

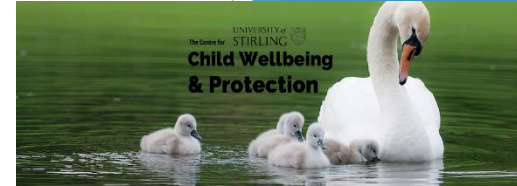
Seminar Series 2017

Implementing and monitoring the UN Convention on the Rights of the Child (UNCRC) in Scotland

Seminar One - the UNCRC in Law

Friday 10th February

SUII, University of Strathclyde, Collins Building, 22 Richmond Street, Glasgow G1 1XQ



Fiona Jones Chair of Together

The UNCRC in Law

Friday 10th February

SUII, University of Strathclyde, Collins Building, 22 Richmond Street, Glasgow G1 1XQ



Camilla Kidner Senior Researcher, SPICe

The UNCRC in Law

Friday 10th February

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The background features abstract, overlapping geometric shapes in various shades of blue, ranging from light sky blue to deep navy blue. The shapes are primarily triangles and quadrilaterals, creating a dynamic, layered effect. The overall composition is clean and modern, with the text centered in the white space.

**Giving effect to the UNCRC: Learning
from International Experience**

**Professor Ursula Kilkelly
School of Law,
University College Cork**

UNCRC: Implementation

UNCRC is legally binding on states parties

States have a duty to take ‘all appropriate legislative, administrative, and other measures’ to implement the UNCRC

Committee has outlined the importance of incorporation, justiciability as well as non-legal measures of implementation

Impact of the UNCRC at national level depends on a range of factors



Studying Implementation: the UNICEF UK Study

Study of 12 countries with different systems and relationships with the UNCRC

Sought to examine the impact of measures taken to implement the Convention

Saw that countries had adopted a wide range of measures to implement the UNCRC, including legal and non-legal measures

Incorporation - examples of full incorporation and select use of principles in sectoral laws

Value of incorporation was

- ▶ the process of awareness raising and education that accompanied it
- ▶ rights coming home - justifiability, ownership
- ▶ gateway to fuller engagement with the UNCRC

While the picture is complex, we found clear evidence that incorporation had in certain cases led to more positive engagement with the UNCRC at national level



Studying European Constitutions: Venice Commission

- ▶ Few of Europe's Constitutions now omit children's rights altogether
- ▶ Most Constitutions contain some CR provisions or references
 - ▶ Education, equality, right to protection, the family
 - ▶ Increasing reference to CRC principles
- ▶ Increasing recognition of children as rights holders
- ▶ Common approach to defer to legislature (indirect incorporation)



Lessons from Ireland

- ▶ Historic, well established paternalism in society and the legal system
- ▶ Significant momentum for change built by domestic inquiries, sustained advocacy and international pressure
- ▶ Referendum to amend Constitution - 2012 - a poor turnout voted 'Yes' by slim majority
- ▶ Journey from paternalism to rights- based approach through constitutional change and subsequent law and policy reform - a gradual process



Conclusions

- ▶ Change requires co-ordinated support and sustained effort by civil society, NHRIs, academia, politicians.
- ▶ Building awareness of the public and interest of the media is key
- ▶ Non-legal measures are vital to build momentum towards legislative incorporation
- ▶ Legislative incorporation - beginning with the CRC principles - can be gradually transformative.



Sources

- ▶ UNICEF Innocenti Research Centre, *Law Reform and Implementation of the CRC* (Florence: UNICEF 2007)
- ▶ Kilkelly et al, *The UN Convention on the Rights of the Child: A Study of Legal implementation in 12 Countries* UNICEF UK, 2012.
- ▶ Venice Commission, *Report on the Protection of Children's Rights: International Standards and Domestic Constitutions'* Strasbourg. 2014
- ▶ Kilkelly, 'The CRC at 12: Assessing the Legal Impact' 62(2) NILQ 143-152





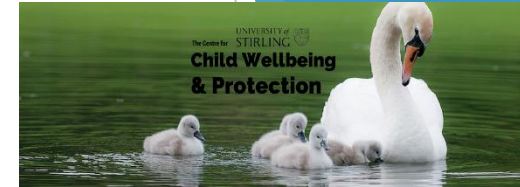
Legislating for the UNCRC in Wales

Dr Simon Hoffman
Swansea University

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Teas & coffees

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Scottish context: Children and Young People (Scotland) Act

Juliet Harris
Director, Together

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The Scottish Context

- ▶ Background to children's rights developments in Scotland
- ▶ Key UNCRC provisions of the Children & Young People (Scotland) Act 2014
- ▶ Where next?

