are always in the best interests of a child or young person.

## **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?**

CHS would like training and guidance to be provided for all those responsible for UNCRC incorporation into Scots law – especially in relation to the health rights of children and young people. We strongly believe that established organisations should be supported to provide training and guidance, rather than creating new bodies. This should be supported with appropriate long-term funding.

A communications and awareness programme would provide clear information to children and young people on what their rights are and what actions are taking place with regards to the incorporation of UNCRC, key dates, and why it is happening. In essence training and awareness is required at every level from legislation to case law, and policy development to service provision for children and young people, as effective implementation will be contingent upon awareness of children's rights. This requires an understanding of children and young people as the subject of rights, to be treated with dignity and respect and to exert influence over their own lives.

## **10. Do you think we are right to reject incorporating the UNCRC solely by making specific changes to domestic legislation?**

Yes. This will ensure that the UNCRC itself is part of Scots law as opposed to a version of it (which may have in some way become "lost in translation" or varied as domestic law is amended to incorporate it).

Furthermore, CHS believes we should directly incorporate the substantive articles of the UNCRC and its Optional Protocols whilst considering where improvements could be made in relation to the Scottish context as detailed in Article 41: If your country's own laws give children more rights than the Convention does, then your country should stick to those laws. This is a unique opportunity to create children's rights with the Bill applying a framework of duties and requirements to those rights.

As the lead organisation for raising public awareness and understanding of the health rights of children and young people, CHS would strongly recommend giving additional prominence to health rights throughout the process.

Therefore, we would like the Young People's EACH (European Association for Children in Scotland) Charter, which is based on the original EACH Charter, to be embedded into the framework of incorporation of the UNCRC to domestic Scots law. EACH is currently mapped to the UNCRC and the well-being indicators from the Getting it right for every child (GIRFEC) approach in our e-Learning resource and can therefore support awareness raising of Children and Young People's Health Rights. [www.enetlearn.com/childhealthscot](http://www.enetlearn.com/childhealthscot)

CHS supports the fact that incorporation is most effective when it is implemented in a way that best complements each individual country's legal system, policies and practices. In the Scottish context, constitutional constraints need to be considered, as some of the UNCRC rights fall within areas of law reserved to the UK Parliament. There are also areas where rights within the UNCRC will be affected both by laws reserved to the UK Parliament and those devolved to the Parliament. Similarly, there are significant overlaps between the rights enshrined in the HRA and the ECHR on one hand and the UNCRC on the other. As a result, the approach to incorporation of the UNCRC must fit within both the devolution settlement, and the human rights framework established by the HRA.

There are a number of additional pieces of Scottish legislation which embody the UNCRC in Scots Law such as:

- The Children (Scotland) Act 1995 (which provides a major part of the legal framework for child welfare and protection in Scotland) as it articulates the UNCRC Articles 1, 3, 5, 9, 12, 18, and 20.

Section 11 of the Children (Scotland) Act 1995 is an example of legislation which goes further than the UNCRC. This states that when considering whether or not to make an order on matters such as child contact and residence in relation to looked after and accommodated children, and parental responsibilities and rights, the court "shall regard the welfare of the child concerned as its paramount consideration". This compares to Article 3 of the UNCRC (best interests of the child) which provides that "the best interests of the child shall be a primary consideration" when considering all actions concerning children.

- Section 2 of the Mental Health (Care and Treatment) (Scotland) Act 2003 makes specific provisions as regards securing the welfare of any child in respect of care or treatment given under the Act. This legislation is based on a set of rights and principles which promotes patient's rights which includes that any function should be carried out for the maximum benefit of the patient, with the minimum necessary restriction on the freedom of the patient and having regard to the views of the patient.

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

CHS welcomes 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 do not support the suggested “transposition model” of incorporation. If it must be considered, then CHS would recommend a suite of children’s rights using the wording of the UNCRC to ensure clarity and effectiveness.

To engage people effectively and efficiently, the suite of children’s rights would need to be drafted and then clear and specific questions about it should be put out for wide-ranging consultation. The consultation must be made known on a national scale for meaningful engagement, and accessible to all relevant persons and bodies. To be effective, this would be necessarily time-consuming.

