

Response ID ANON-4HQB-BQ87-H

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

Submitted on **2019-08-23 13:15:46**

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.:

It is critical that the framework used for incorporation ensures that public authorities must comply with the UNCRC and are prohibited from doing anything that breaches children's rights under the UNCRC.

We recognise that the UK Human Rights Act 1998's approach to the incorporation of the European Convention on Human Rights (ECHR) uses a number of different mechanisms to ensure that UK domestic law is compatible, e.g. the Ministerial statement on compatibility required by section 19. The HRA also requires that judges must read and give effect to other laws in a way which is compatible with ECHR rights (section 3 of HRA) and that it is unlawful for a public authority (including government, policy and local authorities) to act in a way that is incompatible with a Convention right (section 6).

We support the view of Together (Scottish Alliance for Children's Rights) that the incorporation of the UNCRC into Scottish domestic law must make children's human rights binding and not just guiding. The HRA approach would achieve this.

2 Are there any other aspects that should be included in the framework?

Yes

Please explain your views.:

We agree with the Commissioner for Children and Young People in Scotland and Together that it is important to embed in the legislation a preventive approach that ensures a human rights culture and comprehensive protection of children's rights, before any violations occur.

We support the view of Together and the Commissioner that the Rights of Children and Young Persons (Wales) Measure 2011, based on a "due regard" duty, promotes rights-based decision-making. It means that government has to show that it has thought about children's human rights in all decisions.

The inclusion of both a "compatibility" duty and a "due regard" duty would form a robust framework for incorporation of the UNCRC. The draft Bill developed by the Advisory Group established by the Commissioner for Children and Young People in Scotland and Together (the Scottish Alliance for Children's Rights) provides such a model.

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

Yes

Please explain why.:

As explained above, we agree that a duty to comply with the UNCRC rights is essential to ensure that the rights are binding in Scotland.

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 party to the UNCRC should be given in our domestic law

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?:

It is our view that the Committee's General Comments and Observations on reports made by States should be able to be taken account of in Scotland's practical implementation of the UNCRC.

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

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

The UNCRC has already been incorporated into the domestic law of other countries, including Norway, Iceland and Sweden. Their experience of implementation would be of great assistance to Scotland in its incorporation journey.

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 campaign for incorporation has been a long one and we have the beginnings of a legislative foundation for it in the Children (Scotland) Act 1995, the Children and Young People (Scotland) Act 2014 and the current commitment to bring the UNCRC into law by 2021. There is also a body of experience to draw on from those countries who have already incorporated the UNCRC. In addition, there is currently general cross-party support for incorporation. It does not make sense not to press ahead now, whilst taking account of the outcome of this consultation.

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).

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

The Advisory Group (convened in autumn 2018) comprises international and Scottish experts with extensive academic and practical knowledge of the UNCRC and incorporation. As we have commented above, we note that the Group has drafted a Children’s Rights (Scotland) Bill to demonstrate the most effective model through which Scotland could incorporate the UNCRC into domestic law. We also note that the draft Bill proposes the incorporation of the substantive Articles of the UNCRC and the First (on the sale of children, child prostitution and child pornography) and Second (on the involvement of children in armed conflict) Optional Protocols.

We support the aims of the draft Bill, i.e. to ensure a proactive culture of children’s rights across government at all levels in Scotland, embed 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.

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

How should the issue of whether particular UNCRC rights are self-executing be dealt with?:

Our current understanding is that international law is not directly applicable in Scotland until it has been incorporated into domestic law.

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?

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

We support the view of Together that the draft Children’s Rights (Scotland) Bill referred to in Q.7 above provides clarity that the duties would only apply when government is exercising devolved powers or acting in devolved areas (section 2 of draft Bill). Together has made it clear that the draft Bill does not extend the powers of the Scottish Parliament or Scottish Ministers (section 32 of draft Bill on scope and extent).

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

Yes

Please explain why.:

It runs the risk of being piecemeal and therefore not fully compliant.

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

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

We share the concerns expressed by Together about the transposition model and support Together’s expressed preference for direct incorporation.

We also support the Commissioner for Children and Young People in Scotland’s view that “ A piecemeal approach to providing a legal framework for children’s rights brings significant risks of leaving some key part of the rights out. Full and direct incorporation as demonstrated in our draft bill is the best way to ensure the full implementation of UNCRC rights.” (Commissioner for Children and Young People in Scotland (July 2019), Response to the Scottish Government Consultation on Incorporation of the United Nations Convention on the Rights of the Child into Scots law. Available at <https://www.cypcs.org.uk/ufiles/UNCRC-Incorporation.pdf> (accessed 8th August 2019))

12 What is your preferred model for incorporating the UNCRC into domestic law?

Please explain why.:

As we have stated above, we support the aims of the draft Bill referred to in our response to Q7 above, which would deliver incorporation in full.

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. :

As we have stated in our response to Q2 above, the draft Bill already proposed includes provisions for a Children’s Rights Scheme, incorporating 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.

This would build a preventative approach into the legislation.

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

No

Please explain why. :

There should be no delay in the legislation coming into force. We support the position of the Commissioner for Children and Young People in Scotland that any delay would be unnecessary and the new Act should come into force in line with the usual timescales for an Act of the Scottish Parliament.

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. :

Not applicable

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.:

Collaboration and partnership across the public, private and third sectors is essential to promote awareness of children's rights across the country.

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.:

The draft Bill referred to above already reflects this in section 8.

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.:

The regime must allow children and young people the ability to challenge public authorities in respect of action or inaction. The draft Bill referred to above includes both a "due regard" duty and a prohibition against acting incompatibly with the UNCRC. The draft Bill also makes provision in the Children's Rights Scheme (Part 3 of draft Bill) for child-sensitive procedures.

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.:

We think that the redress mechanisms contained in the draft Bill referred to above make sense in this respect. This would align the new legislation with the rules currently applied by Scottish courts in respect of damages.

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.:

UNCRC rights should take precedence over provisions in secondary legislation. In any case, secondary legislation should be in line with UNCRC rights.

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.:

We agree that the Bill should contain strong provisions to require Acts of the Scottish Parliament (ASPs) to be interpreted and applied in so far as possible with the UNCRC.

Indeed, the draft Bill referred to above already contains a "strike down" power to ensure that Acts of the Scottish Parliament (ASPs) that breach UNCRC rights are not law (sections 17-18 of draft Bill).

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.:

It is critical to the successful incorporation of the UNCRC that courts have the power to declare legislation deemed incompatible as unlawful. We note that this is embedded in section 17 of the draft Bill referred to above.

Please explain your views.:

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

No

Please explain your views.:

Children and young people already face barriers in using our legal system. This is why the draft Bill referred to above contains provisions in section 12 for a statutory model by granting automatic standing to:

- A child affected or likely to be affected directly or indirectly by the claimed unlawful act;
- Commissioner for Children and Young People in Scotland;
- Scottish Commission for Human Rights;
- Equality and Human Rights Commission in Scotland;
- Any person or body with sufficient interest in the subject matter of the proceedings.

About you

What is your name?

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Are you responding as an individual or an organisation?

Organisation

What is your organisation?

Organisation:

Scottish Mentoring Network

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

Publish response with name

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

Evaluation

Please help us improve our consultations by answering the questions below. (Responses to the evaluation will not be published.)

Matrix 1 - How satisfied were you with this consultation?:

Very satisfied

Please enter comments here.:

Matrix 1 - How would you rate your satisfaction with using this platform (Citizen Space) to respond to this consultation?:

Very satisfied

Please enter comments here.: