

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

Established by the Commissioner for Children and Young People (Scotland) Act 2003 the Commissioner is responsible for promoting and safeguarding the rights of all children and young people in Scotland. The Commissioner has powers to review law, policy and practice and to take action to promote and protect rights. The Commissioner is fully independent of the Scottish Government and Parliament.

I. Introduction

Fully and directly incorporating the United Nations Convention on the Rights of the Child (UNCRC) into domestic Scots law is the most important thing we can do to ensure children's rights are respected, protected, and fulfilled.

The UNCRC is special. There is a broad array of international instruments which set out the human rights of children, but the UNCRC is the first legally binding international instrument to incorporate their full range of civil, cultural, economic, political, and social rights, as well as aspects of humanitarian law.

The UNCRC builds on the Charter of the United Nations (1945) which recognised that the inherent dignity and the equal and inalienable rights of all members of the human family are the foundation of freedom, justice, peace and social progress. The UNCRC breathes life into the Universal Declaration of Human Rights (1948) which proclaimed that childhood is entitled to special care and assistance.

The UNCRC is the most rapidly and widely ratified international human rights treaty in history. It changed the way children are viewed and treated in international legal terms. It proclaims children's status as human beings with a distinct set of rights, not just as passive objects of care and charity. The rights contained in the 54 articles of the UNCRC are universal, interdependent and interrelated. The articles cover all aspects of a child's life and explain how those in power must work together to make sure all children and young people can enjoy all their rights.

Adopted by the UN General Assembly in 1989, and ratified by the UK in 1991, the UNCRC has yet to be incorporated into domestic Scots law. The UNCRC promotes the rights of children and their families through placing duties on the State to support parents and carers and recognises their role in providing care and support for children and young people. In order to do so the UNCRC requires States to adopt comprehensive legislative measures to ensure that rights are protected, and the

Committee on the Rights of the Child has made clear that “for rights to have meaning effective remedies must be available to redress violations”.¹

This is a key aspect of human rights. The right to an effective remedy, which guarantees that everyone whose rights are violated has a recourse, is essential. This applies to all of the rights in the UNCRC and no distinction should be made between civil, cultural, economic, political, and social rights in terms of their justiciability.

In October 2018, the Children and Young People’s Commissioner Scotland, in partnership with Together (Scottish Alliance for Children’s Rights) established an Incorporation Expert Advisory Group comprising of a range of legal and policy experts on human rights and incorporation.² They proposed a model of incorporation for Scotland, drawing on international best practice and Scots law expertise – the draft **Children’s Rights (Scotland) Bill 2018**.³ The Advisory Group, alongside UNCRC Committee member Mikiko Otani, presented the draft bill to the Deputy First Minister and Minister for Children and Young People on 20 November 2018, Universal Children’s Day.

We welcomed the First Minister’s announcement in April 2019 that the Scottish Government would seek to pass legislation to incorporate the UNCRC within this session of the Scottish Parliament.⁴ This represents an important moment in the campaign for incorporation in Scotland following many years of work by children and young people, civil society, members of the legal community, and successive Children’s Commissioners. Incorporation will be an important step as the UK/Scottish periodic report to the UN Committee on the Rights of the Child is due in 2021.

In May 2019, a Consultation Paper was published, and responses are currently being sought. We are pleased to see our draft bill in the Consultation Paper. This paper highlights the key issues and provides guidance on each of the questions of the Scottish Government consultation.

¹ General Comment No. 5 (2003), CRC/GC/2003/5 27 November 2003, para 24.

² The current members of the Advisory Group are: Bruce Adamson (Children and Young People’s Commissioner Scotland); Juliet Harris (Together); Katie Boyle (Stirling University); Simon Hoffman (Swansea University); Ursula Kilkelly (University College Cork); Laura Lundy (Queen’s University, Belfast); Kasey McCall-Smith (Edinburgh University); Dragan Nastic (UNICEF, UK); Diego Quiroz (Office of the Children and Young People’s Commissioner Scotland).

³ The draft bill is attached to this consultation response and can be accessed at:

https://www.cypcs.org.uk/downloads/Incorporation_/Childrens_Rights_Scotland_Bill_2019.pdf

⁴ In the Programme for Government 2018-19, the Scottish Government indicated an intention to incorporate the UNCRC into Scots domestic law. At the SNP Conference in 28 April 2019 the First Minister confirmed the commitment to doing so within this session of Parliament. The Scottish members of the UK delegation to the UN CAT reaffirmed this commitment to the international community on 8 May 2019.

Response Summary

1. The entire UNCRC must not be changed or rewritten. It should be incorporated in full in order to ensure the indivisible and interdependent character of human rights protections, agreed 30 years ago. Incorporation will give power to children and their parents to advance their interests and enhance accountability in Scotland.
 2. The UNCRC is both clear and comprehensive. It was intended to be directly incorporated into national law when drafted. The protections contained in the UNCRC are wide-ranging and include civil, cultural, economic, political, and social rights. Scottish courts have a long history of interpreting international law and dealing with these rights. There is abundant guidance from the United Nations and national jurisprudence to help interpret the UNCRC.
 3. Urgency is required to ensure the UNCRC can be incorporated within this session of the Scottish Parliament. To allow enough time for proper legislative scrutiny a bill should be introduced this year marking the 30th Anniversary of the UNCRC. We have developed a draft bill for this purpose, which is explained below. Following a different approach or rewriting the UNCRC Articles risks undermining and delaying the protection of the rights of children.
 4. Incorporating the UNCRC will help to support children and their families to claim their rights and build upon the existing human rights framework. This process supports and complements wider work to create new human rights legislation for Scotland as recommended by the First Minister's Advisory Group on Human Rights Leadership, whose final report was unequivocal in its support for incorporation of the UNCRC.
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II. Consultation Questions

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

Yes. The Human Rights Act 1998 provides important protections for a number of human rights under the European Convention on Human Rights. There are several strengths to the Human Rights Act model, including a prohibition for public authorities to act incompatibly with the Act and the provision of substantive and legal remedies when a violation occurs. The Committee on the Rights of the Child has made clear that “for rights to have meaning effective remedies must be available to redress violations”.⁵

Our draft bill (Children’s Rights (Scotland) Bill) has drawn on elements of the HRA to develop a bespoke model for Scotland, which is innovative and more comprehensive. We for example ensure the justiciability element of the HRA by ‘giving further effect’ to rights guaranteed under the UNCRC⁶ in Part 1 as well as making it unlawful for public authorities to act incompatibly with the UNCRC and Optional Protocols,⁷ much like Section 6 of the Human Rights Act. We also adopt a similar set of remedies in case of a violation in Part 2 of our draft bill.

The difference is that our bill fosters a proactive culture of children’s rights. This is covered in our draft bill by the ‘due regard’ duty in Part 3.

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

The Human Rights Act sets out a minimum standard of how the Government and all public authorities should treat all people in our country. However, it works largely as a reactive model, which relies on the courts or threat of litigation to protect rights. As such this alone would not be enough to safeguard and protect children’s rights in Scotland. It is important to embed in legislation both a proactive and preventive approach that ensures a human rights culture, before any violations occur.

Our draft bill embeds a proactive approach through introducing a ‘due regard’ duty in Part 3.⁸ This requires duty bearers to have due regard to the UNCRC and Optional Protocols⁹ with an overarching objective to protect, respect and fulfil children’s rights in Scotland. It requires a Children’s Rights Scheme to be established by Scottish Ministers to enable such duty to be discharged.¹⁰ This duty is aimed at the policy

⁵ General Comment No. 5 (2003), CRC/GC/2003/5 27 November 2003, para 24.

⁶ Justiciability in this paper refers to the ability of the Courts to hear cases and make decisions relating to the rights that the UNCRC gives children.

⁷ Section 7, Draft Children’s Rights (Scotland) Bill 2018.

⁸ Section 20, Draft Children’s Rights (Scotland) Bill 2018.

⁹ Optional Protocols are additional parts to UNCRC that further address a particular substantive or procedural issue.

¹⁰ An important element is that Scottish Ministers must engage with children and young people to create and revise this Scheme.

process, focusing attention on the many administrative and other mechanisms that should be in place for embedding children rights such as training and impact assessments. Our draft bill requires Child Rights Impact Assessments (CRIAs) to further identify and prioritise any rights protections issues, so public bodies are required to consider whether a policy or project has a detrimental impact on children before it is implemented.

These additional features complement the justiciability of rights breaches in line with the requirement in the UNCRC for the State to take 'administrative and other measures' to ensure the implementation of rights. The UN Committee on the Rights of the Child has highlighted the value of such measures as 'key advice for States'.¹¹

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

Yes. A duty to comply would set up the possibility of legal redress for non-compliance. As explained above our draft bill draws on the Human Rights Act model by enshrining several mechanisms to ensure public authorities do not act in a way which is incompatible with the UNCRC. The UN Committee has been clear that "States parties need to ensure, by all appropriate means, that the provisions of the Convention are given legal effect within their domestic legal systems..."¹² Additionally, our draft bill provides further protections in Part 3 through creating an early process in decision-making to give due regard to the UNCRC and its Optional Protocols. We believe that both are necessary to safeguard and protect children's rights in Scotland. The model suggested would achieve the 'gold standard' pursued by the Scottish Government in relation to this Act.

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

General Comments by the UN Committee provide authoritative general guidance and interpretation on children's rights under the Convention. Furthermore, Concluding Observations on UK State Party reports provide context specific recommendations. Our draft bill provides that UNCRC General Comments and Observations made by the UN Committee on the Rights of the Child may be taken into account by the courts,¹³ and by public authorities¹⁴ when exercising their devolved functions. This allows Scotland to keep pace with developments in international law and practice, while retaining judicial independence and autonomy.¹⁵

¹¹ UNCRC General Comment No. 5 (2003), CRC/GC/2003/5 27 November 2003, para 26.

¹² Ibid, paragraphs 19-20

¹³ Section 14 (b), section 14 (c), Draft Children's Rights (Scotland) Bill 2018.

¹⁴ Ibid, section 21.

¹⁵ The Norwegian Supreme Court's case law has increasingly referred to General Comments as a source of interpretive guidance. In preparing for UNCRC incorporation, the Swedish Government published a report which recognised the UN Committee's guidance as providing a very useful source for national authorities who must interpret the UNCRC.

Both General Comments and Concluding Observations are public and official documents of the United Nations.

The UN Committee on the Rights of the Child is a body of 18 independent experts that monitors implementation of the UNCRC by its State Parties (States which are party to the UNCRC). The General Comments provide an explanation as to what is expected of States Parties as they implement the obligations contained in the UNCRC. General Comments are based on the Committee's experience of monitoring reports from States Parties on specific issues such as systematic violations, misunderstood provisions, or emerging matters relevant to the UNCRC. As such they will be of significant assistance in understanding the UNCRC.