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

Our preferred model for incorporating the UNCRC into domestic law is the Children’s Rights (Scotland) Bill, developed by an Expert Advisory Group convened by Together and the Children and Young People Commissioner Scotland.

This is a “gold standard” model which:

- Fully and directly incorporates the UNCRC and its Optional Protocols into Scots law.
- Includes a duty on public authorities to comply with the UNCRC and its Optional Protocols.
- Ensures the UNCRC is accorded high priority in the Scottish domestic legal system, in particular when in conflict with domestic legislation.

This model will improve outcomes for children and young people and help make Scotland the best place in the world to grow up. Article 41 will ensure that the incorporation is done in the best interest of children and young people in Scotland.

### **Theme 2: Embedding Children’s Rights in public services**

## **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?**

Yes. CHS believes a Children’s Right Scheme (CRS), similar to the Welsh example, should be included in this legislation. It is our understanding that this type of scheme will set out the practical arrangements by which the UNCRC is embedded in practice and demonstrate that robust and transparent processes are in place to support the implementation of legislative duties in relation to UNCRC rights. A CRS would demonstrate a commitment from the Scottish Government and hold ministers to account.

Many of the aspects in the Welsh example of a Children's Rights Scheme are present around the Children and Young People (Scotland) Act 2014 as mentioned in the Consultation Document (page 24). For example: Scotland already promotes public awareness and understanding of children's rights (although this can be improved with regards to healthcare rights); has reporting mechanisms for Ministers and public authorities; uses CRWIA; and involves the Children's Commissioner in relation to investigations. So, even if these were embedded in a CRS, it is still very debatable whether it would make any real difference to children and young people.

To explain – something which is already in place in Scotland, but actual practice varies is the CRWIA. Although this exists with guidance and training in place, its use so far, is on a voluntary basis. As a result, the perception is that it is not widely used.

A Scottish Children's Rights Scheme would ensure that:

- Scotland's most vulnerable children are rights holders in the same way as other children and receive the equality protections. This may include looked after and accommodated children, asylum-seeker and refugee children and those with mental health difficulties.
- All children are confident to exercise their rights without fear of victimisation, poor treatment, or retribution. It would also ensure that consideration is given to:
  - How children could report poor practice.
  - How staff could be protected and supported to whistle blow.
- All existing materials to raise public awareness and understanding on the rights of children and young people are brought together and where appropriate made mandatory with a compliance mechanism. CHS believes that this would assist in supporting the implementation of legislative duties in relation to the UNCRC.

With the aim of raising public awareness and understanding of the rights of children and young people, CHS has already developed a digital eLearning Resource on the Health Rights of Children and Young People to assist practitioners to better understand the UNCRC rights in relation to the wellbeing indicators and their application in their area of practice.

- Like the Welsh model, stakeholder engagement is undertaken to help shape the Scheme. Additionally, CRWIA conducted for legislation and policy proposals, and mandatory learning and development for public bodies including NHS staff, Police, teachers; third sector organisations; and housing providers. This could be extended to everyone who has a connection with children's rights.

We welcome an approach that encourages and enables the embedding of children's rights and one which mitigates the potential of a "chilling effect" and hesitancy of duty bearers.

## **Children's Rights Scheme**

### **Response from Cameron Elliot (17), Youth Volunteer with CHS**

Since transparency is provided, all audiences including children can read the legislation. This displays how Article 42 is represented as the rights children must be kept aware of can be seen through their ability to understand the information that is relevant to them. This also represents EACH Charter Point 4 in that young people have the health-related right to information in a way they understand as the latter contained in the legislation is easily accessible to children and young people, therefore that right would be upheld. If children and young people do not understand the impact the legislation will have on them, they will be unable to invoke their rights as they will not know when they have been violated, therefore the simplest language as mentioned is crucial. This shows why children's rights should be implemented as this will act as another way for children to gain knowledge as to their rights, therefore allowing them to best uphold them for their own protection.

