



Children's Rights: Consultation on incorporating the UNCRC into our domestic law in Scotland

About the Consortium

The Human Rights Consortium Scotland is Scotland's civil society network to promote and protect human rights. We work to enable a strong collective civil society voice on human rights and to facilitate civil society to have the understanding and information that it needs to embed human rights in all of its work.

About this submission

This submission is based on discussions with, and the experience and expertise of, many of our members, but may not necessarily represent the views of every one of our member organisations. We have restricted our answers to those questions most relevant to previous discussions and consideration of the Consortium.

Introduction

The Human Rights Consortium Scotland strongly welcomes the Scottish Government's commitment to incorporate the UNCRC into Scots law before the end of this parliamentary session. The Scotland Declaration on Human Rights, supported by over 175 civil society organisations in Scotland, calls on policy makers to 'take all possible steps to protect our rights and make Scotland a world leader in both rights protection and implementation'. We recognise that directly incorporating the UNCRC is just such a significant step towards protecting human rights, being 'the single most important means of enhancing the status of UN treaty rights'¹.

This response derives from our members' concerns that human rights law must fundamentally lead to change in how policies and budgets are made, to rights holders sharing power in decision-making, and that individuals, communities and their representatives must be able to use human rights to frame and press for rights in everyday situations. And for these to happen, it is also essential that there is ultimately effective remedy through enforcement in the courts that is both legally and practically possible for individuals and communities. We highlight that 'without incorporation human rights may be seen as aspirational standards at a distance from the real world of domestic policy. Even worse, without incorporation human rights

¹ Daly et al, Enhancing the Status of UN Treaty Rights in Domestic Settings, 2018

risk becoming ‘dead letters’ because they are not taken seriously by those responsible for their implementation².

- 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?**
- 2. Are there any other aspects that should be included in the framework?**
- 3. Do you agree that the framework for incorporation should include a ‘duty to comply’ with UNCRC obligations?**

The Human Rights Act 1998 (HRA) has been very important for the recognition and protection of human rights in the UK. It has had impact in numerous ways, for example through a wide range of strategic legal cases³, through frequently challenging the hostile immigration environment and protecting refugees from deportation to situations of violence and risk⁴, through challenges to policy within our social security system⁵, and through instigating increased training and awareness raising amongst public bodies and government, particularly within the legal sector⁶.

We agree with the Scottish Government that, as with Section 6 of the HRA, there should be a ‘duty to comply’ within UNCRC incorporation law. This aspect of the HRA has had some important effects on human rights realisation in the UK:

‘Some public authorities have used the HRA as a basis for making decisions, balancing competing interests, setting priorities, training staff, designing services and interacting with people using those services – sometimes with transformative results’⁷.

We note the First Minister’s Advisory Group (FMAG) on Human Rights Leadership report states:

‘The duty to comply can focus minds, incentivise and drive change in how a public body performs’⁸.

The ‘duty to comply’ is an essential, core element of any law to incorporate UN treaty rights, that can provide remedy regarding human rights outcomes, as well as

² Hoffman, S. Incorporation of International Human Rights, Bevan Foundation February 2019, p4

³ For example, see lists at <https://rightsinfo.org/infographics/fifty-human-rights-cases/>

⁴ Coran Children’s Legal Centre, Migrant Children’s Project: Article 8 the right to respect for private and family life, May 2017, available: https://www.childrenslegalcentre.com/wp-content/uploads/2016/10/Article-8-May.2017.final_.pdf

⁵ For examples, see Child Poverty Action Group: Test cases at <https://cpag.org.uk/welfare-rights/test-cases/concluded>

⁶ Rt Hon Jack Straw MP at the Joint Committee on Human Rights, 14 March 2001: <https://publications.parliament.uk/pa/jt200001/jtselect/jtrights/66/1031408.htm>

⁷ A Donald, ‘Letting public authorities loose: The dangers of repealing the Human Rights Act’, UK Human Rights Blog (19 May 2015), available at <https://ukhumanrightsblog.com/2015/05/19/letting-public-authorities-lose-the-dangers-of-repealing-the-human-rights-act-alice-donald/>

⁸ Recommendations for a new human rights framework to improve people’s lives: Report to the First Minister, December 2018

encouraging culture change -indeed, without a duty to comply, the law will be weak and frustratingly ineffective.

