

Scotland's Armed Forces Children's Charity

Scottish Government Consultation on the Incorporation of the United Nations Convention on the Rights of the Child into Scots 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? Please explain your views.

Yes. There a number of particular elements of the HRA framework that we feel should be included in the model for incorporation of the UNCRC. Firstly, section 6 of the Human Rights Act 1998 prohibits public authorities from acting incompatibly with the Act. We believe it is vital that the chosen model for incorporation makes it unlawful for public authorities to act incompatibly with the UNCRC and the Optional Protocols which the UK has signed up to. This will achieve the goal of ensuring the UNCRC is binding and not just guiding.

Secondly, the mechanisms designed to promote the compatibility of legislation with the ECHR are fundamental aspects of the HRA framework. We believe that section 19 of the Human Rights Act 1998 requiring a Minister to make a statement of compatibility when introducing a Bill, section 3 requiring legislation to be read and given effect to in a way which is compatible with the ECHR so far as possible to do so, and section 4 which provides for courts to make a declaration of incompatibility where it has been determined that a provision in primary legislation is incompatible with the ECHR should all be included in the model for incorporation of the UNCRC.

Thirdly, the HRA framework provides for substantive and legal remedies when rights are breached. We believe this is a vital aspect that must be included in the model of incorporation of the UNCRC. In order for the UNCRC rights to be meaningful for children in Scotland, they must be enforceable through effective, accessible remedies.

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

Yes. We believe the framework should include a duty requiring public authorities to pay 'due regard' to the UNCRC and Optional Protocols. This would help ensure a proactive approach to promoting and embedding a rights-based approach to decision-making processes at all levels of government. It would essentially require public authorities to show that they have considered children's rights when exercising their functions and making decisions. We believe this would serve to strengthen the

implementation of the UNCRC. This 'due regard duty' should not be a stand-alone duty but should be in addition to a 'duty to comply' prohibiting public authorities from acting incompatibly with the UNCRC.

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

Yes we strongly agree that the framework for incorporation should include a 'duty to comply' with the UNCRC rights. Making it unlawful for a public authority to act in a way which is incompatible with the UNCRC rights is vital to ensure the UNCRC becomes binding as opposed to guiding in our domestic law. A 'duty to comply' will place a binding obligation on public authorities to protect children's rights. If public authorities fail to fulfil this duty then rights-holders will be able to challenge this failure in our domestic courts. This will help ensure rights become real for children 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 which are party to the UNCRC should be given in our domestic law?

We support the position set forth in the [model for incorporation](#) presented by the advisory group convened by the Commissioner for Children and Young People in Scotland and Together which provides that the UNCRC General Comments and Observations made by the UN Committee on the Rights of the Child are given consideration by the courts and by public authorities when exercising their devolved functions.

As stated in the responses of the [Commissioner for Children and Young People in Scotland](#) and [Together](#) to this consultation, requiring courts and public authorities to take this wealth of expert evidence into account when exercising their functions would ensure Scotland keeps pace with developments in international law and practice. However as the courts and public authorities would not be bound to follow this evidence they would retain judicial independence and autonomy.

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

In addition to the UNCRC General Comments and Observations by the UN Committee on the Rights of the Child we think that the growing body of decisions issued under the new communications procedure under Optional Protocol 3 could provide valuable assistance to the courts in interpreting the UNCRC in domestic law. In addition, case law in countries where the UNCRC has already been incorporated may also be of assistance to the courts.

We feel it is important to again voice our agreement with the responses of the [Commissioner for Children and Young People in Scotland](#) and [Together](#) to this consultation which rightly highlight the wealth of experience the Scottish Courts have of interpreting international law in Scotland. The responses also highlight that the UNCRC is clear and comprehensive and that in countries where incorporation has taken place that existing evidence suggests the courts have not encountered difficulties interpreting the UNCRC.

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.

