

# Child Rights Budgeting in Scotland

## Recommendations for Fulfilment of Legal Obligations

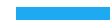
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## Acronyms and Abbreviations

**BIOC:** Best Interests of the Child

**CESCR:** Committee on Economic, Social and Cultural Rights

**CRB:** Child Rights Budgeting

**CRC:** Committee on the Rights of the Child

**CRIA:** Child Rights Impact Assessment

**CRWIA:** Child Rights and Wellbeing Impact Assessment

**CSOs:** Civil Society Organisations

**CWD:** Children with Disabilities

**CYPCS:** Children and Young Persons Commissioner Scotland

**ESC:** Economic, Social and Cultural

**GC:** General Comment

**GDP:** Gross Domestic Product

**HRB:** Human Rights Budgeting

**ICESCR:** International Covenant on Economic, Social, and Cultural Rights

**ICRIA:** Independent Child Rights Impact Assessment

**MAR:** Maximum Available Resources

**SERF:** Social and Economic Rights Fulfillment

**TAAPE:** Transparency, Accountability, Accessibility, Participation, and Empowerment

**UK:** United Kingdom

**UNCRC:** United Nations Convention on the Rights of the Child

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## Executive Summary

This report explores the different principles of Child Rights Budgeting (CRB), specifically how children's rights can be integrated into the budget and translated into an improved lived experience for children. It analyses international and domestic examples to determine legislative and policy processes previously utilised to successfully embed CRB into broader budgeting design and implementation. It also reviews existing literature on this subject and observes how CRB issues are addressed. The Scottish Government can utilise the report to inform its compliance with the forthcoming UNCRC (Incorporation) (Scotland) Bill obligations as it relates to both domestic and international legal obligations.

The report is divided into two main areas of CRB: *budget content* and the *budget process*. The *budgetary content* section of the report highlights issues in respect of the fulfilment of Scotland's minimum core obligations, progressive realisation, maximum available resources, non-retrogression, and non-discrimination. The *budgetary process* section highlights issues related to non-discrimination, the best interests of the child, Child Rights and Wellbeing Impact Assessment, and the transparency, accessibility, accountability, participation, and empowerment (TAAPE) framework.

The ten recommendations of the report provide a framework for Scotland's fulfilment of its soon-to-be statutory obligations. These recommendations are reassertions of Scotland's commitment to an exemplary human rights practice and an improved quality of life for all children in Scotland. Ultimately, this comprehensive report will inform a CRB approach that works towards building upon the rights enjoyed by children in Scotland, creating a brighter future for the coming fiscal year, and realising the Scottish Government's promise to eradicate child poverty.

***‘Budgets are a key sign of a government's values. So, if human rights are not in there, what's being said is that they are not a value worth counting.’<sup>1</sup>***

Professor Aoife Nolan

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<sup>1</sup> Scottish Human Rights Commission (SHRC), ‘Human Rights Budget Work: What, Why, How? Collected Briefing Papers’ (September 2019) quoting Professor Aoife Nolan, 2 <<https://www.scottishhumanrights.com/media/1903/hrbw-collected-briefing-papers-vfinal.pdf>> accessed 5 April 2023 (SHRC Collected Briefing Papers).

## I. Introduction

The Scottish Government has committed to fully incorporate the UN Convention on the Rights of the Child (UNCRC or Convention)<sup>2</sup> into Scots law.<sup>3</sup> This commitment was met partially in 2021 when the Scottish Parliament unanimously passed the UNCRC (Incorporation) (Scotland) Bill (Incorporation Bill).<sup>4</sup> The Bill is being reviewed in light of the ruling from the United Kingdom (UK) Supreme Court<sup>5</sup> that it must adhere to the Scottish Government's devolved competencies to become binding Scottish legislation.<sup>6</sup> As the incorporation of the UNCRC is still underway, it provides an opportunity for Scotland to determine the international human rights obligations stemming from the Convention. In general, governments must *respect, protect* and *fulfil* human rights<sup>7</sup> and in particular, under Article 4 UNCRC, states are under an obligation to take all appropriate legislative, administrative, or any other measures to ensure that the rights recognised in the Convention<sup>8</sup> are a reality for all children.<sup>9</sup> This also entails the obligation to guarantee that budgets are mobilised to realise children's rights,<sup>10</sup> as the implementation of rights has much to do with how governments generate, allocate, and

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<sup>2</sup> United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC).

<sup>3</sup> Scottish Government, 'Children's Rights and the UNCRC in Scotland: An Introduction' (2021), 11 <<https://tinyurl.com/5b5kfr6k>> accessed 5 April 2023.

<sup>4</sup> SP Bill 80B United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill [as passed] Session 5 (2021).

<sup>5</sup> [2021] UKSC 42.

<sup>6</sup> Children and Young People's Commissioner Scotland and Together (Scottish Alliance for Children's Rights), 'UNCRC (Incorporation) (Scotland) Bill Joint Briefing for MSPs' (February 2023), 2-3 <<https://tinyurl.com/4d5n6ask>> accessed 5 April 2023.

<sup>7</sup> Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)' (12 May 1999) UN Doc E/C.12/1999/5, [15] (CESCR GC 12); Committee on the Rights of the Child (CRC), 'General Comment No. 19 on public budgeting for the realization of children's rights (art.4)' (20 July 2016) UN Doc CRC/C/GC/19, [27] (CRC GC 19).

<sup>8</sup> UNCRC Article 4.

<sup>9</sup> John Tobin, 'Art. 4 A State's General Obligation of Implementation' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 108–109 (Tobin 2019).

<sup>10</sup> CRC GC 19, [18]–[19].



spend their resources.<sup>11</sup> This has relevant implications vis-à-vis the realisation of children’s economic, social, and cultural (ESC) rights since these rights are more resource-dependent than civil and political rights.<sup>12</sup> Therefore, states’ financial resources, as reflected in their budgets, are critical to fulfilling children’s ESC rights.<sup>13</sup>

This is particularly relevant in terms of child poverty, which threatens the ESC rights of children in Scotland. The latest available statistics indicate that 24% of children in Scotland were living in relative poverty in 2022<sup>14</sup> — an alarming figure which prompted the recognition of poverty as the ‘*most significant human rights issue facing children and young people in Scotland*.’<sup>15</sup> This is especially disturbing given children’s statements to the Children and Young People’s Commissioner Scotland (CYPCS) that ‘*poverty robs them of their childhood*.’<sup>16</sup>

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<sup>11</sup> Scottish Human Rights Commission, ‘Human Rights Budget Work: What, Why, How? Briefing Paper 5: Human Rights Standards and the Budget’ (September 2019), 2 <<https://www.scottishhumanrights.com/media/1913/hrbw-paper-5-vfinal.pdf>> accessed 5 April 2023.

<sup>12</sup> Aoife Nolan, ‘Economic and Social Rights, Budgets and the Convention on the Rights of the Child’ (2013) 21(2) *The International Journal of Children’s Rights* 248, 268 (Nolan 2013). The CRC underlines that the states must ensure that all rights of children are covered by the budgets, civil and political, as well as economic, social and cultural (ESC) rights: ‘The “rights recognized in the present Convention” include civil, political, economic, social and cultural rights. States parties have the obligation to immediately realize civil and political rights, and to implement economic, social and cultural rights “to the maximum extent of their available resources”. That implies that the full realization of those rights will necessarily be achieved progressively.’ See, CRC GC 19, [25].

<sup>13</sup> Sigrun Skogly, ‘The Requirement of Using the “Maximum of Available Resources” for Human Rights Realisation: A Question of Quality as Well as Quantity?’ (2012) 12 *Human Rights Law Review* 393, 394 (Skogly 2012); Ann Blyberg and Helena Hofbauer, ‘The Maximum Use of Available Resources Booklet: Article 2 and Government Budgets’ (February 2014), 3 <<https://tinyurl.com/2pfwjrfu>> accessed 5 April 2023; CRC, ‘General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)’ (27 November 2003) UN Doc CRC/GC/2003/5, [51] (CRC GC 5); Aidan Flegg, Jo Ferrie, and the Human Rights Budgeting Group, ‘Introduction to Human Rights Budgeting’ (21 October 2021), 5 <<https://tinyurl.com/d8t66xhk>> accessed 5 April 2023.

<sup>14</sup> Scottish Government, ‘Child Poverty Summary’ (2023) <<https://tinyurl.com/4j5evcjz>> accessed 5 April 2023.

<sup>15</sup> Children and Young People’s Commissioner Scotland (CYPCS), ‘Child Poverty’ <<https://www.cypcs.org.uk/positions/child-poverty/>> accessed 5 April 2023.

<sup>16</sup> *Ibid.*

Given the all-encompassing impact of poverty on children’s lives and their fundamental rights, it is, therefore, crucial to take on children’s rights-based approach to tackling it.<sup>17</sup> This entails thinking of its eradication as an obligation and a responsibility. It also calls for the application of human and children’s rights standards and principles in the process. For its part, the Scottish Government has exerted commendable efforts in meeting this obligation through the adoption of the Child Poverty (Scotland) Act 2017<sup>18</sup> and the launch of the Best Start, Bright Futures: Child Poverty Delivery Plan 2022 to 2026.<sup>19</sup> However, a crucial tool in meeting the government’s objective to eradicate child poverty in Scotland is Child Rights Budgeting (CRB) as it is key to ensuring that Scotland’s resources are channeled into areas that impact the prevalence of child poverty.

Hence, the main objective of this report is to unpack and explore the human rights principles and standards applicable to CRB, determine best practices for budget design, and, specifically, how children’s ESC rights can be integrated into the budget. Ultimately, this report provides guidance and proposes a number of recommendations to the Scottish Government to ensure compliance with its obligations stemming from Article 4 UNCRC and the forthcoming Incorporation Bill Section 11(3)(c). The report aims to achieve the preceding objectives through the following sections:

### **A. Key Considerations Underpinning CRB**

*This section discusses general key considerations that must frame the overall approach of the Scottish Government’s implementation of CRB into broader budgetary design and execution.*

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<sup>17</sup> Improvement Services Scotland, ‘Understanding Child Poverty as a Children’s Rights Issue Introductory Paper’ (March 2023), 14-15 <<https://tinyurl.com/yck6vs5z>> accessed 5 April 2023.

<sup>18</sup> Child Poverty (Scotland) Act 2017 asp 6.

<sup>19</sup> Scottish Government, ‘Best Start, Bright Futures: Tackling Child Poverty Delivery Plan 2022 to 2026’ (2022) <<https://t.ly/2qDWM>> accessed 5 April 2023.



## **B. Budgeting Content**

*This section reflects on five core human rights standards and principles that underpin CRB and ends with a discussion of their specific implications on CRB.*

## **C. Budgeting Process**

*This section examines how CRB can be applied to all four stages of the budgeting cycle through an analysis of three key areas of successful CRB.*

## **D. Key Recommendations**

*The report ends with ten recommendations that provide a framework for Scotland's fulfilment of its soon-to-be statutory obligations with regard to CRB.*



## II. Key Considerations Underpinning CRB

Before delving into the specifics of the budget formulation and execution, there are important considerations that must frame the Scottish Government's approaches to the value of Human Rights Budgeting (HRB) and CRB and the latter's undeniable impact on children's enjoyment of ESC rights.

### i. What is HRB and why is it relevant to CRB?

The national budget is the blueprint for how any government invests in its priorities and represents its most important tool for managing the economy. It is also a powerful instrument in realising children's ESC rights. HRB presupposes the employment of a human rights lens in the state's formulation, implementation, and scrutiny of its budget. Accordingly, it calls for the application of human rights standards and principles through every step of the budget cycle<sup>20</sup> by every individual involved.<sup>21</sup> Since children's rights are human rights, these standards and principles necessarily apply to CRB.<sup>22</sup> Additionally, some principles are unique to the fulfilment of children's ESC rights complementing general human rights considerations.<sup>23</sup>

Notably, the Committee on the Rights of the Child (CRC or Committee) has adopted a budget-conscious approach in its interpretation and implementation of the UNCRC and monitoring of state compliance thereto.<sup>24</sup> Hence, the Committee consistently highlights

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<sup>20</sup> SHRC Collected Briefing Papers, 3.

