

# Progressing Incorporation of the United Nations Convention on the Rights of the Child

## November 2018

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### Key messages

- Over the past decade, there has been in-depth debate, discussion and consultation around the incorporation of the UNCRC into Scots law.
- Widespread support for incorporation is evident at all levels – from children and young people to parliamentarians, public bodies to UN treaty bodies.
- In September, the First Minister made a commitment to incorporate the principles of the UNCRC into law. An expert Advisory Group convened by Together (Scottish Alliance for Children's Rights) and the Children and Young People's Commissioner Scotland has drafted a Children's Rights (Scotland) Bill to demonstrate how the First Minister's commitment could be taken forward.
- There is a unique window to progress UNCRC incorporation before 2021 with majority political support across the Scottish Parliament.
- As well as progressing a culture change across Scotland, incorporation would help to mitigate against the negative impact of Brexit on children's rights protections.

### 1. Why should Scotland incorporate the UNCRC into law?

All levels of government – from Scottish Ministers through to public bodies - should already comply with the UNCRC when making any decision that affects children and young people. Although the UNCRC has the status of international law, children (and those legally responsible for them) are not yet able to enforce their UNCRC rights as part of UK or Scots law. The direct incorporation of the UNCRC into Scots law – giving the rights contained in the UNCRC full legal effect in the Scottish courts – is the most comprehensive way of protecting and respecting children's rights.

Incorporation creates legal liability at all levels of government for the way in which they work with and treat children and young people, providing consistency and accountability across local and national government in their obligations to children under the UNCRC. The real strength in incorporation is its power to effect cultural change and bolster challenges to policy and practice with the force of Scots law without ever having to go to court. However, children would be able to obtain redress through the courts when obligations are not met and where progress cannot be made through other means.

Research for the Council of Europe<sup>1</sup> shows that the level of incorporation into European constitutions is now very high. International experience shows that the process of incorporation in itself is important: it raises awareness of the UNCRC and generates respect for children as rights-holders<sup>2</sup>. This results in a culture change that then directly impacts on the application of children's rights principles in national law and policy.<sup>3</sup>

## 2. What support is there for incorporation?

Over the past decade, extensive consultation and research on incorporating the UNCRC has taken place. This has resulted in widespread civil society and political support.

### Children and young people

There have been longstanding – and increasing – calls from children and young people to incorporate the UNCRC into Scots law. In 2011, many children and young people, including members of the Children's Parliament, called for incorporation in their responses to the consultation on the Rights of Children and Young People Bill<sup>4</sup>, citing concerns that without incorporation, *"children's rights might be forgotten about"*.

This momentum has gathered pace, having recently been put into a sharper focus through the Scottish Youth Parliament's campaign 'Right Here, Right Now'<sup>5</sup>, initiated after more than 76% of the 700,000 young people who responded to the 2016-21 manifesto agreed that the UNCRC 'should be fully incorporated into Scots law'<sup>6</sup>. Calls for incorporation have been further echoed at the first<sup>7</sup> and second<sup>8</sup> annual Cabinet Meeting with Children and Young People.

### People working with and for children and young people

Public bodies, NGOs and academics voiced widespread support for the incorporation of the UNCRC during the Rights of Children Bill consultation in 2011. Even in the absence of a specific question on incorporation, 40% of all responses from children's organisations and 25% of all responses from public bodies (including several local authorities and NHS Boards) actively called for incorporation of the UNCRC into Scots law<sup>9</sup>. In response to the subsequent 2012 consultation on the Children & Young People (Scotland) Bill, the Scottish Government's own analysis concluded that:

*"It was commonly felt that although intentions are well meaning, the proposals do not go far enough and that they fall short of fully incorporating the UNCRC ..."*<sup>10</sup>

Those making a case for incorporation through the consultation included a range of human rights bodies, NGOs, academics and public bodies. In the following six years since this consultation, there

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<sup>1</sup> [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)005-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)005-e)

<sup>2</sup> <https://www.qub.ac.uk/research-centres/CentreforChildrensRights/filestore/Filetoupload,485596,en.pdf>

<sup>3</sup> Including Belgium, Norway, Cyprus, Finland, France, Portugal, Spain, Japan and Argentina.

<sup>4</sup> <https://www.gov.scot/Resource/0038/00386681.pdf>

<sup>5</sup> [https://www.syp.org.uk/right\\_here\\_right\\_now](https://www.syp.org.uk/right_here_right_now)

<sup>6</sup> [https://www.syp.org.uk/right\\_here\\_right\\_now](https://www.syp.org.uk/right_here_right_now)

<sup>7</sup> <https://www.gov.scot/Resource/0053/00531243.pdf>

<sup>8</sup> <https://beta.gov.scot/publications/second-annual-meeting-of-ministers-with-children-and-young-people/>

<sup>9</sup> Together (2012) State of Children's Rights report

<sup>10</sup> Scottish Government (2012) Analysis of Responses to the Children and Young People Bill Consultation

has been extensive research and consultation on a proposed model for incorporation, led by civil society and including academics, public bodies, NGOs and children and young people<sup>11</sup>.