The CRWIA links into many principles included in the consultation. This assessment would need to be carried out to ensure the legislative content is compatible with children's rights. Additionally, the youth advisory group mentioned should be consulted as they directly represent children and young people being of a similar age group. The legislation would have to be heavily revised a number of times over a number of processes, therefore not allowing any faults to pass. Articles 43-54 broadly represent these as any necessary amendments can be best made in this way if there are indeed existing problems with the legislation spotted upon being read over thoroughly. EACH Charter Point 6 in that young people should be cared for in the same area and way as people their own age as opposed to being placed into a more general environment would be crucially protected here as a part of such an important aspect of specifically children's health rights. This shows why children's rights should be implemented: so that a high level of consideration can be given to certain rights and these protected through incorporated law.

#### **14. Do you think there should be a "sunrise clause" within legislation?**

Yes. CHS supports the suggested "sunrise clause" for the Bill that would create a two-stage process for it coming into force. The first transitional period would allow time for public authorities to ensure their policies and practices are aligned with the rights in the Act. At the end of that transitional period, public authorities would automatically be under a duty to comply, with clear timelines to give clarity to the process.

Additionally, we support the "sunrise clause" as we think it is important to give organisations an opportunity to ensure they are legally compliant with the UNCRC to avoid unnecessary and costly legislation, especially where public money may be at risk. However, this should be a short time period and not delay the UNCRC incorporation. Implications for disciplinary procedures and other Human Relations related policy etc. will need time to be updated and duty bearers informed of expectations. This should include protection for staff too.

The Children and Young People (Scotland) Act 2014 compels public authorities to undertake a CRWIA and this process should already be underway. Evidence indicates that these have focused on specific children's services. CHS would like to see this extended to organisation wide services, functions and facilities as any failure of children's rights at any point of contact may result in a failure of access, treatment or outcomes.

### **Sunrise Clause**

#### **Response from Cameron Elliot (17), Youth Volunteer with CHS**

Since decision makers potentially have more time to think about the content of the legislation and how this will affect children, they can be far more thorough in their consideration and rethink any aspects of the legislation they submitted after the first submission and amend this before it goes further through the legislative process and closer to officially becoming law, therefore best disallowing ill-advised content. This arguably displays Article 40 in that children can seek help if required in the justice system as this legislation would allow them to do this, getting fairer treatment and in turn a fairer result. EACH Charter Point 8 also is displayed arguably as children's health rights interests are being looked after by the increased amount of time allowed for the consideration of the legislative content by political professionals who have a considerable understanding of child health needs, therefore displaying caution to allow for the best result. This shows why children's rights should be implemented as they will be able to seek additional help from adults who inevitably because of experience and age have more influence than them and therefore can act on their behalf.

#### **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?**

Given the length of time allowed for the HRA to come into force, a maximum of two years would seem to be a reasonable length of time to allow for preparation. It is important however that the timescales run parallel to the time taken for the Bill and incorporation to be achieved and should be announced as part of the SMART objectives of the operational plan that will be developed from this consultation.

#### **16. Do you think additional non-legislative activities, not included in the Scottish Government's Action Plan, are required to further implement children's rights in Scotland?**

CHS would like to see a range of non-legislative activities embraced, to further implement children's rights in Scotland.

For example:

- A national strategy for children and young people**

The effective protection of children’s health rights requires a unifying, comprehensive and rights-based national strategy rooted in children’s rights. This approach should equalise relationships between organisations, their staff, and individual children so that children are confident that they will not be bullied or victimised if they exercise their rights.
- Visible cross-sectoral coordination**

The effective implementation of children’s health rights requires visible cross-sectoral coordination to realise children’s rights across all government departments, between different levels of government, and between local authorities and third sector organisations and must include children and young people. Children and young people need to be confident that they will not be bullied or victimised if they exercise their rights. This should include duty bearer training and learning and qualifications to embed a child’s rights-based approach. Information will be required to help duty bearers understand and mitigate the barriers children may encounter to access their rights, for example, information available in different formats and languages, sign language, adaptive technologies, double appointments etc.
- Budgeting**

