

Scottish Government Consultation on the Incorporation of the United Nations Convention on the Rights of the Child into Scots law

August 2019



About Together (Scottish Alliance for Children's Rights)

Together (Scottish Alliance for Children's Rights) is an alliance that works to improve the awareness, understanding and implementation of the UN Convention on the Rights of the Child (UNCRC) and other international human rights treaties across Scotland. We have over 400 members ranging from large international and national non-governmental organisations (NGOs) through to small volunteer-led after school clubs and interested professionals. Our activities include collating an annual State of Children's Rights report to set out the progress made to implement the UNCRC in Scotland. The views expressed in this submission are based on wide consultation with our members but may not necessarily reflect the specific views of every one of our member organisations.

Together welcomes the commitment made by the Scottish Government to incorporate the UN Convention of the Rights of the Child (UNCRC) into Scots law before the end of this session of parliament in 2021. We agree that the Scottish Government's commitment provides an opportunity to give "practical effect to the UNCRC in a way that demonstrates international leadership and works for every child and young person in Scotland". We note the Scottish Government's proposal to "directly incorporate [UNCRC] rights as closely as is achievable in the Scottish context".¹ We commit to work constructively with the Scottish Government to realise the ambition that UNCRC incorporation gives "practical effect to the UNCRC in a way that demonstrates international leadership and works for every child and young person in Scotland".

Many countries have already incorporated the UNCRC into domestic law, including Belgium, Norway, Iceland, Sweden and Spain. Evidence from these countries shows that 'legal incorporation matters'². These countries are more likely to perceive children as being rights holders and have a broader context of respect for children's rights.³ In giving the UNCRC formal status in the domestic legal system, it becomes an 'influential touchstone' for all those whose decisions impact on children across legislation, policy and practice.⁴ The UN Committee on the Rights of the Child (the UN Committee), which oversees implementation of the UNCRC,⁵ has long called for incorporation of the UNCRC into domestic law in the UK.^{6 7}

Together has been working alongside our members and wider civil society to advocate for UNCRC incorporation for many years. We played an active role in informing the development of the Children and Young People (Scotland) Act 2014 and supporting its subsequent implementation. In 2017, we held a series of seminars exploring the UNCRC in law, policy and practice involving speakers from across the world with

¹ Scottish Government (2019). [Children's Rights: Consultation on incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland](#), p.11

² Kilkelly, U. (2019). [The UN Convention on the Rights of the Child: Incremental and transformative approaches to legal implementation](#), The International Journal of Human Rights, p.17

³ Kilkelly, U. (2019). [The UN Convention on the Rights of the Child: Incremental and transformative approaches to legal implementation](#), The International Journal of Human Rights, p.17

⁴ Kilkelly, U. (2019). [The UN Convention on the Rights of the Child: Incremental and transformative approaches to legal implementation](#), The International Journal of Human Rights, p.17

⁵ [UN Committee on the Rights of the Child](#)

⁶ UN Committee on the Rights of the Child (2002). [Concluding Observations: United Kingdom of Great Britain and Northern Ireland](#), paragraphs 8-9; UN Committee on the Rights of the Child (2008). [Concluding Observations: United Kingdom of Great Britain and Northern Ireland](#), paragraphs 10-11

⁷ UN Committee on the Rights of the Child (2016). [Concluding Observations: United Kingdom of Great Britain and Northern Ireland](#), paragraph 79(a)

in-depth experience and knowledge of UNCRC incorporation. The seminar series culminated in a special edition of the International Journal of Human Rights (IJRH) which drew from international experience to explore the steps taken to greater incorporate the UNCRC into national law and policies.⁸

In 2018, we worked with the Children and Young People's Commissioner Scotland to establish an expert advisory group to draft the Children's Rights (Scotland) Bill, a 'gold standard' model of incorporation. We have since consulted widely with members and legal experts on this model. Most recently, we have been involved in a series of engagement events with children, young people and our membership to explore the Scottish Government's consultation. Our consultation response is based upon this wealth of knowledge and experience.

⁸ International Journal of Human Rights (2019). [Special Issue: Human Rights Monitoring and Implementation](#), Volume 23(3) 2019.

1. Are there particular elements of the framework based on the HRA as described here, that should be included in the model for incorporation of the UNCRC in domestic law? Please explain your views.

Yes. The Human Rights Act framework contains important mechanisms to ensure compatibility with human rights standards and provide redress and remedy if rights are breached. These mechanisms should be included in the model of UNCRC incorporation for Scotland.

The UN Committee on the Rights of the Child (the UN Committee) is clear that:

“...incorporation should mean that the provisions of the Convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice”.⁹

In this way, incorporation focuses on the legal recognition, enforceability, and effect of UNCRC obligations at a domestic level, especially through judicial decisions and legal reforms stemming from the treaty obligations.¹⁰

The Human Rights Act 1998 largely incorporates the European Convention on Human Rights (ECHR) into domestic law. It ensures public authorities act compatibly with the ECHR and that rights can be directly invoked before the courts.¹¹ It obliges courts and other public authorities to interpret and give effect to legislation in a way that is compatible with ECHR rights as far as possible.¹² Where this proves impossible, it gives power to courts to declare that an Act of the UK Parliament is incompatible with the ECHR rights. It doesn't entirely ensure the ECHR prevails if there is a conflict with domestic legislation as it leaves it to Parliament to decide as to whether or not to amend incompatible legislation.¹³ We believe equivalent duties should be included as part of the model of UNCRC incorporation in Scotland.

The Children's Rights (Scotland) Bill includes these equivalent duties. The overarching objective is to require all relevant public authorities to ensure that they respect, protect and fulfil rights.¹⁴ To achieve this, the Bill draws down the UNCRC into Scots Law alongside the First and Second Optional Protocols¹⁵ and makes it unlawful for a public authority to act incompatibly with its provisions.¹⁶ The Bill is clear that UNCRC incorporation would only apply and be exercised within those areas that fall within the responsibility of the Scottish Parliament and Scottish Government.

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

Yes. 'Proactive' duties and measures to promote rights-based decision-making should also be included to complement the 'reactive' duties and measures from the Human Rights Act framework. We believe that the framework should include duty on public authorities to pay 'due regard' to the UNCRC and Optional Protocols.

The Human Rights Act 1998 provides for a 'reactive' approach that it is effective after there has been a breach of ECHR rights. It does not contain specific measures to prevent breaches happening in the first place. Whilst we strongly endorse elements of the Human Rights Act framework as a model for UNCRC

⁹ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraphs 19-20

¹⁰ McCall-Smith, K. (2019). [To incorporate the UNCRC or not – is this really the question?](#) The International Journal of Human Rights, Volume 23(3) 2019

¹¹ Section 6, [Human Rights Act 1998](#)

¹² Section 3, [Human Rights Act 1998](#)

¹³ Section 4, [Human Rights Act 1998](#)

¹⁴ Section 5, [Children's Rights \(Scotland\) Bill](#)

¹⁵ Section 1, [Children's Rights \(Scotland\) Bill](#)

¹⁶ Section 7, [Children's Rights \(Scotland\) Bill](#)

incorporation, we believe these should be complemented by broader ‘proactive’ duties and measures to promote positive measures to further children’s rights and prevent breaches occurring.

The Rights of Children and Young People (Wales) Measure 2011¹⁷ (the ‘Welsh Measure’) shows the value of having a ‘proactive’ duty to promote rights-based decision-making. The Welsh Measure places a duty on Ministers to have ‘due regard’ to the UNCRC when exercising any of their functions.¹⁸ This embeds the UNCRC as part of the framework for policy development in Wales, and places children’s rights at the forefront of all Ministerial decisions.¹⁹ Ministers have to reflect on relevant articles of the UNCRC when considering policy proposals and reflect on how they can exercise their functions to give better effect to children and young people’s rights.²⁰ In this way, the UNCRC is seen first and foremost as a framework for effective policy and decision-making, rather than the basis for a legal claim.

The ‘due regard’ duty has provided opportunities to hold Ministers to account for compliance with the UNCRC for children, NGOs, the Children’s Commissioner for Wales and parliamentarians. A Parliamentary Committee successfully used the duty to push for a child-rights focussed amendment to draft legislation for children with additional learning needs.²¹ Civil society successfully drew on the duty to push for children’s interests to be protected in the Welsh Government’s response to the UK’s withdrawal from the European Union.²² These examples show how the ‘due regard’ duty can be used to influence policy outcomes, promote rights-based decision-making and prevent breaches from occurring.²³

The benefits of a ‘due regard’ duty have been recognised in a recent report by the Equalities and Human Rights Commission, which concludes that the duty has ‘potential to lead to positive actions to enhance the status of treaty rights’.²⁴ The report notes that the duty needs to be accompanied by clear guidance to clarify obligations, responsibilities and specific requirements in practice. We comment on this in more detail in question 13. The duty is becoming increasingly known and understood in Scotland.²⁵ From 2018, under the Fairer Scotland Duty²⁶, certain public authorities are required to pay ‘due regard’ to how they can reduce inequalities of outcome caused by socio-economic disadvantage.²⁷ As such, we believe that a ‘due regard’ duty would be an appropriate duty to promote rights-based decision-making at all levels of government across Scotland.