The Concluding Observations, on the other hand, are the result of a State's examination by the UN Committee based on reports from civil society, Independent Human Rights Institutions and government. They are an authoritative overview of the state of human rights in a country and provide advice which can stimulate systemic improvements and recommend measures for enhanced implementation in the country. It is also important to consider the emerging jurisprudence coming from the Optional Protocol 3,¹⁶ which is a communications procedure/complaints mechanism added to the UNCRC.¹⁷

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

The Scottish Courts have a long history of interpreting international law in Scotland, from criminal law to private law. Both Scotland and the wider UK are already accustomed in doing this, including when considering cases under the Human Rights Act 1998 and EU law. A number of the general principles of the UNCRC are included in Scots law, including the best interests of the child and the views of the child in the Children (Scotland Act) 1995 and the Children's Hearings (Scotland) Act 2011.

The UNCRC has been cited in Scottish case law¹⁸ and has already been used as an interpretive tool in UK courts.¹⁹ However, the UNCRC is not yet fully domestically enforceable, as made clear by the UK Supreme Court in 2015, which analysed the introduction of a benefit cap on housing which disproportionately impacted on women and children. Three of the five judges concluded that the benefit cap was not compatible with article 3(1) of the UNCRC. However, as the UNCRC (and ICESCR) had not been incorporated in domestic law, a treaty breach was not within judicial competence of the court.²⁰

¹⁶ The UNCRC committee has so far adopted 23 General Comments and 22 substantive decisions which provide expert guidance on various aspects UNCRC implementation.

¹⁷ Given that this protocol has not been ratified by the UK, these decisions would not be binding, but would provide the judiciary with useful reference points and considerations.

¹⁸ For example, *Sanderson v McManus* 1997 SC (HL) 55.

¹⁹ For example, In *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166.

²⁰ *R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16.

The strength of any judicial system is to consistently develop jurisprudence and adjudicate on points of law in a wide range of everyday matters. There is a rich jurisprudence to gain insight from; including national case law, UNCRC General Comments, and Optional Protocol 3 communications procedure.

The UNCRC is both clear and comprehensive. The existing evidence is that in those countries which have incorporated the UNCRC, national courts have not had difficulties in interpreting UNCRC rights. The UNCRC has been directly incorporated into law in a range of countries, including Norway, Iceland, and Sweden.

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

Yes. Every day that the incorporation of the UNCRC is delayed is a day that prevents children's full access to justice in Scotland. There is no need for delaying its incorporation. Children and young people made clear that incorporation of the UNCRC into Scots law is a priority for them.²¹ It is important to note that the development of a statutory human rights framework for Scotland via the First Minister's Advisory Group on Human Rights Leadership recommended "UNCRC incorporation" as a "separate process" to its work and made clear that its work "should not cause any delay to UNCRC incorporation."

This year is the 30th anniversary of the UNCRC, which is both a reminder that children have waited long enough for its incorporation and a motive for celebration. Urgency is required to ensure the UNCRC can be incorporated within this session of the Parliament, as committed to by the First Minister on 28th April 2019.

The UK Government's periodic report on the UNCRC is in February 2021, which is a perfect time to deliver this commitment.

We therefore recommend a Bill should be introduced this year (as mentioned above we have developed a draft and presented it to the Deputy First Minister and Minister for Children and Young People on 20th November 2018)²² to ensure enough time for robust scrutiny of the legislation.

We welcome the broader aspirations to go further than the UNCRC and develop a comprehensive legal framework for human rights in Scotland. Incorporation of the UNCRC within this session of Parliament is an important first step, which will establish a strong baseline upon which to build that framework. We will be actively engaging in that process when it begins and ensuring children and young people are part of the process.

²¹ Right Here, Right Now (2017) Scottish Youth Parliament. SYP's 2016-21 youth manifesto, Lead the Way, which received more than 70,000 consultation responses, found that 76 percent agreed that 'The United National Convention on the Rights of the Child should be fully incorporated into Scots law, and the rights of children and young people should be protected and promoted'.

²² Our draft bill has been revised reflecting discussion with a wide range of Scotland's legal experts in a seminar held in Edinburgh in May 2019. The draft bill is annexed to this submission.

Question 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).*

In this question we present an overview of our draft bill: Children’s Rights (Scotland) Bill 2018. Informed by international best practice, the Human Rights Act and the implementation of the Welsh Measure in Wales,²³ our draft bill proposes the incorporation of the substantive Articles of the UNCRC and the First and Second Optional Protocols.²⁴ It aims to ensure a proactive culture of children’s rights across government at all levels in Scotland, embedding children’s rights-based approaches to policy and legislative decision making at an early stage, while also providing redress where children’s rights are breached. It seeks to ensure that government at all levels is able to act in the best interests of all children in Scotland.

The Bill is comprised of 3 parts. Part One specifies which articles of the UNCRC (1-42) and Optional Protocols are incorporated, these are drawn by way of a schedule making them part of Scots law. It clarifies that the ‘Act’ will apply to the Scottish Parliament, Scottish Ministers and Scottish public authorities when they are exercising devolved powers or acting in devolved areas. It requires these bodies to respect, protect and fulfil rights as the overarching objective, embedding progressive realisation of rights protections for children in Scotland and section 1 allows for further protections to be added.

Part Two makes acts or omissions by a relevant authority which are incompatible with the UNCRC (and the Optional Protocols) potentially unlawful, including legislation introduced by the Scottish Parliament. Whether these acts or omissions are unlawful is to be determined by a court, and a list of factors to be considered when reaching these decisions is outlined within Part 2. It clarifies the scope and extent of the ‘Act’ as confined to the regulation of devolved competences, and/or the exercise of powers in devolved areas.

Part Three introduces a proactive duty on relevant authorities to have due regard to the UNCRC (and Optional Protocols) and requires relevant authorities to take account of explicatory output from the UN Committee on the Rights of the Child. It requires Scottish Ministers to make a Children’s Rights Scheme setting out mechanisms for the due regard duty and the overarching objective, and makes a Child Rights Impact Assessment a mandatory requirement.

The bill therefore amounts to full and direct incorporation of the UNCRC and Optional Protocols 1 and 2. The reactive and proactive obligations fused in our bill establish a presumption in favour of progressive realisation of children’s rights. The UNCRC was written with the intention to be incorporated²⁵, and this has been

²³ Rights of Children and Young Persons (Wales) Measure 2011.

²⁴ For the protocols see, <https://ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>

²⁵ General Comment No. 5 (2003), CRC/GC/2003/5 27 November 2003.

reiterated by the Committee on the Rights of the Child's consistent calls for incorporation.²⁶

Justiciability

Justiciability in this paper refers to the ability of the Courts to hear cases and make decisions relating to the rights that the UNCRC gives children. Children and young people often face additional barriers in bringing proceedings to protect their rights. It is therefore crucial that they can claim their rights in Scots courts and tribunals for their rights to be real. It is essential that the right to an effective remedy applies to all of the rights in the UNCRC and that no distinction is made between civil, cultural, economic, political and social rights all of which must be justiciable. While noting that courts are more familiar with interpreting civil and political rights, courts adjudicate social and economic rights all the time, for example on employment law and welfare benefits. There has been significant work recently in relation to the justiciability of economic, social, and cultural rights around the world and the UN Committee on Economic Social and Cultural rights has made clear that all economic, social and cultural rights possess at least some significant justiciable dimension.²⁷

Full and direct incorporation will place children's human rights firmly on our legal system. Our draft bill ensures wider access to justice by providing a broader legal standing than the HRA, which is available not only to those who can prove that their own rights were violated, but to the Children and Young People's Commissioner Scotland or to "any person or body with sufficient interest in the subject matter of the proceedings."²⁸ They can also bring proceedings for judicial review. This further encourages preventative action to protect children's rights prior to the inception of policies and legislation which otherwise may have been in conflict with children's rights.

Incorporation requires proactive measures, protections and processes to ensure that children's rights are central in all decisions which affect children and young people, as is set out by the 'due regard duty' in our draft bill. Due regard has been recognised as having the "potential to lead to positive actions to enhance the status of treaty rights."²⁹ This is not enough however, and effective remedies to ensure enforceability and accountability are required.

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

None of the rights in human rights treaties are self-executing in Scots law, they always require domestic legislation. The process of incorporation is the way in which we "execute" the rights. All the rights contained in the UNCRC are able to be fully

²⁶ Committee on the Rights of the Child, 3 October 2008 Concluding observations: United Kingdom of Great Britain and Northern Ireland CRC/C/GBR/CO/4.

²⁷ Committee on Economic, Social and Cultural Rights, GC 9, Annex IV, para 10.

²⁸ Section 12 (e), draft Children's Rights (Scotland) Bill 2018.

²⁹ See: <https://www.liverpool.ac.uk/media/livacuk/law/2-research/ilhru/EHRC,Enhancing,the,Status,of,UN,Treaty,Rights.pdf>

and directly incorporated. Whether rights provisions are self-executing is largely an issue with monist legal systems where international treaties can become part of domestic law automatically,³⁰ such as in France, Germany and most of Latin America. The reference to Belgium in the Scottish Government's consultation relates to the exercise in such monist legal systems of determining which international commitments require additional legislation and which are self-executing. In dualist systems like Scotland and the UK, international law is not directly applicable until it has been incorporated into domestic law.

Question 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?*

Duty bearers have worked in the context of devolution for 20 years, and so there is a clear and well-developed understanding of devolved and reserved functions. In order for incorporation to be successful for rights holders, it must be accompanied by a range of additional measures such as training, awareness raising,³¹ independent advocacy, and reporting mechanisms.³² The Children's Rights Scheme in Part 3 of our draft bill provides a vehicle to ensure effective implementation and monitoring.³³

There may be instances where incorporation of the UNCRC into Scots Law raises questions about whether public authorities are under a duty to act, however these questions will arise in the context of devolution and whether a public authority is exercising a devolved function, rather than because of the fact of UNCRC incorporation.

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

Yes. This would be a piecemeal approach that may amount to limited change overall. A piecemeal approach does not take into consideration the full complementarity of rights enshrined in the UNCRC. The 2008 UNICEF study (covering 52 countries) 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".³⁴

Incorporation must create an overarching legal framework across all levels of government. The rights enshrined in human rights treaties are universal,

³⁰ Laws, J. 'Monism and Dualism' (2000) 53 La Revue Administrative 18.

³¹ Laundry, L. et al., The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries (UNICEF, 2012).

³² McCall-Smith, K. "To incorporate the CRC or not – is this really the question?" The International Journal of Human Rights, Volume 23, 2019 - Issue 3: Special Issue: Human Rights Monitoring and Implementation.

³³ Section 28, Draft Children's Rights (Scotland) Bill 2018.

³⁴ UNICEF Innocenti Research Centre (2007). Law reform and implementation of the Convention on the Rights of the Child

interdependent and interrelated. The complex web of dependencies among different human rights have implications for their ultimate implementation. The right to nutrition (Article 27 UNCRC) and the right to education (Article 29 UNCRC) may serve as a good example. Governments can implement and respect the right to food in different ways, providing for an adequate nutrition and improved access to education for all. However, if nutrition is not considered in the context of education, as a potential reason for children dropping out of school or a cause for low educational achievement, the advancement of the rights will be limited. Hence, considering the interdependence of rights would allow for the highest degree of human rights implementation.

