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## Incorporation of International Human Rights Briefing Series:

# The UN Convention on the Rights of Persons with Disabilities (UNCRPD)

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## BACKGROUND

In March 2021 the Scottish Government [announced its intention](#) to introduce a Human Rights Bill to the Scottish Parliament. This world-leading legislation will directly incorporate four key United Nations Human Rights treaties into Scots law, subject to devolved competence. This will provide a new human rights framework for Scotland and is the result of a process which started with the [2018 Report of the First Minister's Advisory Group on Human Rights](#) and culminated with the [National Taskforce for Human Rights Leadership Report](#), (also available in [easy read format](#)). The process was informed by extensive engagement with a wide range of representatives from the public sector, civil society and human rights experts. A public consultation process was conducted which resulted in the [All Our Rights in Law Report](#).

The relevant treaties are:

- The International Covenant on Economic, Social and Cultural Rights (ICESCR)
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- The UN Convention on the Rights of Persons with Disabilities (UNCRPD).

The overriding aim of the new framework is to protect and advance the realisation of human rights for everyone in Scotland.

This Briefing series provides an overview of each of the treaties as well as some of the related rights and is intended to aid civil society's knowledge and understanding of the new framework and its potential future application.

## OVERVIEW OF THE CONVENTION

The UN [Convention on the Rights of Persons with Disabilities](#) (UNCRPD) is a UN Convention which was adopted in 2006, and ratified by the UK in 2009. The Treaty has been ratified by 182 of the 194 member nations of the United Nations. The Convention 'is intended as a human rights instrument with an explicit, social development dimension.'<sup>1</sup> It places both negative and positive obligations on states to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities. Negative obligations are those that require the state to refrain from interfering with the exercise of a person's rights. For example, the UNCRPD requires that states do not interfere with a disabled person's right to education and therefore a disabled person cannot be excluded from the general education system on the basis of his or her disability.<sup>2</sup> Positive obligations demand that the state ensures that each individual is able to fulfil their rights by, for example, requiring reasonable accommodations to be made to meet the individual's right to education.<sup>3</sup>

In defining 'persons with disabilities' the Convention adopts a broad categorisation which includes those 'who have long-term

physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.<sup>4</sup> In clarifying how all categories of rights apply to persons with disabilities, the CRPD identifies areas where adaptations must be made to enable the effective exercise of rights, areas where rights have been violated, and the ways in which protection of rights must be reinforced.

Efficacy and implementation of the Convention at domestic level is monitored by the UN's [Committee on the Rights of Persons with Disabilities](#) (CRPD), a body of 18 independent experts who are responsible for holding states to account on their efforts towards upholding the rights of persons with disabilities.

## KEY PROVISIONS

Article 3 sets out the general principles that underpin the rights contained in the Convention: respect for dignity; non-discrimination; participation and inclusion; respect for difference; equality of opportunity; accessibility; equality between men and women; and respect for children. These general principles reinforce the social model of disability which moves the location of the disability away from the

1. UN Department of Economic and Social Affairs, <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

2. Article 24(2)(a) UNCRPD

3. Article 24(2)(c) UNCRPD

4. Article 1 UNCRPD

person and into social structures by recognising that perceptions, attitudes, institutions, and policies all contribute to the creation of disability so that it is framed as a social construct rather than an individual impairment. From this perspective, disability is 'a socially produced injustice which it is possible to challenge and eliminate through radical social change.'<sup>5</sup> The social model provides a contrast with the medical model more commonly found in domestic systems including the UK.

Article 4 imposes a set of general obligations on states which must take a range of measures, with the active involvement of people with disabilities, to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind.

This is underpinned by Article 5 which articulates the principles of equality and non-discrimination in the context of disability by declaring that everyone is equal before and under the law.

Articles 6 and 7 recognise the specific rights of women and girls and children with disabilities respectively by imposing specific obligations on states to acknowledge and act on the particular needs of these groups so as to ensure the full realisation of their rights.

Under Article 8 states must raise awareness of the rights, capabilities and contributions of people with disabilities. This includes challenging stereotypes and prejudices relating to people with disabilities through campaigning, education, media and awareness-raising programmes. Article 9 provides that people with disabilities have the right to access all aspects of society on an equal basis with others including the physical environment, transportation, information and communications, and other public facilities and services.

Article 10 proclaims that people with disabilities have the right to life and that states must take all necessary measures to ensure that people with disabilities are able to effectively enjoy this right on an equal basis with others. Under Article 11 states must take all necessary measures to ensure the protection and safety of all persons with disabilities in situations of risk, including armed conflict, humanitarian emergencies and natural disasters.

