



Children & Young People (Scotland) Bill

Stage 3 briefing on amendment 116

Monday 17th February 2014

Moving from a debate on whether it is *possible* to incorporate the UN Convention on the Rights of the Child into Scots Law, to a debate on whether it is *desirable*

Debate about the incorporation of the UNCRC has become mired in controversy about the legality and appropriateness of different approaches to putting the UNCRC into law.

Amendment 116 in the name of Jean Urquhart would require Ministers to establish a group (“the Body”) to examine the desirability of incorporating the UNCRC into legislation, within one year of the Children and Young People (Scotland) Bill receiving Royal Assent. The Body would have to consider the merits of different approaches to incorporating the UNCRC into law, and then report back to Ministers and the Parliament as to how the UNCRC could be given legislative effect in Scotland. The amendment allows Ministers to decide what form the Body should take: an independent commission of experts that could take evidence from children, young people, academics and so on would be one such option.

The amendment would not put any aspects of the UNCRC into Scottish law now, and would not lead to any requirement to incorporate the UNCRC in a particular way. It would be a matter for the Ministers, under the scrutiny of the Parliament, to indicate whether they subsequently intended to give legislative effect to the UNCRC. Ultimately the decision would always be for Parliament to decide if incorporation was appropriate and what basis it should be carried out. The Body’s job would be to ensure that any such decision was informed by the best available evidence.

For more information, please contact:

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This briefing has been explicitly endorsed by the following Together members¹:



It has also been endorsed by the following individuals:

- Professor Kay Tisdall, Professor of Childhood Policy, University of Edinburgh
- Dr Richard Whitecross, Lecturer in Law, University of Edinburgh
- Dr John Davis, University of Edinburgh
- Professor Nick Watson, Strathclyde Centre for Disability Research
- Lesley – Anne Barnes Macfarlane, Lecturer in Law, Edinburgh Napier University
- Andrew Kendrick, Head of School of Social Work and Social Policy, University of Strathclyde
- Professor Sarah Cunningham – Burley, Medical and Family Sociology Centre for Research on families and Relationships, University of Edinburgh
- Dr Gillian Black
- Professor Samantha Punch, Sociology- School Applied Social Science, University of Stirling

¹ The following Together members have explicitly supported this briefing: Aberlour, Action for Children, Action for Sick Children Scotland, Barnardo's Scotland, CHILDREN 1st, Children's Parliament, Children in Scotland, cl@n childlaw, Includem, National Deaf Children Society, NSPCC Scotland, Parenting Across Scotland, Quarriers, Save the Children, Scottish Youth Parliament, UNICEF UK, Youthlink Scotland, Wave Trust, Who Cares? Scotland.

Why an investigative Body is necessary

Tam Baillie, the Scottish Commissioner for Children and Young People stated in evidence to the stage 1 inquiry into the bill that:

“By ratification of the UNCRC in 1991, the UK has accepted the obligation in international law to give effect to the Convention’s provisions. In dualist legal systems like those of the UK, the principal method of giving direct legal effect to international law is incorporation of treaties into domestic law by passing legislation that creates enforceable rights which mirror those in the treaty, for example the Human Rights Act 1998 (HRA).”

Tam Baillie, Scotland’s Commissioner for Children and Young People²

However, at Stage 1, the Education and Culture Committee received a large amount of evidence in relation to the appropriateness of incorporation of the UNCRC. Some of this evidence was conflicting:

“I think that to incorporate the convention into the domestic legal system of Scotland would be bad policy, bad practice and bad law. I say that primarily because the UN convention was not drafted or worded to create directly enforceable legal rights in the domestic legal system.”

Professor Kenneth Norrie, Strathclyde University³

“My concern is that misconceptions and myths [about incorporation] have emerged in the course of the Committee’s deliberations.” (p2)

“By incorporating the UN Convention into Scottish law, Scotland would join that band of world-leaders that have already done so, whether by specific legislation or otherwise. Certainly, Scotland will not become ‘the best place in the world to grow up in’ as long as we lag behind the more proactive nations of the world.” (p9)

Professor Elaine Sutherland, Stirling University⁴

This illustrates that there is a great deal of debate between esteemed academics about the practicalities of how the UNCRC might best be incorporated.

In addition, UNICEF UK commissioned a legal opinion from Aidan O’Neill QC of Matrix Chambers to explore powers under current devolved arrangements (the Scotland Act 1998) to incorporate the UNCRC into domestic Scots law. He found that:

² Scotland’s Commissioner for Children and Young People - further evidence to the Education and Culture Committee on the benefits of incorporation of the UNCRC into Scots Law for its stage 1 inquiry into the Children and Young People (Scotland) Bill -

http://www.scottish.parliament.uk/S4_EducationandCultureCommittee/Scotlands_Commissioner_for_Children_and_Young_People_2.pdf

³ Professor Kenneth Norrie, Strathclyde University, oral evidence to Education and Culture Committee, 3rd September 2013. Official Report Col 2682, <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8738&mode=pdf>

⁴ Professor Elaine Sutherland, Stirling University, written evidence to Education and Culture Committee.

