

Who Cares? Scotland's Response to the Equality and Human Rights Committee Call for views on United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill

October 2020



Introduction

Who Cares? Scotland (WC?S) is an independent advocacy and influencing organisation working with people who have experience of the care system. We provide direct advocacy, opportunities for local and national participation and hold a diverse membership of Care Experienced people. WC?S aims to provide Care Experienced people in Scotland with knowledge of their rights. We strive to empower them to positively participate in the formal structures and processes they are often subject to solely because of their care experience. At WC?S we ensure the voice of the Care Experienced population of Scotland informs everything we do as an organisation.

In preparing this response, we have pro-actively engaged with our Care Experienced members about various aspects of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill [the Bill]. This involved holding online focus groups and a survey. In total, over 60 Care Experienced members participated and shared their views on the topic of Child and Human Rights. We have also included historic participation activity focused on children's rights where appropriate – including evidence from an event held with the First Minister in January 2020. Throughout this response, we have provided key themes and direct quotes from our members' views and are able to provide further detail where this would be helpful for the Committee.

1. Will the Bill make it easier for children to access their rights?

Yes. We strongly support the Bill as a historic moment to make children's rights real in law and practice in Scotland. As an independent advocacy organisation, we recognise the importance of incorporation and the opportunity now in Scotland to show that child rights are a core part of our culture through intent, protection and legislation.

However, we also know that changing the law is just the first step in ensuring the UNCRC makes a positive and real impact on the lives of children. There are important aspects of the Bill which require careful implementation planning and resourcing to achieve real change in the everyday lives of children. These include: recognising care experience; education on children's rights for all children, the wider public and professionals; ensuring access to justice including the right to independent advocacy; capacity building of services and professionals and robust compliance mechanisms to create accountability.

Recognising Care Experience

We urge the Committee to consider the benefit of expressly naming groups of children, such as those with experience of care, on the face of the Bill. The Bill as it stands is an excellent starting point and has the potential to offer protection to all children. By naming groups that experience disadvantage and rights challenges regularly, the Committee will be following in the footsteps of the UN Committee on the Rights of the Child, which recognises the need to create additional protections for some children. This is further explored in response to question 5.

Education

The Care Experienced members we engaged with were united in their support for ensuring education on rights and remedies reach both children and adults across Scotland. For this to happen in a meaningful way, the Bill must be supplemented by effective training and education programmes which support both children and professionals to understand the rights and responsibilities proposed under the Bill, and how to effectively deliver on this in practice. A core aspect of this Bill is the new legal remedy it offers children, ensuring the justiciability of rights in the UNCRC. It is crucial that organisations around children understand their responsibility and powers within this new legal context. This is further explored in question 4.

We would also encourage the committee to consider the forthcoming 'Making Children's Rights Real' report from Together Scotland.

Access to justice

Legal intervention and the protection offered from courts is absolutely essential in creating accountability and redress and is fundamental in creating a society that genuinely believes in the importance of human rights protection. However, court and legal intervention should always be a last resort for children, especially those already subject to formal procedures such as is the case for Care Experienced children. The full spectrum of access to justice options should be robustly considered by the committee to ensure rights are realised in a pro-active way that means children only have to lean on legal representation and courts when necessary.

We urge the committee to critically explore the creation of a right to independent advocacy, and its role alongside vital legal representation, in safeguarding access to justice for the most marginalised groups of children. This is further explored in questions 2, 3 and 8.

Capacity building

To ensure legal remedy only ever needs to be the last resort for children accessing their UNCRC rights, the Bill must consider the capacity building necessary for a variety of other options to be effective in creating access to justice – defined in the broadest sense. We urge the committee to consider the funding needs and availability of independent advocacy as a key element of ensuring the Bill makes it easier for children to access their rights, especially

for marginalised groups of children, such as those with care experience. This is further explored in question 4.

2. What do you think about the ability to take public authorities to court to enforce children's rights in Scotland?

We strongly support the ability to take public authorities to court to enforce children's rights. The inclusion of legal redress for children on the face of the Bill is an important statement about the expectation for implementation of incorporation to be taken seriously and that there are consequences in place for public authorities that do not uphold their duties to children. It also firmly echoes the expectation of the UN Committee on the Rights of the Child which believes that rights can only be meaningfully embedded if there is recourse to justice.