UNCRC Article 4 requires States to fulfil children’s economic, social and cultural rights to the “maximum extent of their available resources.” There is a requirement to identify and monitor available resources and to allocate to children in national and other budgets. Furthermore, effective monitoring of resources in budgets is crucial to protecting children from changes in economic policies or financial downturns. As such, child budgeting can act as a powerful tool to monitor the Scottish Government’s commitment to children, increasing transparency and accountability.
- Data collection**

Sufficient and reliable data collection on children, disaggregated to enable identification of discrimination and disparities in the realisation of rights, is an essential part of the implementation of children’s rights.
- Participation** Article 12 provides both for the right of children and young people to express their views on all matters concerning them and to have those views given due weight in accordance with their age and maturity. This right applies to all children without discrimination. CHS would like the involvement of and consultation with children to avoid being tokenistic and aim to ascertain representative views to ensure tangible outcomes for children.

There should be such awareness that the public and public bodies do not need to engage in schemes such as the UN-conference sessions proposed, which will inevitably lead to omissions of some sectors and individuals. What is being proposed should lead to universal and automatic awareness and understanding of children’s rights across all sectors e.g. schools, early learning and childcare.



If this can be replicated in all public front-facing service providers for example GP surgeries, it could then become embedded within all sectors of society in Scotland.

In terms of participation, we would recommend a hub and spoke model where all organisations supporting or working with children and young people (especially the more vulnerable and seldom heard) feed into the centre regularly through a variety of media and digital technology so that this engagement can take place as part of their daily lives not as an added extra or some kind of special bolt on.

In terms of CRWIA, unless people are required to use the CRWIA materials, they are less likely to do so. There needs to be further promotion of CRWIA together with some examples of best practice test cases to encourage others to do likewise.

### **Non-legislative Activities**

#### **Response from Cameron Elliot (17), Youth Volunteer with CHS**

The likes of speeches would be highly beneficial as these can often be motivational, especially if they were given by young people. These speeches can encourage children to stand up for their rights. Article 12 of the UNCRC displays this as children have the right to state their opinion and have it taken seriously. Article 13 is also represented as children have the right to find out more information, therefore they can acquire more knowledge as to their rights amongst other pieces. Particularly, EACH Charter Point 5, in that children should be listened to, should also be in evidence as this would be one of the best ways for children to have their voices heard. This shows why children's rights should be implemented as many people who would otherwise ignore children and maybe even deny their rights would be legally obliged to listen which would give them a chance to understand.

### **Theme 3: Enabling compatibility and redress**

#### **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?**

Yes. CHS agrees that any legislation to be introduced in the Parliament should be accompanied by a statement of compatibility with children's rights. This would lend itself to the Parliament being "open, honest and accountable".

When the UNCRC is incorporated into domestic law it must not distract from meeting the health and other outcomes for children and young people. A compatibility statement will keep focus on the UNCRC and its aspirations for all children in Scotland. It would be useful if the statement of compatibility also considers the intersectionality of the protected characteristics on rights and incorporates an Equality Impact analysis where practical.

CHS would like the statement to clearly outline:

- Financial constraints. For example, in the Equality Act 2010 financial constraints can be cited as justified if reasonable adjustments cannot be completed. Would lack of staff, translated materials, accessible formats, for example be considered a reasonable justification as a defence in law in this instance?
- How incorporation into Scots law will deliver better outcomes for children and young people and their families.
- How the UNCRC is upheld and exercised.

## **Compatibility Statement**

### **Response from Cameron Elliot (17), Youth Volunteer with CHS**

It is crucial for the legislative content to represent children's rights otherwise implementation would be pointless as this would not accurately reflect what children need put in place in order to protect them. Article 4 of the UNCRC displays this as this clearly states the government is responsible largely for protecting your rights, therefore this mechanism would contribute to this as any unsuitable content could be easily removed as it is not yet codified. EACH Charter Point 9 also displays this as it states young people should be given continued care for as long as required and processing this action in preparation for the legislation being released would hugely work towards this. This shows why children's rights should be implemented as it would best avoid misinterpretation as to the rights children have, and they would be written down for public viewing so there can be no question as to children's entitlements, therefore benefitting their welfare.