‘disgusted’

‘upset’

The screenshot shows the top portion of a Daily Mail article. At the top, there are social media sharing options for Facebook (8.6M likes), Twitter (@MailOnline), and Daily Mail. The date is Thursday, Feb 9th 2017. The Daily Mail logo is prominent. Below the logo is a navigation menu with categories like Home, News, U.S., Sport, TV&Showbiz, Australia, Femail, Health, Science, Money, and Video. A secondary menu includes Latest Headlines, News, World News, Arts, Headlines, France, Pictures, Most read, News Board, Wires, and Dis. The main headline reads: "Furious mother blasts her daughter's school for giving the 13-year-old the controversial HPV cervical cancer jab without parental consent". To the right of the headline are social media icons for Facebook, Twitter, and Pinterest. Below the headline is a list of bullet points: "Laverne Crosebourne hit out after her daughter revealed she'd received HPV jab", "Mother didn't want daughter to have injection after reading about possible risks", and "NHS said Shian, 13, consented to vaccination and legal decision is down to her".

Like 8.6M Follow @MailOnline DailyMail Thursday, Feb 9th 2017

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Furious mother blasts her daughter's school for giving the 13-year-old the controversial HPV cervical cancer jab without parental consent

- Laverne Crosebourne hit out after her daughter revealed she'd received HPV jab
- Mother didn't want daughter to have injection after reading about possible risks
- NHS said Shian, 13, consented to vaccination and legal decision is down to her

‘astonished’



General Principles of the UNCRC





UN Committee definition of incorporation:

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

Incorporation by itself does not avoid the need to ensure that all relevant domestic law, including any local or customary law, is brought into compliance with the Convention. In case of any conflict in legislation, predominance should always be given to the Convention [...].'

Responses to the Children & Young People (Scotland) bill consultation:



“This duty appears to be a duty to report on steps taken rather than a verification that policies are compliant with UNCRC or that they are having an impact on the lives of children.”

Association of Directors of Education Scotland

“We are concerned that there is a gap between the aspirations expressed in the background information and the specific proposals within the Bill and question whether the proposed actions go far enough to address these drivers”

NHS Scotland

“While any attempt to raise the profile of the United Nations Convention on the Rights of the Child is to be welcomed, this proposal does not go far enough and, indeed, does nothing to increase the responsibility of Scottish Ministers and public bodies beyond that already incumbent on them as a result of the United Kingdom having ratified the UN Convention.

Elaine E Sutherland



Part 1 of the Act: *Rights of Children*

Duty on Scottish Ministers to further the UNCRC

- *...“keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements”.*
- Report to the Scottish Parliament every three years.
- Child Rights Impact Assessment model.



Part 1 of the Act: *Rights of Children*

Awareness-raising duty on Scottish Ministers

- *... "promote public awareness and understanding (including appropriate awareness and understanding among children) of the rights of children".*
- Article 42 of the UNCRC into Scots law.
- Awareness-raising and competence-building measures, such as ongoing, high-quality training and development programmes.



Part 1 of the Act: *Rights of Children*

Duty on Scottish Ministers – the views of children

- *“In complying with their duty under subsection (1)(a), the Scottish Ministers must take such account as they consider appropriate of any relevant views of children of which the Scottish Ministers are aware.”*
- *Article 12 of the UNCRC.*



Part 1 of the Act: *Rights of Children*

Duty on Public Bodies

- Public bodies must report every three years on *"what steps it has taken in that period to secure better or further effect within its areas of responsibility of the UNCRC requirements."*
- Opportunity for public bodies to integrate children's rights into the very core of their values and services.