The Children’s Rights (Scotland) Bill includes a ‘proactive’ duty of ‘due regard’ on public authorities to promote rights-based decision-making at all levels of government. This duty complements the ‘reactive’ duties discussed in question 1 which ensure effective mechanisms are in place to provide remedy and redress if rights are breached.

¹⁷ [Rights of Children and Young Persons \(Wales\) Measure 2011](#)

¹⁸ Section 1 of the [Measure](#) requires the Welsh Ministers, when exercising any of their functions, to have due regard to: Part 1 of the CRC; articles 1 to 7 of the Optional Protocol to the CRC on the involvement of children in armed conflict, except article 6(2); and, articles 1 to 10 of the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography.

¹⁹ Welsh Government (2010). [Explanatory Memorandum: Proposed Rights of Children and Young Persons \(Wales\) Measure](#), page 11

²⁰ The [Measure](#) includes a power, under section 6, for Ministers to amend existing legislation which is inconsistent with the UNCRC (if within the scope of devolved competences). To date this provision has not been used, possibly because the Welsh Government has been proactive in introducing new policy in areas impacting on children and young people.

²¹ Children, Young People and Education Committee (2017). [Report on the Additional Learning Needs and Educational Tribunal \(Wales\) Bill](#)

²² Welsh Government and Plaid Cymru. (2017). [Securing Wales’ Future: Transition from the European Union to a new relationship with Europe](#); Welsh Government (2017). [Minister’s response to questions from the CYPEC on Brexit](#)

²³ For detailed examples of the Welsh Measure, see Hoffmann, S. (2019). The UN Convention on the Rights of the Child, Decentralisation and Legislative Integration: A Case Study from Wales. *The International Journal of Human Rights*, Volume 32(3)

²⁴ Daly, A. (2018) [Enhancing the Status of UN Treaty Rights in Domestic Settings](#), p.16

²⁵ It is within the public sector equality duties under the [Equality Act 2010](#)

²⁶ This implements section 1 of the [Equality Act 2010](#)

²⁷ Scottish Government (2018). [The Fairer Scotland Duty Interim Guidance for Public Bodies](#).

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

Yes. Incorporation must make children’s human rights binding and not just guiding. A duty to comply places binding duties on public authorities to respect and protect children’s rights, and allows children to challenge breaches of their rights in domestic courts.

The UN Committee is clear that:

“States parties need to ensure, by all appropriate means, that the provisions of the Convention are given legal effect within their domestic legal systems...”²⁸

A duty ‘to comply’ help to achieve the UN Committee’s definition of incorporation (see question 1). It requires public authorities to provide an outcome which is consistent with the UNCRC. If the duty is not fulfilled, it allows rights-holders can bring individual cases - as well as systemic human rights problems – to the attention of the courts. This is an essential part of providing an effective remedy to children and is already well established and understood in domestic law through the Human Rights Act.²⁹

The First Minister’s Advisory Group on Human Rights notes that a duty ‘to comply’ can “focus minds, incentivise and drive change in how a public body performs”. However, it is a ‘reactive’ duty in that it is only effective after rights have been breached and requires the courts to adjudicate and provide effective remedy and redress. As such, it can result in human rights being seen as a matter for lawyers, and the cost and length of legal proceedings can be prohibitive.³⁰ This is why we believe it needs to be complemented by a ‘due regard’ duty (see question 2).

The Children’s Rights (Scotland) Bill includes a duty ‘to comply’ with the UNCRC which makes it unlawful for a public authority to act incompatibly with the UNCRC and its Optional Protocols.³¹

4. What status, if any, do you think General Comments by the UN Committee on the Rights of the Child and Observations of the Committee on reports made by States which are party to the UNCRC should be given in our domestic law?

The framework for incorporation must ensure that the UN Committee’s jurisprudence is given consideration by public authorities and the courts. This should include General Comments, Concluding Observations and opinions made by the Committee in relation to Optional Protocol 3. This will ensure that Scotland keeps pace with developments in international human rights law and practice whilst being able to apply learning in a way that can be adapted to fit the Scottish context.

The Scottish Government sets out concerns that 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”. This is not the case. There is a body of interpretive guidance available from the UN Committee in the form of General Comments³² and Concluding Observations. This supports the interpretation of the UNCRC, clarifying the content of the rights, sometimes outlining potential violations of those rights and offering advice on how best to comply with the UNCRC obligations. General Comments cover areas ranging from the rights of children with disabilities and children’s rights in juvenile justice through to children’s rights in public budgeting and the impact of business on children’s rights. The UN

²⁸ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraphs 19-20

²⁹ Section 6, [Human Rights Act 1998](#)

³⁰ First Minister’s Advisory Group on Human Rights Leadership (2018). [Recommendations for a new human rights framework to improve people’s lives: Report to the First Minister](#), p.28

³¹ Section 7, [Children’s Rights \(Scotland\) Bill](#)

³² The Committee has so far adopted 23 [General Comments on various aspects of UNCRC implementation](#).

Committee's guidance is supported by emerging jurisprudence in relation to communications considered under UNCRC Optional Protocol 3.³³

Internationally, the guidance provided by the UN Committee is seen as guiding rather than binding. Norway is often held up as an example of how the UNCRC and Optional Protocols can be incorporated into domestic law.³⁴ Since incorporation, the Norwegian Supreme Court's case law has increasingly referred to General Comments as a source of interpretive guidance.³⁵ In preparing for UNCRC incorporation, the Swedish Government published a report which recognised the UN Committee's guidance as providing a very useful source for national authorities who have to interpret the UNCRC.³⁶

We believe the UN Committee's interpretive guidance should be included in the framework for UNCRC incorporation in a way that ensures it must be given consideration by public authorities and the courts. This should specifically include General Comments, Concluding Observations and opinions made by the Committee in relation to Optional Protocol 3. This will ensure that Scotland keeps pace with developments in international human rights law and practice whilst being able to apply learning in a way that fits the Scottish context.

The Children's Rights (Scotland) Bill includes provisions that ensure the UN Committee's General Comments and Concluding Observations are considered by courts and public authorities when exercising their devolved functions.³⁷

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

Courts in Scotland and across the UK are already accustomed to drawing from the UNCRC when considering cases under existing legislation, including the Human Rights Act and wider EU law. There is developing jurisprudence through caselaw from countries that have already incorporated the UNCRC, such as Norway and Iceland. In addition, courts will be able to draw from wider jurisprudence from countries that have incorporated wider international human rights protections into law, such as South Africa.

A recent report from the Equalities and Human Rights Commission notes that:

“...Judges are capable of interpreting laws in a progressive way in line with human rights principles where there is a will to do so.”³⁸

This statement echoes the position put forward by James Wolffe QC, the now Lord Advocate, who said that if economic and social rights were to be incorporated into domestic law, “lawyers and courts will learn the necessary techniques – just as they have with the Convention”. He noted that:

“[d]omestic 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”.³⁹

³³ To date, there have been 22 substantive decisions. See: <http://juris.ohchr.org/en/search/results?Bodies=5&sortOrder=Date>

³⁴ Section 2, [Menneskerettsloven 1999](#)

³⁵ Sandberg, K. (2014). [The role of national courts in promoting children's rights: The case of Norway](#). The International Journal of Children's Rights, Volume 22(1)

³⁶ Office of the Chancellor of Justice (2016). [Barnkonventionen blir svensk lag](#).

³⁷ Sections 14 and 21, [Children's Rights \(Scotland\) Bill](#)

³⁸ Daly, A. (2018) [Enhancing the Status of UN Treaty Rights in Domestic Settings](#), p.11

³⁹ Wolffe, J. (2014). [Economic and Social Rights in Scotland: Lessons from the Past; Options for the Future: A lecture for International Human Rights Day 2014](#).

He also has confidence in the courts' ability to responsibly adjudicate on economic, social and cultural rights, stating that:

“... a court, alive to the respective roles of the legislature and executive on the one hand, and the court on the other, can responsibly adjudicate on social and economic rights”.⁴⁰

He continues that:

“Courts are, in my experience, generally acutely conscious of the limitations of their competence, of the democratic legitimacy which attends policymaking by parliament and by an executive accountable to Parliament and of the subsidiary and limited role which the Courts may accordingly properly play in checking executive and legislative action”.⁴¹

Courts in Scotland are already engaging with the UNCRC. It is used as an aid to interpret the ECHR⁴² and if legislation is ambiguous, courts should interpret it in a way that is compatible with the UNCRC.⁴³ A report from the Swedish Government into preparations for UNCRC incorporation recognises the value of courts already having experience in interpreting the ECHR domestically and becoming “used to applying rights-based legislation”.⁴⁴ These conclusions apply equally to Scotland.

A number of the general principles of the UNCRC are included in Scots law, albeit on a piecemeal basis. The best interests of the child is particularly prominent through provisions that treat welfare as ‘the paramount consideration’ such as in the Children (Scotland Act) 1995 and the Children’s Hearings (Scotland) Act 2011. The views of the child are also included in the 1995 Act, which places an obligation on those fulfilling a parental responsibility, and on courts, to give children the opportunity to express their view, and to have regard to their view as far as practicable, taking into account the child’s age and maturity. A similar obligation is placed on Children’s Hearings⁴⁵ and education authorities.⁴⁶ These existing obligations will help courts develop further jurisprudence around the UNCRC.