### **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?**

Yes. While it is true that the incorporation of the UNCRC into Domestic law should not be accompanied by a corresponding increase in litigation in relation to children's rights, there needs to be some form of protection and redress when the acts of public authorities are incompatible with the rights as set out in the Bill. We accept that it is always preferable to reach a satisfactory outcome through discussion, negotiation and compromise.

It has to be said however, that CHS does hear cases where children's rights have not and are not respected by public authorities in relation to their health rights both and in and out of school and which in some cases have necessitated resorting to the legal route through Additional Support Needs Tribunals. Examples of this include:

1. When a child cannot go to school as their health care needs are not being met in that school and their attendance would place them at risk.
2. When a child has to remain at home not well enough to go to school but does not receive any education provided at home which is the child's right.

Clearly without the back stop of the courts, both to guarantee compliance and to vindicate the rights-holder in cases of breach, the Bill's effectiveness in a democratic society would be at risk.

## **Rights Holders Challenging Public Authorities**

### **Response from Cameron Elliot (17), Youth Volunteer with CHS**

Children absolutely should be able to challenge decision makers and their authority as they are in a position of considerable power. If children feel misrepresented by decisions being made, in this case in the legislation, they should more than feel able to express this for their own benefit. In this way, they can stop the chance of any content that does not accurately reflect their rights. Article 3 of the UNCRC is displayed here as if children feel they have to stop certain decisions being made, these decisions clearly cannot ultimately best benefit children even if the adults were acting solely in their interests, therefore the decisions are bad. EACH Charter Point 10 is also represented here as in order for the best result possible to come out of this legislation, young people must be respected along with their views, therefore allowing self-expression is key for communication which leads to a positive result. This shows why children's rights should be implemented as it would best minimize any disrespect children receive in not being listened to and not being allowed their voice, therefore allowing them to communicate their feelings.

#### **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?**

CHS is of the opinion that the approach to financial compensation should in principal follow that of just satisfaction damages taken under the HRA. This would of course not apply in all cases as outlined in the text and would have to be decided on case by case basis, looking at all the circumstances and in line with a judgement determining the level of loss incurred by the rights-holder.

#### **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. Learning from countries that have incorporated the UNCRC shows that ensuring the UNCRC is accorded high priority in the Scottish domestic legal system, in particular when in conflict with domestic legislation, would play an essential role in ensuring incorporation has an impact on children's experiences of their rights. This will involve some work going through secondary legislation, but such work will be necessary. Issues mentioned e.g. non-devolved issues will have a bearing on this.

#### **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?**

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

**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?**

Yes

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

The model of UNCRC incorporation should include provisions that enable children to bring proceedings if and when a public authority has failed to comply with the UNCRC or Optional Protocols.

**General View**

**Response from Cameron Elliot (17), Youth Volunteer with CHS**

The consultation covers next to all bases. For the legislation to be legitimate in content, it must contain input from children and young people, in this case through the youth advisory group mentioned for the best representation of the views of youths possible. Awareness must be increased fully in order to make decision makers understand completely what children's rights are and the standards to which they must be held. All plans must be heavily revised, and any amendments made as necessary with a regular review in order to ensure it is kept up to date. This should all be done over a long period of time to allow maximum consideration which in turn will allow for the best result. Going back to the influence of young people, as well as this, there should be influence on the part of all caring and passionate members of society to allow them their say. Non-legislative activities can potentially be performed here and encouraged too such as public speaking where figures could produce their views in a way that sympathises and supports children's rights. Specifically, children's health rights must be considered as well. There should be a particular focus on children with poor health as they can be some of the most vulnerable members of society because of disadvantages they have such as potentially being unable to attend school therefore their own body takes away their right to be educated and so all should be done to allow general people to help them. Many children and young people can often have traumatic experiences as well and so the best mental support should be provided, and the implementation of this legislation would almost guarantee this. To allow for this, there could be a specialist team within the group focusing on children's rights and promoting these specifically to place them into law. They could challenge decision makers if they deem any legislation incompatible with considered health rights. To conclude, the UNCRC should be incorporated into Scots law because it will allow for greater protection broadly for all rights of children and young people, therefore providing them with security and making them feel less scared.