*'While there is no one policy or initiative that can bring about the kind of change required, there is a **fundamental role for legislation**: to accelerate the progress that has already been made and to ensure a consistent structure within which services operate; [...] and to inspire renewed debate and ambition for what Scotland's children and young people can expect.'*

Scottish Government 2013

Policy Memorandum to the Children and Young People (Scotland) Bill



UNCRC

Gaps in Legislation

Alison Reid
Principal Solicitor
Clan Childlaw

Clan Childlaw

- **Improve children and young people's life chances**
- **Use legal skills and expert knowledge**
- **Help take part in decisions**
- **Children's rights are realised in Scots Law**



Background

- **Scottish Government – C&YP Bill**
Opportunity to “make rights more real”
- **What is in legislation and where are the gaps?**
- **Practical point of view**

Background

- **No point in having rights without being able to enforce them**

“for rights to have meaning, effective remedies must be available to redress violations.”

UN Committee on the Rights of the Child, General Comment 5, CRC/CG/2003/5, 2003

- **Legal framework, practice, enforcement**



UNCRC

- 1. The use of UNCRC in Court**
- 2. Articles 3(best interests) & 12(views)**
- 3. Other Articles – 16(privacy), 19(equal protection), 37(restraint), 40(juvenile justice)**

UNCRC in Court

- **If contrary to domestic law then domestic law is likely to prevail if clear and unambiguous** (*Salomon v Commissioners of Customs and Excise [1967] 2QB 116*)
- **Benefits Cap Case** (*R (on the application of SG) v Secretary of State for Work and Pensions [2015 UKSC16]*)
- **Proper to look to international instruments as aids to interpretation of ECHR** (*Christian Institute v Lord Advocate [2015] UKSC 0216*)



Article 3 – best interests

Best interests - a primary consideration

- **Children’s Hearings – paramount**
- **Contact & Residence – paramount**
- **Adoption – paramount (through life)**
- **Other areas of law?**

Article 12 – Children’s Hearings

Hearings

- child at centre, papers, attendance
- advocacy provisions delay

Court

- environment
- role of solicitors, safeguarders

Better Hearings - Review



Form F9 Form of intimation in an action which includes a crave for a section 11 order

Rule
33.7(1)(h)
PART A

Court Ref. No.

This part must be completed by the Pursuer's solicitor in language a child is capable of understanding

To (1)
The Sheriff (the person who has to decide about your future) has been asked by (2) to decide:-

(a) (3) and (4)

(b) (5)

(c) (6)

If you want to tell the Sheriff what you think about the things your (2) has asked the Sheriff to decide about your future you should complete Part B of this form and send it to the Sheriff Clerk at (7) by (8). An envelope which does not need a postage stamp is enclosed for you to use to return the form.

IF YOU DO NOT UNDERSTAND THIS FORM OR IF YOU WANT HELP TO COMPLETE IT you may get free help from a SOLICITOR or contact the SCOTTISH CHILD LAW CENTRE ON the FREE ADVICE TELEPHONE LINE ON 0800 328 8970.

If you return the form it will be given to the Sheriff. The Sheriff may wish to speak with you and may ask you to come and see him or her.

NOTES FOR COMPLETION

- | | |
|--|---|
| (1) Insert name and address of child. | (2) Insert relationship to the child of party making the application to court. |
| (3) Insert appropriate wording for residence order sought. | (4) Insert address. |
| (5) Insert appropriate wording for contact order sought. | (6) Insert appropriate wording for any other order sought. |
| (7) Insert address of sheriff clerk. | (8) Insert the date occurring 21 days after the date on which intimation is given. N.B. Rule 5.3(2) relating to intimation and service. |
| (9) Insert court reference number. | (10) Insert name and address of parties to the action. |

PART B

IF YOU WISH THE SHERIFF TO KNOW YOUR VIEWS ABOUT YOUR FUTURE YOU SHOULD COMPLETE THIS PART OF THE FORM

To the Sheriff Clerk, (7)

Court Ref. No. (9)
(10).....

QUESTION (1): DO YOU WISH THE SHERIFF TO KNOW WHAT YOUR VIEWS ARE ABOUT YOUR FUTURE?

(PLEASE TICK BOX)

YES
NO

If you have ticked YES please also answer Question (2) or (3)

QUESTION (2): WOULD YOU LIKE A FRIEND, RELATIVE OR OTHER PERSON TO TELL THE SHERIFF YOUR VIEWS ABOUT YOUR FUTURE?

(PLEASE TICK BOX)

YES
NO

If you have ticked YES please write the name and address of the person you wish to tell the Sheriff your views in Box (A) below. You should also tell that person what your views are about your future.