<sup>21</sup> Ibid, 20.

<sup>22</sup> The CRC's interpretation of children's ESC rights under the UNCRC is considered equivalent to that of the CESCR's. See, Tobin 2019, 110, 132.

<sup>23</sup> CRC GC 19, [9]; Nolan 2013, 123-125.

<sup>24</sup> Nolan 2013, 137.

the link between the fulfilment of children's ESC rights and budgetary decisions.<sup>25</sup> Therefore, it sets a clear obligation for the Scottish Government to consider these rights in its budget design and processes.

## ii. Why should Scotland budget for children's rights?

Firstly, by applying and implementing CRB, Scotland will ensure that its budgetary decisions comply with the obligations stemming from the Convention and Incorporation Bill.<sup>26</sup> This duty applies to all government branches, including at the local level<sup>27</sup> which constitute primary service providers that respond to children's needs. Secondly, the CRB will provide Scotland with the opportunity to consider children's needs, especially those from underprivileged and marginalised backgrounds<sup>28</sup> who have been disproportionately affected by the COVID-19 pandemic and the current cost of living crisis in the UK,<sup>29</sup> since budgetary allocations call for an evaluation of how choices about spending affect children.<sup>30</sup> Lastly, with its increased fiscal authority, the Scottish Government is in the position to formulate a comprehensive and inclusive budgeting process<sup>31</sup> by applying human rights principles and standards. In that case, Scotland

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<sup>25</sup> Nolan 2013, 136-137; CRC GC 5, [51].

<sup>26</sup> CRC GC 19, [26]-[27].

<sup>27</sup> Ibid, [19], [23]. Pursuant to Juan Pablo Bohoslavsky, Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights: 'Governments at all levels - including local and subnational governments - must properly take into account their human rights obligations when designing and formulating economic reforms.' See, Office of the High Commissioner for Human Rights (OHCHR), 'UN expert issues new guiding principles on economic reforms and human rights' (21 January 2019) <<https://tinyurl.com/msbevfrt>> accessed 6 April 2023. For guidance for human rights impact assessment of economic reforms formulated and implemented by states, see: Human Rights Council (HRC) 'Guiding principles on human rights impact assessments of economic reforms' (19 December 2018) UN Doc A/HRC/40/57.

<sup>28</sup> CRC GC 19, [47], [52]; CRC, 'Day of General Discussion - Resources for the Rights of the Child: Responsibility of States' (21 September 2007), [40]-[41] (CRC DoGD Report).

<sup>29</sup> House of Commons Library, 'Briefing Research: Rising Cost of Living in the UK' (27 March 2023) <<https://tinyurl.com/43xyunvs>> accessed 6 April 2023.

<sup>30</sup> CRC GC 19, [73], [90].

<sup>31</sup> SHRC, 'Human Rights Budget Work, What? Why? How? Briefing Paper 1: Human Rights Budget Work' (September 2019), 8 <<https://www.scottishhumanrights.com/media/1905/hrbw-paper-1-vfinal.pdf>> accessed 6 April 2023.

could serve as a model for other countries to follow and ensure that its budgetary decisions are fair, efficient, responsible, and transparent.<sup>32</sup>

### iii. Which human rights standards and principles underpin CRB?

Overall, the UNCRC's four guiding principles should be woven into all decisions concerning children's rights, including in the formulation and execution of Scotland's budget.<sup>33</sup> These four principles are:

- Right to non-discrimination (Article 2 UNCRC)<sup>34</sup>
- Best interests of the child (BIOC) (Article 3 UNCRC)<sup>35</sup>
- Right to life, survival, and development (Article 6 UNCRC)<sup>36</sup>
- Right to be heard (Article 12 UNCRC)<sup>37</sup>

On top of the preceding guiding principles, the CRC also identified five general budget principles for children's rights in General Comment (GC) 19, namely: *effectiveness*, *efficiency*,<sup>38</sup> *equity*,<sup>39</sup> *transparency*,<sup>40</sup> and *sustainability*.<sup>41</sup> Every budgetary decision must reflect these principles.

Additionally, the following human rights principles applicable to ESC rights should be considered when formulating and executing budgets (in accordance with Scotland's international human rights obligations):<sup>42</sup>

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<sup>32</sup> Ibid, 8-9. See, also SHRC Collected Briefing Papers, 46-47.

<sup>33</sup> CRC GC 19, [40].

<sup>34</sup> Children should not be discriminated against when exercising their rights under the UNCRC, regardless of their race, color, sex, language, religion, or any other status (Article 2(1) UNCRC).

<sup>35</sup> All decisions involving children should be made with their best interests in mind, in line with their level of development, physical, emotional, and intellectual needs (Article 3(1) UNCRC).

<sup>36</sup> Children have the right to life, survival, and development and states are obliged to safeguard this right to the maximum extent possible (Article 6 UNCRC).

<sup>37</sup> Children have the right to be involved in decisions that will influence their life, and their opinions should be taken into consideration in a manner appropriate to their age and maturity (Article 12(1) UNCRC).

<sup>38</sup> CRC GC 19, [60].

<sup>39</sup> Ibid, [61].

<sup>40</sup> Ibid, [62].

<sup>41</sup> Ibid, [63].

<sup>42</sup> Robb Watts, 'Human Rights Budgeting' (The Scottish Parliament SPICe Briefing, 22 October 2022), 4-5 <<https://tinyurl.com/bdenvxez>> accessed 6 April 2023 (Watts 2022). Also, according to Nolan, the CRC drew a parallel between its reading of the 'umbrella obligation' as it applies to ESC rights under the

- Progressive Realisation<sup>43</sup>
- Minimum Core Obligation<sup>44</sup>
- Maximum Available Resources<sup>45</sup>
- Non-discrimination<sup>46</sup>
- Non-retrogression<sup>47</sup>

Since the CRC has not elaborated a child-specific ESC rights framework<sup>48</sup> (with some exceptions),<sup>49</sup> interpretations of the obligations in this regard will also rely on the jurisprudence of the Committee on Economic, Social and Cultural Rights (CESCR).<sup>50</sup>

The present report seeks to analyse how these principles can be integrated into the *content* of budgets and the budget formulation *process*.




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UNCRC (Article 4 UNCRC) and the CESCR's understanding of the 'umbrella obligation' as applied to equivalent rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Article 2(1)). Therefore, human rights obligations as interpreted by CESCR under Article 2(1) ICESCR apply to Article 4 UNCRC, including in the budgeting process. See, Nolan 2013, 255. This approach is also confirmed in CRC GC 5 and CRC GC 19.

<sup>43</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), Article 2(1): 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, *with a view to achieving progressively the full realization of the rights recognized in the present Covenant* by all appropriate means, including particularly the adoption of legislative measures' (emphasis added); See, also CRC GC 5, [7].

<sup>44</sup> CRC DoGD Report, [48]; See, also CESCR, 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' (14 December 1990) UN Doc E/1991/23, [10] (CESCR GC 3).

<sup>45</sup> UNCRC Article 4; CRC GC 19, [25].

<sup>46</sup> CRC GC 19, [41]-[44]; CESCR GC 3, [1]; CRC DoGD Report, [47].

<sup>47</sup> CRC GC 19, [31]; CRC DoGD Report, [47].

<sup>48</sup> Nolan 2013, 249.

<sup>49</sup> CRC GC 19; CRC, 'General Comment No 1: The aims of education (article 29)' (17 April 2001) UN Doc CRC/GC/2001/1 (CRC GC 1); CRC, 'General Comment No 4: Adolescent health and development in the context of the Convention on the Rights of the Child' (1 July 2003) UN Doc CRC/GC/2003/4 (CRC GC 4); CRC, 'General Comment No 21: Children in street situations' (21 June 2017) UN Doc CRC/C/GC/21; CRC, 'General Comment No 20: Implementation of the rights of the child during adolescence' (6 December 2016) UN Doc CRC/C/GC/20; CRC, 'General Comment No 17: Right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31)' (17 April 2013) UN Doc CRC/C/GC/17; CRC, 'General Comment No 15: Right of the child to the enjoyment of the highest attainable standard of health (art. 24)' (17 April 2013) UN Doc CRC/C/GC/15 (CRC GC 15); CRC, 'General Comment No 3: HIV/AIDS and the rights of the child' (17 March 2003) UN Doc CRC/GC/2003/3.

<sup>50</sup> In particular, interpretation and application of Article 2(1) ICESCR by CESCR. See also, CESCR GC 3.

### III. Budgeting Content

Formulating the budget is more than a technical exercise.<sup>51</sup> It also calls for consideration of crucial human rights concepts if the Scottish Government is to comply with its human rights obligations. The present section will analyse these key concepts to help Scotland make decisions on the content of the public budget that are aligned with its obligations under the UNCRC, other relevant international human rights treaties, and the treaty bodies' official interpretations.<sup>52</sup>

#### i. Obligation to Meet the 'Minimum Core'

States are under an immediate obligation to guarantee the minimum core of ESC rights at all times for children to live a life with dignity.<sup>53</sup> The minimum core has additional implications in relation to progressive realisation.<sup>54</sup> The delivery of the minimum essential level of ESC rights should be considered a bottom line from which states must put efforts to fulfil ESC rights progressively.<sup>55</sup>

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<sup>51</sup> OHCHR, 'Realizing Human Rights Through Government Budgets' (2017) UN Doc HR/PUB/17/3, 47 (OHCHR, Realizing Human Rights 2017).

<sup>52</sup> The Scottish Government is obligated by the Incorporation Bill to take UNCRC principles as well as their official interpretations by treaty bodies into account in the performance of its functions (Incorporation Bill, Part I, Section 4; Part 3, Section 13). This is on top of its general international human rights commitments to heed other applicable treaty interpretations by relevant treaty bodies.

<sup>53</sup> Amrei Muler, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9(4) Human Rights Law Review 557, 601; CESCR GC 3, [10]-[12]. This is in line with the CESCR's interpretation of minimum core as being non-derogable, see, CESCR, 'General Comment No 14: The right to the highest attainable standard of health (Art. 12)' (11 August 2000) UN Doc E/C.12/2000/4, [47] and CESCR, 'General Comment No 15: The right to water (Arts. 11 and 12 of the Covenant)' (20 January 2003) UN Doc E/C.12/2002/11, [40].

<sup>54</sup> Aidan Flegg and Katie Boyle, 'Economic, Social and Cultural Rights: International Legal Obligations – An Explainer' (May 2022), 5 <<https://tinyurl.com/8e427kc9>> accessed 6 April 2023 (Flegg and Boyle 2022).

<sup>55</sup> Ibid.



### A. What constitutes ‘minimum core’?

The ‘minimum core’ contains essential elements of each ESC right, which states must guarantee immediately, notwithstanding resource constraints.<sup>56</sup> The CRC has determined the minimum core obligation, as: ‘essential foodstuffs, equal access to primary health care, basic shelter and housing, social security or social assistance coverage, family protection, and basic education.’<sup>57</sup> It is a threshold below which no child in Scotland should fall.<sup>58</sup>

### B. What does the minimum core obligation mean?

While the CESCR and CRC have elaborated on what the minimum core obligations include with respect to several rights, among others, right to health,<sup>59</sup> education,<sup>60</sup> housing,<sup>61</sup> and food,<sup>62</sup> there remain difficulties in interpreting the content of the minimum core obligation and what it means in practice.<sup>63</sup> From this perspective, an important starting point for Scotland is the determination of the minimum core content of each ESC right,<sup>64</sup> the extent to which it fails to comply with these obligations, and the resources needed to meet the minimum core obligations.<sup>65</sup> In the absence of clear minimum core content, it is difficult to ascertain whether Scotland is providing sufficient

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<sup>56</sup> Sandra Liebenberg, ‘The International Covenant on Economic, Social and Cultural Rights and Its Implications for South Africa’ (1995) 11 South African Journal on Human Rights 359, 366-367 (Liebenberg 1995); CRC DoGD Report, [48].

