

Children's Rights: Consultation on incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland

Closing date 28 August 2019, response submitted 23rd August 2019

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

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

Yes

Please explain your views:

The Scottish Out of School Care Network fully supported the previous (2012 circa) proposals to fully incorporate the UNCRC into domestic law in Scotland, so we support all of the proposals here endorsed by "Together". We advocate for the children and families who need or use out of school care; that is children's rights to play, care and learning out with school hours. We also support the services which directly provide these opportunities for children.

All of our responses to questions here are informed by "Together" The Scottish Alliance of Children's Rights, response, as they have expertise on the legal and international framework, and consultation work already undertaken on the topic. In many questions, and certainly where it is more legal and technical, we just support their response.

We agree with the "Together" fuller response in that the Human Rights Act framework contains important mechanisms to ensure compatibility with human rights standards and provide redress and remedy if rights are breached.

"These mechanisms should be included in the model of UNCRC incorporation for Scotland as they will be the most effective way of ensuring that the rights of children under the UNCRC are incorporated into domestic law, as per the recommendations of the UN Committee on the Rights of the Child."

https://togetherscotland.org.uk/media/1342/uncrc_incorporation_response_final.pdf

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

We believe it is not enough to act whenever there is a breach of human rights but that we should follow the duty within the UNCRC to promote and publicise the UNCRC rights to children and what mechanisms are in place in this country to address a breach of such rights. We note that "Together" advises that a more pro-active "due regard" to the UNCRC would address this point and that of assessing impact of decision making at the earliest stages, in terms of how this would impact on children's rights.

3 Do you agree that the framework for incorporation should include a “duty to comply” with the UNCRC rights?

While "due regard" is fine in terms of ensuring children's rights are not ignored and are considered at various stages, through for example, Child Rights Impact Assessments, without a further, firmer duty to comply, this could result in processes of "due regard" taking place, which might demonstrate compliance, but without concrete action on children's rights, which gives them the means of redress should their rights be breached. Again, referring to the response from "Together", who have the legal expertise that we do not have, they make the point that we need both the duty to comply, in order for full rights to be properly incorporated in law, while "due regard" keeps it a pro-active process, not something to be left to the courts to decide.

4 What status, if any, do you think General Comments by the UN Committee on the Rights of the Child should be given in our domestic law?:

We would agree with “Together” in that:

"The framework for incorporation must ensure that the UN Committee’s jurisprudence is given consideration by public authorities and the courts.

This should include General Comments, Concluding Observations and opinions made by the Committee in relation to Optional Protocol 3. This will ensure that Scotland keeps pace with developments in international human rights law and practice whilst being able to apply learning in a way that can be adapted to fit the Scottish context. "

As a national organisation for children who use or need out of school care, play care and learning out of school hours, we have engaged with, and disseminated, General Comments before in relation to General Comment 17, on Article 31, on the rights of children for play, rest, cultural and leisure activities; which tie in with our advocacy for them.

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

We are aware that the UNCRC, or similar principles such as the "best interests of the child" have already being gradually introduced into various legislation involving children and families; Notably the Children Act (Scotland) 1995. We were involved in the development of the Children and Young People (Scotland) Act 2014 which has already has further raised awareness and understanding of the UNCRC obligations among public authorities by placing reporting duties on Ministers and public bodies to set out what steps are being taken to further children’s rights.

Good practice from other devolved administrations, such as Wales, and indeed international good practice, e.g. Norway, could also inform developments where other countries have already or are implementing similar measures. (See more detailed evidence in the response from "Together".)

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

Yes

Please explain your views.:

The Scottish Government is "minded" to do this within this Parliamentary period, and we agree, as to wait until the Human Rights legislation would delay this until perhaps 2023.

7 We would welcome your views on the model presented by the advisory group convened by the Commissioner for Children and Young People in Scotland and Together (the Scottish Alliance for Children's Rights).

It is quite clear our response has been informed by the work done by this advisory group and as a member of Together, and strong supporter of their aims we support the model outlined by them.

As follows:

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

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

The Children's Rights (Scotland) Bill provides a model of full and direct incorporation, making it clear that all the substantive articles of the UNCRC and Optional Protocols should be part of Scots law.

This is line with the UN Committee's clear statement that: "States Parties are required to implement the CRC as a whole, in recognition of the status of children as rights holders and in light of the indivisible and inter-dependent nature of CRC provisions". (Together response)

We agree with all of that and it would help also children and families who need the type of services and support we advocate for them considering, for example, if this right was properly realised in Scotland:

Article 18 1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible. (UNCRC)

8 How should the issue of whether particular UNCRC rights are self-executing be dealt with?: Agree with Together response in principle here that this is not an issue.

9 How could clarity be provided to rights holders and duty bearers under a direct incorporation approach, given the interaction with the Scotland Act 1998?

It is now over 20 years since the 1998 Act, certainly those rights holders and duty bearers within the publicly funded domain will already have experience of the difference between devolved and non-devolved areas of law, as will the legal system. Within children's sector organisations like ours, we for example, in our quality improvement framework for out of school care, make it clear that compliance with the UNCRC should be in their practice and relevant policies, so while there will be a good understanding of children's rights in such services, whether some legal aspects are for the UK or Scottish Governments, will likely not be so clear.

