

Children's Rights: Consultation on incorporating the United Nations Convention on the Rights of the Child into domestic law in Scotland – August 2019

Inspiring Scotland

Since 2008, Inspiring Scotland has worked to build a country without poverty or disadvantage. No matter what circumstances people are born into, we believe everyone has the right to a happy, healthy life. We set ourselves against the inequalities of the status quo and will do whatever it takes, however long it takes, to build a fairer Scotland.

We are a venture philanthropy organisation. This means we apply venture capital principles – such as long-term investment and tailored development support – to the voluntary sector.

We transform vital charities. We empower visionary leaders. We shape public policies. We believe in opportunity for everyone.

Through our **thematic funds**, we bring together the right people and organisations to design rigorous and innovative solutions. We work in the communities that need it most and build strong partnerships with government and business to maximise our impact.

We work with charities supporting children, young people and their families who live with the challenges of poverty and inequality. We see first-hand what happens when children's rights are not adequately protected and that is why we wholly support Scottish Government's commitment to incorporate the UN Convention on the Rights of the Child (UNCRC) into Scots law before the end of this session of parliament in 2021.

We believe that the direct incorporation model for incorporating the UNCRC into Scots law is the strongest way to protect the rights of children and young people in Scotland. We would support the work undertaken by the Incorporation Expert Advisory Group established by Together Scotland and the Children & Young People's Commissioner Scotland (CYPCS) and their proposal for a model of incorporation for Scotland, drawing on international best practice and Scots law expertise – the draft Children's Rights (Scotland) Bill 2018.

Response to Consultation Questions

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. We agree with the Scottish Government and the Advisory Group convened by Together and CYPCS. A UNCRC framework, similar to the Human Rights Act (HRA), is required in Scotland by 2021.

The HRA framework contains important mechanisms to ensure compatibility with human rights standards, which provide redress and remedy if rights are breached. These mechanisms should be included in the model of UNCRC incorporation for Scotland. The model for incorporation must ensure that children and young people's rights are fully respected, protected and fulfilled in Scotland.

They must be legally binding, not guiding in courts and tribunals across Scotland. All public authorities including local authorities, health boards, Arm's Length External Organisations etc. should be legally obliged to act in a way which is compliant with the UNCRC and the Optional Protocols (OP) which the UK has signed up to. We support the provisions made within the draft Children's Rights (Scotland) Bill 2018.

These rights must remain within Scottish law. Without them, children and young people across the country could lose the protections they should rightly expect. From ensuring that local authorities house them appropriately, to ensuring all children grow up with the safety and dignity they deserve, these rights are a cornerstone of a civilised society. If these laws were not transferred into the Scottish Statute Book, children and young people face an uncertain future. Their rights are too important to slip through the cracks. It is essential we ensure these rights throughout Scotland.

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

We support the position of Together Scotland and the CYPCS, that the framework should ensure children's rights are protected proactively, as well as redressed reactively. It is important to embed in legislation a preventive approach that ensures a human rights culture and comprehensive protection of children's rights, before any violations occur.

The Children's Rights (Scotland) Bill 2018 includes a 'proactive' duty of 'due regard' on public authorities to promote rights-based decision-making at all levels of government. This duty complements 'reactive' duties which ensure effective mechanisms are in place to provide remedy and redress if rights are breached.

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

Yes. Anything other than the inclusion of a "duty to comply" provision would not be full incorporation. We agree that incorporation must make children's human rights binding and not just guiding. A duty to comply places binding duties on public authorities to respect and protect children's rights and allows children to challenge breaches of their rights in domestic courts.

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?

The UN Committee on the Rights of the Child is comprised of independent experts who support the interpretation of the UNCRC and offer advice on how best to comply with the UNCRC obligations. Thus, the framework for incorporation must ensure that the UN Committee's jurisprudence is given consideration by public authorities and the courts.

This will ensure that Scotland keeps pace with developments in international human rights law and practice, while being able to apply learning in a way that can be adapted to fit the Scottish context. We would support advice and guidance offered by the Incorporation Expert Advisory Group in the development of the draft Children's Rights (Scotland) Bill 2018 in this regard.

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

We would support advice and guidance offered by the Incorporation Expert Advisory Group in the development of the draft Children's Rights (Scotland) Bill 2018 in this regard.

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 to delay its incorporation. We wholly support CYPCS assertion that a Bill should be introduced this year to ensure sufficient time for robust scrutiny of the legislation.

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 support the model drafted by the Incorporation Expert Advisory Group fully. We consider that their expertise in children's rights and rights law has taken consideration of all technical and legal issues to present a model of incorporation which will best provide children and young people with the necessary protections.