<sup>57</sup> CRC DoGD Report, [48].

<sup>58</sup> Flegg and Boyle 2022, 5.

<sup>59</sup> CRC GC 4; CRC GC 15.

<sup>60</sup> CRC GC 1.

<sup>61</sup> CESCR, ‘General Comment No 4: The right to adequate housing (Art. 11 (1) of the Covenant)’ (13 December 1991) UN Doc E/1992/23; CESCR, ‘General Comment No 7: The right to adequate housing (art. 11.1 of the Covenant: Forced Evictions)’ (20 May 1997) UN Doc E/1998/22.

<sup>62</sup> CESCR GC 12.

<sup>63</sup> Aidan Flegg, ‘Minimum Core Obligations under the UN Convention on the Rights of the Child: A Scottish Perspective’ (2021) 25 Edinburgh Law Review 238, 245.

<sup>64</sup> *Ibid*, 238-239. Flegg proposes three key approaches to define the minimum core content of the ESC rights within the Scottish context: Immediacy, Basic Needs, and Participation.

<sup>65</sup> Watts 2022, 30.

resources in the budget to deliver the minimum core.<sup>66</sup> These considerations are especially acute because of the current cost of living crisis in the UK, which has worsened children's enjoyment of various rights and prompted debates regarding whether Scotland is meeting the minimum core of the rights to food and housing.<sup>67</sup>

## ii. Progressive Realisation<sup>68</sup>

The principle of progressive realisation imposes an obligation on states to undertake all appropriate measures to implement ESC rights under the UNCRC to the maximum extent of their available resources and with a view to progressively achieve the full realisation of those rights.<sup>69</sup>

### A. What constitutes 'progressive'?

Progressive realisation 'is not an option or a duty that can be delayed.'<sup>70</sup> It represents an 'ongoing obligation on governments, independent from economic growth.'<sup>71</sup> Expectations with respect to the rate of progress are not universal for governments and depend on different factors, including the level of economic development and availability of resources.<sup>72</sup> Despite such 'flexibility,' the concept of 'progressive realisation' is qualified by several features and normative components which inform budgetary decisions. In particular, states are under an immediate obligation to take effective,

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<sup>66</sup> Ibid. The National Taskforce for Human Rights Leadership has also underlined the importance of reaching a consensus on the minimum core obligations in Scotland. See, Scottish Government, 'National Taskforce for Human Rights Leadership Report' (2021), 36-37 (Recommendation 13) <<https://tinyurl.com/dj79u2ap>> accessed 6 April 2023.

<sup>67</sup> Human Rights Consortium Scotland, 'International Covenant on Economic, Social and Cultural Rights: Report to the UN Committee on Economic, Social and Cultural Rights' (January 2023), 6-7 <<https://tinyurl.com/3aw8tkyp>> accessed 6 April 2023.

<sup>68</sup> The principle of 'progressive realisation' is not specifically mentioned in Article 4 UNCRC, unlike its counterpart – Article 2(1) ICESCR. However, 'progressive realisation' forms an indispensable part of the UNCRC and therefore, applies to the interpretation and application of ESC rights under the UNCRC. See in this regard, CRC GC 5, [7] and CRC GC 19, [25].

<sup>69</sup> CRC GC 5, [7]-[8]; CESCR GC 3, [9]; CRC GC 19, [29].

<sup>70</sup> SHRC Collected Briefing Papers, 7.

<sup>71</sup> Ibid.

<sup>72</sup> CESCR, 'Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant [on Economic, Social and Cultural Rights]' (13 April 2007) UN DOC E/C.12/38/CRP.1, [10] (CESCR Evaluation).

appropriate, and adequate steps<sup>73</sup> to advance the full realisation of children's ESC rights as 'expeditiously and effectively as possible.'<sup>74</sup> Additionally, the state must demonstrate that every effort has been made to enhance ESC rights and ensure non-retrogression even in times of economic crisis.<sup>75</sup>

### iii. Maximum Available Resources (MAR)

The MAR principle mandates the Scottish Government to do what it can to fully realise ESC rights within the maximum of its available resources.<sup>76</sup> Thus, it is recognised that the realisation of ESC rights operates within resource constraints.<sup>77</sup>

#### A. What are resources?

ESC rights are resource intensive,<sup>78</sup> and in practice, state resources are most often equated with financial resources.<sup>79</sup> Nonetheless, a dynamic understanding of resources is asserted<sup>80</sup> so that quantitative and qualitative approaches must be taken when defining this notion.<sup>81</sup> Accordingly, the CRC endorses an 'open-ended vision'<sup>82</sup> of

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<sup>73</sup> CRC DoGD Report, [47].

<sup>74</sup> Ibid.

<sup>75</sup> CRC GC 19, [31].

<sup>76</sup> Article 2(1) ICESCR; Radhika Balakrishnan and James Heintz, 'Economic Policy and Human Rights' in Jackie Dugard and others (eds), *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar Publishing 2020), 353 <<https://doi.org/10.4337/9781788974172>> accessed 5 April 2023 (Balakrishnan and Heintz 2020).

<sup>77</sup> Allison Corkery and Ignacio Saiz, 'Progressive Realization Using Maximum Available Resources: The Accountability Challenge' in Jackie Dugard and others (eds), *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar Publishing 2020), 282 <<https://doi.org/10.4337/9781788974172>> accessed 5 April 2023 (Corkery and Saiz 2020).

<sup>78</sup> Kasey McCall-Smith, 'Minimum Standards for Delivering Economic, Social and Cultural Rights' (Academic Advisory Panel to the National Taskforce for Human Rights Leadership Minimum Standards for Delivering Economic, Social and Cultural Rights) (22 June 2020), 21 <<https://tinyurl.com/yj67huza>> accessed 5 April 2023 (McCall-Smith 2020).

<sup>79</sup> Skogly 2012, 404.

<sup>80</sup> Tobin 2019, 132.

<sup>81</sup> Ibid; Corkery and Saiz 2020, 286; Skogly 2012, 399-400, 404.

<sup>82</sup> Tobin 2019, 132-133; The CRC states as follows: 'Resource must be understood as encompassing not only financial resources but also other types of resources relevant for the realization of economic, social and cultural rights, such as human, technological, organizational, natural and information resources. Resources are also to be understood in qualitative terms and not solely quantitative.' (CRC DoGD Report, [24]).

resources — they are never determinate.<sup>83</sup> Still, the following resources<sup>84</sup> must be considered if states are to truly maximise their available resources:<sup>85</sup>

- Natural resources<sup>86</sup>
- Human resources<sup>87</sup>
- Technological resources<sup>88</sup>
- Informational resources<sup>89</sup>
- Organisational resources<sup>90</sup>
- International resources<sup>91</sup>

#### B. When are resources available?

A comprehensive approach to *availability* is necessary. It extends to resources that may not be within Scotland's jurisdiction or subject to its Government's direct control but are

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<sup>83</sup> Tobin 2019, 135.

<sup>84</sup> CRC DoGD Report, [24].

<sup>85</sup> Robert E. Robertson, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights' (1994) 16 Human Rights Quarterly 693, 697 (Robertson 1994).

<sup>86</sup> Ibid, 696; A holistic understanding of resources necessarily covers the State's land, minerals, and other natural resources as many rely on these to survive; See, CESCR 'General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (10 August 2017) UN Doc E/C.12/GC/24, [18], wherein the CESCR noted the need to regulate the exploitation of natural resources in consideration of its adverse impact on the enjoyment of other ESC rights.

<sup>87</sup> This is similar to the notion of human capital. See, Skogly 2012, 406.

<sup>88</sup> These are State's technological and scientific capacities that advance critical ESC rights areas such as housing, farming, and medicine. See, Robertson 1994, 696.

<sup>89</sup> Ibid. Information within the control of the State is likewise vital in promoting many ESC rights. These include government data and research that can empower citizens in promoting their own and others' ESC rights. See, Ibid, 697.

<sup>90</sup> Organisations, particularly the family unit, were identified as a hidden resource base in which mobilisation is an effective yet cost-efficient way to fulfill children's rights. See, James Himes, 'Implementing the United Nations Convention on the Rights of the Child: Resource Mobilization and the Obligations of the States Parties', Innocenti Occasional Papers, Child Rights Series No. 2 (International Child Development Centre Florence 1992), 7-8 <<https://tinyurl.com/4ye8w2p9>> accessed 5 April 2023 (Himes 1992).

<sup>91</sup> MAR obligations entitle a state to receive resources offered by the international community. This implies an obligation to actively seek and not to unreasonably refuse international assistance. While largely considered to be monetary in character, international resources also take other forms. See, CESCR Evaluation, [5].

available within different sectors and levels of society.<sup>92</sup> Consequently, its Government is obligated to mobilise these potential resources to realise children’s ESC rights.<sup>93</sup> In this sense, available resources must be perceived as not fixed, static, or arbitrary. Rather, they are the outcome of deliberate policy choices<sup>94</sup> for which the Scottish Government is responsible.

### C. What constitutes *maximum*?

The *maximum* as the standard of the extent of resource utilisation connotes that the Scottish Government must exert ‘every effort’<sup>95</sup> to ‘fully use the resources at its disposal’<sup>96</sup> so that it can ensure to its ‘utmost ability’<sup>97</sup> the ‘broadest possible enjoyment’<sup>98</sup> of ESC rights.

To date, however, there is no official set of systematic standards to assess whether states utilise their resources to the maximum extent.<sup>99</sup> Nonetheless, the assessment frameworks (described below) developed by experts can help inform the Scottish Government of what is expected from it in order to comply with the MAR principle.

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<sup>92</sup> Tobin 2019, 136; Himes 1992, 33.

<sup>93</sup> Tobin 2019, 136.

<sup>94</sup> Balakrishnan and Heintz 2020, 354.

<sup>95</sup> CESCR GC 12, [17].

<sup>96</sup> Balakrishnan and Heintz 2020, 354

<sup>97</sup> Radhika Balakrishnan and others, ‘Maximum Available Resources & Human Rights: Analytical Report’ (Brunswick, New Jersey: Center for Women’s Global Leadership, June 2011), 3 <<https://www.cwgl.rutgers.edu/economic-a-social-rights/380-maximum-available-resources-a-human-right-s-analytical-report>> accessed 6 March 2023 (Balakrishnan and others, MAR Analytical Report 2011).

<sup>98</sup> CRC DoGD Report, [16].

<sup>99</sup> Rodrigo Uprimny, Sergio Chaparro Hernández, and Andrés Castro Araújo, ‘Bridging the Gap: The Evolving Doctrine on ESCR and “Maximum Available Resources”’ in Katharine G Young (ed), Amartya Sen, *The Future of Economic and Social Rights* (Cambridge University Press 2019) 640 <<https://tinyurl.com/3aecbzmn>> accessed 5 April 2023 (Uprimny and others 2019).

## D. What should be taken into consideration in complying with MAR?

### a. The MAR Star<sup>100</sup>

While budget decisions and taxation are the most relevant to MAR-based claims, other policy areas are still essential to sustainably maximising availability of resources.<sup>101</sup> The MAR Star provides a holistic approach to a state's MAR obligations by examining resources through the following interrelated policies:

- Government expenditure<sup>102</sup>
- Government revenue<sup>103</sup>
- Development assistance<sup>104</sup>
- Debt and deficit financing<sup>105</sup>
- Monetary and financial policies<sup>106</sup>

### b. Indicators of MAR Utilisation

The methodology developed by the CESCR<sup>107</sup> and endorsed by the CRC<sup>108</sup> in assessing state measures taken to the MAR also provides helpful guidance for the

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<sup>100</sup> These five dimensions of MAR are represented in a diagram with five critical nodes for mobilising State resources, hence dubbed as the 'MAR Star.' See Balakrishnan and others, 'MAR Analytical Report' 2011, 5.