However, given that we want to make this UNCRC framework as good and as strong as possible, the 'duty to comply' is not on its own enough to bring about the proactive cultural change and shift in how we make policy and budgets in Scotland that children need. We need the law to address both the process and the outcome. Therefore, we would support the UNCRC framework also including a 'due regard' duty. This reflects the findings of the FMAG, and is already an established principle in the public sector equality duty and the Fairer Scotland socio economic duty. We note from guidance on the latter that this means there must be active consideration:

*'To 'have due regard' means that, in making any strategic decision, a public authority subject to the Duty must actively consider, with an open mind, whether there are opportunities to reduce inequalities of outcome caused by socio-economic disadvantage. This is not a tick box exercise. Serious consideration must be given – and as early in the decision-making process as possible.'*⁹

This strongly mirrors what is required to implement a human rights-based approach and indeed, many aspects of the way in which the socio economic duty is to be implemented such as including participation of those affected, will go hand in hand with a human rights based approach. Therefore including both 'due regard' and a 'duty to comply' in this UNCRC framework legislation is timely, anticipated, strong, and most of all, essential for children and young people's rights to be realised.

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?

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

In light of the UK's increasing isolationist approach as we leave the European Union, there has never been a better time to affirm the international nature of human rights and to firmly embed human rights in Scotland within this international framework. Our human rights are at heart international, and we need, and benefit from, international scrutiny to continue progression to see human rights realised for every person.

We welcome the Scottish Government's positive approach to UN rights monitoring processes. We also note that the Scottish Parliament Human Rights Inquiry recognised the importance of UN rights monitoring and made many recommendations around how we can better use UN rights monitoring to lead to actions to implement rights. Therefore, we highlight that the UNCRC framework should also recognise this international system by enabling courts to take General

⁹ Fairer Scotland Duty: Interim guidance for public bodies: <https://www.gov.scot/publications/fairer-scotland-duty-interim-guidance-public-bodies/pages/2/>

Comments and Concluding Observations from the UN Committee on the Rights of the Child into account in order to best interpret and apply 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?

Yes. There is no reason to delay UNCRC incorporation, and there are many reasons to press ahead with this legislation. These reasons include that it has been widely recognised for many years that UNCRC incorporation is needed, it has been recommended several times by the UN Committee on the Rights of the Child, there is broad support across Scottish civil society and public sector, and that it would be very disappointing were another generation of children to grow up without this rights protection in place.

Furthermore, we highlight that knowledge and understanding of the UNCRC is already growing both for rights holders and duty bearers. Children and young people increasingly understand and know about their UNCRC rights through programmes such as UNICEF Rights Respecting Schools, Amnesty International's human rights education in schools and the work of the Scottish Youth Parliament and Children's Parliament.

There are many policies and laws that mean that public bodies are already considering implications of the UNCRC, such as Getting it Right for Every Child and the Child Rights and Wellbeing Impact approach within the Children and Young People Scotland Act 2014. We know that more could be done for public bodies to take a human rights based approach, but the UNCRC rights journey has definitely started. Understanding and applying children's rights is therefore not new - indeed, incorporating the UNCRC is simply the next logical step forward to progress children and young people's rights in Scotland and as such, should not be delayed.

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 presented by the Commissioner for Children and Young People in Scotland and Together (the Scottish Alliance for Children's Rights). This model was drafted by experts in international human rights and children's rights, who have a sound knowledge of what is needed to make our UNCRC framework of 'gold standard'. Scotland should aim for nothing less.

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?

All public bodies are used to working within the context of devolution and the complexities of this, no less so within issues affecting human rights. We suggest that clarity for rights holders and duty bearers comes not necessarily from the law itself but from the accompanying guidance, training and awareness raising. Indeed, the Act could include a requirement for statutory guidance to ensure clarity.