Whilst we welcome consideration of the development of a Statutory Human Rights Framework for Scotland, we strongly agree that it is best to push forward with incorporation of the UNCRC now as a matter of urgency. There are a number of key reasons for this:

Firstly, the First Minister's Advisory Group has stated it is supportive of UNCRC incorporation and views it as a 'separate process' to development of a Statutory Human Rights Framework. The Advisory Group has explicitly stated that its recommendations '*should not cause any delay to UNCRC incorporation*'.¹

Secondly, the debate around incorporation of the UNCRC is mature in Scotland. Steps towards incorporation have taken place over many years most notably the Children and Young People (Scotland) Act 2014 which introduced duties on Ministers and public bodies relating to the UNCRC. There is a widespread and indeed growing support for children's rights in both civil society and government. Additionally, there is a current political majority support for UNCRC incorporation in the Scottish Parliament which we feel it is vital to take advantage of.

Thirdly, the current uncertainty over Brexit brings with it uncertainty around the protection of children's rights, particularly in terms of the planned withdrawal from the European Charter of Fundamental Rights. Incorporation of the UNCRC can help protect the rights of children and young people from the negative impact that Brexit may have and it is therefore important that we move forward with incorporation now.

Fourthly, we wish to voice our support for the response of the [Scottish Youth Parliament](#) to this consultation which highlights the importance of capitalising on the legacy of the Year of the Young People 2018 and the fantastic work carried out by the Scottish Youth Parliament through their national campaign 'Right Here, Right Now'. This campaign aimed to ensure young people in Scotland are aware of and understand their rights and are empowered to defend their rights. The campaign specifically called for incorporation of the UNCRC into domestic law.

Ultimately, if the UNCRC is to be incorporated within the current session of Parliament, as committed to by the First Minister, it is vital that this be pushed forward now as a matter of urgency.

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 are fully supportive of the [model for incorporation](#) presented by the advisory group convened by the Commissioner for Children and Young People in Scotland and Together. At a fundamental level the draft Bill provides for full and direct incorporation of the UNCRC in Scotland which will serve to make rights real for children in Scotland. The First Minister has stated that the through the selected model for UNCRC incorporation '*we must make sure we are meeting the UN's gold standard on*

¹ First Minister's Advisory Group on Human Rights Leadership (2018). [Recommendations for a new human rights framework to improve people's lives: Report to the First Minister](#), p.54

children's rights'.² We firmly believe the model presented by the advisory group offers this 'gold standard'.

The model sets forth a comprehensive legal framework which serves to ensure a proactive culture of children's rights across all levels of government in Scotland thus embedding a children's rights approach to policy and legislative decision-making processes from the earliest stage, whilst also providing effective mechanisms for redress where children's rights have been breached.

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

Our understanding, based on discussions within the children's sector with input from legal experts, is that the concerns raised around this issue by the Scottish Government are not relevant within the Scottish legal system. None of the rights set forth in human rights treaties are self-executing in Scots law. Domestic legislation is always required to give effect to these rights in our domestic law. Therefore it is the act of incorporating the UNCRC into Scots law that will give effect to UNCRC rights.

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?

In terms of rights holders, legislation directly incorporating the UNCRC will not in and of itself make rights real for children and young people in Scotland. Incorporation must therefore be accompanied by additional measure such as rights education, training, awareness raising, independent advocacy services and reporting mechanisms. With additional measures such as rights education and awareness raising we would urge the Scottish Government to ensure there is a targeted effort to engage with potentially vulnerable and/or overlooked groups including children and young people in Armed Forces families.

In terms of duty bearers, public authorities have been working in the context of devolution for 20 years and have developed a clear understanding of devolved and reserved competencies and functions over this time. UNCRC incorporation would of course only apply to devolved matters. Public authorities would therefore be well-equipped to apply their existing knowledge and understanding when fulfilling their duties arising from UNCRC incorporation.

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 we think the Scottish Government are right to reject incorporating the UNCRC solely by making specific changes to domestic legislation. This is not a strong enough approach and would certainly not amount to the 'gold standard' of incorporation spoken of by the First Minister. To effectively and meaningfully incorporate the UNCRC into domestic law, the model for incorporation must create a comprehensive framework which embeds the UNCRC across all levels of government. Making specific changes to domestic legislation would ultimately amount to a fragmented and disjointed approach to incorporation.

