



Scottish Government consultation on incorporating the UN Convention on the Rights of the Child into Scots law

In April 2019, the First Minister [committed](#) to pass a law within the next two years that will bring the UN Convention on the Rights of the Child (UNCRC) into Scots law.¹ This is known as 'incorporation' and means that children's human rights will be binding on all levels of government. The announcement has been widely welcomed and celebrated across Together's membership who recognise the culture change that incorporation can bring, and the impact it will have on children, young people and their families across Scotland.

In May 2019, the Scottish Government launched a consultation to look at how a new Act could take forward this commitment to incorporate the UNCRC into Scots law.² We have written this briefing to help unpick and explain some of the questions in the consultation paper and to support our members as they consider how to respond. We will publish our draft response to the consultation in late July to support our members in drafting their own responses. The Scottish Government consultation closes on 14th August 2019.

In partnership with the Children and Young People's Commissioner Scotland, we established an Expert Incorporation Advisory Group in autumn 2018. This group comprises of international and Scottish experts with extensive academic and practical knowledge of the UNCRC and incorporation. Drawing from their experience and expertise, the group drafted a [Children's Rights \(Scotland\) Bill](#) to demonstrate the most effective model through which Scotland could incorporate the UNCRC into law. Alongside Mikiko Otani, a member of the UN Committee on the Rights of the Child, our Expert Advisory Group presented the draft Bill to the Deputy First Minister on Universal Children's Day in November 2018. This Bill is included in the Scottish Government's consultation (question 7).

We have considered the detail of Scottish Government's consultation. We continue to believe that the model of incorporation in the draft Children's Rights (Scotland) Bill (our model) provides a strong foundation on which to base the 'gold standard' - committed to by the First Minister. We recognise that through the process of consultation, further technical changes may be identified that strengthen or enhance our approach.

As such, throughout this briefing we will:

- Demonstrate how the draft Children's Rights (Scotland) Bill aligns with the Scottish Government's proposals and supports the First Minister's ambition;
- Highlight learning from countries that have already incorporated the UNCRC, including Norway, Finland, Belgium, Sweden and Spain;
- Explore developments closer to home that have prepared the way for incorporation, including the Rights of Children and Young Persons (Wales) Measure 2011³ and the Children and Young People (Scotland) Act 2014.⁴

¹ [Nicola Sturgeon, address to SNP conference \(April 2019\)](#)

² Scottish Government, [Children's Rights: Consultation on incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland](#)

³ [Rights of Children and Young Persons \(Wales\) Measure 2011](#)

⁴ [Children and Young People \(Scotland\) Act 2014](#)

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

Framework for incorporation (questions 1-3)

In this section, the consultation paper sets out what legal duties could be placed on Government Ministers and public bodies as part of incorporation:

1. “Act compatibly” which follows the Human Rights Act model. This means the government has to comply with the UNCRC and cannot do anything that breaches children’s UNCRC rights.
2. “Due regard” which follows the [Welsh Measure for Children and Young People](#). This means government has to show that it has thought about children’s human rights but doesn’t necessarily have to comply with them.

The Scottish Government says that “it would be appropriate to have a similar framework” to the Human Rights Act (pg. 14).

We largely agree.

Incorporation must make children’s human rights binding and not just guiding. An “act compatibly” duty like in the Human Rights Act achieves this. However, evidence from Wales also shows the value of having a “due regard” duty to promote rights-based decision-making. That is why we are keen to see a model that contains both duties – a model that could be considered a ‘Human Rights Act *plus*’ model.

How does our draft Children’s Rights (Scotland) Bill fit?

Our draft Children’s Rights (Scotland) Bill includes both a ‘compatibility’ and a ‘due regard’ duty (section 7 includes compatibility and section 12 includes due regard). This means that government needs to show that it has thought about children’s human rights in all decisions, and then has to comply with the UNCRC when these decisions are put into practice.

The options for incorporation (questions 4-12)

Which UNCRC rights?

In this section, the consultation paper sets out how the UNCRC could be brought into Scots law:

- “Direct incorporation” which would mean that the exact wording of the rights in the UNCRC and Optional Protocols would be brought into Scots law; or
- A Scottish “suite of rights” which develops a bespoke set of domestic rights rooted in the UNCRC.

Scottish Government also refers to gradually revising legislation to bring it in line with the UNCRC.

The Scottish Government sets out concerns around “direct incorporation”, mainly that the UNCRC rights are “not specifically tailored for application by rights holders, duty bearers and courts in our legal system” and that there is “no body of international jurisprudence”. It goes on to say that a Scottish “suite of rights” is more in line with the recommendations of the First Minister’s Advisory Group.