We also highlight here that, where an issue affecting someone's human rights crosses reserved/devolved competencies so that the reserved aspect is not technically within the remit of the devolved incorporation framework, there is nothing to prevent the public body adopting the highest standard of rights protection.

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 do not think that such a piecemeal approach is sufficient or appropriate for a human rights-based approach that seeks to guarantee basic rights and freedoms across many issue areas. We also highlight that such a piecemeal approach leads to unnecessary confusion and complexity for rights holders and will not lead to the culture change and proactive process changes that are required.

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

Such participation within the timescale is not possible, but nor is this model desirable.

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

As noted above, we support the direct incorporation of the UNCRC using the model developed by the Together and CYPSC expert advisory group. Scotland should not adopt a transposition 'pick and choose' model because human rights:

- **are international** – we need to secure and embed that the UNCRC is international, with all of the best practice, jurisprudence, cross-border protections and recognition, and international connections that this entails. As outlined earlier, within Brexit-related isolationism, we need to further embed this global approach and the benefits that this brings for rights progression.
- **are indivisible and interdependent** - all of our rights depend on each other and interplay with each other. Only keeping some and not others ignores this fundamental interaction. It also flies in the face of what children and young people are taught and understand around the UNCRC, and gives too much credence to the perceived risk of a reserved/devolved competency issue. We urge the Scottish Government to look into how to resolve this competency

issue within a law that incorporates the UNCRC directly, rather than start to rewrite children's rights.

- **need to keep pace** – directly incorporating the UNCRC with General Comments and concluding observations to aid evolving interpretation enables the children's rights framework to keep up with changing circumstances and issues, with changes in devolution, and with progressive international standards.
- **protect the most marginalised and the often-ignored** – if we start to pick certain UNCRC rights over others, we risk missing out on those rights which protect ignored minorities or those who are unpopular. There are no UNCRC rights that Scotland does not need or want.

Indeed, the Consortium would gladly engage in discussion and developments about how Scotland can go even further than the UNCRC to protect our most discriminated-against children and young people.

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?

Yes. The law itself will not be enough to secure children and young people's rights and so it should be accompanied by provision of advocacy services, training, awareness raising, human rights based budgeting and clear guidance. The Scottish Government could usefully consider, in dialogue with expert civil society organisations such as the Scottish Independent Advocacy Alliance, Together and the Children's Parliament, what is needed and how these are best embedded and implemented.

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. We note that this closely reflects this duty in Section 19 of the HRA which, although limited in of itself, has nonetheless been useful. For example, research has found that:

'Section 19 has resulted in the development of many positive practices relating to the preparation of legislation by central government and the scrutiny of legislation by Parliament, notably the production of detailed guidance for the Executive and the work of the Joint Committee on Human Rights¹⁰.'

We note that the FMAG recommended that there should be enhanced pre-legislative scrutiny of human rights to 'ensure compliance with civil, political, economic, social, cultural and environmental rights'. This is also reflected in the Scottish Parliament Human Rights in the Parliament Inquiry recommendations around enhancing the

¹⁰ Weston, E. Section 19 of the Human Rights Act 1998: importance, impact and reform, 2013

human rights scrutiny and information about Bills¹¹. Given that we know that sometimes these statements of compatibility appear to be tickbox exercises¹², it would be valuable to consider how best to make the process around statements of compatibility, meaningful, including how this will relate to statements of compatibility with wider human rights treaties when these are incorporated.

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. Such ability for rights holders to challenge acts of public authorities, or omissions, on the basis of human rights is a core element of any incorporation of UN convention rights and reflects the incorporation of the ECHR through the HRA. Whilst remedy through courts or tribunals is a last resort, it is an essential component of a rights based framework.

Further we highlight that it is essential that not only is such enforcement through courts available in law but it also must be available in practice. We welcome the current consultation on changes to the system of legal aid, and we welcome that legal aid continues to be available for a wide range of cases including immigration cases. We highlight that, as this UNCRC law is developed and implemented, the Scottish Government could usefully examine and explore children and young people's access to justice, what this looks like currently and what would make this more possible. This exploration could include access to justice across human rights.