The UN Committee on the Rights of the Child welcomes the incorporation of the UNCRC into domestic law and is clear that further work may exist in ensuring that all legislation is in line with the UNCRC, alongside full and direct incorporation of the UNCRC into law itself. Incorporation by itself does not avoid the need to ensure that all relevant domestic law is brought into compliance with the UNCRC. The Committee is unequivocal that incorporation means all provisions of the UNCRC be directly invocable before the courts and applied by national authorities. In case of any conflict in legislation, predominance should always be given to the UNCRC, in the light of article 27 of the Vienna Convention on the Law of Treaties.³⁵

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

It is important to note that transposition is used in a particular context when a part of international law becomes binding domestically. This has a specific legal meaning and context. For example, there are very clear rules around the transposition of EU directives into UK law to ensure the full directive is implemented without provisions being left out or diverted from.

This is distinct from choosing which rights to include through the creation of a new 'suite of rights'. This is commonly known as a 'cherry-picking of obligations', which integrate individual provisions of an international treaty into domestic law, and clearly it does not amount to full incorporation. 'Transposition' runs the risk of rights-editing by leaving some key parts of rights out. Full and direct incorporation as demonstrated in our draft bill is the best way to ensure the full implementation of UNCRC rights. There is an important 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.

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

³⁵ General Comment No. 5 (2003), CRC/GC/2003/5 27 November 2003.

We recommend The Children's Rights (Scotland) Bill, developed by an Expert Advisory Group convened by Together and the Children and Young People's Commissioner for Scotland.

We are strongly in favour of the 'human rights +' model as proposed through our draft bill. It is not enough to provide children with redress when their rights are violated, but it is important to have a proactive approach embedded in legislation too. The draft bill amounts to full and direct incorporation of the UNCRC and Optional Protocols 1 and 2. The HRA is a good example of incorporating an international treaty in domestic law, but we think it would not be sufficient to achieve the cultural change required to make Scotland the best place in the world for children to grow up. Therefore, we decided to embed a proactive approach in our draft bill through introducing a 'due regard' duty and a children's rights scheme in Part 3. See a further explanation of our bill in question 7.

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

Yes. International experience shows that the most successful models of incorporation are those that are accompanied by a range of implementation measures. The Welsh experience demonstrates the utility of this instrument in supporting Ministers compliance with the legislation and promoting rights-based decision making. The Children's Rights Scheme will establish accountability processes, providing transparency and information on how the Scottish Ministers are doing in relation to the new act. Therefore, our draft bill includes provisions for a Children's Rights Scheme in Part 3.

Further, our Children's Rights Scheme includes duties to produce a consultation document providing additional opportunities for children and young people, their families, those who work for and with them and wider civil society to scrutinise progress and engage with decision making.³⁶ Transparency and accountability are key principles of a human rights-based approach to policy making, alongside opportunities for people to participate and scrutinise decisions which affect them.

A children's rights scheme for Scotland should contain a mandatory requirement for:

- Child rights impact assessments,
- 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.

Question 14. *Do you think there should be a "sunrise clause" within legislation? Please explain your views.*

³⁶ Sections 22-31, draft Children's Rights (Scotland) Bill 2018.

No. The UNCRC was ratified by the UK nearly 30 years ago and all public authorities should already be operating in compliance with their duties to children. The UK's ratification of the UNCRC places binding obligations on the Scottish Government under the Scotland Act 1998. Furthermore, the Scottish Government has a responsibility to observe and implement obligations under international human rights conventions.³⁷ There should already be ongoing work on implementation of the UNCRC, including human rights education, and the use of impact assessments. Given this timeline and the implementation foundation in Scotland, we find the sunrise clause unnecessary.

The new Act should come into force in line with the usual timescales for an Act of the Scottish Parliament. The domestic enforceability of UNCRC and the preventative measures outlined in our draft bill will ensure better realisation of rights but should not require a delay in coming into force.

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

While noting that this is different from incorporation, the UN Committee on the Rights of the Child in its General Comment No. 5 states that there is a need for visible cross-sectoral coordination to recognise and realise children's rights across Government, between different levels of government and between Government and civil society - including in particular children and young people themselves.³⁸ UNCRC incorporation should therefore be accompanied by additional implementation measures that progressively embed a children's rights approach across all levels of government and society. These measures should include advocacy services, systematic training for children and those who work with children, and child rights budgeting.

The Committee further notes that rigorous monitoring once the UNCRC is implemented would be required. This should be built into the process of government at all levels but also carried out via independent monitoring and reporting by national human rights institutions, NGOs and others. Rigorous monitoring must include scrutiny of budgets "to protect children's economic, social and cultural rights."³⁹

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

³⁷ Section 57 and Schedule 5, paragraph 7, Scotland Act 1998

³⁸ Paragraph 27, 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) CRC/GC/2003/5, 27 November 2003.

³⁹ Ibid, paragraph 52.

Yes. The current pre-legislative checks relating to Scottish Parliamentary legislative competence as set out in section 31 of the Scotland Act 1998 play an important role in relation to ECHR compatibility.⁴⁰ Such checks are also required by section 19 of the Human Rights Act 1998. A statement of compatibility would play an important role in ensuring that any new legislation introduced in the Parliament is compatible with the UNCRC. It would be useful for the person in charge of a bill to help ensure that proper checks have been made before Parliamentary consideration begins. Our draft bill reflects this in Section 8.⁴¹

The UN Committee recognises the ‘essential’ role of parliamentary committees in monitoring implementation of the UNCRC.⁴² Countries such as in Belgium and Australia have introduced this check to achieve greater compliance between national laws and the UNCRC.⁴³ These measures promote greater accountability and promote children’s rights among decision makers. We note the continuing work by the Scottish Parliament, and in particular the Equality and Human Rights Committee on improving the ability of the Parliament to act as a Human Rights Guarantor.⁴⁴

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

Yes. This is an important element of access to justice for children and their families. Access to justice for children is at the core of the protection of human rights and an essential prerequisite for the protection and promotion of all other human rights of children. States must ensure that individuals have accessible, effective and enforceable remedies and obtain reparations where violations have occurred.

Public authorities will often be the main point of contact for children and young people, be it through receiving education at school, or accessing health and wellbeing support and services. It is vital that their rights are protected when interacting with these. The incorporation bill must include a regime which allows rights holders to challenge their action or inaction in order to prevent or remedy violations of children’s human rights. The UN Committee on the Rights of the Child, General Comment No. 5, makes clear that a mechanism for challenging public authorities should include the provision of child-friendly information, advice, (self) advocacy, and access to independent complaints procedures.⁴⁵ Our draft bill,

⁴⁰ Adamson, B. (2015) ‘The Protection of Human Rights in the Legislative Process of Scotland’ in M Hunt, H Hooper and P Yowell (eds.) *Parliaments and Human Rights: Redressing the Democratic Deficit* (Oxford, Hart Publishing) p 203.

⁴¹ Section 8, Draft Children’s Rights (Scotland) Bill.

⁴² General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, paras 45-47

⁴³ Kil Kelly, U. (2019). The UN Convention on the Rights of the Child: Incremental and transformative approaches to legal implementation. *International Journal of Human Rights*.

⁴⁴ See: <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/Equalities-Committee.aspx>

⁴⁵ General Comment No. 5 (2003), CRC/GC/2003/5 27 November 2003, para 24. Our draft bill reflects this in the Children’s Rights Scheme in Part 3.

includes a prohibition to act incompatibly with the UNCRC in relation of the public bodies listed on the bill.⁴⁶

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

Yes. The primary principle governing the award of compensation by that Court is that the victim should, as far as possible, be placed in the same position as if the violation had not occurred. It is for the courts to consider what the implications are for the award of damages. This approach is not significantly different to the rules currently applied by courts in this country to the award of damages. Therefore, we agree that this model should be followed for the new legislation. Our draft bill sets out redress mechanisms⁴⁷ to enable children and young people to be able to access financial compensation in that way.

The UN Committee on the Rights of the Child view is that when rights are found to have been breached, “there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration.”⁴⁸ It is essential that the right to an effective remedy applies to all the rights in the convention and that no distinction is made between civil, cultural, economic, political, and social rights - which must all be justiciable. Courts are already familiar with adjudicating both civil and political rights (e.g. criminal justice), and economic and social rights (e.g. employment, taxation and welfare) in Scotland/UK.⁴⁹

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

Yes. The new legislation will contain the fundamental rights for children in Scotland, therefore secondary legislation should be in line with the UNCRC rights. This is a well-established practice by the UK Parliaments which is required under section 19 of the Human Rights Act. Learning from Norway⁵⁰ or Belgium, for example, highlights that the constitutionalisation of rights sends a strong message about the importance of rights and this would be the strongest protection that can be given.⁵¹ Article 92 of the Norwegian Constitution states that all governmental bodies in Norway, including

⁴⁶ Section 20 and 7, Draft Children’s Rights (Scotland) Bill.

⁴⁷ Sections 15-19, Draft Children’s Rights (Scotland) Bill 2018.

⁴⁸ General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, para 24

⁴⁹ Committee on Economic, Social and Cultural rights, GC 9, Annex IV, para 10.

⁵⁰ Section 3, Menneskerettsloven 1999

⁵¹ See: <https://www.liverpool.ac.uk/media/livacuk/law/2-research/ilhru/EHRC,Enhancing,the,Status,of,UN,Treaty,Rights.pdf>

the courts are obliged to respect and ensure human rights as set out in the Constitution and all human rights treaties Norway is a party to, including the UNCRC.

A provision should be included in the incorporation bill to ensure courts read and give effect to primary and subordinate legislation of the Scottish Parliament in a way which is compatible with the UNCRC.

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

Yes. In order to provide the strongest possible protections for children's rights in Scotland it is important that a court of law has the power to declare an Act of the Scottish Parliament to be incompatible, if it violates the UNCRC. To ensure that such a violation does not occur again it is crucial that the court has a power to declare the legislation unlawful ('strike down' power). This means that the legislation that has been subject to a 'strike down' will cease to have effect.⁵² Our draft bill embeds this protection in Section 17. This 'strike down' power mirrors the Scotland Act 1998 in relation to ECHR protections. Nevertheless, the court also has the option to give the Scottish Parliament time to make the changes required to make the incompatible legislation compliant with children's rights under the UNCRC.⁵³

A declaration of incompatibility in UK constitutional law is a declaration issued by a judge that a piece of legislation is incompatible with the ECHR under the Human Rights Act, section 4. This is weaker than a 'strike down' power and means that the incompatible provisions remain in law until the UK Parliament decides to amend it.

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

No. procedural barriers must not be put in place for children's access to justice. This is already reflected in Scots law. While the age of full legal capacity is 16 years old a younger child can instruct a solicitor provided they have a general understanding of what it means to do so.