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 certainty that the rights incorporated into law are UNCRC rights rather than an alternative version. It allows courts to look to other countries that have directly incorporated the UNCRC and draw from General Comments and wider jurisprudence to inform decisions. Countries including Belgium, Norway and Spain are developing detailed case law which could be used by courts in Scotland to aid interpretation. In Norway, it has been reported that the judiciary experienced little difficulty in interpreting the UNCRC. This is partly because, like Scotland, most legislation is already in line with the UNCRC, or in some cases gives stronger protections.⁴⁷

Courts in Scotland can also look more widely at comparative international caselaw. A 2016 report into children’s access to justice across the world found evidence of the UNCRC being cited in 60% of the 197 countries studied. Of these countries, 20 used the UNCRC frequently and consistently enough to amount to

⁴⁰ Wolffe, J. (2014). [Economic and Social Rights in Scotland: Lessons from the Past; Options for the Future: A lecture for International Human Rights Day 2014.](#)

⁴¹ Wolffe, J. (2014). [Economic and Social Rights in Scotland: Lessons from the Past; Options for the Future: A lecture for International Human Rights Day 2014.](#)

⁴² See, for example, *Christian Institute v Lord Advocate* [2015] UKSC 0216, *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; *BH (AP) and another v Lord Advocate and another (Scotland)*; *KAS or H (AP) v Lord Advocate and another (Scotland)* (2012) UKSC 24.

⁴³ *White v, White*, [2001] S.L.T. 485. Lord Hope at paragraph 494.

⁴⁴ Government Office of Sweden (2016) [English summary on proposals for an act on incorporation the UN Convention on the Rights of the Child \(CRC\) into Swedish domestic law \(from SOU 2016:1.](#)

⁴⁵ Section 27, [Children’s Hearings \(Scotland\) Act 2011](#)

⁴⁶ Section 2(2), [Standards in Scotland’s Schools etc. Act 2000](#)

⁴⁷ See, for example, Bårdsen, A. (2015). [Children’s Rights in Norwegian Courts: Seminar on Children’s Rights](#), Kathmandu

an established jurisprudence.⁴⁸ Those involved in Together's consultation events were clear that courts need to look at how other countries are interpreting the UNCRC and to learn from their approaches whilst aspiring to the highest international standard.⁴⁹

In addition, there is wide range of comparative case law from countries that have incorporated economic, social and cultural rights that would be of assistance to interpreting the UNCRC, from countries including South Africa, Germany and Argentina.⁵⁰ Experience from these countries shows that it is possible to adjudicate on economic, social and cultural rights without straying into the role of the Parliament or legislature.⁵¹

6. Do you agree that it is best to push forward now with incorporation of the UNCRC before the development of a Statutory Human Rights Framework for Scotland? Please explain your views.

Yes. Scotland has been taking significant steps towards the incorporation of the UNCRC for very many years. The First Minister's Advisory Group is supportive of UNCRC incorporation and sees it as a 'separate process' to the development of a Statutory Human Rights Framework for Scotland. The First Minister's Advisory Group was clear that its recommendations 'should not cause any delay to UNCRC incorporation'. Given the solid foundation of UNCRC implementation, we agree that it is best to move forward now with UNCRC incorporation.

Momentum has been building for very many years towards the incorporation of the UNCRC into Scots law. In this time, Scotland has emerged with the potential to become an international leader in children's rights. Since the establishment of the Scottish Parliament, children's rights have increasingly garnered wider interest and support at a civil society and governmental level. This culminated in the Children and Young People (Scotland) Act 2014, which introduced duties on Ministers and public bodies relating to the UNCRC. At that time, there was great disappointment from children, young people and their advocates that the Scottish Government did not commit to full and direct incorporation of the UNCRC.

In June 2017, following a consultation with more than 5,000 young people across Scotland, Members of the Scottish Youth Parliament (MSYPs) voted to focus all their efforts on the rights of young people. Their subsequent campaign, *Right Here, Right Now*,⁵² aimed to ensure that Scotland's young people are aware of and understand their own rights, and are empowered to take action to defend their own rights and those of others. It specifically made a call for the incorporation of the UNCRC into Scots law. Political momentum around implementation of the UNCRC has continued to grow. The 2017-18 Programme for Government⁵³ included several positive commitments to children's rights, including a commitment to undertake a comprehensive audit on the most practical and effective way to further embed the principles of the UNCRC into policy and legislation. A commitment was made to set up an independent Advisory Group on Human Rights Leadership tasked with making recommendations on how Scotland can lead by example in the field of human rights, specifically on economic, social, cultural and environmental rights.

⁴⁸ Child Rights International Network (2016). [Rights, Remedies & Representation: Global report on access to justice for children](#)

⁴⁹ The Health and Social Care Alliance Scotland (the ALLIANCE) and Together (Scottish Alliance for Children's Rights) (2019). [Incorporation of Children's Rights Consultation Event 11 July 2019, Children in Scotland](#), Edinburgh

⁵⁰ See case studies in Boyle, K. (2018). [Models of Incorporation and Justiciability for Economic, Social and Cultural Rights](#). Edinburgh: Scottish Human Rights Commission

⁵¹ For example, the South African Constitutional Court has recognised that the state is not obliged to go beyond available resources or to achieve a particular right immediately, stating that: "...all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights [...] on a progressive basis", *Minister of Health & Others v. Treatment Action Campaign & Others (No 2)* 2002 5 SA 721 (CC), para 35

⁵² For further information about this campaign, see [here](#)

⁵³ Scottish Government (2017). [A nation with ambition: The Government's Programme for Scotland 2017-2018](#)

2018 was designated as the Year of Young People to celebrate young people and put a focus on their participation in decision-making.⁵⁴ In September 2018, the UNCRC Audit was advanced through the 2018-19 Programme for Government,⁵⁵ which included a commitment to incorporate the principles of the UNCRC into domestic law. At the end of 2018, Scottish Government published a 3-year report on UNCRC implementation and put forward a 3-year Action Plan on Children’s Rights, as required by the 2014 Act.⁵⁶ Public authorities are due to publish their first reports on UNCRC implementation in 2020.

The First Minister’s Advisory Group has recognised the significant progress made towards UNCRC incorporation in Scotland. As such it has been clear that UNCRC incorporation should be seen as a “separate process”⁵⁷ to the development of a Statutory Human Rights Framework and that its recommendations “should not cause any delay to UNCRC incorporation”.

Given the solid foundation of UNCRC implementation in Scotland, we agree that it is best to move forward now with UNCRC incorporation. The creation of a Statutory Human Rights Framework for Scotland will provide a subsequent opportunity to enshrine wider protections for children embedded in other international human rights treaties such as the UN Convention on the Rights of Persons with Disabilities and the Convention on the Elimination of Discrimination Against Women. The UNCRC itself emphasises the importance of these broader human rights instruments to children.⁵⁸

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 (Scottish Alliance for Children’s Rights).

The Children’s Rights (Scotland) Bill is informed by international best practice as well as experience gained within the UK through the implementation of the Human Rights Act 1998 and the Welsh Measure. It provides a comprehensive legal framework to proactively promote children’s UNCRC rights whilst also providing remedy and redress if these rights are breached. We believe it offers the ‘gold standard’ model of UNCRC incorporation that meets the First Minister’s aspiration for children in Scotland.

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 UNCRC incorporation. 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, the Incorporation Expert Advisory Group presented the Bill to the Deputy First Minister on Universal Children’s Day in November 2018.

⁵⁴ For further information, see [here](#)

⁵⁵ Scottish Government (2018). [Delivering for Today, Investing for Tomorrow: The Government’s programme for Scotland 2018-19](#)

⁵⁶ Scottish Government (2018). [Progressing children’s rights in Scotland: an action plan 2018 to 2021 - consultation](#)

⁵⁷ First Minister’s Advisory Group on Human Rights Leadership (2018). [Recommendations for a new human rights framework to improve people’s lives: Report to the First Minister](#), p.54

⁵⁸ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraph 23

After considering the detail of the Scottish Government’s consultation, we continue to believe that the Children’s Rights (Scotland) Bill (‘the Bill’) provides the ‘gold standard’ model of UNCRC incorporation that meets the First Minister’s aspiration for children in Scotland. The Bill includes three key elements:

1. Drawing down the Preamble, Articles of the UNCRC (1-42) and the First and Second Optional Protocols to make them part of Scots law.
2. A duty to ‘act compatibly’ which follows the Human Rights Act model. This means the State must comply with the UNCRC and may be held accountable in law for breaches of children’s UNCRC rights.
3. A duty to have ‘due regard’ to the UNCRC which follows the Welsh Measure. This means the State must actively think about how to give effect to children’s human rights when making policy decisions.