Although we strongly support the ability for court to be an accessible, final option for when rights abuses take place, we want to ensure that equal focus is given to the pro-active and preventative measures elsewhere in the Bill. It is very important that legal remedy provides a backstop for when all other avenues of effective collaboration and challenge have been exhausted. We believe the aim of the Bill must be to utilise public and professional education, a variety of options to access justice defined beyond legal representation and a thorough, supported Children's Rights Scheme which embeds rights-based practice into the ways local authorities operate and plan their services.

The combination of preventative measures, independent advocacy and accessible, child-friendly legal recourse will ensure this Bill is set up to effectively protect child rights in Scotland.

Complaints mechanisms

A child taking a public authority to court should be seen as a failure by a public authority to support the child, and individuals involved, to reach a solution through less adversarial mechanisms. An important way to do this is through the use of child-friendly complaints mechanisms, which adequately address rights concerns from children and young people – before court intervention is deemed necessary. We echo the points made in Together Scotland's response about the importance of providing '*child-friendly information, advice, advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance*'¹.

This position was echoed through our engagement with Care Experienced members.

"Why is the process so long? I'll make time for it, but a young person or child, will they understand that process and have that patience? It's so long. There needs to be a child

¹ Together Scotland (2020). [UNCRC \(Incorporation\) \(Scotland\) Bill](#). Response to Equality and Human Rights Committee call for views.

friendly way to challenge things, it's very tailored to adults who make the rules and not the ones who experience them."

We know from our Care Experienced members that complaints procedures can be varied in their effectiveness and can often feel inaccessible for children and young people. Throughout our engagement on rights, Care Experienced members have shared their experiences with making complaints and these stories should be taken into consideration by the committee in their deliberation of Part 2 of the Bill.

"Complaints procedures don't work – organisations tend to protect their staff (CAMHS, mental health, education)."

"I made a couple of complaints about my experience of throughcare, but it was detrimental that I did. I had some issues, brought it up, but I got punished for it. They started not returning my calls or would know I needed to get a document in on a certain date and would intentionally wait until it was too late to tell me."

"Yeah, I was made to feel like I was in the wrong for making a complaint. I'm sorry but this is my life, those decisions you make directly affect my life. I have to deal with the consequences where they can switch off at night."

The committee must consider the action required to ensure complaints procedures across public authorities are not viewed as biased or leading to negative consequences for the child or young person seeking to challenge practice.

The role of independent advocacy

As an organisation specialising in providing independent advocacy, we know that this form of representation for children and young people can lead to solutions without the need for courts to intervene. Our advocacy experience tells us that access to justice should be viewed as spectrum of methods; preventing the need for formal legal action by ensuring the child's voice and views are heard within decision-making, supporting a child to submit complaints or grievances through public authorities' own complaints mechanisms and in certain circumstances, working collaboratively alongside solicitors formally representing a young person in a legal case. We urge the committee to understand the spectrum of intervention and support a child or young person can receive when their rights are not upheld by public authorities.

If incorporation of the UNCRC fails to take into account this important spectrum of methods, many children will be unable to achieve the outcomes they need in a quick, trauma-informed and accessible way.

3. What more could the Bill do to make children's rights stronger in Scotland?

Duties on public authorities (section 6)

We share the concern of Together Scotland about the definition of ‘public authorities’ and the ability for private providers to be adequately covered by the duties included in the Bill². We are one of the members of Together Scotland who have raised concerns that private bodies may escape liability. Particularly in the care and protection system, there are a great variety of private providers who carry out essential services for Care Experienced children and young people – from the operation of children’s homes, to the provision of mental health services. Many of these private providers have a great deal of power to impact on Care Experienced children’s rights being upheld and protected, therefore they must come within the scope of the duties on public authorities.

When asking our Care Experienced members which organisations and professionals should protect the rights of children, many of them included expansive definitions which went beyond the traditional statutory bodies we may think of. Several stated that every adult who is in contact with a child and can protect their rights and should do so.

“EVERY ADULT in Scotland has a role in ensuring all our children live safely and can reach their full potential.”

Ensuring that duties on public authorities extends to those private providers who are central in Care Experienced children’s lives, will also ensure accountability for all organisations who work within the remit of public services and deliver vital services for those in the care system.