We further recognise that both Together and CYPCS have appropriately engaged with children, young people and the children's sector in the development of the model. As such, it represents a cohesive approach while supporting the ambition to 'go further' in the pursuit of the protection of rights for children and young people in Scotland.

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

We would defer to the expertise of Together, CYPCS and their Incorporation Expert Advisory Group on this matter.

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?

We would agree with the CYPCS assertion that duty-bearers have worked in the context of devolution for 20 years, so there is a clear and well-developed understanding of devolved and reserved functions. We further agree that for incorporation to be successful in protecting and upholding the rights of children and young people, it must be accompanied by a range of additional measures such as training, awareness raising, independent advocacy, and reporting mechanisms.

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. An approach such as that would undermine the universality and complementary nature of the UNCRC and result in inadequate protections. 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.

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

We would support the assertion from Together and CYPCS that full and direct incorporation as demonstrated in the draft bill is the best way to ensure the full implementation of UNCRC rights.

We would not support the development of a 'suite of rights' – rights are universal, indivisible, interdependent and interrelated. Choosing a suite to be incorporated fails to recognise that.

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

We believe a model which offers full incorporation of the UNCRC into Scots Law is the best way to promote, protect and uphold the rights of children and young people in Scotland. We would support the draft Children's Rights (Scotland) Bill 2018 developed by the Incorporation Expert Advisory Group as it builds on the HRA to include proactive preventative measures to ensure children's rights are duly considered.

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. We would welcome the creation of a Children's Rights Scheme, similar to the Welsh example, in the model of UNCRC incorporation. We know from the experience in Wales that this will help to create opportunities for children, young people and wider stakeholders to inform how the UNCRC is implemented. We believe that the Children's Scheme should include a mandatory requirement to set out a process for child rights impact assessments (CRIA), complaints and the participation of children and young people in decision making. The creation of a Children's Rights Scheme supports the practicalities of implementing the range of additional measures such as training, awareness raising, independent advocacy, and reporting mechanisms which will be necessary for successful incorporation.

14. Do you think there should be a “sunrise clause” within legislation? Please explain your views.

No. Any delay would be unnecessary. The new Act should come into force in line with the usual timescales for an Act of the Scottish Parliament. 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. There should already be ongoing work on implementation of the UNCRC, including human rights education, and the use of impact assessments. Incorporation of the UNCRC into Scot’s Law will ensure enforceability and the preventative measures as outlined in the draft Children’s Rights (Scotland) 2018 Bill will ensure better realisation of rights but should not require a delay in coming into force.

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 your views.

N/A

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.

We would support CYPCS in noting that the UN Committee on the Rights of the Child’s view, 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.

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.”

As stated in previous answers, we believe there should be a range of measures put in place to ensure successful incorporation such as training, advocacy, awareness raising and monitoring processes.

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.

Yes. We agree with Together that a Statement of Compatibility would play an important role in ensuring that any new legislation introduced in the Parliament is compatible with the UNCRC and that the statement should be accompanied by a CRIA that explicitly sets out how the Bill furthers UNCRC compliance and mitigates against any negative impacts on children’s rights.

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. We see first-hand the effect on children and young people’s lives where decisions made, or not made, by public authorities are not compatible with the UNCRC. Children can face real difficulties in challenging breaches of their rights.

It is essential that there are effective, child-sensitive procedures available to children and their representatives to challenge breaches of their rights. These should include the provision of child-friendly information, advice, advocacy, access to complaints procedures and, ultimately, access to the courts with necessary legal and other assistance. Children must have the ability to seek redress against any action or inaction which breaches their rights. This will make incorporation of the UNCRC binding.

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 UN Committee is clear that where there are breaches of children's UNCRC rights, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration. This is enshrined in UNCRC Article 39.

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, unless a higher protection exists as per Article 41 UNCRC.

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? Please explain your views.

Yes. We would support Together's view that provisions should be included in the model of UNCRC incorporation 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.

This would ensure the consistent enforcement of these rights and ensure children and young people across Scotland can continue to rely on the protections of the UNCRC.

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.

We would defer to those with more expertise in the technicality of legislation but understand there is provision for this contained within the draft Children's Rights (Scotland) 2018 Bill as developed by the Incorporation Expert Advisory Group.

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

No. We would support the view of CYPCS that 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.

The draft bill seeks to minimise this through by creating early protections in the decision making process, and ensuring 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."

The draft bill offers a statutory model by granting automatic standing to the Children and Young People's Commissioner and other National Human Rights Institutions in Scotland. This provides a wide-ranging model for legal standing to protect children's rights. Therefore, there is no need to bring a case under the Bill as a model is already established.