The Children’s Rights (Scotland) Bill provides a model of full and direct incorporation, making it clear that all the substantive articles of the UNCRC and Optional Protocols should be part of Scots law. This is in line with the UN Committee’s clear statement that:

“States Parties are required to implement the CRC as a whole, in recognition of the status of children as rights holders and in light of the indivisible and inter-dependent nature of CRC provisions”.⁵⁹

This approach was strongly supported by the majority of attendees at Together’s consultation events.⁶⁰ In including the Preamble of the UNCRC, it sends a clear message to children that the rights enshrined into Scots law help to ensure children grow up in a ‘family environment of happiness, love and understanding’. This has been raised by care experienced children and young people as being of particular importance to them.⁶¹ It also reflects the holistic nature of the UNCRC in that all rights are universal, interrelated and indivisible. There is a growing evidence base that full and direct incorporation helps to ensure a rights-based approach to decision-making⁶² and encourages a more positive human rights culture.⁶³ Children and young people have spoken about the importance of this culture change to them.⁶⁴ They have raised the importance of being equal to the rest of society and being included in decision making, setting out the need for everyone to feel “included within society’ and for young people to be “addressed as citizens”⁶⁵

The First Minister’s Advisory Group on Human Rights Leadership highlighted the challenge of how:

“to find a way to bring out the best of the ‘due regard’ duty and the ‘duty to comply’ while recognising that the right to an effective remedy for a rights-holder is indispensable and is an international obligation.”⁶⁶

The Bill meets this challenge by including the two complementary duties: a duty to act compatibly, and a duty to have due regard to children’s rights. This provides both proactive measures to encourage positive steps to further children’s rights and prevent rights violations, alongside reactive measures to ensure

⁵⁹ Kilkelly, U. (2019). [The UN Convention on the Rights of the Child: Incremental and transformative approaches to legal implementation](#), The International Journal of Human Rights Volume 23(3) 2019; UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#)

⁶⁰ The Health and Social Care Alliance Scotland (the ALLIANCE) and Together (Scottish Alliance for Children’s Rights) (2019). [Incorporation of Children’s Rights Consultation Event 11 July 2019, Children in Scotland](#), Edinburgh

⁶¹ Who Cares? Scotland (2019). [Love: my vision](#)

⁶² McCall-Smith, K. (2019). [To incorporate the UNCRC or not – is this really the question?](#). The International Journal of Human Rights, Volume 23(3) 2019, p.3

⁶³ Daly, A. (2018) [Enhancing the Status of UN Treaty Rights in Domestic Settings](#), p.13

⁶⁴ Scottish Youth Parliament (2019). [Respondent information form: Children’s Rights: Consultation on incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland](#)

⁶⁵ YouthLink Scotland (2019). [Young People’s Response to the Consultation on Incorporating the UN Convention on the Rights of the Child \(UNCRC\) into Scots Law](#)

⁶⁶ First Minister’s Advisory Group on Human Rights Leadership (2018). [Recommendations for a new human rights framework to improve people’s lives: Report to the First Minister](#), p.28

remedy and redress if a violation does take place. The importance of this approach is discussed more in our answers to questions 2 and 3.

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”.⁶⁷ Whilst we agree that some aspects of the UNCRC are outwith the competence of the Scottish Parliament, we do not agree with this statement. In recognition of the limited powers of the Scottish Parliament, the Bill is clear that the duties would only apply when government is exercising devolved powers or acting in devolved areas.⁶⁸ The Bill does not seek to extend the powers of the Scottish Parliament or Scottish Ministers.⁶⁹ Those involved in Together’s consultation events were clear that while issues surrounding devolution may be a concern, this should not overshadow the aims and ambitions behind incorporation. Any concerns should be dealt with as they arise, rather than designing a weaker tool, such as Scottish Suite of Rights.⁷⁰

The Scottish Government sets out an aspiration to “go further” than the UNCRC where possible. Young people have endorsed this ambition and many would like to see Scotland push the boundaries and become a world leader.⁷¹ The UNCRC is clear that where there is a higher standard set in domestic law than that in the UNCRC, then the higher standard must prevail.⁷² The framework provided by the Children’s Rights (Scotland) Bill would support this ambition, by providing a strong foundation for further progress across all devolved areas and encouraging the Scottish Government to continually ‘push the boundaries’ and put forward legislation and policy that far exceeds the standards required by the UNCRC.

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

We do not believe that the concerns raised by Scottish Government are relevant to Scotland. The act of incorporating the UNCRC into Scots law is what gives UNCRC rights practical effect.

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?

Over the past 20 years of devolution, public authorities have had to develop a clear understanding of devolved competencies and functions. UNCRC incorporation could only apply and be exercised within those areas that fall within the responsibility of the Scottish Parliament. Public authorities would have to apply their existing understanding of devolved competencies and functions when implementing duties resulting from UNCRC incorporation. This could be supported through guidance, training, awareness-raising and other measures included within the Children’s Scheme (see questions 13 and 16).

10. Do you think we are right to reject incorporating the UNCRC solely by making specific changes to domestic legislation? Please explain your views.

⁶⁷ Scottish Government (2019). [Children’s Rights: Consultation on incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland](#), p.19

⁶⁸ Section 2, [Children’s Rights \(Scotland\) Bill](#)

⁶⁹ Section 32, [Children’s Rights \(Scotland\) Bill](#)

⁷⁰ The Health and Social Care Alliance Scotland (the ALLIANCE) and Together (Scottish Alliance for Children’s Rights) (2019). [Incorporation of Children’s Rights Consultation Event 11 July 2019, Children in Scotland](#), Edinburgh

⁷¹ Scottish Youth Parliament (2019). [Respondent information form: Children’s Rights: Consultation on incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland](#)

⁷² Article 41, [United Nations Convention on the Rights of the Child](#)

Yes. Incorporation must create an overarching legal framework through which the UNCRC is considered and embedded across all levels of government. Making piecemeal changes to domestic legislation would not achieve this and would not equate to incorporation.

Yes. Making piecemeal changes to domestic legislation results in patchy protections of children's rights and does not amount to incorporation. This is evidenced through a 2008 UNICEF study covering 52 countries which found that a key issue for governments in ensuring effective implementation of the UNCRC tends to be "gaps in law reform and difficulties in implementing new legislation designed to protect the rights and principles contained in the Convention".⁷³

Making ongoing changes to domestic legislation is a fundamental part of implementing the UNCRC. The UN 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.⁷⁴ This is reflected in practice in the 2008 UNICEF study which clearly demonstrated that dealing with gaps in law reform "requires a continued and concerted effort to review the legislation in force and amend or replace it, as necessary, to ensure it adequately protects all the rights of all children".⁷⁵ In Sweden, the Parliament acknowledged the importance of UNCRC incorporation as an 'educational tool' and committed to "a guidance document, an education initiative and continued systematic transformation work" as part of the work towards incorporation.⁷⁶ This included a comprehensive programme to bring legislation in line with the UNCRC.⁷⁷ Scotland should draw from this experience and build on the findings of the 2017-18 UNCRC Audit to take steps to ensure that all legislation is in line with the UNCRC, alongside full and direct incorporation of the UNCRC into law itself.

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

Children's rights are universal, indivisible, interdependent and interrelated. All rights are equal in importance and cannot be fully enjoyed without the others. We believe that full and direct incorporation provides the legal certainty and clarity sought by the Scottish Government. As such, we do not support the suggested transposition model. We believe that there is a role for children, young people and broader civil society to inform and influence the Children's Scheme and broader guidance as to how UNCRC incorporation should be implemented.

We do not support the suggested 'transposition model' of incorporation. Children's rights are universal, indivisible, interdependent and interrelated. All rights are equal in importance and cannot be fully enjoyed without the others. Integrating individual provisions of an international human rights treaty into domestic law has been described as a "cherry-picking of obligations"⁷⁸ and therefore does not amount to true incorporation.

It is important to make a distinction between 'incorporation' and 'implementation'. Incorporation is about bringing rights into domestic law. Implementation is about making sure those rights are made real in practice. The First Minister's Advisory Group made recommendations about both incorporation and implementation. In relation to *incorporation*, the FM Advisory Group recommended an Act of the Scottish

⁷³ UNICEF Innocenti Research Centre (2007). [Law reform and implementation of the Convention on the Rights of the Child](#).

⁷⁴ UN Committee on the Rights of the Child (2016). [Concluding Observations: United Kingdom of Great Britain and Northern Ireland](#), paras. 7-11.

⁷⁵ UNICEF Innocenti Research Centre (2007). [Law Reform and Implementation of the Convention on the Rights of the Child](#), p.112

⁷⁶ Ministry of Health and Social Affairs, Government Offices of Sweden (2018). [Convention on the Rights of the Child will become Swedish law](#)

⁷⁷ Ministry of Health and Social Affairs, Government Offices of Sweden (2018). [Convention on the Rights of the Child will become Swedish law](#)

⁷⁸ McCall-Smith, K. (2019). [To incorporate the UNCRC or not – is this really the question?](#). The International Journal of Human Rights

Parliament which includes rights that are to be “drawn from UN human rights treaties ratified by the UK but not yet incorporated into Scottish law”.⁷⁹ On the contrary, 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”.

We would welcome a broad consultation on how we can ensure that incorporation achieves real and transformational change to children’s lives. This consultation can take place alongside the act of legal incorporation. However, we do not think that this process should be used to ‘cherry pick’ which rights are incorporated. We maintain that all rights within the UNCRC should be brought into Scots law. There would be a role for a public participation process in raising awareness and understanding of what incorporation means in practice and in informing guidance and training materials to support implementation.