#### The Scottish Government

In September 2018, the First Minister for Scotland made a commitment to incorporate the principles of the UN Convention on the Rights of the Child into Scots law.<sup>12</sup> Scottish Government officials have stressed that ‘principles’ means the ‘intent of every article’ of the UNCRC. This has been welcomed by children, young people and wider civil society. Recent action by the Scottish Government to improve further implementation measures, such as through a recent consultation on a Child Rights Action Plan<sup>13</sup> provide a solid base on which incorporation can sit to ensure legislative measures have impact.

#### The Scottish Parliament

Scottish Labour, the Green Party and the Liberal Democrats all made commitments to incorporation in the manifestos for the 2016 Scottish Parliament election. These commitments were further bolstered by commitments made in the manifestos for the 2017 UK Parliament elections.<sup>14</sup> This means there is currently majority political support for incorporation in Scotland, providing a possibly unique opportunity to progress incorporation in the next 3 years.

#### International

The UNCRC was written with the intention that it should be incorporated into domestic law.<sup>15</sup> Article 4 of the Convention requires governments to ‘undertake all appropriate legislative, administrative and other measures’ to implement the UNCRC. These legislative measures should ensure that all domestic legislation and related administrative guidance are fully compliant with the UNCRC. The incorporation of international treaties into domestic law has been at the forefront of all discussions by UN treaty bodies over the past fifteen years. After widespread consultation with civil society, the UN Committee on the Rights of the Child has made repeated calls for the UNCRC to be incorporated into law across the UK.<sup>16</sup>

### 3. Why now?

Given the depth of discussion that has already taken place in Scotland, combined with the strong political and civil society support, there is currently a unique window in which to progress the Scottish Government’s commitment to children and young people. Brexit creates an additional urgency - specific legal protections of children’s rights included in the EU Charter of Fundamental Rights will be lost when the UK leaves the European Union and incorporation provides the most effective means of protecting children and young people against further regression of their rights.

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<sup>11</sup> <https://www.togetherscotland.org.uk/resources-and-networks/uncrc-in-scotland-seminar-series/>

<sup>12</sup> Delivering for Today, Investing for Tomorrow The Government’s Programme for Scotland 2018-19, page 5 Available at <https://beta.gov.scot/publications/delivering-today-investing-tomorrow-governments-programme-scotland-2018-19/>

<sup>13</sup> <https://consult.gov.scot/children-and-families/childrens-rights/>

<sup>14</sup> <https://www.togetherscotland.org.uk/news-and-events/news/2017/05/manifesto-commitment-to-child-rights-ahead-of-general-election/>

<sup>15</sup> Committee on the Rights of the Child, 2003. General Comment No. 5: General Measures of Implementation of the CRC

<sup>16</sup> See Committee on the Rights of the Child, 3 October 2008 Concluding observations: United Kingdom of Great Britain and Northern Ireland CRC/C/GBR/CO/4

## An Independent Advisory Group on UNCRC Incorporation

In light of this urgency, Together (Scottish Alliance for Children's Rights) has been working alongside the Children and Young People's Commissioner Scotland to convene a short-term Advisory Group to explore what a Bill to incorporate the UNCRC into Scots law would look like. The Advisory Group is independent from the Scottish Government and comprises of a range of world-leading legal experts on children's rights and incorporation. These experts have been drawing from their wide experience of incorporation across the world to set out a model of incorporation for Scotland that would meet the standards put forward by the UN Committee on the Rights of the Child.

### **4. The draft Children's Rights (Scotland) Bill**

The Advisory Group has drafted a Children's Rights (Scotland) Bill to show how the UNCRC could be incorporated into Scots law. On Universal Children's Day, 20<sup>th</sup> November 2018, the Advisory Group presented the draft Children's Rights (Scotland) Bill 2019 to the Deputy First Minister and Minister for Children and Young People. The Children's Rights (Scotland) Bill has been specifically drafted to incorporate the UNCRC into Scots law. It has been written in a way that ensures a proactive culture of children's rights across local and national government and provides redress to children if their rights are breached. We are committed to working collaboratively with children and young people, the legal community and wider civil society to secure rights protections for children in Scotland as set out in international law.

### **5. Next steps**

Echoing calls from Together's members and the Children and Young People's Commissioner Scotland, the Advisory Group has urged the Scottish Government to draw from the draft Children's Rights (Scotland) Bill to inform a wider public consultation in early 2019. A robust public consultation on the draft bill, informed by the work of the Advisory Group, would facilitate meaningful discussions and allow duty bearers to engage with proposals. It would also further raise awareness of children's rights in Scotland. This would ensure that a Children's Rights (Scotland) Bill – could be introduced into the Scottish Parliament in autumn 2019. This would mark the 30<sup>th</sup> Anniversary of the UNCRC and allow for it to be passed before the end of the parliament in 2021.

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