<sup>101</sup> Ibid.

<sup>102</sup> Balakrishnan and Heintz 2020, 356.

<sup>103</sup> Uprimny and others 2019, 640.

<sup>104</sup> Radhika Balakrishnan, James Heintz, and Diane Elson, 'Mobilizing Resources to Realize Rights Debt, Aid, and Monetary Policy' in Radhika Balakrishnan, James Heintz, and Diane Elson, *Rethinking Economic Policy for Social Justice* (Routledge London 2016), 73-74 <<https://doi.org/10.4324/9781315737911>> accessed 5 April 2023.

<sup>105</sup> Ibid, 72. Debts can play a positive role in ESC rights realisation. It expands resources available to the State and raises the MAR threshold.

<sup>106</sup> Balakrishnan and others, 'MAR Analytical Report' 2011, 19; Diane Elson, 'Financing for Gender Equality: How to Budget in Compliance with Human Rights Standards' in Zhora Khan and Nalini Burn (eds), *Financing for Gender Equality: Realising Women's Rights through Gender Responsive Budgeting* (Palgrave Macmillan UK 2017), 40-41 <<http://link.springer.com/10.1057/978-1-137-46101-8>> accessed 5 April 2023.

<sup>107</sup> CESCR Evaluation.

<sup>108</sup> UNCR Committee, 'Report on Forty-Sixth Session' (22 April 2008) UN Doc CRC/C/46/3, [90].

Scottish Government. It provides that in allegations of violation of the MAR principle, the following considerations<sup>109</sup> will be taken into account:

- How deliberate, concrete, and targeted the measures are;
- The non-arbitrary exercise of discretion;
- The observance of human rights standards in the allocation or non-allocation of available resources;
- The adoption of a policy that least restricts ESC rights;
- The time frame in which the steps were taken;
- The consideration of the precarious situation of disadvantaged and marginalised individuals or groups, and;
- The prioritisation of grave situations or situations of risk.

c. Presumptions of MAR Non-utilisation

There are also emerging CESCRC doctrines that provide guidance through the following circumstances giving rise to the presumption that states are not fulfilling their obligations with respect to resources:<sup>110</sup>

- A stagnant public expenditure on ESC rights;<sup>111</sup>
- An insufficient public expenditure in areas where they are deemed more urgent;<sup>112</sup>
- Evidence of strong and prolonged economic growth not followed by the allocation and expenditure of resources for ESC rights;<sup>113</sup>
- A tax policy that is insufficient or discriminatory in nature;<sup>114</sup> and
- High levels of economic inequality.<sup>115</sup>

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<sup>109</sup> CESCRC Evaluation, [8].

<sup>110</sup> Uprimny and others 2019, 634.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid, 635.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid, 636.

<sup>115</sup> Ibid, 637.

#### iv. Non-retrogression

The principle of non-retrogression mandates that states do not take steps backwards in the provision of rights. In budgeting, non-retrogression must not be equated with a reduction in funding, but rather should be conceptualised as a reduction in rights.<sup>116</sup>

Retrogression falls under two theoretical categories: normative and empirical. That is, retrogressive measures (*de jure*) and retrogressive effects (*de facto*).<sup>117</sup> A symbolic reduction in rights may be more apparent as it appears in a legal text or in a budget (leaving a paper trail), but effects can be more pressing to measure.

##### A. Permissible Retrogressions

Though retrogression is to be avoided as best as possible, in certain scenarios, it is unavoidable. The CRC's GC 19 offers eight considerations to be made prior to any regressive shift to assure that the measure is not in breach of a state party's commitment to the UNCRC.<sup>118</sup> Therefore, permissive retrogressive measures must be

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<sup>116</sup> Aoife Nolan, Nicholas J Lusiani and Christian Curtis, 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression In Economic and Social Rights' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014) 123 <<https://tinyurl.com/yeeddh5d>>.

<sup>117</sup> Ibid.

<sup>118</sup> CESCR publications have provided inconsistent interpretations of what characteristics constitute an allowable retrogressive step. CESCR GC 19 offers six criteria for consideration to determine whether a shift is retrogressive. Although the steps to proving retrogression are limited per CESCR GC 19 published in 2007, they were reduced even more in 2012 by a letter from the Chairperson of the CESCR, leaving only four remaining criteria. Of these, academics have found only two to stand alone as specific to retrogression: the policy must be temporary, and it must be necessary and proportionate. To abide by the 2012 letter would thus be incredibly damaging as it could excuse a host of austerity policies that contradict Scotland's forthcoming obligations to practise CRB. However, to abide solely by CESCR GC 19 would similarly provide limited protection to children. See, CESCR, 'General Comment 19: The Right to Social Security (Art. 9 of the Covenant)' (23 November 2007) UN Doc E/C12/GC/19, [42]; Chairperson of the CESCR, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights' (2012) UN Doc HRC/NONE/2012/76, UN reference CESCR/48th/SP/MAB/SW; Ben TC Warwick, 'Socio-economic rights during economic crises: A changed approach to non-retrogression' (2016) 65(1) *International and Comparative Law Quarterly* 249, 257; CRC GC 19, [31].



reasonable, necessary, proportionate, non-discriminatory, and temporary (with assurances that rights will be restored to earlier levels as soon as possible).<sup>119</sup>

## B. Non-retrogression and Non-discrimination

Additionally, children, especially marginalised children, must be the last to be impacted by such a measure so as to ensure compliance with the principle of non-discrimination, meaning that all feasible alternatives must be considered.<sup>120</sup> The decision-making process for the measure must also involve the participation of children, and the measure may not go below the minimum core as determined by the state.<sup>121</sup> Non-retrogression is a key HRB principle that should feature heavily in CRB decision-making, particularly during national crises when children and their rights become more vulnerable.<sup>122</sup>

## v. Non-discrimination

Non-discrimination is an immediate and cross-cutting obligation under the UNCRC. Therefore, in conceptualising the content of a budget, the Scottish Government must take express care to comply with the principle and counteract discriminatory practices. This entails ensuring that neither formal nor substantive discrimination<sup>123</sup> are preserved, enacted, or promoted by the government.<sup>124</sup>

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<sup>119</sup> CRC GC 19, [31].

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

<sup>122</sup> For further information on government failure to comply with UNCRC obligations during financial crises, case studies of Sweden in the 1990s provide helpful lessons. See, Jana Kjellberg, Jan Lindvall and Elisabeth Näsman, 'The Art of Tracking Educational Resources: A Swedish Child-Focused Budget Study' (Save the Children Sweden, 2001), 8 <<https://tinyurl.com/5xxczycr>> accessed 4 March 2023.

<sup>123</sup> Formal discrimination refers to differential treatment explicitly detailed by policy or legal design. Substantive discrimination refers to discrimination in practice, even if unintended. See, CESCR, 'General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)' (2 July 2009) UN Doc E/C.12/GC/20, [8] (CESCR GC 20); CESCR, 'General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)' (11 August 2005) UN Doc E/C.12/2005/4 [7].

<sup>124</sup> CESCR GC 20, [8].

Non-discrimination thus involves guaranteeing that the budget is not by design discriminatory by considering its *de facto* effects. According to CESCR, the non-discrimination obligation consists of preventative actions, affirmative action initiatives, and financial compensation for past discrimination, all of which necessitate explicit funding allotments.<sup>125</sup> Thus, to be executed appropriately, CRB requires thoughtful planning and allocations aimed toward reducing existing disparities.

#### A. Equity and Non-discrimination

When discussing CRB, the relevant line items are not only those explicitly focused on children. Children's rights are also entangled with the rights of adults around them. Therefore, the Scottish Government must both budget for children directly and through funding non-children-specific services.<sup>126</sup> Discriminatory practices in social services spending for adults can then lead to discrimination against children in the care of those adults. Health service inequity (in the form of disparities in quality or access) may also directly impact adults and have secondary impacts on children in the same household or community.<sup>127</sup>

#### B. Structural Inequalities and Intersectional Discrimination

CRB involves awareness of historical and ongoing societal prejudices and distinctions, which could result in intentional or unintentional discrimination. Importantly, budget

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<sup>125</sup> Aoife Nolan and Mira Dutschke, 'Article 2(1) ICESCR and States Parties' Obligations: Whether the Budget?' (2010) 3 European Human Rights Law Review 280, 302.

<sup>126</sup> CRC GC 5, [51].

<sup>127</sup> In the Scottish context, for instance, between 2020 and 2021 the drug-related hospital admission rate in the country's most deprived areas was over 21% higher than the admission rate in the least deprived areas. Children in these areas are thus more likely to face secondary impacts of adults dealing with drug dependency than children in less-deprived areas. Investment in substance abuse prevention and intervention programmes for adults thus benefits children and young people as well. In 2020, Scotland saw the highest ever reported rate of drug-related deaths (and the highest rate in Europe). An investment in substance abuse prevention and intervention programmes is an absolutely necessary component of CRB in Scotland. See, Audit Scotland, 'Drug and alcohol services: an update' (March 2022) <<https://tinyurl.com/7ba26b5y>> accessed 7 April 2023; Scottish Government, 'Long-term monitoring of health inequalities: March 2022 report' (1 March 2022), 56 <<https://tinyurl.com/3t3rccm8>> accessed 7 April 2023.

drafters and legislators must consider that ‘spending equitably does not always mean spending the same amount on each child, but rather making spending decisions that lead to substantive equality among children.’<sup>128</sup> To effectively counteract discrimination against marginalised children (based on ethnicity, disability, gender, socioeconomic status, or geographical location), budgets must be designed with the context in mind. Certain children may need more support than others, or different iterations of support and budgets should reflect this. Differential treatment in budgeting used to redress systemic discrimination has had hugely beneficial impacts.<sup>129</sup>

### C. Budgeting Methodologies

Scotland must also draw on other inclusive budgeting strategies — such as HRB, gender-responsive budgeting, disability-inclusive budgeting, and climate-responsive budgeting — to develop effective non-discriminatory budgetary solutions.<sup>130</sup> These methodologies provide best practices for more equitable budgeting and often intersect with CRB. Efforts at remediating inequality include altering budget formulas to calculate more equitable allocation amounts or developing new programme initiatives targeted directly at supporting vulnerable populations.<sup>131</sup> These strategies require careful

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<sup>128</sup> CRC GC 19, [61].

<sup>129</sup> OHCHR, *Realizing Human Rights* 2017, 89–98.

<sup>130</sup> CRC ‘Draft General Comment No. 26: Children’s rights and the environment with a special focus on climate change’ (9 December 2021), [54]. For further information on these methodologies of inclusive budgeting, see, Mary-Ann Stephenson, ‘A Guide to Gender-Responsive Budgeting’ (Oxfam International, February 2018) <<https://tinyurl.com/2jyn85tb>>; Antoni Tsaputra, ‘Disability Inclusive Budgeting in Indonesia: A pathway to *difabel* citizenship’ (Doctoral thesis, University of New South Wales Sydney, December 2019) <<https://doi.org/10.26190/unsworks/21637>>; Daniel Mont, ‘Disability inclusive or CRPD compliant budgeting?’ (Center for Inclusive Policy, November 2018) <<https://tinyurl.com/2p8tz5dn>>; Rohan Gulrajani and Joanne Bosworth, ‘Budgets for Climate, Sustainability & Social Inclusion: A Rapid Review of Approaches and Tools’ (United Nations Children’s Fund (UNICEF), 2022) <<https://tinyurl.com/ye8f3r4k>> accessed 7 April 2023; Ibrahim Akalbila and others, ‘Gender-Responsive Budgeting in Ghana: An analysis of GRB implementation and its existing and potential impacts on women small-scale farmers’ (Research backgrounder, Oxfam America, 2020) <<https://tinyurl.com/y4r9zah7>>; OHCHR, *Realizing Human Rights* 2017, 92.