We would have a role, with others, such as Together, providing relevant guidance as the Bill progresses and becomes law.

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

Yes

Please explain why.:

Yes there should be a specific legal framework for incorporation as amending other legislations in parts can leave gaps and create inconsistencies. It also sends a much stronger signal on children's rights across all government policy and practice.

Together also have evidence in their response to demonstrate this e.g. "Incorporation must create an overarching legal framework through which the UNCRC is considered and embedded across all levels of government. Making piecemeal changes to domestic legislation would not achieve this and would not equate to incorporation. "

And

"This is evidenced through a 2008 UNICEF study covering 52 countries which found that a key issue for governments in ensuring effective implementation of the UNCRC tends to be "gaps in law reform and difficulties in implementing new legislation designed to protect the rights and principles contained in the Convention".

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

Again we agree with the response from "Together" e.g. "We maintain that all rights within the UNCRC should be brought into Scots law. There would be a role for a public participation process in raising awareness and understanding of what incorporation means in practice and in informing guidance and training materials to support implementation" Therefore we do not agree with a transposition model which brings it in piecemeal.

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

We support the Children's Rights (Scotland) Bill, developed by an Expert Advisory Group convened by Together and the Children and Young People Commissioner Scotland, represents a 'gold standard' model of UNCRC incorporation that meets the First Minister's aspiration for children in Scotland. We support the model of full and direct incorporation proposed by this Bill.

Following Together's response here we agree that the preferred model for incorporating the UNCRC into domestic law is the Children's Rights (Scotland) Bill. This is a 'gold standard' model which:

- Fully and directly incorporates the UNCRC and its Optional Protocols into Scots law.
- Includes a duty on public authorities to comply with the UNCRC and its Optional Protocols.
- Ensures the UNCRC is accorded high priority in the Scottish domestic legal system, in particular when in conflict with domestic legislation.

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

Theme 2: Embedding Children's Rights in public services 13 Do you think that a requirement for the Scottish Government to produce a Children's Rights Scheme, similar to the Welsh example, should be included in this legislation?

Yes

Please explain why. :

This legislation must contain processes which ensure Ministers have duties to have due regard to and comply with children's rights; the model of the Wales Children's Rights Scheme has provided children and young people, as well as those interested in their rights, with the opportunities to influence and feedback on children's rights issues.

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

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

Child Rights Impact Assessments are already introduced in Scottish Government policy in terms of Children's Rights and Wellbeing Impact Assessments, and, indeed, this is being rolled out to others, included third sector national organisations such as ours. We would therefore make the point here that the use of such assessments should be proportionate and consideration should be given in terms of training, staff time and relevance in terms of actual impact on children's rights.

14 Do you think there should be a "sunrise clause" within legislation?

No

Please explain why. :

Through our involvement in supporting the Children and Young People (Scotland) Act 2014 we know it has further raised awareness and understanding of the UNCRC obligations among public authorities by placing reporting duties on Ministers and public bodies to set out what steps are being taken to further children's rights.

It is our understanding that this was a compromise already in terms of recommendations back then for full incorporation of the UNCRC; therefore there will be systems in place which can be updated so that from 2021 the full incorporation will be possible.

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

Please explain why. :

We believe, given the activities already underway for the Children and Young People (Scotland) Act 2014, which further raised awareness and understanding of the UNCRC obligations among public authorities by placing reporting duties on Ministers and public bodies to set out what steps are being taken to further children's rights, that it should be possible to build on this after 2021.

Any and all organisations may need resources, time and training to support full implementation therefore we cannot put an exact time on this except that it should be reasonable and recognise the work already undertaken.

16 Do you think additional non-legislative activities, not included in the Scottish Government's Action Plan, are required to further implement children's rights in Scotland?

Yes

Please explain why.:

Please see the comment above on resources, time and training. Whilst we also agree with "Together" in that:

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

- advocacy services
- awareness-raising programmes
- systematic training for those who work with children child rights education for children and their parents
- child rights budgeting" (Together)

We would add that for advocacy organisations like ours; who advocate for specific resources for children and their families, support such as breakfast, after school and holiday clubs and measures to address disadvantage and food insecurity, that we are part of the infrastructure to help deliver that training and support to those who work with children. We would need time and resources to carry this out.

Theme 3: Enabling compatibility and redress

17 Do you agree that any legislation to be introduced in the Parliament should be accompanied by a statement of compatibility with children's rights?

Yes

Please explain your views.:

For all questions (17 to 23) in this Theme 3 section, we agree, in principle, with the Together response, as we do not have the legal knowledge here to form a full, legally, informed response ourselves. We are grateful to Together for their advance briefing of their response and all of the work done to consult on this important measure for children in Scotland.

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

Yes

Please explain your views.:

A/A

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

Yes

Please explain your views.:

A/A

20 Do you agree that the UNCRC rights should take precedence over provisions in secondary legislation as is the case under the HRA for ECHR rights? Are there any potential difficulties with this that you can see?

Yes

Please explain why.:

A/A

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

Yes

Please explain your views.:

A/A

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

Yes

Please explain your views.:

A/A

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

Yes

A/A

Respondent Information

Irene Audain MBE, Scottish Out of School Care Network

Agree to publish response with name of organisation

Agree to share response with others in Scottish Government