We have concerns about this approach.

The UNCRC has been directly incorporated into law in a range of countries, including Norway, Iceland and Sweden. In countries that have directly incorporated, courts have not had difficulties in interpreting UNCRC rights. Direct incorporation provides clarity and means that domestic law keeps pace with developments in international human rights law. It gives courts clarity that the rights incorporated into law are UNCRC rights rather than an alternative version. It allows courts to look to other countries that have incorporated the UNCRC and draw from UN General Comments and wider jurisprudence to inform decisions. Courts in Scotland and the wider UK are already used to doing this and regularly refer to the rights in the UNCRC when considering cases under the Human Rights Act 1998.^{5 6 7}

Referring to the incorporation of economic and social rights, James Wolffe QC, the now Lord Advocate, has said “...if that step is taken, lawyers and courts will learn the necessary techniques – just as they have with the Convention [ECHR]. Domestic courts have, in recent years, been more used to dealing with a range of international materials than they were in the past – and, indeed, may have to do so when they apply EU law and interpret Convention rights”.⁸

There is a body of interpretive guidance available from the UN Committee in the form of General Comments⁹ and Concluding Observations, which is supported by the emerging jurisprudence under Optional Protocol 3,¹⁰ the UNCRC Communications Procedure, which sets out a ‘menu of options’ with regard to how implementation is to be achieved at a national level. UNCRC Article 41 ensures that if there is a higher standard set in domestic law than that in the UNCRC, then the higher standard must prevail.¹¹

In relation to implementation, the FM Advisory Group made a recommendation for a public participation process to “help determine what is needed to make sure the Act is practically and effectively implemented and achieves its purpose of improving the lives of people”. As such, we would welcome a broad consultation on how we can ensure that incorporation achieves real and transformational change to children’s lives. However, we do not think that this process should be used to ‘pick and choose’ which rights are incorporated and maintain that all rights within the UNCRC should be brought into Scots law.

In terms of Scottish Government’s reference to gradually revising legislation to bring it in line with the UNCRC, the UN Committee is clear that this is a fundamental part of implementation. The Committee recognises that there must be a comprehensive, continuous and rigorous process of legislative review alongside incorporation itself to ensure that the provisions of the UNCRC are given direct legal effect.¹²

⁵ ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4

⁶ BH (AP) and another v Lord Advocate and another (Scotland); KAS or H (AP) v Lord Advocate and another (Scotland) (2012) UKSC 24. Lord Hope at para.56. Despite this finding, the Supreme Court held that extradition was proportionate given the circumstances and the relative weight of interests involved.

⁷ *Ibid.* para. 15

⁸ Wolffe (2014) Economic and Social Rights in Scotland: Lessons from the Past; Options for the Future: A lecture for International Human Rights Day 2014

⁹ The Committee has so far adopted 23 General Comments on various aspects UNCRC implementation. [Accessible here.](#)

¹⁰ To date, there have 22 substantive decisions. [Accessible here.](#)

¹¹ UNCRC Article 41.

¹² Committee on the Rights of the Child, General Comment No 5, General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)

How does our draft Children's Rights (Scotland) Bill fit?

Our draft Children's Rights (Scotland) Bill makes it clear that all the substantive articles of the UNCRC and Optional Protocols should be part of Scots law. In recognition of the limited powers of the Scottish Parliament, the draft Bill is clear that the duties would only apply when government is exercising devolved powers or acting in devolved areas (section 2). The draft Bill does not seek to extend the powers of the Scottish Parliament or Scottish Ministers (section 32).

This overarching approach brings clear benefits, including:

- It reflects the holistic nature of the UNCRC - highlighting the clear principle that all UNCRC rights are interrelated and indivisible and avoids a 'pick and mix' approach.
- It future-proofs the final Act - ensuring that whenever further powers are devolved to the Scottish Parliament, the Act will automatically cover these powers.

It also reflects the approach used in Wales in the Rights of Children and Young Persons (Wales) Measure 2011 and other comparable legislation.

Devolved competencies

Scottish Government says that without a section 30 order or similar provision, "it would not be possible to include certain articles or aspects of certain articles of the UNCRC and the Optional Protocols in the Bill" (page 19).

Whilst we agree that some aspects of the UNCRC are outwith the competence of the Scottish Parliament, we do not agree with this statement.

How does our draft Children's Rights (Scotland) Bill fit?

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This overarching approach brings clear benefits:

- It reflects the holistic nature of the UNCRC - reflecting the clear principle that all UNCRC rights are interrelated and indivisible and avoids a 'pick and mix' approach.
- It future-proofs the Bill - ensuring that whenever further powers are devolved to the Scottish Parliament, the Bill will automatically cover these powers.