[http://www.scottish.parliament.uk/S4_EducationandCultureCommittee/Children%20and%20Young%20People%20\(Scotland\)%20Bill/Elaine_E._Sutherland.pdf](http://www.scottish.parliament.uk/S4_EducationandCultureCommittee/Children%20and%20Young%20People%20(Scotland)%20Bill/Elaine_E._Sutherland.pdf)

Paragraph 7(2)(a) of Schedule 5 of the Scotland Act 1998 puts it within the legislative competence of the Scottish Parliament to ‘observe and implement international obligations’. In principle it is therefore within the powers of Scottish Government and Scottish Parliament to directly and fully incorporate the UNCRC into domestic Scots law in relation to devolved issues. In doing so, enforceable rights and new channels of redress would be created within the Scottish judicial system. ... The direct incorporation of the CRC into domestic law would not run contrary to the requirements of the European Convention on Human Rights. Scottish courts also already have an obligation where possible to interpret and apply the provisions of domestic law consistently with any relevant UK treaty obligations. As such, the Children (Scotland) Act 1995 and the Equality Act 2010 should already be interpreted and applied consistently with the UNCRC.

Aidan O’Neill QC⁵

What the investigative Body would do

The establishment of a national Body to investigate the case for incorporating the UNCRC into Scots Law, as set out in Amendment 116, would move public discussion beyond a debate around the practicalities of incorporation, to the question of whether any of the potential options for full incorporation are desirable. If it was concluded that full incorporation was indeed *desirable*, this would be reported to Ministers and the Parliament, and it would only then be a matter for Parliament to decide if this would be *appropriate*.

However, we recognise that it is fully within Ministers existing powers to establish such a body, without a legislative duty to do so. Our main hope for this amendment is therefore that it encourages Ministers to take this opportunity to set out how they will ensure that any future debates around the UNCRC are based on a clearer understanding of the legal opportunities.

We hope that MSPs will support Amendment 116 at Stage 3, or, if they do not believe that a legal duty to establish a commission in this way is appropriate, will urge Ministers to explore the option of setting up a UNCRC Commission under their existing powers.

Summary

The Children and Young People Bill is a key part of the Scottish Government’s ambition of making Scotland “the best place to grow up”. This is a vision we are proud to share. No matter whether this Bill is passed, and no matter its final wording, the task of making Scotland the best place to grow up will continue.

Passing Amendment 116 would be a fitting ending to the Children and Young People Bill, leaving the final focus on the rights of children. This Bill is an important step, but the job of strengthening the rights of Children will need to continue, and this amendment ensures that the task of making Scotland the best place to grow up with rights continues on an informed basis.

⁵ Aiden O’Neill QC legal opinion for UNICEF UK - [http://www.unicef.org.uk/Documents/Publications/UNICEF%20UK%20Summary%20and%20Annex_Legal%20Opinion%20Aidan%20O’Neill%20QC%20\(2\).pdf](http://www.unicef.org.uk/Documents/Publications/UNICEF%20UK%20Summary%20and%20Annex_Legal%20Opinion%20Aidan%20O’Neill%20QC%20(2).pdf)

Group 1: Duties of Scottish Ministers in relation to the rights of children

Jean Urquhart

116* Before section 1, insert—

<Duty on Scottish Ministers to establish a body to consider whether the UNCRC should be given legislative effect

- (1) Within one year of this Act receiving Royal Assent, the Scottish Ministers must by order establish a body to consider whether the UNCRC should be given legislative effect.
- (2) Where a body established under subsection (1) has completed its consideration it must—
 - (a) make a written report of its conclusions,
 - (b) lay the report before the Scottish Parliament,
 - (c) publish the report.
- (3) As soon as practicable after the report has been laid before the Parliament, the Scottish Ministers must make a statement—
 - (a) responding to the report,
 - (b) indicating, on the basis of that report, whether they intend to give legislative effect to the UNCRC.
- (4) The Scottish Ministers must—
 - (a) lay a copy of the statement under subsection (3) before the Parliament,
 - (b) publish the statement in such a manner as they consider appropriate.
- (5) An order under subsection (1) may make provision about—
 - (a) the status, constitution and proceedings of the body,
 - (b) the period within which the body must report to the Parliament,
 - (c) the matters which must be covered in the report,
 - (d) the publication of the report.>