Children and young people often face additional barriers in bringing proceedings to protect their rights, so it is crucial to address this imbalance of power rather than add more. Our draft bill seeks to ensure that legal standing is provided for the child who is directly subject to an adverse effect of legislation and to those "with sufficient interest in the subject matter of the proceedings."⁵⁴ Our draft bill offers a statutory model by granting automatic standing to the Children and Young People's Commissioner and other NHRIs in Scotland as they are often able to identify

⁵² Section 18(a), Draft Children's Rights (Scotland) Bill 2018.

⁵³ Section 18(b), Draft Children's Rights (Scotland) Bill 2018.

⁵⁴ Section 12 (e), draft Children's Rights (Scotland) Bill 2018.

systematic and widespread violations of children's rights. This provides a wide-ranging model for legal standing to protect children's rights.

End.

Annex 1. Children’s Rights (Scotland) Bill 2018.



Children’s Rights (Scotland) Bill

An Act to give further effect in Scotland to the rights and obligations set out in the United Nations Convention on the Rights of the Child.

PART 1 – THE CONVENTION, RELEVANT AUTHORITIES AND THE OVERARCHING OBJECTIVE

The Convention

1. In this Act:
 - a. The ‘Convention’ means those articles of the United Nations Convention on the Rights of the Child set out in schedule 1.
 - b. The ‘Optional Protocols’ means:
 - i. those articles of the Optional Protocol to the Convention on the involvement of children in armed conflict,

- ii. those articles of the Optional Protocol on the sale of children, child prostitution and child pornography, set out in schedule 2.
- c. The Scottish Ministers may by order amend schedule 2 to add further optional protocols.

Incorporation

- 2. On commencement of this Act the Convention and the Optional Protocols are part of Scots law for the purposes of this Act.
 - a. In relation to the exercise of devolved functions.
 - b. In relation to devolved law as amended from time to time

Relevant Authorities

- 3. Relevant authorities for the purpose of the Act are:
 - a. The Scottish Parliament.
 - b. The Scottish Ministers.
 - c. Authorities which are:
 - i. Exercising functions in areas of law or policy devolved to Scotland under the Scotland Act 1998.
 - ii. Scottish public authorities within the meaning of the Human Rights Act 1998.
- 4. The Scottish Ministers may by Order declare that a body exercising public functions in Scotland in areas of law or policy devolved to

Scotland under the Scotland Act 1998 is a relevant authority for the purposes of this Act.

The Overarching Objective

5. A relevant authority must at all times seek to ensure the realisation of the Convention and the Optional Protocols in Scotland.

6. Ensuring realisation of the Convention and the Optional Protocols in Scotland means:
 - a. Respecting children's rights by taking steps to avoid acts or omissions which would result in a breach of the Convention or the Optional Protocols.
 - b. Protecting children's rights by taking steps to prevent acts or omissions by others which would result in a breach of the Convention or the Optional Protocols.
 - c. Fulfilling children's rights by taking steps to fully implement the Convention and the Optional Protocols.

PART 2 – PREVENTING ACTS INCOMPATIBLE WITH CHILDREN’S RIGHTS AND REDRESS

Unlawful Acts

7. It is unlawful for a relevant authority, when exercising any of its functions insofar as they are referable to matters that are devolved to Scotland, to act in a manner which is incompatible with the Convention or the Optional Protocols.
 - a. For the avoidance of doubt, a relevant authority may commit an unlawful act through an act or omission.
 - b. An authority which acts contrary to this section will commit an ‘unlawful act’.

8. When laying a Bill before the Scottish Parliament the Scottish Ministers or a Member of the Scottish Parliament must, when the Bill is laid, include a statement that the Bill is compatible with the Convention and the Optional Protocols.
 - a. A statement required to be laid in accordance with this section may not be made by way of a Child Rights Impact Assessment as required by section 27[a].

9. A relevant authority may not rely on a statement of compatibility laid in accordance with section 8 as a defence in any proceedings where it is claimed that the said relevant authority commits an unlawful act.

10. Whether a relevant authority commits an unlawful act is a matter to be decided by a court.

Enforcement

11. Any person who claims to be a person affected by an unlawful act may bring proceedings before a court or tribunal or rely on the unlawful act as a defence in any action against them by a relevant public authority.
12. Where proceedings brought under this Part are to be dealt with by way of judicial review the persons listed below have standing to bring proceedings:
 - a. A child affected or likely to be affected directly or indirectly by the claimed unlawful act.
 - b. The Commissioner for Children and Young People in Scotland.
 - c. The Scottish Commission for Human Rights.
 - d. The Equality and Human Rights Commission in Scotland.
 - e. Any person or body with sufficient interest in the subject matter of the proceedings.
13. In addition to any other matter which it considers relevant, a court called upon to determine whether a relevant authority has committed an unlawful act shall take into account the views of any child or children affected by the alleged unlawful act and consider which of those matters set out in section 14 it will take into account.

14. In accordance with section 13 a court may take into account:
 - a. The extent to which the claimed unlawful act ensures the overarching objective.
 - b. Any General Comment issued by the Committee on the Rights of the Child which is relevant to the article or articles of the Convention or the Optional Protocols which are in issue.
 - c. Any Concluding Observation or Recommendation made by the Committee on the Rights of the Child subsequent to examination of the UK State Party under Part II of the UN Convention on the Rights of the Child which is relevant to the article or articles of the Convention or the Optional Protocols which are in issue.
 - d. Any opinion submitted to the court by the Commissioner for Children and Young People in Scotland and/or the Scottish Commission for Human Rights and/or the Equality and Human Rights Commission in Scotland.
 - e. Whether the act or omission which it is claimed is an unlawful act is proportionate taking account of all relevant matters.

Redress and Remedies for an Unlawful Act

15. In relation to any act which the court finds is, or would be an unlawful act, it may grant such relief to the person affected by the unlawful act as it considers just and appropriate.