² [Nicola Sturgeon, address to SNP Conference \(April 2019\)](#)

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

We do not support the transposition model. Children's rights are universal, indivisible, interdependent and interrelated. All rights are equally important. Therefore selecting particular rights to create a new 'suite of rights' would amount to a fragmented, disjointed approach to incorporation. Full and direct incorporation will ensure full implementation of UNCRC rights.

However, should the transposition model be followed we would urge the Scottish Government to ensure it undertakes targeted efforts to engaging with seldom heard and/or potentially vulnerable groups of children and young people such as Armed Forces children and young people.

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

Our preferred model for incorporating the UNCRC into domestic law is one of full and direct incorporation. As noted in our response to question 7, we are fully supportive of the model presented by the advisory group convened by the Commissioner for Children and Young People in Scotland and Together. We agree it amounts to a 'gold standard' model for incorporation which fulfils our aspirations for incorporation. It amounts to full and direct incorporation, ensures a proactive culture of children's rights across all levels of government, and provides redress to children if their rights are breached.

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 think that a requirement for the Scottish Government to produce a Children's Rights Scheme, similar to the Welsh example, should be included in the model for UNCRC incorporation. The experience in Wales has shown the Scheme to be effective in ensuring compliance with children's rights and promoting rights-based decision making at national government level.

A Children's Rights Scheme will help to ensure transparency and accountability around how Scottish Ministers are fulfilling their duties the new legislation. We also support the further measures set out in the Children's Rights Scheme set forth in the [model for incorporation](#) presented by the advisory group convened by the Commissioner for Children and Young People in Scotland and Together which 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.

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

No we do not think there should be a 'sunrise clause' within legislation. The UK ratified the UNCRC almost 30 years ago in 1991. Many aspects of law, policy and practice in Scotland are already rooted in the UNCRC whilst the Children and Young People (Scotland) Act 2014 served to further raise awareness and understanding of the UNCRC obligations amongst public authorities. Public authorities should already be complying with their existing duties to children and should therefore

be equipped to operate under the more comprehensive duties that will come into place following UNCRC incorporation. The new legislation should therefore come into force within the general 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 your views.

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.

Yes we think additional non-legislative activities, not included in the Scottish Government's Action Plan are required to further implement children's rights in Scotland. The UN Committee has made clear that in order for UNCRC implementation to be effective, legislative measures must be accompanied by a range of non-legislative measures. The Scottish Government's Action Plan includes a strategic approach to participation, CRIA and a programme of work to raise awareness and understanding of the UNCRC and we are strongly supportive of these measures. However, we believe that additional implementation measures are necessary to truly embed a children's rights approach in Scotland. Such additional measures include advocacy services, children's rights education for children and parents, children's rights training for those working with children and young people and children's rights budgeting. Again the [model for incorporation](#) presented by the advisory group convened by the Commissioner for Children and Young People in Scotland and Together provides for these additional measures.

As Scotland's Armed Forces children's charity we would again like to highlight the importance of targeting seldom heard and/or potentially vulnerable groups when implementing such measures, including Armed Forces children and young people.

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 that any legislation to be introduced in the Parliament should be accompanied by a statement of compatibility with children's rights. The Scotland Act 1998 provides for such pre-legislative checks in relation to Scottish Parliamentary legislative competence and this plays an important role in relation to ensuring compatibility with the ECHR. The Human Rights Act 1998 also requires such checks. Requiring a statement of UNCRC compatibility to be made by the person in charge of legislation on its introduction to Parliament would play an important role in ensuring new legislation is compatible with the UNCRC and would help embed a children's rights approach to the scrutiny of legislation in Parliament.

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. Children and young people regularly come into contact with public authorities for example, education or health services. It is therefore of the utmost importance that children and young people are able to challenge public authorities to ensure meaningful protection of their rights. It is

important to note that children and young people can face real barriers in challenging breaches of their rights and therefore it is crucial that child sensitive processes are put in place to enable them to do so including: access to child-friendly information and advice, advocacy services including support for self-advocacy, access to independent complaints procedures and to courts together and legal assistance. It is once again important to note the [model for incorporation](#) presented by the advisory group convened by the Commissioner for Children and Young People in Scotland and Together provides for these additional measures in the Children's Rights Scheme.