<sup>131</sup> HRC, ‘Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque’ (28 July 2012) UN Doc A/HRC/21/42/Add.3, [18]; Ludovico Carraro and Amartuvshin Tserennadmid, ‘Mongolia: Building Capacity for an Effective Social Welfare System’ (Asian Development Bank, October 2020), 21 <<https://tinyurl.com/vae78udt>> accessed 4 March 2023; United Nations Mongolia, ‘Analysis of Child-Focused Budgets and Expenditure in the Social Sectors in Mongolia’ (UNICEF 2021), 140 <<https://tinyurl.com/4mapedfk>> accessed 4 March 2023; Nguyen Thi Van Anh and

consideration and study of local contexts to understand the landscapes of discrimination children and young people face and provide the most effective budgetary content.

## vi. Implications for CRB Content

The following points are crucial in order to ensure that human rights principles inform how the Scottish Government generates, allocates, and spends its resources in accordance with CRB:

### A. Minimum Core Obligations

*Prioritise the delivery of the minimum core of ESC rights for all children.* When making budgetary allocations, the Scottish Government should always prioritise and set a minimum funding level to satisfy the minimum core of each ESC right.<sup>132</sup> This guarantees that the rights associated with minimum core obligations are adequately funded for a child to lead a life with dignity.<sup>133</sup> This places the minimum core obligation at a higher resource priority.<sup>134</sup> Therefore, in the face of competing claims over the state's financial resources, the CRC's clear recommendation is to prioritise children within the budget.<sup>135</sup> In line with this, the CRC also recommended prioritising allocation for social services as these impact the realisation of children's rights the most.<sup>136</sup>

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others, 'Assessing the rights to education of children with disabilities in Vietnam: A Vietnamese Child-Focused Budget Study' (Report, Save the Children Sweden, 2001) <<https://tinyurl.com/2p8349kj>> accessed 4 March 2023; Vera Institute of Justice, 'Budgeting for Access' (August 2014) <<https://tinyurl.com/vsxznbec>> accessed 6 April 2023.

<sup>132</sup> Mira Dutschke, Aoife Nolan, Rory O'Connell, Colin Harvey and Eoin Rooney, 'Budgeting for Economic and Social Rights: A Human Rights Framework' (5 October 2010), 51 <<http://dx.doi.org/10.2139/ssrn.1695955>> accessed 6 April 2023 (Dutschke and others 2010).

<sup>133</sup> CRC DoGD Report, [48].

<sup>134</sup> Dutschke and others 2010, 51. When a government fails to ensure the minimum core, it is in violation of the obligations enshrined in the UNCRC, except in cases where it can prove that all reasonable efforts have been made to implement the minimum core as a matter of priority. See, CESCR GC 3, [10].

<sup>135</sup> CRC GC 19, [12].

<sup>136</sup> CRC, '10th Anniversary Commemorative Meeting' (October 1999), [291(o)] <<https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRC/Discussions/Recommendations/Recommendations1999.pdf>> accessed 5 April 2023.

*Guarantee the minimum core to every child.* It is crucial that the minimum core is guaranteed to every child within the public budget. Otherwise, the Scottish Government will be in violation of its obligations under the UNCRC.<sup>137</sup> An increase in the fiscal space<sup>138</sup> is one way of meeting this obligation under CRB.<sup>139</sup> Fiscal space provides the necessary flexibility to states to ‘increase spending on national priority areas, which may include social protection, in a sustainable manner.’<sup>140</sup> From a child’s rights perspective, fiscal space is especially important as it will enable Scotland to provide support to children from the most marginalised groups.<sup>141</sup>

*Resource constraints or economic crises cannot be used to justify failure to deliver the minimum core.* Scotland is under an obligation to make ‘every effort’<sup>142</sup> and use all resources<sup>143</sup> to satisfy the minimum core of each ESC right, even in times of economic crisis.<sup>144</sup> When there are resource constraints, the respective government must demonstrate that every effort has been made to deliver the minimum core as a matter of priority.<sup>145</sup> In any case, a dynamic understanding of resources rejects any assertion that

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<sup>137</sup> According to the CESCR, states will be in violation of their obligations under the ICESCR in case: ‘any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education.’ See, CESCR GC 3, [10].

<sup>138</sup> Fiscal space stands for ‘the availability of budgetary room that allows a government to provide resources for the desired purpose without any prejudice to the sustainability of a government’s financial position.’ See, Peter S. Heller, ‘Understanding Fiscal Space’ (IMF Policy Discussion Paper No. PDP/05/4, March 2005), 3 <<https://www.imf.org/external/pubs/ft/pdp/2005/pdp04.pdf>> accessed 6 April 2023.

<sup>139</sup> McCall-Smith 2020, 21.

<sup>140</sup> UN Women and International Labour Organization, ‘Fiscal Space for Social Protection: A Handbook for Assessing Financing Options’ (2019), 9–10 <<https://tinyurl.com/2fewbdx3>> accessed 6 April 2023.

<sup>141</sup> CRC GC 19, [61]. See, on the equity-focused approach: UNICEF Executive Board, ‘The UNICEF Strategic Plan 2014-17: Realising the Rights of Every Child, especially the Most Disadvantaged’ (11 July 2013) E/ICEF/2013/21, [1], [12]. Some work has already been undertaken vis-à-vis approaches on how to increase fiscal space, which could be used by Scotland to evaluate its options to improve children’s well-being and address the multifaceted nature of child poverty, especially acute following the global COVID-19 pandemic and cost-of-living crisis in the UK. See, in this regard, International Policy Centre for Inclusive Growth, United Nations Development Programme, and the UNICEF, ‘Fiscal Space for Child-Sensitive Social Protection in the MENA Region’ (2019) <<https://t.ly/pp35>> accessed 6 April 2023.

<sup>142</sup> CRC GC 19, [30].

<sup>143</sup> UNCRC Article 4.

<sup>144</sup> CRC GC 19, [31].

<sup>145</sup> Liebenberg 1995, 367; CESCR GC 3, [10].

states lack resources to secure children's rights, given the array of resources that can be maximised to benefit children.<sup>146</sup>

## B. Progressive Realisation

*Report the progress made in advancing children's rights under the UNCRC.*<sup>147</sup> This obligation implies that the CRC expects states to evaluate and enhance their policies frequently to examine the progress and guarantee the availability and maximum use of resources for the realisation of ESC rights of all children.<sup>148</sup> One way of doing this is to reflect human rights standards into budgetary 'concepts, terms, and lines,'<sup>149</sup> through clear and measurable qualitative and quantitative indicators in policy.<sup>150</sup> In Scotland, the National Performance Framework<sup>151</sup> could be used for setting out human rights benchmarks and indicators in respect of budgetary allocation, to evaluate progress against the national targets.<sup>152</sup>

*Assess the links between resource allocation and rights realisation.* This assessment is necessary to evaluate how Scotland progressively realises children's ESC rights.<sup>153</sup> Benchmarks and indicators alone do not allow for a 'deeper analysis'<sup>154</sup> of whether

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<sup>146</sup> Tobin 2019, 135.

<sup>147</sup> UNCRC Article 44.

<sup>148</sup> CRC GC 19, [32].

<sup>149</sup> Ann Blyberg, 'Government Budgets and Rights Implementation: Experience from Around the World' in Jody Heymann and Adele Cassola (eds), *Making Equal Rights Real: Taking Effective Action to Overcome Global Challenges* (Cambridge University Press 2012) 211.

<sup>150</sup> Corkery and Saiz 2020, 291, 297; CRC DoGD Report, [38].

<sup>151</sup> Overview of Scotland's National Performance Framework (NPF) and human rights outcomes are available at <<https://nationalperformance.gov.scot/index.php/what-it>> accessed 6 April 2023.

<sup>152</sup> Corkery and Saiz 2020, 297. According to the Budget Process Review Group established by the Scottish Government: 'there needs to be greater visibility in how individual policies and plans relate to agreed national outcomes, including cross-cutting outcomes such as equalities outcomes, and that wherever possible there should be a clear link between individual policies and plans and budget documentation.' See, Scotland Budget Process Review Group, 'Final Report' (June 2017), Recommendation 26 <<https://t.ly/WEJK>> accessed 6 April 2023. These targets should be a priority for the Scottish Government in terms of resource allocation, which, if implemented, would enable it to meet ESC rights targets. See also, Flegg and Boyle 2022, 4.

<sup>153</sup> Corkery and Saiz 2020, 292.

<sup>154</sup> Oliver De Schutter, 'Public Budget Analysis for the Realization of Economic, Social and Cultural Rights: Conceptual Framework and Practical Implementation' in Katharine G. Young (ed), *The Future of Economic and Social Rights* (Cambridge University Press 2019) 595.

budgetary allocations enable governments to comply with the ‘minimum core obligations’ or ‘progressive realisation.’ Scotland could use a variety of approaches to evaluate the connections between resource distribution and rights realisation, such as the Social and Economic Rights Fulfillment (SERF) Index.<sup>155</sup> Another methodology is the OPERA framework,<sup>156</sup> which is considered to be the most comprehensive methodology for assessing policies and programs related to ESC rights, unlike the SERF Index, which focuses only on the obligation of results.<sup>157</sup>

### C. Maximum Available Resources

*Identify direct and indirect allocations for children in the budget.* CRB does not mean a separate budget for children, but that budgets readily identify allocations to children.<sup>158</sup> The CRC provides that no state can claim that it is fulfilling children’s ESC rights to the maximum of its available resources unless it can identify the proportions of its national and other budgets that are allocated to children.<sup>159</sup> These allocations, in turn, are indicative of how much financial resources are dedicated to children and whether these resources are indeed the maximum that can be allocated for them, given the overall fiscal envelope. The three frameworks proposed above<sup>160</sup> can help inform Scotland’s

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<sup>155</sup> Corkery and Saiz 2020, 292-293. Overview of the Social and Economic Rights Fulfillment (SERF) Index is available at: <<https://serfindex.uconn.edu/overview/>> accessed 6 April 2023. See, also Sakiko Fukuda-Parr, Terra Lawson-Remer, and Susan Randolph, 'Making the Principle of Progressive Realization Operational: The SERF Index, an Index for Monitoring State Fulfillment of Economic and Social Rights Obligations', in LaDawn Haglund and Robin Stryker (eds), *Closing the Rights Gap: From Human Rights to Social Transformation* (Oakland, CA, 2015).

<sup>156</sup> Center for Economic and Social Rights, 'The OPERA Framework: Assessing Compliance with the Obligation to Fulfill Economic, Social and Cultural Rights' (2012) <[https://www.cesr.org/sites/default/files/the.opera\\_framework.pdf](https://www.cesr.org/sites/default/files/the.opera_framework.pdf)> accessed 6 April 2023. See, also case studies on how OPERA Framework has been used in practice in Angola, Egypt, Guatemala, Ireland, Kenya, and South Africa, Center for Economic and Social Rights, 'OPERA in Practice: Case Studies Applying CESR's Monitoring Framework' (June 2017) <<https://www.cesr.org/opera-practice-case-studies-applying-cesrs-monitoring-framework/>> accessed 6 April 2023.

<sup>157</sup> Lillian Chenwi, 'Unpacking "Progressive Realisation", Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance' (2013) 46 De Jure 742, 765 <<https://www.dejure.up.ac.za/images/files/vol46-3-2013/Chapter%205.pdf>> accessed 6 April 2023; Corkery and Saiz 2020, 293-296.