BOX A:

(NAME)

(ADDRESS)

Is this person -	A friend?	<input type="checkbox"/>	A relative?	<input type="checkbox"/>
	A teacher?	<input type="checkbox"/>	Other?	<input type="checkbox"/>

OR

QUESTION (3): WOULD YOU LIKE TO WRITE TO THE SHERIFF AND TELL HIM WHAT YOUR VIEWS ARE ABOUT YOUR FUTURE?

(PLEASE TICK BOX)

YES
NO

If you decide that you wish to write to the Sheriff you can write what your views are about your future in Box (B) below or on a separate piece of paper. If you decide to write your views on a separate piece of paper you should send it along with this form to the Sheriff Clerk in the envelope provided.

.....

What I Think

Name ... Sheriff Court

Address Case Ref:

Email Address

Mobile Number

You can put this What I Think form in the envelope and send it back to the sheriff. You don't need a stamp.

How do you feel about [seeing your Dad] just now?



Good



In the middle



Not good

If you would like to tell the sheriff more about this, use the box below

Is there anything else you would like to happen?

Would you prefer to say what you think in a different way?

Yes

No

What different way would you like to say what you think?

In the letter with this form, there are Freephone numbers for the Scottish Child Law Centre and Clan Childlaw, if you want some other ideas.

If an adult has helped you with this What I Think form, please write their name and how you know them here: _____

Thank you.

The sheriff will decide what happens next.

The experience of Children



Article 12 – Contact & Residence

- **Different approaches – West Lothian, Avenue (Aberdeen)**
- **Recent Court Case – *SM v CM* [2017] CSIH 1**
- **Civil Justice Council Family Law Committee Review**

Article 12 – Access to Justice

- **Views to be given due weight**
- **“Accessing justice is an essential pre-requisite for promotion & protection of all the rights of the child.”**

Flavia Pansieri, UN Deputy High Commissioner for Human Rights, 13 March 2014



Article 12 – Access to Justice

- **Right to instruct a solicitor**
- **Changes to legal aid to require parents' resources to be considered**
- **Lack of confidential and independent advice**
- **Optional Protocol 3 – Complaint mechanism**



Article 16 – Right to Privacy

- ***Christian Institute v Lord Advocate***
(Named Person case)

<https://www.supremecourt.uk/cases/docs/uksc-2015-0216-judgment.pdf>

- **Balance between privacy and information sharing – Article 8 ECHR**



Article 19 – Equal Protection

- “justifiable assault” –incompatible with Article 19
- Practice – “Equally Protected”
<https://www.nspcc.org.uk/globalassets/documents/research-reports/equally-protected.pdf>
- Scottish Government
- Member’s Bill – John Finnie MSP
- Challenge – under Article 3 & 8 ECHR?



Article 37 - Restraint

- **Not subject to cruel, inhuman or degrading treatment or punishment**
- **Concerned that used excessively and not as last resort**
- **Robust and comprehensive recording system**
- **Assault; Residential Establishments Regs 1996; Prisons & Young Offenders Institutions Rules 2006; Article 3 & 8 ECHR**

Article 40- Juvenile Justice

- **Minimum Age of Criminal Responsibility**
- **Fair procedures and treatment of charges on children**
- **Supreme Court case - *AB v HMA UKSC 2016/0083* – relied on ECHR Articles 6,8,14**



Conclusion

Legal Framework

- **piecemeal transposition**

Practice

- **Areas where practices do not follow law**

Enforcement

- **Must be mechanisms in place**
- **More effective if applicable like ECHR**



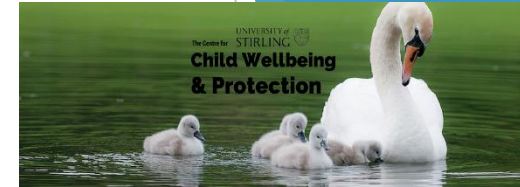
Thank you

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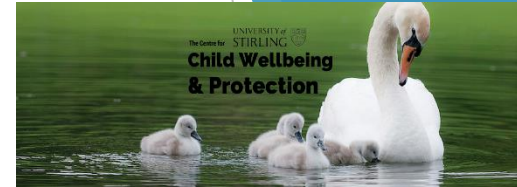