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

The Children’s Rights (Scotland) Bill, developed by an Expert Advisory Group convened by Together and the Children and Young People Commissioner Scotland, represents a ‘gold standard’ model of UNCRC incorporation that meets the First Minister’s aspiration for children in Scotland. We support the model of full and direct incorporation proposed by this Bill. Further information on the Bill can be found under question 7, above.

Our preferred model for incorporating the UNCRC into domestic law is the Children’s Rights (Scotland) Bill. 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.

The model has been carefully drafted to ensure the model can only be applied insofar as the powers of the Scottish Parliament allow. It takes a proactive approach to the realisation of children’s rights in relation to the exercise of devolved functions. It encourages and embeds rights-based decision-making across all levels of government and provides children with access to redress if their rights are breached. It also ‘future-proofs’ children’s rights protections in a way that keeps pace with developments in international human rights law and covers any further powers that might be devolved to Scotland.

⁷⁹ First Minister’s Advisory Group on Human Rights Leadership (2018). [Recommendations for a new human rights framework to improve people’s lives: Report to the First Minister](#), p.31

13. Do you think that a requirement for the Scottish Government to produce a Children’s Rights Scheme, similar to the Welsh example, should be included in this legislation? Please explain your views.

Yes. We welcome Scottish Government’s proposal to include a Children’s Rights Scheme, similar to the Welsh example, in the model of UNCRC incorporation. We know from the experience in Wales that this will help to create opportunities for children, young people and wider stakeholder to inform how the UNCRC is implemented. We believe that the Children’s Scheme should include a mandatory requirement to set out a process for child rights impact assessments (CRIA), complaints and the participation of children in decision-making.

Yes. International experience shows that the most successful models of incorporation are those that are accompanied by a range of implementation measures.⁸⁰ In Wales, the Children’s Rights Scheme has been largely effective in promoting rights-based policymaking within national government. Welsh Ministers are under a duty to prepare this Scheme, which sets out what they have done and are planning to do to ensure that children’s rights are considered when making decisions. The Scheme is supported by a duty on Welsh Ministers to publish a compliance report and lay it before the Welsh Parliament every three years. This has 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.

To be effective, a Children’s Rights Scheme needs to enshrine systematic, robust and consistent consideration of children’s rights in all decisions made by public authorities. To support this, we believe that such a scheme for Scotland should contain a mandatory requirement for:

- Child rights impact assessments (CRIA)
- Complaints processes
- Regular reports on progress⁸¹
- Processes to involve children and the Children and Young People’s Commissioner Scotland in the development and review of the Scheme

Child Rights Impact Assessments

We know from experience in Wales and Scotland that child rights impact assessments are key to ensuring that children’s rights are adequately reflected in policy development.⁸² The UN Committee is clear that impact assessment processes need to be built into government at all levels and as early as possible in the policy development process.⁸³ This was widely supported by attendees at Together’s consultation events.⁸⁴ It is important to ensure that in future years – regardless of the level of political commitment to children’s human rights – there continues to be adequate consideration of children’s human rights in policy development. As such, we support provision that would make makes CRIA a mandatory part of the Children’s Scheme.

⁸⁰ Daly, A. (2018) [Enhancing the Status of UN Treaty Rights in Domestic Settings](#), Liverpool: University of Liverpool, p.13

⁸¹ Including reporting on steps taken to ensure children grow up loved, safe and respected.

⁸² Backbier, M., Didio-Girard, S., Quist, S.E., Fisher, E., Jahnel, J., Lane, S., Riemslogh, J., Munoz, E., Strachan, G. (2019). [A Children’s Rights Approach: Recommendations to the Scottish Government on Refining Children’s Rights and Wellbeing Impact Assessments in Scotland](#); Chitashvili, I., Combes, H.L.J., Gillespie, K., Kipielová, K., Khan, S., Murakami, K., Rakymova, N., Schmid, L., Sharma, G. (2019). [Recommendations and Notes on Scottish Children’s Rights and Wellbeing Impact Assessments](#).

⁸³ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraphs 45,46,47

⁸⁴ The Health and Social Care Alliance Scotland (the ALLIANCE) and Together (Scottish Alliance for Children’s Rights) (2019). [Incorporation of Children’s Rights Consultation Event 11 July 2019, Children in Scotland](#), Edinburgh

Complaints Processes

Barriers in access to justice and long drawn-out processes can seriously compromise a child's ability to assert their rights.⁸⁵ The UN Committee emphasises the importance of independent complaints procedures and child friendly information, as well as access to the court and independent advocacy (see question 16).⁸⁶ This is endorsed by Together members, who repeatedly set out the need for child-friendly complaints mechanisms at all levels of government⁸⁷ to ensure public authorities are held to account for their decisions at the earliest possible stage and that the courts remain the measure of last resort. As such, we believe that the Children's Scheme should include a requirement on public authorities to set out what mechanisms have been put in place to support complaints from children.

Regular Progress Reports

Regular parliamentary and public scrutiny plays an essential role in embedding children's rights in decision-making.⁸⁸ This is recognised by the UN Committee, which supports the publication of comprehensive reports on the state of children's rights and recognises the value of wide dissemination and public debate of these reports, including in Parliament.⁸⁹ This was endorsed by attendees at Together's consultation events, who were clear that frequent and meaningful reporting which is more than just a 'tick-box exercise' is essential.

The Children and Young People (Scotland) Act 2014 already places UNCRC reporting obligations on Ministers and public authorities on a statutory basis. As a result, Scottish Ministers have put in place an Action Plan for Children's Rights 2018-2021 which promotes the non-statutory use of CRIA, a strategic framework for participation and a programme to raise awareness and understanding of the UNCRC. Introducing a new Children's Scheme provides an opportunity to strengthen these duties in a way that adds value to the existing obligations under the 2014 Act and the periodic reporting to the UN Committee.

Reporting around UNCRC implementation must be substantive. It should look not only at how the processes embedded in the Scheme are functioning, but also at the extent to which incorporation is bringing about improved outcomes for children. It should include mechanisms to allow for in-depth analysis and robust scrutiny of improvements made to children's rights over time. This would ensure the robust implementation of the UNCRC and a timely response to any challenges that may arise. As such, we believe that the Children's Scheme should include a requirement for robust reporting processes that build on the requirements of the 2014 Act.

Given the consistent and powerful arguments put forward by care experienced children and young people around the importance of love⁹⁰, these progress reports should include systematic reporting on the steps taken by public authorities to ensure that children grow up "loved, safe and respected" in line with the Scottish Government's National Outcome for children.⁹¹ This would provide a specific, regular opportunity through which care experienced children and young people could hold government to account.

⁸⁵ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraph 24

⁸⁶ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraph 24

⁸⁷ The Health and Social Care Alliance Scotland (the ALLIANCE) and Together (Scottish Alliance for Children's Rights) (2019). [Incorporation of Children's Rights Consultation Event 11 July 2019, Children in Scotland](#), Edinburgh

⁸⁸ McCall-Smith, K. (2019). [To incorporate the UNCRC or not – is this really the question?](#). The International Journal of Human Rights

⁸⁹ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraph 49

⁹⁰ Who Cares (Scotland)? (2019) [We Don't Have to Wait](#)

⁹¹ Scottish Government (2018) [National Performance Framework](#)

Involvement of children and the Children and Young People’s Commissioner in development and review of the Scheme

Children and young people must be properly involved in the development and review of the Children’s Scheme. The UN Committee raises a challenge in saying that “...appearing to ‘listen’ to children is relatively unchallenging; giving due weight to their views requires real change”.⁹² For children to be meaningfully involved, the UN Committee is clear that “[t]ranslations [of reports], including child-friendly versions, are essential for engaging children and minority groups in the process”.⁹³ This has also been raised by children and young people, who have said that in their perfect world, they would have their opinions valued and that they would be “listened to by every adult by law”⁹⁴.

There should also be further independent monitoring and evaluation embedded into the Children’s Scheme. This should include children and young people, the Scottish Parliament, the Children and Young People’s Commissioner Scotland, as well as broader civil society. 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.

The Children’s Rights (Scotland) Bill includes similar provisions for a Children’s Scheme⁹⁵. 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. The Bill requires government to undertake consultation - including with children and the Children and Young People’s Commissioner Scotland – in the development of the Scheme.⁹⁶

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

No. The UK ratified the UNCRC almost 30 years ago in 1991. The UK’s ratification of the UNCRC placed binding obligations on the Scottish Government and, as a result, the UNCRC has already been embedded into legislation, policy and practice in Scotland over many years, albeit on a piecemeal basis. The Children and Young People (Scotland) Act 2014 has further raised awareness and understanding of the UNCRC obligations among public authorities by placing reporting duties on Ministers and public bodies to set out what steps are being taken to further children’s rights. As such, public authorities should be ready by 2021 to apply the more comprehensive duties that result through UNCRC incorporation.