<sup>158</sup> HRC, 'Towards Better Investment in the Rights of the Child: Report of the United Nations High Commissioner for Human Rights' (19 December 2014) UN Doc A/HRC/RES/28/33, [35].

<sup>159</sup> CRC GC 5, [51]; Ibid.

<sup>160</sup> The MAR Star, CESCR Indicators of MAR Utilisation, and Presumptions of Non-utilisation.

decisions and actions surrounding these allocations for children in the budget. Additionally, Wales uses a comprehensive methodology for assessing child-focused spending,<sup>161</sup> which Scotland could further utilise. It is also important to note that an increase in the budgetary allocations alone for a specific right or a social program is not a sufficient indicator that ESC rights of children are sufficiently funded.<sup>162</sup> Other factors need to be considered when making budgetary decisions, such as inflation rates.<sup>163</sup>

#### D. Non-retrogression

*Approach reduction with a critical eye.* The Scottish Government must abide by the guidelines offered in the CRC's GC 19 to ensure that any retrogressive measure complies with its forthcoming obligations under the Incorporation Bill. In the event of budget cutbacks and other crisis-motivated allocational shifts, the Scottish Government must ensure that any regression is only enacted following a stringent review in accordance with this criteria. During challenging periods, those already most vulnerable are often the most severely impacted — meaning that children need more protection and budgetary provisions.<sup>164</sup> These factors highlight the importance of non-discrimination and non-retrogression as crucial principles for crisis budgeting and general budgetary decision-making.

#### E. Non-discrimination

*Consider the context.* The Scottish Government must design budgets that are not only non-discriminatory in and of themselves but also redress existing discrimination. This requires collecting and disaggregating data to map out the landscape of discrimination

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<sup>161</sup> UNICEF, 'Measuring Budgetary Investment in Children, Proposed Methodology and Initial Results in Spain' (Working document, July 2018), 13–14. Wales determines age groups (0-17, 18-25, 26-64 and over-65) that receive benefits from each budget category and all budget headings are included in the analysis, not just social spending for children.

<sup>162</sup> Corkery and Saiz 2020, 291.

<sup>163</sup> Ibid.

<sup>164</sup> Joana Vassilopoulou and others, 'International Perspectives on Securing Human and Social Rights and Diversity Gains at Work in the Aftermath of the Global Economic Crisis and in Times of Austerity' (2019) 16(4) European Management Review 837, 838 <<https://doi.org/10.1111/emre.12333>>.





country-wide, budgeting for equity, and considering both children-specific and non-children-specific services related to CRB. Accordingly, in case of scarce resources, Scotland must further safeguard the rights of marginalised and disadvantaged children, especially those facing intersectional barriers to the enjoyment of their rights.<sup>165</sup>



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<sup>165</sup> Tobin 2019, 143; CRC DoGD Report, [40].

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## IV. Budgeting Process

### i. Introduction

The present section outlines how CRB process principles can be utilised to create a guideline for adherence to the UNCRC within all four stages of the budgeting cycle: drafting, legislation, execution, and auditing.<sup>166</sup> While acknowledging that budget decision-making bodies may encounter changes to the fiscal envelope throughout the fiscal year, this section will discuss three key areas of successful CRB processes: (1) the principles of the UNCRC in the form of the BIOC and non-discrimination, (2) *ex-ante* and *ex-post* Child Rights and Wellbeing Impact Assessments (CRWIA) in connection to the budget process, and (3) the transparency, accessibility, accountability, participation, and empowerment (TAAPE) framework.

### ii. Non-discrimination and BIOC

The CRC maintains the necessity of CRB in ensuring that any measures taken have a sustainable and beneficial impact on children and the realisation of their rights.<sup>167</sup> BIOC and non-discrimination are entangled throughout the application of all CRB process principles, from transparency to empowerment.<sup>168</sup>

Taking the BIOC into primary consideration is a consistent and fundamental focal point for the CRC in both the Committee's GCs and concluding observations on state budgetary resource allocation.<sup>169</sup> Resource allocation connected to the BIOC is not only strictly related to public budgeting, but also to specific legislative measures that safeguard public expenditure for children. This is of particular importance for marginalised children, who the government must take additional considerations to

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<sup>166</sup> Alberto Minujin, Javier Curcio and Louise Daniels, 'Child Budget Initiatives in Latin America' (International Affairs Working Paper 2010-01, January 2010), 15 <<https://tinyurl.com/y6pkdyky>> accessed 7 April 2023 (Minujin 2010).

<sup>167</sup> CRC GC 19, [12].

<sup>168</sup> CRC GC 19, [26].

<sup>169</sup> Nolan 2013, 265.

protect in policy and practice.<sup>170</sup> Thus, non-discrimination stands alone as a general principle of the UNCRC but is also in the best interest of all children, reflecting the need for BIOC and non-discrimination to be implemented hand-in-hand throughout the budgeting process. As such, both will be woven into the following procedural recommendations and must be enacted and made visible within budget allocations and expenditures.

### iii. Child Rights and Wellbeing Impact Assessments (CRWIA)

Comprehensive and consistent impact assessments are essential to an effective application of the principles of the BIOC and non-discrimination.<sup>171</sup> In Scotland, CRWIA were introduced in 2015<sup>172</sup> and completion of these assessments will become a statutory obligation under sections 14(1), 14(3), and 11(3)(c)<sup>173</sup> of the Incorporation Bill. CRWIA provide an opportunity to consider the potential impacts on children that any allocation decision may have<sup>174</sup> and enable government officials to implement the UNCRC.<sup>175</sup>

#### A. Ex-ante and Ex-post CRWIA

*Ex-ante* CRWIA refer to the practice of impact assessments that anticipate how specific resource allocations will impact different groups of children.<sup>176</sup> Furthermore, CRWIA in Scotland are formulated to reveal issues of inequity in the design of policies and can help budgeting authorities to recognise possible disparities in how a line item or

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<sup>170</sup> Ibid, 266.

<sup>171</sup> UNICEF-UK, 'Child Rights Impact Assessment (CRIA): A review of comparative practice across the UK' (2017), 6 <<https://www.unicef.org.uk/publications/unicef-uk-cria-2017/>> accessed 7 April 2023 (UNICEF-UK 2017).

<sup>172</sup> Children and Young People (Scotland) Act asp 8, pt 1.

<sup>173</sup> These are the anticipated article numbers and are subject to the final bill article numbers.

<sup>174</sup> CRWIA can take place *ex-ante* and *ex-post* in any budgetary decision. The former considers any anticipated impact that can be expected from the allocation, whereas the latter utilises *de facto* expenditures and effects of budgetary implementation; both are crucial to successful budgetary impact analysis and to CRB in general. See, UNICEF-UK 2017, 7.

<sup>175</sup> Scottish Government, 'Child Rights and Well-Being Impact Assessment (CRWIA): External Guidance' (2021), 4 <<https://tinyurl.com/36vmrbbd>> (CRWIA: External Guidance 2021).

<sup>176</sup> Simon Hoffman, 'Ex ante children's rights impact assessment of economic policy' (2020) 24(9) *The International Journal of Human Rights*, 1333–1334 (Hoffman 2020).

programme might impact children.<sup>177</sup> Failure to undertake CRWIA for budgetary resource allocations reflects a failure to adhere to BIOC and non-discrimination principles and breaches the Incorporation Bill. The UNCRC promotes the use of CRWIA in public budgeting due to children's dependency on adults and the fact that any public expenditure impacts the realisation of children's rights.<sup>178</sup> CRWIA are also impactful as a preventative measure.<sup>179</sup> Early inclusion of *ex-ante* CRWIA in the policy development process and utilisation of *ex-post* CRWIA minimises the harm caused by budgetary decisions and allows for accurate evaluations of successes and failures in expenditure.<sup>180</sup>

### B. Assessing Non-discrimination

The tools offered by CRWIA can continue to serve Scottish Government officials in adhering to their obligation of non-discrimination following the implementation of budgetary measures throughout the budgeting process. Upon adoption of the Incorporation Bill, the Scottish Government must look to other jurisdictions, but also to its own successes and failures so as to eliminate current forms of budgetary discrimination and amplify inclusive practices. Analysis of expenditure can offer valuable instruction on what works and what does not. However, further work needs to be done, across the budgeting timeline to ensure non-discrimination is upheld in the Scottish budget. Successes and failures revealed by *ex-post* CRWIA must be brought into future

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<sup>177</sup> CRWIA: External Guidance 2021, 15; European Network of Ombudspersons for Children, 'Common Framework of Reference on Child Rights Impact Assessment: A Guide on How to Carry Out CRIA' (2020), 12 <<https://tinyurl.com/bdz9fuew>> accessed 7 April 2023.

<sup>178</sup> Hoffman 2020, 1335.

<sup>179</sup> Ibid, 1343.

<sup>180</sup> The Scottish Government considered the BIOC in its CRWIA used to assess its response to the COVID-19 pandemic and the subsequent restrictions related to the pandemic response. Specifically, how the right to education was impacted by remote learning. For example, different rights were weighed against each other such as the right to education as covered by UNCRC Article 28 and the right to health and wellbeing as set out by UNCRC Article 24. The conclusion of the CRWIA was that the temporary restriction of the right to education was justified when the possible deaths would be more detrimental to society at large and to children specifically, thus making the restriction of the right to education in the best interest of the child. Similar CRWIAs should be undertaken in relation to public budgeting and the weighing of different rights against each other as they relate to public expenditure, given both the domestic and international legal obligations of Scotland under the UNCRC (UNCRC, Articles 24 and 28); Scottish Government, 'Coronavirus (Recovery and Reform) (Scotland) Bill, Child Rights and Wellbeing Impact Assessment' (CRWIA) (2022), 25-26, <<https://tinyurl.com/mrxsj7hz>> accessed 7 April 2023.

budgeting methods and expenditures to combat entrenched and country-wide intersectional inequalities effectively.<sup>181</sup>

### C. Austerity and CRWIA

Additionally, CRWIA must be conducted before and after any budgetary shift pushed forward by COVID-19 or the cost of living crisis. Amid crises, children's participation in CRB becomes more critical as a source of reliable information.<sup>182</sup> It is children themselves, particularly the most marginalised children, who can effectively determine whether a budgetary decision meets the criteria of non-retrogression,<sup>183</sup> as it is their lived experiences of rights as rights-holders that must be preserved and improved. Non-governmental bodies, too, can and should conduct independent CRWIA to hold the government to account.<sup>184</sup>

### D. Data Collection and Disaggregation

Data collection and disaggregation are essential for an effective CRWIA and for meeting the obligation of non-discrimination.<sup>185</sup> This is critical as children are a vulnerable group, but this group also consists of other marginalised sub-groupings. Cognisance of intersectional discrimination is a key aspect of non-discrimination. In CRB, this comes into play in the form of budget prioritisation. Children with disabilities, for example, need discrete funding blocs and resources to provide for their specific needs.

In Scotland, much of this disaggregation in budgeting is apparent in social security design, especially following the Scotland Act 2016<sup>186</sup> which devolved new social

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<sup>181</sup> UNICEF-UK 2017, 7.

<sup>182</sup> EK Tisdall and Fiona Morrison, 'Children's human rights under COVID-19: learning from children's rights impact assessment' (2022) *International Journal of Human Rights*, 6 <<https://doi.org/10.1080/13642987.2022.2036135>> accessed 7 April 2023.

<sup>183</sup> See above for criteria listed in CRC GC 19, [31].

<sup>184</sup> Alice MacLachlan, C McMellon, and Joana Inchley, 'Public mental health during the COVID-19 pandemic: impacts on children's rights' (2022) *International Journal of Human Rights*, 5 <<https://doi.org/10.1080/13642987.2022.2057958>> accessed 7 April 2023.