It also reflects the approach used in Wales in the Rights of Children and Young Persons (Wales) Measure 2011 and other comparable legislation.

Theme 2: Embedding children's rights in public services

In this section, the consultation paper discusses a range of measures that could be used to ensure that public bodies (including the Scottish Government) mainstream children's rights in practice. We agree that this is an important and necessary part of any draft Bill - the Bill must include the power to prevent violations of children's human rights from the outset (what we call 'upstream interventions'). In our Bill, this is where we include a 'due regard' duty on public bodies. This builds

on what we know has been successful in Wales in ensuring that policy decisions are informed by the UNCRC and Optional Protocols, as well as the UN Committee's General Comments which set out what each right means in more detail (section 20-21). The consultation paper does not consider the use of a 'due regard' duty in this way to embed children's rights into public services. It does, however, consider other mechanisms that we would support in addition to the 'due regard' duty.

Children's Rights Scheme (question 13)

The consultation sets out details of the Children's Rights Scheme that is currently in place in Wales (page 23). It says that a similar scheme could bring together and build on the measures we already have in Scotland, mainly through the Children and Young People (Scotland) Act 2014.

We largely agree.

In Wales, the Children's Rights Scheme has been largely effective in promoting rights-based policy making within national government. It is supported by the duty on Welsh Ministers to publish a compliance report and lay it before the Welsh Parliament every three years. These duties combined have provided children, young people, the Children's Commissioner and wider civil society with the opportunity to influence government action to promote children's human rights.

How does our draft Children's Rights (Scotland) Bill fit?

Our draft Children's Rights (Scotland) Bill includes similar provisions for a Children's Scheme (sections 22-26). As in Wales, the duty to publish a Children's Rights Scheme is on Ministers alone. This is partly in recognition of the leadership role played by national government as an example for others to follow but also in recognition of the range of reporting duties that exist for public bodies, including UNCRC reporting as part of the 2014 Act.

As in Wales, our Bill requires government to undertake consultation - including with children and the Children and Young People's Commissioner Scotland - in the development of the Scheme (section 25). We know from experience in Wales and Scotland that child rights impact assessments (CRIA/CRWIA) are key to ensuring that children's rights are adequately reflected in policy development. As such, we include a duty that makes CRIA/CRWIA a mandatory part of the Children's Scheme (section 27). This would ensure that in future years - regardless of the level of political commitment to children's human rights - there would continue to be adequate consideration of children's human rights in policy development. The duty means that all Bills laid before the Scottish Parliament would need to be accompanied by a CRIA/CRWIA. This would support Parliament to scrutinise legislation from a child rights perspective and ensure it is compatible with the UNCRC before it is passed.

The compliance report is an important part of scrutiny and accountability. In Wales, the compliance report is put before the Children, Young People and Education Committee. This has provided several opportunities to hold Ministers to account on what they have done to uphold children and young people's rights. Whilst Ministers in Scotland are already under a similar duty through the 2014 Act, our draft Bill strengthens this duty by ensuring that a child friendly version of the report is published.

Other non-legislative activities (question 16)

The paper outlines a series of other 'non-legislative' activities to progress implementation of the UNCRC (page 26). Scottish Government says that "there are many non-legislative actions that can help make children's rights real" and goes on to outline activities including awareness raising, participation and the use of CRIA/CRWIA.

We agree.

There are many non-legislative actions that can play an essential role in furthering children’s human rights across Scotland. As previously discussed, we believe that it is important that CRWIA/CRIA is placed on a statutory basis and that duties should be placed on public bodies to ensure the participation of children and young people. However, these duties can be supported and enhanced through non-legislative activities and these should be considered in greater detail once it is clear what legislative activities are going to be included in the Bill.

Theme 3: Enabling compatibility and redress

Certification of Scottish Parliament Bills (question 17)

The paper suggests including a requirement for a ‘statement of compliance’ to be given by any person introducing a Bill to the Scottish Parliament (page 28). This would mean that whoever introduces the Bill would need to make a statement to confirm that it complies with the UNCRC and Optional Protocols.

We agree.

How does our draft Children’s Rights (Scotland) Bill fit?

Our draft Children’s Rights (Scotland) Bill also includes a requirement for a ‘statement of compliance’ (section 8). As previously stated, the Bill should also include a requirement that all future Bills introduced to the Scottish Parliament must be accompanied by a CRIA/CRWIA. This would support Parliament’s scrutiny of the Bill’s compliance.

Remedies and redress (question 18-19).