Remedies for unlawful acts (section 7 and 8)

In section 7 of the Bill, it states that no action before the incorporation of the UNCRC is enacted can be challenged using the remedies available in the Bill. However, we know that many Care Experienced children are experiencing rights abuses right now. We ask the committee to consider in Section 8, if other options for remedy should be made available for historic instances of rights abuses, even if the legal remedy provided in the Bill would not be deemed appropriate.

In our [recent response](#) to the Education and Skills Committee call for views on the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill³ we made clear that child abuse has long featured in the history of Care Experienced people’s lives in Scotland. The scale of this abuse is still being investigated by the Scottish Child Abuse Inquiry (SCAI) and interim reports highlight the culture of abuse which has been present in care in Scotland since the modern-day care system was established. We encourage the Committee to consider this response, with a particular focus on our assessment of what effective redress can include in both financial and non-financial terms. Importantly, for many Care Experienced people, non-

² Together Scotland (2020). [UNCRC \(Incorporation\) \(Scotland\) Bill](#). Response to Equality and Human Rights Committee call for views.

³ Who Cares? Scotland (2020) [Response to the Education and Skills Committee call for views on the Redress for Survivors \(Historical Child Abuse in Care\) \(Scotland\) Bill](#)

financial redress must include varied options including apologies from the state and the offer of free therapeutic support. This combination of non-financial redress is important in leading out reparative justice which seeks to reverse the feeling of self-blame that many individuals experience when the subject of systemic rights failures.

4. If you work for an organisation or public authority, what resources do you need to help children and young people access their rights? Will you require additional resources or training to implement the Bill, for example to make or respond to challenges in court?

The most effective way to ensure children and young people have their rights protected and upheld is by ensuring the adults in their lives thoroughly understand and respect these rights. By training and upskilling the professionals and other adults around children, conversations, financial spending, decision-making and policy implementation are much more likely to embed effectively.

As mentioned earlier in this response, our Care Experienced members were united in their support for ensuring education on rights and remedies reach both children and adults across Scotland. Educating professionals and children on the importance of realising rights and how to access justice using incorporation of the UNCRC is vital for the Bill to have impact and effect. From speaking to our Care Experienced members, they believe people do not have enough knowledge about children's rights. When asked the question: 'Do you think enough people in Scotland understand what human rights are?', 97% answered 'No' or 'Not sure'. One member commented on the challenge this creates for the protection of rights individually and collectively.

"...if the masses are not aware of their rights then there are less challenges due to a lack of understanding. This ensures that the majority are not aware as their human rights are regularly infringed, re-enforcing the individualised infringement as opposed to connecting with others experiencing similar infringements and challenging [them]."

Members of Who Cares? Scotland feel passionately that children should be actively educated about their rights and that this must include knowledge of how they identify rights abuses and raise concerns in a supported way. It is important that Committee members understand the many barriers there are for a child when speaking out about their rights not being met, with many children either not knowing they have rights that should be protected or how they can raise concerns. Awareness of rights alone is not enough to ensure access to justice for children.

"Not just talking to school kids about what human rights are within society, but like, different organisations can help them uphold their rights if there is a breach. Teaching how you uphold them."

Equally it was pointed out that the need to educate children about their rights was a symptom of adults not meeting them.

“Why should you have to campaign for your rights, they should be automatic?”

Therefore, although all children must know their rights, it is vital the burden of responsibility does not rest on a child to challenge when they are not met, as ultimately it is the responsibility of adults and services around the child to pro-actively uphold their rights and protect them.

In addition to investing in the training and education necessary for rights protection, the Committee should consider the essential investment needed to allow all children to access independent advocacy and legal representation by solicitors trained in child rights, trauma-informed approaches and the care system. While all children should have access to such representation, it is vital that groups offered additional focus by the UNCRC – including those with care experience and disabled children – have the right to access such representation whenever it is needed; without being subject to the postcode lottery and resource-led access issues they face now.

5. Are there any relevant equalities and human rights issues related to this Bill, or potential barriers to rights, that you think we should look at?

“Are we making sure that young people who are Care Experienced are getting extra support?”

We urge the Committee to consider how the Bill can explicitly name and protect groups of children who experience the most significant challenge to their rights. We encourage the Committee to consider naming a right to independent advocacy within the Bill, particularly in relation to the groups of children most in need of it. This hope is one which was cited in the findings of [the Independent Care Review](#)⁴ which recognised the necessary role of independent advocacy for all Care Experienced children should they want it.