<sup>185</sup> National Assembly for Wales Children and Young People Committee 'Children's Budgeting in Wales' (2009), 26 <<https://tinyurl.com/pdu4yxx8>> accessed 7 April 2023.

<sup>186</sup> Scotland Act 2016, pt 3.

services to the Scottish Government's control.<sup>187</sup> Multiple projects implemented, or in the process of being enacted following the adoption of the Scotland Act, have been directed at countering discrimination and uplifting highly vulnerable groups of children, like the Winter Fuel Payment.<sup>188</sup>

However, as these are new programmes, assessing expenditure and the success of implementation is essential. *Ex-post* CRWIA aids in furthering government understandings of what must be altered and what must be amplified in these services to truly serve the communities they were developed to help. As Scotland aims to eradicate child poverty, data disaggregation must be employed alongside deliberative dialogue with children living in poverty. Ultimately, this can provide the government with the most comprehensive tools to diagnose root issues and tackle their strategic priority for the 2023-2024 fiscal year.

#### iv. CRB Process Principles

The following section synthesises HRB approaches to inform the most crucial principles for a CRB practice: transparency, accessibility, accountability, participation, and empowerment (TAAPE).<sup>189</sup> These principles underpin the obligation of the government to include the wider public within all four stages of the budgeting process.

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<sup>187</sup> However, the UK Government still reserves control over other critical benefits (about 85% of total benefits, leaving around 15% under Scotland's control), such as Universal Credit (which comprises, *inter alia*, Jobseeker's Allowance, Working Tax Credits, Income Support and Housing Benefit), Child Benefit, Pension Credit, and more. In this way, incomplete devolution complicates the Scottish Government's obligation of non-discrimination in social security expenditure. See, Scottish Government, 'Social Security for Scotland: Equality, Poverty and Social Security' (PowerPoint Presentation, September 2021) <<https://tinyurl.com/7nwh5mca>> accessed 7 April 2023.

<sup>188</sup> The Winter Fuel Payment provides financial support for heating costs to families with disabled children. Similarly, the Scottish Child Payment and Best Start Grant (both directed at supporting low-income families with young children). See, Scottish Government, 'Policy: Social Security' <<https://www.gov.scot/policies/social-security/>> accessed 7 April 2023.

<sup>189</sup> Minujin 2010, 15.

## A. Transparency

The key to a successful practice of transparency is the involvement of Civil Society Organisations (CSOs) as actors who regularly practise oversight of government budgetary decisions throughout the fiscal cycle. To this end, frameworks for oversight refer to article 4 in the UNCRC on administrative measures stating that a ‘child-sensitive approach’ should meet a ‘test of reasonableness’ which ensures that government officials are ‘principled, evidence-based, transparent and evaluative’ in their decision-making.<sup>190</sup> An exemplary framework for transparency is the Tunisian Government’s ‘Citizen Budget’. Here, the Joint Committee on Budget Transparency invites 100 CSOs into the process to inform the budget.<sup>191</sup> Throughout the year, regular reports are used to ensure that any excess resources that arise during the year are funnelled into programmes that CSOs have identified as necessary for the population.<sup>192</sup>

In cases of lower-than-anticipated resources, ‘child-friendly’ approaches must engage in an ‘ongoing democratisation process’ through which children’s organisations are continually present to ensure that any funding retrogressions do not fall below the minimum core.<sup>193</sup> In addition, transparency and oversight from external actors within a CRB process help states to fulfil their obligations under the UNCRC by utilising their MAR and upholding the minimum core.

## B. Accountability

Accountability mechanisms function in two key ways: allowing CSOs to perform checks and balances of state power (*vertical accountability*) and providing an opportunity for

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<sup>190</sup> Tobin 2019, 141.

<sup>191</sup> OHCHR, Realizing Human Rights, 42.

<sup>192</sup> Ibid.

<sup>193</sup> Eliana Riggio, ‘Child Friendly Cities: Good Governance in the Best Interests of the Child’ (2002) 14(2) Environment and Urbanization, 45 <<https://tinyurl.com/2rmue49n>> accessed 7 April 2023. The necessity of this approach is apparent in the case of *Djazia and Bellili v Spain* where the ICESCR committee found that the Madrid City Council had evicted Mr. Ben Djazia and his family from their public housing and rendered them homeless due to ‘rationalising the resources of their social services.’ See, *Mohamed Ben Djazia and Naouel Bellili v Spain* (20 June 2017) CESCR Communication No. 5/2015 UN Doc E/C.12/61/D/5/2015.

learning from other exemplary practices (*horizontal exchange*).<sup>194</sup> Practices developed within Latin American Supreme Audit Institutions offer such mechanisms. These include the ability of CSOs to function as government watchdogs and the value of producing audit information in accessible terms for non-specialists, including children.<sup>195</sup> Moreover, the Scottish Government should make space for collaboration between governmental bodies and CSOs in developing innovative solutions for budgeting challenges. This collaboration is an integral element of social accountability which emphasizes the importance of civic engagement in the budgeting process.<sup>196</sup>

### C. Accessibility

Accessibility within CRB approaches calls on public officials to actively bridge the gap between children and the highly technical budgeting process. This involves making budgeting documents more comprehensible for children and young people and creating regular opportunities for discussion with government officials.<sup>197</sup> This is an essential facet of the Lundy Model of Participation which demands that children have ‘space, voice, audience and influence’<sup>198</sup> when presenting their views.

#### a. The Lundy Model

Crucially, ‘voice’ implies adult support to facilitate children’s expression of their perspectives to government officials. ‘Space’ asks governments to consider how altering their budgeting process can include children, of all ages and abilities, to perform

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<sup>194</sup> Marcus Andre Melo and others, ‘Political and Institutional Checks on Corruption: Explaining the Performance of Brazilian Audit Institutions’ (2009) 42(9) *Comparative Political Studies*, 1217 <<https://journals.sagepub.com/doi/epdf/10.1177/0010414009331732>> accessed 7 April 2023.

<sup>195</sup> Anti-Corruption Resource Centre, ‘When Supreme Audit Institutions engage with civil society: Exploring lessons from the Latin American Transparency Participation and Accountability Initiative’ (2014), 4 <<https://tinyurl.com/yu64n6ep>> accessed 7 April 2023.

<sup>196</sup> Laura Lundy, Karen Orr and Chelsea Marshall, ‘Children’s Rights Budgeting and Social Accountability: Children’s Views on its Purposes, Processes and their Participation’ (2020) 4(1) *Global Campus of Human Rights Journal* 91, 93 <<https://pureadmin.qub.ac.uk/ws/files/227281132/child.pdf>> accessed 7 April 2023 (Lundy and others 2020)

<sup>197</sup> *Ibid*, 111.

<sup>198</sup> Laura Lundy, ‘Enabling the Meaningful Participation of Children and Young People Globally: The Lundy Model’ (2014) Queen’s University Belfast <<https://tinyurl.com/ysfb37nm>> accessed 7 April 2023 (Lundy 2014).



advocacy within participation mechanisms.<sup>199</sup> This is integral for adherence to the instructions of the CRC's GC 5, which states that participation bodies must '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.'<sup>200</sup>

#### b. Accessibility and Public Involvement

Moreover, participation mechanisms for children must be designed to include the perspectives of all children, including young children. As a framework, Ghana's community-focused approach to accountability is exemplary in assuring that parents and young children can engage in the budgeting process during the auditing stage through 'community scorecards.'<sup>201</sup> In this format, CSOs, children, and parents are able to track education budgets to 'determine the outcome of resources allocated to primary education.'<sup>202</sup> This example emphasises that a CRB process must build a sustained flow of information between young children, parents, government officials, and CSOs to achieve a sufficient grasp of how national budgets are performing within key institutions for children.<sup>203</sup> Fundamentally, this is essential for a full realisation of Article 12 UNCRC. It also deconstructs the notion that individuals under 18 'lack interest or capacity'<sup>204</sup> to provide feedback on budgeting issues by creating stages in the budget process which are accessible to them.

#### D. Participation and Empowerment

The Welsh Observatory of Human Rights underscores the importance of consultation, empowerment, and education. These tools aim to inspire children to 'take advantage' of

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<sup>199</sup> Ibid.

<sup>200</sup> CRC GC 5, [69].

<sup>201</sup> ALMA Scorecard Hub, 'Ghana Community Scorecard: how it works' <<https://tinyurl.com/4ykke7pv>> accessed 7 April 2023.

<sup>202</sup> Save the Children, 'Budget for Children Analysis: A Beginners' Guide' (2010) <<https://tinyurl.com/mryz3427>> accessed 7 April 2023, 11.

<sup>203</sup> Ibid, 14.

<sup>204</sup> Bronagh Byrne and Laura Lundy, 'Children's rights-based childhood policy: a six-P framework' (2019) 23(3) The International Journal of Human Rights 357, 16.

their right to participation which is essential for a non-tokenistic CRB process.<sup>205</sup> The Irish Government has incorporated this into its budgeting approach through its National Child Participation Strategy. Within this mechanism, children under the care of Mental Health Services were consulted about the level of their rights enjoyment within the Youth Empowerment Service programme. This CRB approach made children's experiences visible within the budgeting process, which is significant as their circumstances are often stigmatised or diminished.<sup>206</sup> Hence, the Scottish Government must recognise the power of its budget to uplift marginalised children by encouraging them to guide budgeting design and assess the possible impacts of proposed allocations.<sup>207</sup>

In its recommendations to Lithuania, the CRC highlighted that the government had established participation forums. However, they did not provide enough contextual information on the topics being discussed for the children to become meaningful actors in the process.<sup>208</sup> To tackle this issue, it is useful to turn to Helgesson, who outlines how CRWIA can serve as a mechanism for ensuring that governments give children a regular space to report on budget allocations.<sup>209</sup> Subsequently, the Scottish Government must ensure that they pair regular opportunities for participation with an active effort to encourage children of all ages, abilities, and knowledge of the topics to engage in these forums. Inevitably, this will lead to a CRB approach that empowers children to express the extent to which their rights are being fulfilled within the budgeting process.<sup>210</sup>

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<sup>205</sup> Simon Hoffman, 'Strengthening and Advancing Equality and Human Rights in Wales' (2021) (Cardiff: 2021) Welsh Government, GSR report number 54/2021 <<https://tinyurl.com/mpmark8>> accessed 5 April 2023, 8.

<sup>206</sup> Ibid, 81; Department of Children and Youth Affairs, 'National Strategy on Children and Young People's Participation in Decision-making 2015-2020' (2015) <<https://assets.gov.ie/24462/48a6f98a921446ad85829585389e57de.pdf>> accessed 7 April 2023.

<sup>207</sup> Lundy and others 2020.

<sup>208</sup> CRC, 'Combined Fifth and Sixth Periodic Reports Submitted by Lithuania under Article 44 of the Convention, due in 2019' (2022) UN Doc CRC/C/LTU/5-6.

<sup>209</sup> Sara Helgesson, 'Budgetary Obligations under the Convention on the Rights of the Child—Recommendations to Scotland as it moves towards the incorporation of the UNCRC into Scots law' (2020) The University of Edinburgh, 28-29 <<https://tinyurl.com/mt3h5z77>> accessed 7 April 2023.

<sup>210</sup> Ibid, 14.

## v. Implications for a CRB Process

In summary, this report presents the following as essential for informing a CRB process within all stages of the budgeting cycle.

### A. Design

Prior to designing budgets for the next fiscal cycle, it is essential that *ex-ante* CRWIA are utilised to provide data on the current gaps in realising children's rights in Scotland. Crucially, there must be a concerted effort to survey the experiences of a wider range of children. This must include *all* children, particularly those who experience discrimination. The proposed budgets must be made transparent for the ends of accountability to children's rights organisations and children.