The paper says that “children (and those acting on their behalf) who believe that their rights have been infringed by the acts or omissions of a public body should have the ability to challenge those public bodies” (page 29). This means that children – or those representing children – should be able to go to court if the government has done something that violates a child’s UNCRC rights (“acts”), or has failed to act, meaning a child’s UNCRC rights were not adequately protected (“omissions”).

We agree.

How does our draft Children’s Rights (Scotland) Bill fit?

Our draft Children’s Rights (Scotland) Bill contains a range of enforcement, redress and remedies to enable children and young people to be able to access justice through the courts if their rights are violated (sections 11-19). These will be outlined below.

Conflict with secondary legislation (question 20)

Scottish Government goes on to ask if “it would be appropriate for UNCRC rights to take precedence over provisions in secondary legislation as is the case under the HRA for ECHR rights” (page 30). This is asking whether public bodies should have to comply with the UNCRC even in instances where this might go against existing secondary legislation. This would be in line with what already happens with the ECHR through the Human Rights Act. There is clear evidence at an international level that the most effective models of incorporation are those in which the human rights treaty is given

precedence over other legislation (for example, in the case of the UNCRC in Norway and the ECHR through the Human Rights Act in the UK).¹³

We think it is important the UNCRC rights to take precedence as is the case under the HRA for ECHR rights.

Challenges to primary legislation (question 21 and 22)

Sometimes a provision included in legislation passed by the UK and Scottish Parliament may breach ECHR rights. The paper sets out how, through the Scotland Act 1998, courts in Scotland have the power to declare that provisions passed by the Scottish Parliament that breach ECHR rights are ‘not law’ (page 31). This is known as a ‘strike down’ power. We included this in our draft Children’s Rights (Scotland) Bill (sections 17-18). The paper also sets out how, through the Human Rights Act, courts across the UK only have the power to issue a ‘statement of incompatibility’ to provisions passed by the UK Parliament that breach ECHR rights. This isn’t as strong as a ‘strike down’ power and means that the incompatible provisions remain in law until the UK Parliament amends them. Scottish Government says that the Scottish Parliament would be unable to pass a Bill that includes strike down powers within the devolved competencies. It is unclear as to why the Scottish Government believes this is the case.

We would like to know more about the Scottish Government’s reasoning as to why it believes that the Scottish Parliament is unable to limit its own legislative competence.

How does our draft Children’s Rights (Scotland) Bill fit?

Whilst we recognise the value of ‘statements of incompatibility’, we included a ‘strike down’ power within our draft Children’s Rights (Scotland) Bill. If a ‘strike down’ power is outwith the legislative competence of the Scottish Parliament, provisions for a ‘statement of incompatibility’ would provide an important – albeit weaker – alternative.

The paper goes on to explain how both the 1998 Act and HRA contain provisions that require courts to interpret and apply legislation in a way that complies with the ECHR. Scottish Government suggests that similar provisions should be included in this Bill in relation to the UNCRC to ensure that legislation is ‘read narrowly’ to ensure that – as far as possible - it is seen to be compatible with the UNCRC.

We agree that the Bill should contain strong provisions to require Acts of the Scottish Parliament to be interpreted and applied in so far as possible with the UNCRC.

How does our draft Children’s Rights (Scotland) Bill fit?

We included similar provisions in our draft Children’s Rights (Scotland) Bill and are clear that strong provisions must be included to require Acts of the Scottish Parliament to be interpreted and applied in so far as possible with the UNCRC.

Standing to take proceedings (question 23)

“Standing” refers to who can bring a case to court if rights have been violated. The paper explains that to have ‘standing’ under the Human Rights Act or Scotland Act 1998, you must be the ‘victim’ of a rights violation. This could be challenging for children and young people who may wish that

¹³ Stern (2019) Much Ado about Nothing? The Road to the Incorporation of the UN Convention on the Rights of the Child in Sweden. International Journal of Children’s Rights

someone else could take a case on their behalf. The paper proposes a broader definition of standing should be used that allows those with 'sufficient interest' to take a case.

We agree that a broader definition of standing should be taken than that included in the Human Rights Act.

How does our draft Children's Rights (Scotland) Bill fit?

The provisions we included in our draft Children's Rights (Scotland) Bill gave standing to a child who affected or likely to be affected by a breach of UNCRC rights, as well as those with 'sufficient interest', the Children and Young People Commissioner Scotland, the Scottish Human Rights Commission and the Equalities and Human Rights Commission. We believe that this definition of standing gives the best possible chance for breaches of children's rights to be remedies through the courts.

The views expressed in this paper do not necessarily reflect those of our membership and wider partners and should be considered as initial reflections that are open to wider discussion and debate. We will engage widely with our membership in the coming weeks and will draft a position paper and formal response to the consultation by the end of July.

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