In March 2003, the Scottish Parliament passed the Mental Health (Care and Treatment) (Scotland) Act. This Act recognises the challenges associated with state intervention and decision-making in an individual’s life and respects this by affording a right to independent advocacy for those affected by a mental disorder. We urge the Committee to consider the lifelong implications of not affording this right to children subject to the care and child protection systems (explored further at the end of this response).

Article 20 of the UNCRC states that children who are not able to live with their family should be protected, looked after, and afforded additional measures to ensure their rights are upheld. The UN Committee on the Rights of the Child has repeatedly focused on the needs of this group of children, recognising the importance of creating specialist measures for protecting their rights, the most recent of which is the UNGA Resolution on the Rights of the

⁴ Independent Care Review (2020) [The Promise](#). Ch 6.

Child adopted by the UN General Assembly on 18th December 2019, which reaffirms the commitment that states must make to children, with a specific focus on the protection of rights of children in care and strengthening mechanisms of accountability for this group. A core driver of this is their recognition of the intrinsic link between poverty and care – a sentiment echoed in early 2020 by the [Independent Care Review](#) in their assessment of care in Scotland⁵.

During our engagement, Care Experienced members directly spoke about the challenge they can face due to the formality of the care system.

“For me personally, I was 8 and used to go to children’s panels and I didn’t understand my rights. It was all adults talking, using words I didn’t understand. The environment wasn’t child friendly, I felt that I couldn’t talk about if my human rights weren’t being met, I couldn’t say anything about my home with that person I live with sitting next to me, can I really express what my rights are without causing offence and damaging my childhood home any further than it already is?”

“My views were never taken seriously – in education, CAMHS decision making.”

“Children’s hearings didn’t take my views seriously – they never got taken on board. This is one of the main disadvantages of being in care – it affects confidence, trust and working relationships with professionals.”

“In my experience, the “adults” made the decisions and there was nothing I could do. It was belittling.”

“My views were never taken seriously - in education, CAMHS. Moved away against my will.”

“We feel that meetings such as LAAC reviews or panels, the panel members have already made their decision before the meeting about what happens to the young person so our views won’t be listened to in coming to a decision.”

“Most views will be listened to, but no actual action would be taken.”

In 2010, the UN General Assembly adopted the [Guidelines for the Alternative Care of Children](#) resolution⁶ and with that, encouraged ‘States to take the Guidelines into account and to bring them to the attention of the relevant executive, legislative and judiciary bodies of government, human rights defenders and lawyers, the media and the public in general’.

These guidelines will be crucial for the Committee in understanding the importance of ensuring this Bill explicitly protects the rights of Care Experienced children, recognising the challenge of implementing this within a system designed to bring state intervention directly into this lives of children.

⁵ Independent Care Review (2020) [The Promise](#). Pg 17.

⁶ United Nations General Assembly (2009). Resolution 64/142. [Guidelines for the Alternative Care of Children](#).

In considering this, the Committee should take an inclusive understanding of Care Experience, acknowledging that the complexity of the system creates multiple, valid identities. One individual engaged with expressed the challenge faced by those no longer considered looked-after through adoption.

“If you’re in care I think it’s easier to have your rights upheld. If you’re adopted, it feels like it’s harder to make sure you get your rights.”

6. What are your views on the provisions in the Bill that allow the courts to strike down legislation judged to be incompatible with the UNCRC?

We welcome the Bill provision which provides the courts with strike down powers in relation to legislation which is incompatible with the UNCRC. Likewise, it is encouraging that the Bill includes an incompatibility declarator provision for legislation which postdates the passing of the Bill. This important inclusion creates another layer of accountability, ensuring the implementation of the Bill at all levels is set up to be effective in practice and naming the crucial role of the Children and Young People’s Commissioner for Scotland.

7. What are your views on the Children’s Rights Scheme and the requirement on public authorities to report?

Compliance is an extremely important aspect of the Bill’s provisions and we believe the Children’s Rights Scheme will allow for pro-active embedding of children’s rights across public authority activity and planning.

“Listening to people and giving them their rights, there needs to be more ownership of them making sure everyone has access to this, this could come down to a post code lottery there needs to be a clear mandate from the government to make sure everyone gets the same in each local authority and they need to be held accountable if they don’t adhere to them.”