Articles 12 and 13 provide for the legal capacity and access to justice of persons with disabilities respectively which should operate and be provided on an equal basis with others in all aspects of life.

Under Articles 14 people with disabilities have the right to liberty and security on an

5. Anna Lawson & Angharad E. Beckett (2020) The social and human rights models of disability: towards a complementarity thesis, *The International Journal of Human Rights*, DOI: 10.1080/13642987.2020.1783533, 2

equal basis with others so that disability alone cannot be used to justify deprivation of liberty. Article 15 provides that people with disabilities have the right to be free from torture and from cruel, inhuman, or degrading treatment or punishment and that no one shall be subjected to medical or scientific experimentation without his or her free consent. Article 16 provides protection from all forms of exploitation, violence and abuse, and Article 17 states that every person with a disability has a right to respect for his or her physical and mental integrity on an equal basis with others.

Article 18 proclaims the right to a nationality. Children with disabilities have the right to a name and to know and be cared for by their parents. Article 19 provides the right to live independently in the community and places an obligation on states to ensure that people with disabilities have the opportunity to choose where and with whom they live, and that they are provided with the necessary support.

Under Article 20 states must take effective and appropriate measures to ensure personal mobility for people with disabilities in the manner and time of their choice, and at affordable cost. People with disabilities also have the right to access quality mobility aids, assistive technologies and forms of live assistance and intermediaries.

Articles 21, 22 and 23 provide for freedom of expression, respect for privacy, and respect for the home and family.

Article 24 provides the right to education without discrimination and Article 25 proclaims that the highest attainable standard of health should be enjoyed without discrimination. States have an obligation to ensure that education and health are accessible and are provided within or close to people's own communities. Under Article 26 states must take effective and appropriate measures to enable people with disabilities to develop, attain and maintain maximum ability, independence and participation through the provision of appropriate services and programmes.

Economic rights are provided for under Article 27 which proclaims the right to work, including the right to work in an environment that is open, inclusive and accessible, and Article 28 which provides that people with disabilities have the right to an adequate standard of living including food, water, clothing and housing, and to effective social protection including poverty reduction and public housing programmes.

Article 29 states that people with disabilities have the right to participate in politics and in public affairs, as well as to vote and to be elected and Article 30 provides for participation in cultural life, recreation, leisure and sport.

Article 31 requires states to collect information about people with disabilities, with their active involvement, to enable better understanding of the barriers they

experience and to make the Convention rights real.

## KEY POTENTIAL IMPACTS OF INCORPORATION

Following on from the [First Minister's Advisory Group on Human Rights Leadership's recommendation](#) to fully incorporate a range of international human rights Conventions including the UNCRPD, the National Taskforce for Human Rights Leadership has been examining how the UNCRPD and its sister Conventions which deal with women's rights<sup>6</sup> and racial discrimination,<sup>7</sup> might be brought into Scots law through incorporation.<sup>8</sup> [Direct incorporation](#) means that the provisions of an international agreement, such as the UNCRPD, become part of the national law. It is the first legal step towards making human rights enforceable in the national legal system. Enforceability means that there are institutions and procedures available to provide a remedy when a human right is abused or violated. Incorporation will encourage stronger implementation, which includes all of the law, policy and other measures taken to ensure that human rights are respected, protected and fulfilled.

The UNCRPD is clearly targeted at changing attitudes and perceptions so that people with disabilities are recognised as active rights holders. It does this by rejecting the

characterisation of persons with disabilities as the passive recipients of rights based on a medical understanding of disability in favour of an agency-based approach by which they are classified as active members of society who are capable of claiming their rights and making decisions about their own lives. The reference in the definition of persons with disabilities provided by Article 1 to '... interaction with various barriers [which] may hinder their full and effective participation in society on an equal basis with others' applies a social model of disability to the rights contained in the Convention. This approach acknowledges that the barriers experienced by those with disabilities are socially constructed and arise because of the tendency in policies, processes and practices to rely on a normative 'ablest' model which often leaves those with disabilities of all kinds outside of their provision due to their inability to comply. The Convention seeks to remove or deconstruct such barriers to enable full inclusion and participation. This social model is in contrast to the medical model which focuses on individual impairment to justify why disability can serve as a barrier to full participation in social, economic, and cultural activities.

Although the scope and nature of the UNCRPD's provisions overlap with the protections provided by domestic laws, which do adopt a social model in some

6. UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

7. UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

8. National Taskforce for Human Rights Leadership, [Leadership Report](#), 12 March 2021

respects, the Convention is more comprehensive as it imposes a set of principles and clear aims that cut across all areas of state policy. It differs in this respect from domestic anti-discrimination law which is often narrowly focused on commercial activities, such as employment, or those which carry clear resource implications. Incorporation offers an opportunity to adopt this integrated approach in areas where relevant [policy is devolved to the Scottish Parliament](#).

Under the current devolution arrangements, 'equal opportunities', and therefore equality law, is a reserved matter subject to certain limited exceptions.<sup>9</sup> The right not to be discriminated against on the grounds of disability is dealt with in the Equality Act 2010, an Act of the UK Parliament which applies to Great Britain with Northern Ireland having its own equality law regime in place. The Equality Act's scope is broad: it provides protection on the grounds of a range of 'protected characteristics' (PCs)<sup>10</sup> in relation to employment (also a reserved matter), the provision of goods and services, the exercise of public functions, housing and education.

Disability is one of the protected characteristics.<sup>11</sup> As well as prohibiting direct and indirect discrimination and harassment

and victimisation, the Act provides two additional protections for people with disabilities: the duty to make reasonable adjustments, which is unique to this protected characteristic,<sup>12</sup> and the additional prohibition of discrimination arising from disability.<sup>13</sup> These provisions go some way to ensuring that those covered by the Act are able to rely on a relatively broad approach to equality. However, the definition of disability under the Act is highly medicalised and this restricts access to the rights provided under it. To be defined as disabled within the meaning of the Act, a person must have a 'physical or mental impairment' that has a 'substantial' and 'long-term' negative effect on his or her ability to do normal daily activities.

The focus on 'impairment' within the domestic framework emphasises the medical model which suggests that the disability is caused by the said impairment rather than by the social structures which prevent the full participation of persons with disabilities in a range of activities. This reinforces an 'ablest' model based on an 'unimpaired' normative standard. As well as perpetuating the stigma associated with disability, the medical model lacks the proactive nature of the social model epitomised by the UNCRPD.

9. See the Scotland Act 1998, Schedule 5 L2, as amended by section 37 of the Scotland Act 2016

10. The protected characteristics are age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex

11. Section 6 Equality Act 2010

12. Section 20 Equality Act 2010

13. Section 15 Equality Act 2010

The UNCRPD, in common with other international human rights Conventions, provides for an alternative or ‘substantive equality’ approach which,

*requires states to take steps to eliminate discrimination in order to achieve substantive equality of outcome and address structural injustices. International law requires that access and delivery of human rights, including economic, social and cultural rights, should not exclude groups, particularly those who are marginalised and possibly ‘hidden’ from the system.*<sup>14</sup>

The limitations of the domestic framework in giving full effect to the interpretation of rights under the UNCRPD has been recognised by the CRPD Committee. In 2016 the Committee determined that impact assessments conducted prior to the implementation of several welfare reforms by the UK government expressly anticipated an adverse impact on disabled people and these measures have in fact had a disproportionate and adverse effect on disabled people.<sup>15</sup> The Committee also found that there was inadequate representation of disabled people in the impact assessment process itself. The Committee’s commentary makes clear that reviewing discrimination claims on the basis

of existing domestic law fails to recognise the interrelated nature of the rights protected under the CRPD framework, for example, in relation to the intersectional effects of two or more protected characteristics.

The Scottish Government’s disability rights framework brings together a range of laws and policies and a CRPD delivery plan.<sup>16</sup> The development of an integrated approach to rights realisation could provide the policy infrastructure necessary to support the incorporation of the UNCRPD but requires some fundamental amendment in terms of its substantive content and implementation methods. While its aims are written in the language and terminology of the Convention, there are gaps between policy and delivery. Disabled people in Scotland frequently report the lack of clear information about disability services and limited success in having their views heard or in influencing decision-makers.<sup>17</sup> The holistic approach required by the UNCRPD calls for a more participative process in policy formulation which would provide a deeper understanding of how individuals can utilise their existing rights based on a social model of disability.

The UNCRPD’s incorporation into Scots law would require the adoption of a substantive

14. Katie Boyle *Models of Incorporation and Justiciability for Economic, Social and Cultural Rights*, (Scottish Human Rights Commission, 2018), p. 8

15. CRPD Committee, Inquiry concerning the UK, CRPD/C/15/4 (2017); CRPD Committee, Follow-up to the Inquiry into the UK, UN Doc CRPD/C/GBR/FIR/1 (2018), [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeCategoryID=7](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeCategoryID=7)

16. A Fairer Scotland For Disabled People 2016-2021 Delivery Plan, available: <https://www.gov.scot/publications/fairer-scotland-disabled-people-delivery-plan-2021-united-nations-convention/>