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. Financial compensation is a necessary part of effective remedy and would aid consistency with the HRA.

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?

Yes.

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.

¹¹ SP Equalities and Human Rights Committee, Getting Rights Right, 2018

¹² Ibid Weston, E. See discussion around Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2011, SI 2011/1158

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?

The fundamental underpinning nature of human rights means that all Acts of the Scottish Parliament should be interpreted and applied to ensure that they are compatible with the UNCRC. Courts should be able to make rulings on whether ASPs are compatible with the UNCRC.

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

'Public Interest Litigation (PIL) is a core element of any democratic society based on the rule of law which aims to recognise and protect human rights. It is an essential tool in keeping public decision-making in check, in guaranteeing that human and environmental rights are protected and embedded in our society, and in providing access to justice to those whose voice might otherwise not be heard.'¹³

However, under section 7(7) of the Human Rights Act and section 100(1) of the Scotland Act, only those who are victims of a human rights violation (or the Equalities and Human Rights Commission) can take a case. This has meant that many human rights issues which would benefit greatly from the clarity that the courts can bring, and around which government or public authority decision-making needs to be challenged, never get taken to court. This is for many reasons, such as the individuals who would take such cases often being vulnerable or disadvantaged, and this obviously often applies to children and young people whose very childhood can be at risk by engaging in lengthy court procedures. For some, before a particular case can be taken, the public authority can amend their decision-making to nullify the potential reason for their case - it is important to note in this regard too, that lawyers must work in their client's best interests which does not necessarily coincide with the public interest. With some public interest issues, the impact on each individual may appear relatively minor but when considered together, constitutes a systemic human rights abuse. For others still, the very thought of being involved in litigation is terrifying and to be avoided, and many will not even know that they could seek remedy through the courts.

For these reasons and more, we support the UNCRC framework adopting a wider definition of standing around 'sufficient interest' to take a case.

However we also highlight that whilst this definition of sufficient interest has applied to non-human rights cases for some time, Scottish courts have often adopted a narrow view of this definition¹⁴. This conservative approach has still excluded cases being taken by those with genuine expertise and concern about the issue raised.

¹³ Clan Childlaw, Human Rights Consortium Scotland et al. Overcoming barriers to public interest litigation, Nov 2018

¹⁴ Mullen, T. (2015) Public interest litigation in Scotland. *Juridical Review*, 2015, pp. 363-383

Whether in the text of the law itself or in accompanying court rules, there should be criteria used to direct the courts to apply this test broadly. For example, English courts take the following into account:

- the legislative framework within which the decision challenged was taken;
- the strength and importance of the grounds of challenge;
- whether any other person would be likely to raise the legal issues in question if standing were denied;
- whether that person has relevant expertise either in the relevant law or in the subject matter that might assist the court;
- the track record of the person in campaigning about or otherwise working on the issues raised by the case;
- whether that person has participated in any consultation process that preceded the decision, and
- the extent to which that person represents the interests of persons affected by the decision¹⁵

A widened and effective definition of standing should also apply to public interest interventions, bringing added value and expertise to court decision-making.

Furthermore, the Scottish Government could usefully consider eliminating other barriers to public interest litigation around human rights in general and children's rights in particular. For example, legal aid should be extended to groups or charities, there should be clarity around Protective Expenses Orders, and better information about court cases¹⁶.

As the Consortium and some of our members explore this area further, we welcome discussion with the Scottish Government around the ways in which the incorporation of the UNCRC can be accompanied by an enabling of public interest litigation to strengthen our human rights system.

Mhairi Snowden

Human Rights Consortium Scotland, August 2019

¹⁵ Mullen, T. (2015) Public interest litigation in Scotland. *Juridical Review*, 2015, pp. 363-383

¹⁶ Clan Childlaw, Human Rights Consortium Scotland et al. *Overcoming barriers to public interest litigation*, Nov 2018