International experience shows that the ‘building blocks’ towards the ultimate goal of incorporation may need to be put in place over time.⁹⁷ Many young people spoke about the importance of ensuring the process of incorporation is not rushed and that time should be taken to get it right.⁹⁸ It is important to recognise that Scotland has not rushed towards incorporation. ‘Building blocks’ towards incorporation have steadily been put in place ever since the UK ratified the UNCRC in 1991. Through this work, Scotland has built a solid foundation on which it can incorporate the UNCRC in 2021.

⁹² UN Committee on the Rights of the Child (2009). [General comment no.12: The right of the child to be heard](#), paragraph 12

⁹³ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraph 49

⁹⁴ YouthLink Scotland (2019). [Young People’s Response to the Consultation on Incorporating the UN Convention on the Rights of the Child \(UNCRC\) into Scots Law](#)

⁹⁵ Sections 22-26, [Children’s Rights \(Scotland\) Bill](#)

⁹⁶ Section 25, [Children’s Rights \(Scotland\) Bill](#)

⁹⁷ Kilkelly, U. (2019). [The UN Convention on the Rights of the Child: Incremental and transformative approaches to legal implementation](#), *The International Journal of Human Rights*, p.18

⁹⁸ YouthLink Scotland (2019). [Young People’s Response to the Consultation on Incorporating the UN Convention on the Rights of the Child \(UNCRC\) into Scots Law](#)

As signatory to the UNCRC, the UK Government agreed to undertake all appropriate legislative, administrative and other measures needed for its full implementation. The UK's ratification of the UNCRC places binding obligations on the Scottish Government.⁹⁹ Under the Scotland Act 1998, the Scottish Government has a responsibility to observe and implement obligations under international human rights conventions.¹⁰⁰ There is also an assumption in Scotland that:

“when the United Kingdom enters into an international treaty, that may give rise to a legitimate expectation on the part of individuals that the executive will act in accordance with the terms of the treaty”.¹⁰¹

As a result of these obligations, the UNCRC has already been embedded into legislation, policy and practice in Scotland over many years, albeit on a piecemeal basis. The Children and Young People (Scotland) Act 2014 built on this by placing reporting duties on Ministers and public bodies to set out what steps are being taken to further children's rights.

We recognise that public bodies may have concerns that UNCRC incorporation could place an additional burden on already stretched public finances. However, the UNCRC includes the concept of 'progressive realisation' of children's human rights. This accepts that lack of resources can hamper the full implementation of economic, social and cultural rights whilst placing a requirement on public authorities to demonstrate that they have implemented the UNCRC 'to the maximum extent of their available resources'.¹⁰² Irrespective of the resources available, this means that public authorities must seek to ensure that every child has, at the very least, minimum levels of rights, and then make every effort to improve children's realisation of their rights over time.

Given the solid foundation which has already been built in Scotland for implementing the UNCRC, we do not believe that a sunrise clause is necessary. Public authorities should already comply with the UNCRC. Between now and the passing of an Act of Incorporation 2021, public authorities should continue to raise awareness and understanding of the UNCRC at policy and practice levels to prepare for the domestically binding duties of incorporation.

15. If your answer to the question above is yes, how long do you think public bodies should be given to make preparations before the new legislation comes into full effect? Please explain your views.

See above at answer 14.

⁹⁹ Article 26 of the [Vienna Convention on the Law of Treaties](#) (ratified by the UK Government in 1971) states that 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'

¹⁰⁰ Section 57 and Schedule 5, paragraph 7, [Scotland Act 1998](#)

¹⁰¹ Lord Drummond Young in *Khairandish v Secretary of State for the Home Department* 2003 SLT 1358.

¹⁰² UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraph 7

16. Do you think additional non-legislative activities, not included in the Scottish Government’s Action Plan and described above, are required to further implement children’s rights in Scotland? Please explain your views.

Yes. We welcome the Scottish Government’s Action Plan, which includes a strategic approach to participation, CRIA and a programme of work to raise awareness and understanding of the UNCRC. We also welcome the Scottish Government’s recent report on UNCRC implementation submitted to Parliament in December 2018. There is a growing body of evidence that UNCRC incorporation should be accompanied by additional implementation measures that progressively embed a children’s rights approach across all levels of government and society. These measures should include advocacy services, systematic training for those who work with children, child rights education for children and their parents and child rights budgeting.

The UN Committee is clear that effective implementation of the UNCRC is not achieved by legislative measures alone. It has identified a range of non-legislative activities that are needed for effective implementation, including the development of structures, training, awareness-raising and other activities.¹⁰³ There is a growing body of evidence that direct incorporation of the UNCRC into law needs to be accompanied by additional implementation measures that progressively embed a children’s rights approach across all levels of government and society.¹⁰⁴ These measures support the gradual culture change which follows incorporation. Countries that have had the most positive experiences of incorporation have put a range of legal and non-legal measures in place – producing a positive accumulative effect. There is much that Scotland can learn from this international experience.

Whilst the measures included in Scotland’s 2014 Act are important, more needs to be put in place. This includes:

- advocacy services
- awareness-raising programmes¹⁰⁵
- systematic training for those who work with children¹⁰⁶
- child rights education for children and their parents¹⁰⁷
- child rights budgeting¹⁰⁸

¹⁰³ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#)

¹⁰⁴ McCall-Smith, K. (2019). [To incorporate the UNCRC or not – is this really the question?](#). The International Journal of Human Rights, p.3

¹⁰⁵ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#)

¹⁰⁶ Kilkelly, U. (2019). [The UN Convention on the Rights of the Child: Incremental and transformative approaches to legal implementation](#), The International Journal of Human Rights, p.2, p.14

¹⁰⁷ UN Committee on the Rights of the Child (2001). [General comment No.1: Article 29 \(1\): The aims of education](#)

¹⁰⁸ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraph 24

Advocacy Services

The UN Committee is clear about the barriers children face in seeking justice and redress if their rights are breached. The UN Committee recommends that a clear channel of redress for breaches of children's rights should include provision of advocacy and child-friendly information as well as access to independent complaint procedures (see question 13) and the courts (see question 18).¹⁰⁹ Barriers in access to justice and long drawn-out processes can seriously compromise a child's ability to develop to their full potential.¹¹⁰ Children and young people have frequently discussed the importance of receiving help, support and advocacy to enable them to assert their rights. They have particularly mentioned the importance of youth workers, mental health workers, teachers, social workers, counsellors and independent advocates, and have said that in their perfect world there would be 'lots of' them.¹¹¹ They also spoke about the importance of knowing about the different support mechanisms available.¹¹²

Awareness-raising programmes

Awareness-raising programmes play an important role in supporting legal incorporation.¹¹³ The UN Committee is clear that:

'[i]f the adults around children, their parents and other family members, teachers and carers do not understand the implications of the Convention, [...] it is most unlikely that the rights set out in the Convention will be realized for many children.'¹¹⁴

The UN Committee has also noted that awareness-raising programmes are most effective when they are inclusive and participatory, they should be conceived as:

' a process of social change, of interaction and dialogue rather than lecturing' which involves all sectors of society, including children and young people'.¹¹⁵

In line with this recommendation, the 2014 Act includes a duty on Ministers to raise awareness and understanding of the UNCRC among adults and children alike. The 2018-2021 Action Plan for Children's Rights already includes a programme of work to raise awareness, including plans to: map existing rights-based awareness resources, develop resources and training programmes, and strengthen understanding of children's rights in schools, early learning and childcare centres.¹¹⁶

This progress is welcome, yet international experience shows the need for broader awareness-raising work to be done. Attendees at Together's consultation events felt there is a great need for raised awareness and understanding of both incorporation and the UNCRC more broadly among the general public and public authorities.¹¹⁷

¹⁰⁹ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraph 24

¹¹⁰ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraph 24

¹¹¹ YouthLink Scotland (2019). [Young People's Response to the Consultation on Incorporating the UN Convention on the Rights of the Child \(UNCRC\) into Scots Law](#)

¹¹² YouthLink Scotland (2019). [Young People's Response to the Consultation on Incorporating the UN Convention on the Rights of the Child \(UNCRC\) into Scots Law](#)

¹¹³ Kilkelly, U. (2019). [The UN Convention on the Rights of the Child: Incremental and transformative approaches to legal implementation](#), *The International Journal of Human Rights*, p.14

¹¹⁴ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraph 66

¹¹⁵ UN Committee on the Rights of the Child (1999). [Report on the twenty-second session](#), para 291(k).

¹¹⁶ Scottish government (2018). [Progressing the human rights of children in Scotland: 2018-2021 Action plan](#)

¹¹⁷ The Health and Social Care Alliance Scotland (the ALLIANCE) and Together (Scottish Alliance for Children's Rights) (2019). [Incorporation of Children's Rights Consultation Event 11 July 2019, Children in Scotland](#), Edinburgh

Systematic training

The UN Committee sets out that learning about the UNCRC needs to be integrated into the initial and in-service training of all those working with and for children.¹¹⁸ There needs to be systematic training for those who work with and for children, including specialist training for specific professions. It recommends that training uses participatory methods in order to 'equip professionals with skills and attitudes that enable them to interact with children and young people in a manner that respects their rights, dignity and self-respect.'¹¹⁹ This has also been highlighted by children and young people, who have set out the need for 'children's rights champions in organisations' and for 'specialist training to ensure children's rights are always at forefront'.¹²⁰

The effectiveness of training programmes should be regularly evaluated. This evaluation should cover not only knowledge of the UNCRC, but also the extent to which the training programme contributes to developing attitudes and practice which actively promote children's rights'.¹²¹ In Norway, there was a concerted programme of work to raise awareness and understanding of the UNCRC among the judiciary.¹²² This led to an increased citation of the UNCRC in the legal system.¹²³ In Belgium, training for the legal profession and judiciary led to similar outcomes.¹²⁴ A similar programme of work should be considered for Scotland.