16. When granting relief under section 15 a court may grant:

- a. Any relief, remedy, or order that is within the power of a court to make in civil proceedings in Scotland.
 - b. In addition to any remedy under section 16[a], damages for an unlawful act.
- in order to afford just satisfaction to the victim.
17. Where a higher court is satisfied that the unlawful act is by reason of legislation enacted or to be enacted by the Scottish Parliament it shall have power to declare the legislation unlawful.
18. Where a court makes a declaration as mentioned in section 17:
- a. Unless the court orders otherwise in accordance with section 17[b], the legislation to which the declaration refers will cease to have effect on a day the declaration is made.
 - b. The court may make an order to suspend the effect of the declaration mentioned in section 17 for such time as it considers necessary to allow the incompatibility to be remedied.
 - c. The court may give directions as to the operation of the declarations mentioned in legislation prior to the date on which it ceases to have effect.
 - d. Such directions as are given under section 18[c] may include directions as to the payment of damages under section 16[b].
19. Where a court is satisfied that damages under section 16[b] or section 29[c] will provide just satisfaction to the victim it must

award damages, irrespective of whether any other relief or remedy is contemplated or awarded, unless there are strong and compelling reasons why such an award should not be made.

PART 3 – SECURING COMPATIBILITY AND PROMOTING THE RIGHTS OF CHILDREN IN SCOTLAND

The Due Regard Duty

20. Subject to section 32 a relevant authority must, when exercising any of its functions, have due regard to:
 - a. The Convention.
 - b. The Optional Protocols.
 - c. The overarching objective in section 5.

21. A relevant authority, when having due regard as required by section 21, must take into account:
 - a. The Preamble to the United Nations Convention on the Rights of the Child.
 - b. Any relevant General Comment issued by the United Nations Committee on the Rights of the Child.
 - c. Any relevant Concluding Observation or Recommendations made by the Committee on the Rights of the Child subsequent to examination of the UK State Party under Part II of the UN Convention on the Rights of the Child relevant to the Convention or the Optional Protocols.
 - d. Findings from a relevant Child Rights Impact Assessment carried out in accordance with any procedure established under section 27[a] below.
 - e. Any other matter that the Scottish Ministers may by Order direct.

A Children's Rights Scheme

22. The Scottish Ministers must make a Children's Rights Scheme (the 'Scheme') setting out the arrangements they have made, or propose to make, for the purposes of:
 - a. Meeting the overarching objective in section 5.
 - b. Discharging their duty under section 20.

23. The Scheme must be made, published and laid before the Scottish Parliament no later than 6 months from the date this Act comes into force.

24. Subject to sub-section 25[a], the Scottish Ministers may remake the Scheme at any time.
 - a. The Scottish Ministers must review, and if they consider it appropriate, remake the Scheme within three years of the date on which the first Scheme and any subsequent Scheme is published.
 - b. If the Scottish Ministers decide to remake the Scheme at any time they must lay the remade Scheme before the Scottish Parliament.

25. Before making or remaking the Scheme the Scottish Ministers must:
 - a. Publish a draft of the Scheme they propose to make.
 - b. Carry out a Child Rights Impact Assessment on the Scheme they propose to make and publish this with the draft Scheme.

- c. Consult with children on the Scheme they propose to make.
 - d. Consult with the Children and Young People’s Commissioner for Scotland on the Scheme they propose to make.
26. The Scheme may include such matters as the Scottish Ministers consider appropriate, but must include:
- a. A procedure for Child Rights Impact Assessment.
 - b. Information on procedures to consult with children as part of carrying out a Child Rights Impact Assessment.
 - c. Information on publication of the findings from a Child Rights Impact Assessment.
 - d. A complaints procedure accessible to children or their representatives to make a complaint about a decision or action by a Scottish Minister, including an alleged unlawful act under section 7.
27. In addition to any arrangement for publication as mentioned in section 26[c], a Child Rights Impact Assessment must be completed on, and laid with any Bill that the Scottish Ministers or any Member of the Scottish Parliament lay before the Scottish Parliament.

Reports on Progress

28. The Scottish Ministers must publish and lay before the Scottish Parliament a Compliance Report, reporting on:
- a. Action they have taken to meet the overarching objective in section 5.

- b. How they have complied with their duty under section 20.
29. The Compliance Report may be published as part of any report the Scottish Ministers are required to publish under Part 1 of the Children and Young People (Scotland) Act 2014 or as a separate report.
30. If the Compliance Report is published as a separate report the Scottish Ministers must:
- a. By [*date to be specified*] lay the Compliance Report before the Scottish Parliament.
 - b. At or before the end of each succeeding period of three years from the date of any previous Compliance Report, publish a further Compliance Report.
31. The Scottish Ministers shall when laying any report or publishing any document they are required to lay or publish in accordance with this Part, publish a child friendly version of the said report or document.

Scope and Extent

32. Nothing in this Act is to be read or given effect so as to:
- a. Extend the competences of the Scottish Parliament beyond those set out in the Scotland Act 1998.

- b. Extend the powers of the Scottish Ministers beyond those set out in the Scotland Act 1998

Orders

33. Before deciding whether or not to exercise any power to make an Order under this Act the Scottish Ministers must:
 - a. Consult with children.
 - b. Consult with the Commissioner for Children and Young People in Scotland.
 - c. Consult with any other body that they see fit.
 - d. Carry out a Child Rights Impact Assessment.

Additional sections:

- Commencement
- Interpretation
- Repeals etc.
- Rules of procedure
- Orders (whether + or – procedure is to apply)