Q+A and discussion

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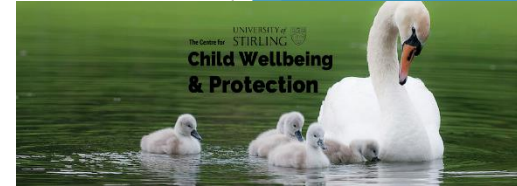


Lunch

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Helen Fogarty

Head of Better Life Chances Unit, Scottish Government

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Incorporation of the UNCRC into Scots law

Dr Kasey McCall-Smith
University of Edinburgh

The UNCRC in Law

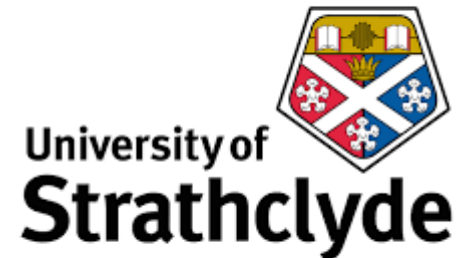
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United Nations Convention on the Rights of the Child

The Argument *AGAINST* Incorporation into Domestic Law

Kenneth McK. Norrie
Law School
University of Strathclyde



Principles

- It is *wrong* to regard the UNCRC as the repository of all wisdom, or the revelatory source of universal truths.
- It is *foolish* to take a document designed for one purpose and seek to use it for another purpose. The UNCRC was designed as “soft law”; incorporation attempts to make it “hard law” with directly enforceable rights (or, more accurately, duties).
- We should recognise that the UNCRC is *aspirational*. But courts of law should not be involved in the political assessment of aspirations.

Articles to be Wary About

- **Article 1**

For the purposes of the present Convention, a child means every human being **below the age of eighteen years** unless under the law applicable to the child, majority is attained earlier.

Articles to be Wary About

- **Article 3**

- In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a **primary consideration**.
 - 1925: “the first and paramount consideration”
 - 1986: “the paramount consideration”
- Cf art 21: in adoption best interests are to be “**the paramount consideration**”.
 - 1978: “first consideration”
 - 1995: “the paramount consideration”
- And art 9 (protective measures allowed where “necessary for the best interests of the child”)

Articles to be Wary About

- **Article 17**
 - States Parties shall ... encourage the production and dissemination of children's books ... *especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.*

Articles to be Wary About

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse.

(Problem is connected to the overreach of article 1).

Articles to be Wary About

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons *who have not attained the age of fifteen years* do not take a direct part in hostilities.

Articles that are non-justiciable

- **Article 4**
 - States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. **With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources** and, where needed, within the framework of international co-operation.

Articles that are non-justiciable

- **Article 11**

- 1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
- 2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Articles that are non-justiciable

- **Article 24**

- States Parties recognize the right of the child to the enjoyment of *the highest attainable standard of health*... States Parties shall ... take appropriate measures to diminish infant and child mortality...
- 4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, *particular account shall be taken of the needs of developing countries*.

Articles that are non-justiciable

Article 10

A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, **States Parties shall respect the right of the child** and his or her parents **to leave any country**, including their own, and **to enter their own country**. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

THE SCOTTISH COURT CANNOT TRUMP A FOREIGN ENTRY BAN



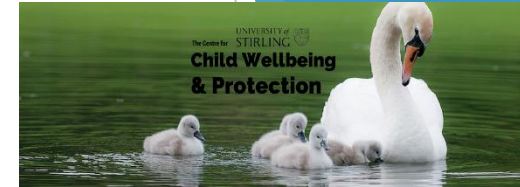
Incorporation of the UNCRC into Scots law

Panel discussion

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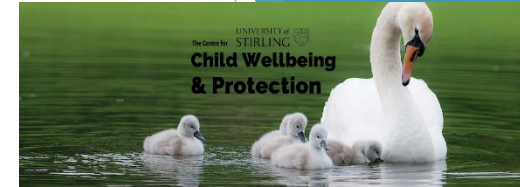


Room discussion with coffee & wall task

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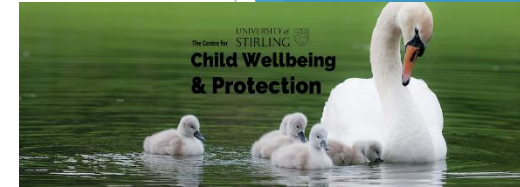
Key messages

Professor Elaine Sutherland University of Stirling

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Questions and close

Dr Andressa Gadda
University of Stirling

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