Child rights education for children and their parents

Children need to know about their rights if they are to be able to assert and enjoy them. The UN Committee places special emphasis on integrating human rights education into the school curriculum at all stages. Article 29 UNCRC requires that the education of the child is directed to '... the development of respect for human rights'. The UN Committee elaborate on this to state that '...children should also learn about human rights by seeing human rights standards implemented in practice whether at home, in school or within the community. Human rights education should be a comprehensive, lifelong process and start with the reflection of human rights values in the daily life and experiences of children.'¹²⁵ This has been endorsed by children and young people, who have identified the need to 'educate all ages on rights of children to prevent problems and inspire solutions' and to provide 'knowledge and training surrounding rights support'.¹²⁶ It was also reflected in feedback from those attending Together's consultation events who recommended that 'Children's rights should be included in the school curriculum and embedded across multiple subjects rather than a single learning unit'.¹²⁷

The UNCRC highlights the importance of family in the preamble and across very many of its articles. As such, the Committee highlights the importance of integrating the promotion of children's rights into preparation for parenthood and parenting education.¹²⁸ The UN Committee also recognises the 'crucial

¹¹⁸ UN Committee on the Rights of the Child (1999). [Report on the twenty-second session, CRC/C/90](#), paragraph 53

¹¹⁹ UN Committee on the Rights of the Child (1999). [Report on the twenty-second session, CRC/C/90](#), paragraph 291(I)

¹²⁰ YouthLink Scotland (2019). [Young People's Response to the Consultation on Incorporating the UN Convention on the Rights of the Child \(UNCRC\) into Scots Law](#)

¹²¹ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraphs 54, 55

¹²² Daly, A. (2018). [Enhancing the Status of UN Treaty Rights in Domestic Settings](#), p.18

¹²³ UNICEF Innocenti Research Centre (2007). [Law Reform and Implementation of the CRC](#); Lundy, L., Kilkelly U., Byrne, B. and Kang, J. (2012). [The UN Convention on the Rights of the Child: A study of legal implementation in 12 countries](#), p.38, p.62

¹²⁴ See UNICEF Innocenti Research Centre (2007). [Law Reform and Implementation of the CRC](#); Lundy, L., Kilkelly U., Byrne, B. and Kang, J. (2012). [The UN Convention on the Rights of the Child: A study of legal implementation in 12 countries](#), p.38, p.62

¹²⁵ UN Committee on the Rights of the Child (2001). [General comment No.1: Article 29 \(1\): The aims of education](#)

¹²⁶ YouthLink Scotland (2019). [Young People's Response to the Consultation on Incorporating the UN Convention on the Rights of the Child \(UNCRC\) into Scots Law](#)

¹²⁷ The Health and Social Care Alliance Scotland (the ALLIANCE) and Together (Scottish Alliance for Children's Rights) (2019). [Incorporation of Children's Rights Consultation Event 11 July 2019, Children in Scotland](#), Edinburgh

¹²⁸ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraphs 54-55

role' that the media can play raising awareness and understanding of the UNCRC.¹²⁹ Many of Together's members have also given feedback on the importance of raising awareness of children's rights among parents and families. Those attending Together's consultation events have spoken of the need for a 'positivity campaign' that would tackle misconceptions and fears around incorporation such as widespread litigation and parents' rights being restricted.¹³⁰

Child rights budgeting

Child rights budgeting is also an essential part of improving implementation of the UNCRC. Rights-based budgeting helps to ground decisions about resources in clear human rights principles, including universality, equity, transparency, accountability and participation.¹³¹ In the reporting guidelines to state parties, the UN Committee is clear that governments must identify and analyse resources for children in national and other budgets.¹³² The UN Committee commends state parties that publish annual 'children's budgets'. All levels of government should evidence that budgetary planning and decision-making should include the best interests of children as a primary consideration and that children, including in particular marginalised and disadvantaged groups of children, are protected from the adverse effects of economic policies or financial downturns.¹³³

¹²⁹ The Committee held a day of general discussion on 'The child and the media' in 1996 and made specific detailed recommendations (see [CRC/C/57](#), para 242) and [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paras 68-70

¹³⁰ The Health and Social Care Alliance Scotland (the ALLIANCE) and Together (Scottish Alliance for Children's Rights) (2019). [Incorporation of Children's Rights Consultation Event 11 July 2019, Children in Scotland](#), Edinburgh

¹³¹ Daly, A. (2018) [Enhancing the Status of UN Treaty Rights in Domestic Settings](#), p.10, p.19

¹³² UN Committee on the Rights of the Child (2005). [General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted under Article 44, Paragraph 1\(b\), of the Convention on the Rights of the Child](#), paragraph 20

¹³³ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraphs 51, 52

17. Do you agree that any legislation to be introduced in the Parliament should be accompanied by a statement of compatibility with children’s rights? Please explain your views.

Yes. A Statement of Compatibility would play an important role in ensuring that any new legislation introduced in the Parliament is compatible with the UNCRC. The statement should be accompanied by a CRIA that explicitly sets out how the Bill furthers UNCRC compliance and mitigates against any negative impacts on children’s rights.

We agree that the model of incorporation should include a requirement for a ‘statement of compliance’ to be given by any person introducing legislation to the Scottish Parliament to confirm that it complies with the UNCRC and Optional Protocols. The UN Committee recognises the ‘essential’ role of Parliamentary Committees in monitoring implementation of the UNCRC.¹³⁴ It commends those countries which have adopted legislation requiring the preparation and presentation of formal impact assessments to Parliament.¹³⁵ Internationally, this approach is used widely to achieve greater compliance between national laws and the UNCRC (for example in Belgium and Australia).¹³⁶ These measures are viewed as promoting greater accountability and awareness of children’s rights among decision makers.¹³⁷ The model of incorporation should also require that all legislation introduced to the Scottish Parliament is accompanied by a CRIA. 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 Children’s Rights (Scotland) Bill includes a requirement for a ‘statement of compliance’.¹³⁸ It includes a requirement for all legislation laid before the Scottish Parliament to be accompanied by a child rights impact assessment.¹³⁹

18. Do you agree that the Bill should contain a regime which allows right holders to challenge acts of public authorities on the ground that they are incompatible with the rights provided for in the Bill? Please explain your views.

Yes. Children can face real difficulties in challenging breaches of their rights. It is essential that there are effective, child-sensitive procedures available to children and their representatives to challenge breaches of their rights. These should include the provision of child-friendly information, advice, advocacy, access to complaints procedures and, ultimately, access to the courts with necessary legal and other assistance.

Children must be able to access justice if their rights have been breached. This is a requirement under international human rights law and enshrined in UNCRC Article 39. The UN Committee states that “...for rights to have meaning, effective remedies must be available to redress violations”.¹⁴⁰ The UN Human Rights Council has also been clear that “...every child whose rights have been violated shall have an effective remedy.”¹⁴¹ Internationally, it has been argued that the more the provisions of the UNCRC can be relied upon in courts and other decision-making processes, the greater the impact it will have.¹⁴²

¹³⁴ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paras 45-47

¹³⁵ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraphs 45- 47

¹³⁶ Kilkelly, U. (2019). [The UN Convention on the Rights of the Child: Incremental and transformative approaches to legal implementation](#), The International Journal of Human Rights, p.14

¹³⁷ Kilkelly, U. (2019). [The UN Convention on the Rights of the Child: Incremental and transformative approaches to legal implementation](#), The International Journal of Human Rights

¹³⁸ Section 8, [Children’s Rights \(Scotland\) Bill](#)

¹³⁹ Section 27, [Children’s Rights \(Scotland\) Bill](#)

¹⁴⁰ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraph 24

¹⁴¹ UN Human Rights Council (2014). [Resolution on the Rights of the Child: Access to justice](#),

¹⁴² Liefwaard, T. and Doek, J. E. (2015). Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic

Although the importance of access to justice applies equally to children and adults, children consistently face additional barriers in pursuing remedies for breaches of their rights. These include inadequate resources, and reliance on others to act on their behalf where capacity is in issue.¹⁴³ To overcome these barriers, children, or those advocating on behalf of children, must be able to use and trust the legal system to protect and enforce their UNCRC rights. The legal system must provide children the means to obtain a quick, effective and fair response to protect their rights and this must be available through a transparent, efficient, accountable and affordable process.