Within the Children’s Rights Scheme, the requirement for public authorities to report on their activity provides an opportunity for Scotland to provide supportive measures, whilst also ensuring compliance with their duties. We ask the Committee to consider the accountability mechanisms that may be required following reporting cycles and in the periods between reporting expectations. As an organisation we have extensive experience working alongside Corporate Parents, who are legally required to report on their duty to support Care Experienced people. With little in the way of accountability or enforcement mechanisms, it is a challenge to address when Corporate Parents are not doing enough to meet the duties included in Part 9 of the Children and Young People (Scotland) Act 2014.

The issue of compliance was something that engagement with our Care Experienced members conveyed strongly.

“Definitely need to have an independent body to oversee and regularly review and report locally and nationally. Feed directly back to children in a multitude of ways and this would also create an on-going opportunity to raise awareness of rights directly with children and create on-going opportunities for peer education progressing development of practitioners

too. Definitely have consequences in place usually anything relating to finances will ensure that areas are prioritised. Something in place that would exclude organisations from future tendering processes for services etc.”

Accountability for public authorities at both a local and national level is extremely important for our Care Experienced members. Many individuals shared with us their experiences of feeling let down or failed by services, without consequences or redress for those actions.

*“You say things are in progress,
Prove it, cause all I see is a mess,
Where's the official evidence?
Who've you got to support the relevance?
No one, that's why so many are failed,
And many scary stories are told.”*

In consideration of Part 3 of the Bill, we would refer Committee members to Together Scotland's response which outlines methods of strengthening such measures through⁷:

1. Greater expectation on the requirements of section 11(3) the duty to prepare the Scheme, and its inclusion of independent advocacy and other child-friendly complaints mechanisms.
2. Inclusion of UN decisions under the third optional protocol when drafting, amending and reporting on the Scheme.
3. Creation of child-friendly versions of reporting methods, including direct participation of children, to ensure scrutiny and accountability for the population the legislation seeks to protect.

“Scrutinise and make them accountable, young people should be involved in the review process.”

In addition to this, acknowledging the learning surrounding the similar Scheme adopted in Wales, we would encourage the Committee to refer to [a review of the legal integration of the UNCRC in Wales](#) prepared by Dr Simon Hoffman, Wales Observatory on Human Rights of Children and Young People and Sean O'Neill, Children in Wales⁸. This report provides important learning and reflection that will aid the Committee in developing the Bill further.

8. Is there anything else you want to tell us about the Bill?

As previously stated, any expectation of state intervention in the lives of individuals is often recognised as requiring the right to access independent advocacy, alongside crucial legal representation. This Bill provides an opportunity to afford this level of protection to children

⁷ Together Scotland (2020). [UNCRC \(Incorporation\) \(Scotland\) Bill](#). Response to Equality and Human Rights Committee call for views.

⁸ S. Hoffman & S. O'Neill (2018). [The impact of Legal Integration of the UN Convention on the Rights of the Child in Wales](#).

subject to formal state intervention (or the potential of intervention) by amending the Bill to include the right to independent advocacy for Care Experienced children and other groups requiring additional rights protections.

The need for tailored resource and independent remedy for the Care Experienced population is evident through their own words, with our recent engagement displaying significant examples of the lifelong impact of failing to provide robust rights protection and empowerment.

“Often survival strategies will kick in and your view of services and people in authority is skewed which influences all areas of life, increasing vulnerability for yourself & possibly others, increased risks to develop toxic relationships, unplanned pregnancies, poor housing, lack of social supports, poverty, lack of life skills, education impacted upon due to care exp, judgements and lack of aspirations for you, individuals internalising and creating emotional harms.”

“..excluded from education, never prioritised, worst communities for housing from the age of 16, health needs never prioritised by others or self, lack of financial management. As a young parent I felt that I was discriminated on a regular basis and it still has some negative influences in areas of my current life and my ability to be confident in me? Which I challenge on a daily basis it can be exhausting.”

“Older members rights were not upheld when they were in local authority care, and this has had a knock on effect, and so the LA is still responsible for the legacy they have to live with – poor mental health, poor education and employment opportunities that affects them throughout their life.”

Following submission of this response, WC?S will be preparing a separate report depicting the views of all the Care Experienced members that participated in our discussions about child rights. This report will be shared directly with the Committee in due course.

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