17. e.g. Disability and Careers Benefits Expert Advisory Group (DACBEAG), *Letter to Shirley-Anne Sommerville regarding Disability Assistance for Children and Young People*, 19 July 2019

approach to tackling inequalities and their causes based on the different lived experiences of people with a range of disabilities. This approach is capable of instilling change in the systems, practices and processes which currently perpetuate injustice and disadvantage. Although the reservation of equality and employment law limits Scotland's power to act in certain respects, many policy areas relevant to the realisation of full and substantive equality are devolved to Scotland, including education, health, housing and criminal justice. In some other areas which are reserved, arrangements are in place to enable decisions about policy and service delivery to be taken at the Scottish rather than UK level, including some elements of social security. Furthermore, working within reserved equality and employment law offers some potential progress, for example through the permitted use of positive action under the Equality Act<sup>18</sup> which has not been widely used to date so that its specific boundaries remain untested. More generally in the provision of services as well as in employment, further potential for progress in the Scottish context exists under the Public Sector Duty (PSED)<sup>19</sup> and the Fairer Scotland Duty (FSD).<sup>20</sup>

The UNCRPD's incorporation would provide a consolidated, comprehensive, and strengthened legal framework which could be used to improve the realisation of rights for people with disabilities, even in areas with existing provision.

To ensure that the promise of equality for people with disabilities is realised through better implementation of rights under existing domestic frameworks as well as through the UNCRPD's incorporation, it is important that Scottish civil society ensures that the voices of those it represents are heard, particularly in relation to the different lived experiences. Appropriate action could include pressing for changes to the devolution framework to give the Scottish Parliament enhanced powers over equality law or holding the Scottish Government to account for the better realisation of equality in devolved policy areas. The UNCRPD provides an important tool which can be used to support such claims and it is important to remember that the UK is already bound by its provisions through the ratification process and that, despite the complexities of devolution, incorporation would place an obligation on the Scottish government to maximise the enjoyment of the rights provided by the UNCRPD.

18. See Section 158, Equality Act 2010, which allows for 'any action' to be taken to support those with a protected characteristic as long as it is a 'proportionate means of achieving a legitimate aim'

19. Section 149, Equality Act 2010 which requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between different people when carrying out their activities. In Scotland a further set of additional Scottish specific duties are imposed on public bodies including the requirement to publish a set of equality outcomes and to report on progress every two years. In setting these outcomes, public authorities must consider relevant evidence and take steps to involve people with protected characteristics

20. Section 1, Equality Act 2010 which places a legal duty on public authorities in Scotland to pay due regard to how they can reduce inequalities of outcome caused by socioeconomic disadvantage when making strategic decisions

## NEXT STEPS

In line with the Human Rights Taskforce recommendations, the establishment of a new statutory human rights framework will be a multistep process. The aim of the new framework is to incorporate a range of internationally recognised human rights, including those set out in the UNCRPD, as well as civil and political rights and special attention to individuals or groups of individuals who have often been given the least attention by society. To accomplish this, further consultation on the approach to be taken is necessary. This includes pre-legislative consultation processes across all parts of society followed by public participation as part of the normal legislative process. Extensive law and policy guidance will be developed so that all people, public authorities and government understand what respecting, protecting and fulfilling human rights means in law, policy and practice. Together, everyone can play a part in making rights real in Scotland.

Nicole Busby  
October 2021

## USEFUL RESOURCES

Academic Advisory Panel to the National Taskforce on Human Rights Leadership,  
<https://www.gov.scot/publications/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/>

Committee on the Rights of Persons with Disabilities,  
<https://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx>

EHRC, UNCRPD, 2021,  
<https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/un-convention-rights-persons-disabilities>

First Minister's Advisory Group on Human Rights Leadership, Final Report, 10 December 2018,  
<https://humanrightsladership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>

Human Rights Consortium Scotland, resources for civil society around human rights incorporation, available at:  
<https://hrcscotland.org/incorporating-human-rights/incorporation-general/>

Incorporating Human Rights in Scotland, project website, including infographics, easy-read, and other resources,  
<https://www.law.ed.ac.uk/research/research-projects/incorporating-human-rights-in-scotland>

Kasey McCall-Smith, Making Rights Real for Disabled People in Scotland, The Alliance and Inclusion Scotland, 2020,  
<https://www.alliance-scotland.org.uk/blog/news/making-rights-real-for-disabled-people-in-scotland/>

National Taskforce for Human Rights Leadership, Leadership Report, 12 March 2021,  
<https://www.gov.scot/publications/national-taskforce-human-rights-leadership-report/>  
Scottish Human Rights Commission, <https://www.scottishhumanrights.com/our-law-and-policy-work/disabled-peoples-rights/>

This briefing is published as part of a partnership project between the Human Rights Consortium Scotland and the Scottish Universities Legal Network on Europe (SULNE), funded by The Legal Education Foundation

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