The UN Committee reiterates the importance of ensuring that there are child friendly procedures in place through which children, and those advocating on behalf of children, can access justice. These should include the provision of child-friendly information, advice, advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance.¹⁴⁴

In April 2014, the Optional Protocol on a Communications Procedure to the UNCRC (known as OP3) entered into force providing a complaints mechanism for children whose rights have been breached. To date, 63 States have signed OP3, of which 44 have ratified it.¹⁴⁵ The UK Government has not committed to ratify OP3 and the Scottish Government is yet to indicate support for the UK's ratification. Whilst for those countries that have ratified OP3 there is an additional route to access justice for children, this is a route that is not yet open to children in Scotland.

The Children's Rights (Scotland) Bill includes a 'compatibility' duty on public bodies which ensures children and their representatives can challenge acts of public authorities on the grounds that they are incompatible with the UNCRC and Optional Protocols.¹⁴⁶

19. Do you agree that the approach to awards of financial compensation should broadly follow the approach taken to just satisfaction damages under the HRA? Please explain your views.

Yes. The UN Committee is clear that where there are breaches of children's UNCRC rights, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration. This is enshrined in UNCRC Article 39.

The UN Committee is clear that when rights are found to have been breached, "there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by Article 39."¹⁴⁷

The Children's Rights (Scotland) Bill sets out mechanisms to enable children to access financial compensation if it is determined that their rights have been breached.¹⁴⁸ The Bill creates a presumption that damages will be awarded.¹⁴⁹ This differs from the Human Rights Act which contains a presumption against the award of damages.

and International Jurisprudence. Dordrecht: Springer Netherlands

¹⁴³ Hoffman, S. (2019). [The UN Convention on the Rights of the Child, decentralisation and legislative integration: A case study from Wales](#). The International Journal of Human Rights

¹⁴⁴ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraph 24

¹⁴⁵ UN Human Rights Office of the High Commissioner (2019). [Map: Status of ratification of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure](#)

¹⁴⁶ Section 7, [Children's Rights \(Scotland\) Bill](#)

¹⁴⁷ UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraph 24

¹⁴⁸ Section 19, [Children's Rights \(Scotland\) Bill](#)

¹⁴⁹ Section 19, [Children's Rights \(Scotland\) Bill](#)

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. The UN Committee is clear that ‘...incorporation should mean that the provisions of the Convention [...] will prevail where there is a conflict with domestic legislation or common practice’. 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.

Internationally, it has been noted that the stronger the position of the UNCRC in the domestic legal system, the more likely it is to influence policy and decision making.¹⁵⁰ Furthermore, the visibility of the UNCRC in domestic law promotes and strengthens understanding of children as rights holders, which is essential for UNCRC rights to have meaning and be effectively implemented in practice.¹⁵¹ The Norwegian model of incorporation sets out that the UNCRC has precedence over other legislation and prevails over domestic law in the case of a conflict (alongside the ECHR).¹⁵² Norway is seen as a successful model of incorporation that has had a significant impact on the realisation of children’s rights. This has included improved awareness and understanding of the UNCRC, evidenced by a significant increase in the number of references to the UNCRC in Supreme Court cases after incorporation.¹⁵³ The UNCRC also has precedence in Spain and Belgium.^{154 155} Both Finland and Iceland have also incorporated the UNCRC (in 1991 and 2013 respectively) but neither has given it precedence in the legal hierarchy. It has been reported that incorporation has had limited effects in these countries. It has been argued, therefore, that a key to successful implementation is the elevated status of the UNCRC in the domestic legal hierarchy. As such, the model of incorporation must ensure the UNCRC is accorded high priority in the Scottish domestic legal system, in particular when in conflict with domestic legislation.

21. Do you agree that the Bill should contain strong provisions requiring an ASP to be interpreted and applied so far as possible in a manner which is compatible with the rights provided for in the Bill? Please explain your views.

Yes. 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.

We would support the inclusion of this mechanism in Scotland’s model of incorporation. The Human Rights Act 1998 requires the courts to interpret UK legislation in a manner that is compatible with the ECHR as far as possible.¹⁵⁶ This means that if a piece of legislation or provision at first appears incompatible with the ECHR, then the courts should try to interpret it in a way that *does* comply. This ensures that the courts read and give effect to law in a way which respects human rights. The Scotland Act 1998 requires courts to take a similar approach in relation to acts of the Scottish Parliament and subordinate legislation.¹⁵⁷

¹⁵⁰ Kilkelly, U. (2019). [The UN Convention on the Rights of the Child: Incremental and transformative approaches to legal implementation](#). The International Journal of Human Rights

¹⁵¹ Lundy, L., Kilkelly U., Byrne, B. and Kang, J. (2012). [The UN Convention on the Rights of the Child: A study of legal implementation in 12 countries](#).

¹⁵² Section 3, [Menneskerettsloven 1999](#)

¹⁵³ Sandberg, K. (2014). [The role of national courts in promoting children’s rights: The case of Norway](#). The International Journal of Children’s Rights, 22(1)

¹⁵⁴ Lundy, L., Kilkelly U., Byrne, B. and Kang, J. (2012). [The UN Convention on the Rights of the Child: A study of legal implementation in 12 countries](#).

¹⁵⁵ McCall-Smith, K. (2019). [To incorporate the UNCRC or not – is this really the question?](#). The International Journal of Human Rights

¹⁵⁶ Section 3, [Human Rights Act 1998](#)

¹⁵⁷ Section 101, [Scotland Act 1998](#)

22. Should the Bill contain a regime which would enable rulings to be obtained from the courts on the question of whether a provision in an ASP is incompatible with the rights secured in the Bill? Please explain your views.

Yes. It is unclear as to why the Scottish Government believes it would not be possible to introduce 'strike down' powers. We would like Scottish Government to explain the reasoning behind this assertion.

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'. This is known as a 'strike down' power. This can be contrasted with the power granted to courts through the Human Rights Act 1998. Under the Human Rights Act, courts across the UK only have the power to issue a 'statement of incompatibility' to provisions passed by the UK Government 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 it would not be possible to introduce 'strike down' powers. We would like Scottish Government to explain the reasoning behind this assertion.

We would be keen to see 'strike down' powers included in the model of incorporation which would mean that any law passed by the Scottish Parliament would no longer be considered to be law if a court decided that it breached the UNCRC. This will ensure that the rights enshrined in the UNCRC are given the same status as that given to ECHR rights through the Scotland Act 1998¹⁵⁸.

The Children's Rights (Scotland) Bill includes 'strike down' powers that would allow courts to declare an Act of the Scottish Parliament to be incompatible with the UNCRC and the Optional Protocols.¹⁵⁹ This mirrors the protections given to ECHR rights under the Scotland Act 1998¹⁶⁰ and would ensure that the rights enshrined in the UNCRC are given the same status as that given to ECHR rights through the Scotland Act 1998.¹⁶¹

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

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

It is a basic requirement that a child must be able to bring a case in their own name, recognising that the law treats children as their own legal person with interests that the court should protect. It is important to strike a balance between the fact that many children will need and want support and representation in order to engage with the legal system, and yet barriers must not be put in place for those children who wish - and have the capacity to - act on their initiative. This is already reflected in Scots law. The age of full legal capacity in is 16 years old. Children under the age of 16 are considered competent to instruct a solicitor provided they have 'a general understanding of what it means to do so'. Children over the age of 12 are presumed to have this capacity.

¹⁵⁸ Section 29, [Scotland Act 1998](#)

¹⁵⁹ Section 17, [Children's Rights \(Scotland\) Bill](#)

¹⁶⁰ Section 18, [Children's Rights \(Scotland\) Bill](#)

¹⁶¹ Section 29, [Scotland Act 1998](#)

Given that there are particular barriers for children in accessing justice (see question 18), special consideration needs to be given to the approach to legal standing. Collective action can be a particularly effective way of challenging widespread or systemic breaches of children’s rights while reducing the burden on any one child. This allows groups of children or their representatives to bring a case or complaint together.

Alternatively, public interest litigation can allow a case to be brought in the public interest in general without specifying individual victims.¹⁶² Organisations, such as the Children and Young People’s Commissioner Scotland and the Scottish Human Rights Commission, are often well placed to identify and challenge widespread breaches of children’s rights. They may also have the expertise to support an individual child seeking redress. As such, it is important that these organisations can bring cases in their own name, on behalf of children or in the public interest, and that they have power to intervene in existing cases.

The Children’s Rights (Scotland) Bill includes a wide-ranging model for legal standing that enables children and those with ‘sufficient interest’ to bring proceedings, alongside the Children’s Commissioner, Scottish Human Rights Commissioner and Equalities and Human Rights Commission.¹⁶³

For further information, please contact Juliet Harris, Director
Together (Scottish Alliance for Children's Rights)
Tel: **0131 337 9015** Email: juliet@togetherscotland.org.uk
Web: www.togetherscotland.org.uk Twitter: [@together_sacr](https://twitter.com/together_sacr)
Level 1 Rosebery House, 9 Haymarket Terrace Edinburgh, EH12 5EZ

¹⁶² In South Africa, for example, the Constitution allows ‘anyone acting as a member of, or in the interest of, a group or class of persons’, ‘anyone acting in the public interest’ or ‘an association acting in the interest of its members’ to bring a case alleging a violation of the Bill of Rights (Section 38, [Constitution of the Republic of South Africa 1996](#))

¹⁶³ Section 12, [Children’s Rights \(Scotland\) Bill](#)