### B. Legislation


When translating these proposed budgets into legislation, the Scottish Government must consult with Scottish local authorities and children to ensure that altering budgetary allocations will not result in a retrogression below the minimum core. A CRB approach requires drafting and passing legislation that leads to sustainable and effective rights delivery. It considers BIOC and non-discrimination as essential in guiding the design of legislation and its implementation.

### C. Execution

The Scottish Government has an obligation to include children's expression of their views in the budget execution process.<sup>211</sup> Participation mechanisms that enable this must be available and broadcast to all children. The existence of participation mechanisms must be partnered with awareness campaigns such that children and young people are encouraged to engage in these forums. This will ensure that the Scottish Government is able to hear the voices of those impacted by its budgets. The Scottish Government must train government officials to work collaboratively and effectively with children. Further, a CRB approach requires regular reports which

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<sup>211</sup> UNCRC Article 12.



integrate this feedback into the execution of budgets. This should be produced in collaboration with the central government, local authorities, children's rights organisations, parents, and children.

#### D. Auditing

The Scottish Government must conduct *ex-post* CRWIA as part of their auditing process to comply with the Incorporation Bill and effectively adopt CRB. Continual data collection and analysis throughout the budgeting cycle will allow for a greater understanding of the landscape of children's experiences during this budgeting cycle in Scotland. Disaggregation of this data is crucial in employing the principle of non-discrimination to protect and ensure the rights of all children through future budgets, and improve upon the strengths and weaknesses of previously-implemented budgets. Moreover, this will give the 'space, voice, audience and influence'<sup>212</sup> for children to relay their experiences of this budgeting cycle and the realisation of their rights in the previous year.



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<sup>212</sup> Lundy 2014.

## V. Recommendations for the Scottish Government

	<b>Budgeting Content Recommendations</b>
1	<p><i>The Scottish Government must</i> define the minimum core of each ESC right informed by a participatory and inclusive process involving the government, experts, different organisations, and individuals. Delivery of the minimum core of ESC rights should be prioritised for all children in the budgets. Resource constraints can not be used to justify the failure to deliver the minimum core.</p>
2	<p><i>The Scottish Government must</i> take targeted steps to move as expeditiously and effectively as possible towards the full realisation of ESC rights of all children and ensure non-retrogression. Scotland must consider, <i>inter alia</i>,</p> <ul style="list-style-type: none"> <li>a) Increase direct or indirect funding for children in budgets</li> <li>b) Efficient mobilisation of existing and potential resources</li> <li>c) The level of economic development and the impact of inflation rates</li> <li>d) Assessment of the links between resource allocation and rights realisation</li> </ul>
3	<p><i>The Scottish Government must</i> not just efficiently administer existing resources, but also proactively mobilise potential resources that can advance children’s ESC rights and the following frameworks provide helpful guidance in ensuring the performance of this obligation:</p> <ul style="list-style-type: none"> <li>a) The MAR Star</li> <li>b) CESCRI Indicators of MAR Utilisation</li> <li>c) Presumptions of MAR Non-utilisation</li> </ul>
4	<p><i>The Scottish Government must</i> seek to understand how children are impacted by structural inequalities and intersectional discrimination in Scottish society and thus develop budgets focused on substantive equality among children. In times of austerity, budgets must take additional care to protect the rights of children who are already experiencing greater barriers to the enjoyment of their rights.</p>
5	<p><i>The Scottish Government must</i> ensure that any reductions in allocations relevant to children’s rights are necessary, reasonable, proportionate, non-discriminatory, and temporary, and must engage children in the decision and consider all other alternatives.</p>



<b>Budgeting Process Recommendations</b>	
1	<i>The Scottish Government must regularly undertake ex-ante CRWIA (assessing the anticipated impact on children) and ex-post CRWIA (evaluating impacts of programmes following their implementation).</i>
2	<i>The Scottish Government must ensure that all children, particularly marginalised children, are given the means and encouragement key to developing their advocacy and public speaking skills which will allow them to participate in accessible budgeting design and feedback forums fully.</i>
3	<i>The Scottish Government must ensure that there are regular opportunities for transparency throughout the fiscal cycle to guarantee that changes to the fiscal envelope do not result in retrogression below the minimum core and that excess funds can be allocated in accordance with the key needs of the population identified by CSOs.</i>
4	<i>The Scottish Government must provide consistent opportunities for the meaningful participation of children throughout all four stages of the budgeting process:</i>  a) To hold government officials and their practices to account b) To empower children c) To uplift the voices of those most marginalised and excluded from policy decisions
5	<i>The Scottish Government must consistently collect disaggregated and quality data to analyse the effectiveness of its budget and its unique impacts on children to identify marginalised subgroupings of children and effectively combat entrenched and intersectional inequalities.</i>





## VI. Conclusion

Upon the incorporation of the UNCRC into Scots Law, the Scottish Government is obliged to make children, directly and indirectly, visible throughout the entire budget cycle and its contents. Our ten recommendations provide a framework for Scotland's fulfilment of its soon-to-be statutory obligations under the UNCRC incorporation, a reassertion of Scotland's commitment to an exemplary human rights practice, and an improved quality of life for all children in Scotland. Most crucially, this comprehensive report seeks to inform a CRB approach that works towards building upon the rights children enjoy in Scotland, creating a brighter future for the coming fiscal year, and realising Scotland's promise to eradicate child poverty.



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## Annex: Legal Underpinnings of the Ten Recommendations

	Budgeting Content Recommendations	Relevant Articles, Legal Provisions, and Treaty Body Interpretations	Applicable UNCRC General and Budget Principles
1	<p><i>The Scottish Government must define the minimum core of each ESC right informed by a participatory and inclusive process involving the state, experts, different organisations, and individuals. Delivery of the minimum core of ESC rights should be prioritised for all children in the budgets. Resource constraints cannot be used to justify the failure to deliver the minimum core.</i></p>	<p>UNCRC Article 4</p> <p>UNCRC Article 6</p> <p>UNCRC Article 12</p> <p>ICESCR Article 2(1)</p> <p>CRC, 'General Comment 5', UN Doc CRC/GC/2003/5</p> <p>CRC, 'General Comment 19', UN Doc CRC/C/GC/19</p>	<p>Right to Life, Survival, and Development</p> <p>Right to be Heard</p> <p>Effectiveness</p> <p>Sustainability</p>
2	<p><i>The Scottish Government must take targeted steps to move as expeditiously and effectively as possible towards the full realisation of ESC rights of all children and ensure non-retrogression. Scotland must consider, <i>inter alia</i>,</i></p> <p>a. Increased direct or indirect funding for children in budgets</p> <p>a. Efficient mobilisation of existing and potential resources</p> <p>b. The level of economic development and the impact of inflation rates</p> <p>c. Assessment of the links between resource allocation and rights realisation</p>	<p>UNCRC Article 4</p> <p>UNCRC Article 6</p> <p>ICESCR Article 2(1)</p> <p>CRC, 'General Comment 5'</p> <p>CRC, 'General Comment 19'</p>	<p>Right to Life, Survival, and Development</p> <p>Effectiveness</p> <p>Efficiency</p> <p>Sustainability</p>

<p>3</p>	<p><i>The Scottish Government must not just efficiently administer existing resources, but also proactively mobilise potential resources that can further children’s ESC rights and the following frameworks provide helpful guidance in ensuring its performance of this obligation:</i></p> <ul style="list-style-type: none"> <li>a) The MAR Star</li> <li>b) CESCER Indicators of MAR Utilisation</li> <li>c) Presumptions of MAR Non-utilisation</li> </ul>	<p>UNCRC Article 4</p> <p>UNCRC Article 6</p> <p>ICESCR Article 2(1)</p> <p>CRC, ‘General Comment 5’</p> <p>CRC, ‘General Comment 19’</p> <p>CESCR, ‘Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant [on Economic, Social and Cultural Rights], UN Doc E/C.12/38/CRP.1</p>	<p>Right to Life, Survival, and Development</p> <p>Efficiency</p> <p>Sustainability</p>
<p>4</p>	<p><i>The Scottish Government must seek to understand how children are impacted by structural inequalities and intersectional discrimination in Scottish society, and thus develop budgets focused on substantive equality among children. In times of austerity, budgets must take additional care to protect the rights of children who are already experiencing greater barriers to enjoyment of their rights.</i></p>	<p>UNCRC Article 2(1)</p> <p>UNCRC Article 3(1)</p> <p>UNCRC Article 6</p> <p>ICESCR Article 2(2)</p>	<p>Non-discrimination</p> <p>BIOC</p> <p>Right to Life, Survival, and Development</p> <p>Effectiveness</p> <p>Equity</p> <p>Sustainability</p>



5	<i>The Scottish Government must ensure that any reductions in allocations relevant to children's rights are necessary, reasonable, proportionate, non-discriminatory and temporary, and must engage children in the decision and consider all other alternatives.</i>	<p>UNCRC Article 2</p> <p>UNCRC Article 3(1)</p> <p>UNCRC Article 6</p> <p>UNCRC Article 12</p> <p>ICESCR Article 2(1)</p> <p>ICESCR Article 2(2)</p> <p>CRC, 'General Comment 19'</p> <p>CESCR, 'General Comment No. 19', UN Doc E/C.12/GC/19 [42]</p>	<p>Non-discrimination</p> <p>BIOC</p> <p>Right to Life, Survival, and Development</p> <p>Right to be heard</p> <p>Effectiveness</p> <p>Equity</p> <p>Transparency</p> <p>Sustainability</p>
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	<b>Budgeting Process Recommendations</b>	<b>Relevant Articles, Legal Provisions, and Treaty Body Interpretations</b>	<b>Applicable UNCRC General and Budget Principles</b>
1	<i>The Scottish Government must continually complete ex-ante CRWIA (assessing anticipated impact on children) and ex-post CRWIA (evaluating programmes following their implementation)</i>	<p>UNCRC Article 3(1)</p> <p>UNCRC Article 12</p> <p>CRC, 'General Comment 5'</p> <p>CRC, 'General Comment 19'</p> <p>UNCRC (Incorporation)(Scotland) Bill sections 14(1), 14(3) and 11(3c)</p>	<p>BIOC</p> <p>Right to be heard</p> <p>Effectiveness</p> <p>Efficiency</p> <p>Transparency</p>
2	<i>The Scottish Government must ensure that all children, particularly marginalised children, are given the</i>	<p>UNCRC Article 12</p> <p>CRC, 'General</p>	<p>Right to be heard</p> <p>Effectiveness</p>

	means and encouragement key to developing their advocacy and public speaking skills which will allow them to fully participate in accessible budgeting design and feedback forums.	Comment 5' CRC, 'General Comment 19'	Equity Transparency
3	<i>The Scottish Government must ensure that there are regular opportunities for transparency throughout the fiscal cycle to guarantee that changes to the fiscal envelope do not result in retrogression below the minimum core and excess funds can be allocated in accordance with the key needs of the population identified by Civil Society Organisations.</i>	UNCRC Article 12 (1) ICESCR Article 2 (1) CRC, 'General Comment 19'	Right to be heard Effectiveness Efficiency Transparency
4	<i>The Scottish Government must provide consistent opportunities for the meaningful participation of children throughout all four stages of the budgeting process.</i>  a) To hold government officials and their practices to account b) To empower children c) To uplift the voices of those most marginalised and excluded from policy decisions	UNCRC Article 2 UNCRC Article 12 (1) ICESCR Article 2(2) CRC, 'General Comment 19'	Right to be heard Effectiveness Efficiency Transparency
5	<i>The Scottish Government must consistently collect disaggregated and quality data to analyse the effectiveness of its budget and its unique impacts on children to identify marginalised subgroupings of children and effectively combat entrenched and intersectional inequalities</i>	UNCRC Article 2(1) CRC, 'General Comment 5' CRC, 'General Comment 19'	Non-discrimination Right to be heard Effectiveness Efficiency Equity Transparency Sustainability