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.

The UN Committee has made clear that where children's rights under the UNCRC are found to have been breached '*there should be appropriate reparation, including compensation....*' We agree that the approach to awards of financial compensation should broadly follow the approach taken to just satisfaction damages under the HRA. The key principle applied by the European Court of Human Rights when considering awards of compensation for breaches of the ECHR is that the victim should be placed in the same position, as far as possible, as if the breach had not occurred. This approach is very similar to that already taken by the Scottish courts in relation to the award of damages. We therefore agree that it would be appropriate to follow this approach in the model for UNCRC incorporation.

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 we agree that the UNCRC rights should take precedence over provisions in secondary legislation. The legislation incorporating the UNCRC will set forth the basic rights for children and young people in Scotland. The Human Rights Act 1998 has such provisions in terms of the ECHR and it therefore follows that such provisions should be in place ensuring secondary legislation respects the UNCRC rights. Indeed the UN Committee has made clear that '*incorporation should mean that the provisions of the Convention...will prevail where there is a conflict with domestic legislation or common practice*'.³

International learning suggests that the higher the status of the UNCRC in the domestic legal system, the more likely incorporation is to be successful in terms of influencing decision-making and policy processes.⁴ In Norway for example, the Norwegian Constitution states that all governmental bodies, including 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. Norway is widely regarded as a successful model of incorporation. Successes have included increased awareness and understanding of the UNCRC and a significant increase in references to the UNCRC in Supreme Court cases.⁵ In order to ensure successful implementation that ultimately makes rights meaningful for

³ UN Committee on the Rights of the Child, [General Comment No. 5 General measures of implementation of the Convention on the Rights of the Child](#), UN Doc. CRC/GC/2003/5, 27 November 2003, para 20.

⁴ Kilkelly, U. (2019). The UN Convention on the Rights of the Child: Incremental and transformative approaches to legal implementation, *The International Journal of Human Rights*

⁵ Sandberg, K. (2014). The role of national courts in promoting children's rights: The case of Norway. *The International Journal of Children's Rights*, 22(1)

children and young people in Scotland, it is vital that the UNCRC is accorded high priority in the domestic legal system, particularly when in conflict with domestic legislation.

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 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. The Human Rights Act 1998 contains provisions requiring the courts to interpret UK legislation in a manner that is compatible with the ECHR as far as possible. In addition, the Scotland Act 1998 requires courts to take a similar approach in relation to acts of the Scottish Parliament and subordinate legislation. The Bill for UNCRC incorporation should include such a provision to ensure the courts read and give effect to legislation in a manner which respects children's rights. This will again help to further embed and strengthen a children's rights based approach within the court system.

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 the Bill should 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. To ensure meaningful and effective protection of children's rights it is crucial that the courts have the power to declare an Act of the Scottish Parliament to be incompatible where it is found to breach UNCRC rights. In addition we support the position set forth in the [model for incorporation](#) presented by the advisory group convened by the Commissioner for Children and Young People in Scotland and Together which includes 'strike down' powers. This power would allow the court to declare the legislation unlawful which means that any legislation declared to be incompatible with UNCRC rights would cease to have effect. A 'strike down' power is provided for by the Scotland Act 1998 in relation to ECHR rights. We feel it is vital that the UNCRC rights are given the same level of protection in this regard as the ECHR rights.

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 do not consider any special test for standing to bring a case under the Bill should be required. Children and young people very often face additional barriers to accessing justice and it is important that the model for incorporation acknowledges and addresses this. In order to ensure meaningful protection of children's rights, it is crucial that any child or young person who is directly adversely affected by legislation can bring a case in their own name. However it is also important to recognise that children and young people may need and want support and representation to engage in legal proceedings. It is therefore important that groups of children or representatives can bring a case where appropriate.

We once again support the position set forth in the [model for incorporation](#) presented by the advisory group convened by the Commissioner for Children and Young People in Scotland and

Together which provides for a wide-ranging model for legal standing that enables children and those with 'sufficient interest' to bring a case. It also grants automatic standing to the Children and Young People's Commissioner, the Scottish Human Rights Commissioner and the Equalities and Human Rights Commission.

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