

Incorporating the United Nations Convention on the Rights of the Child into Domestic Law in Scotland: Working Group, 2nd Meeting, 10 July 2019

Summary of Workshop Discussions

Introduction

1. At the second meeting of the working group, which took place on 10 July 2019, facilitated workshop style discussions were held around the issues of:

- Legal Mechanisms for Incorporation: reserved and devolved matters;
- The Articles of the Convention, in terms of whether or not these are self-executing; and
- How public authorities fulfil their duties.

This note seeks to summarise the varying views and opinions expressed by individual Members, setting out the points raised under key themes.

Context

2. A number of points of general context were raised by Members as follows:

- Some Members noted that the starting point for their discussions was the First Minister's clear commitment to incorporate the UNCRC into domestic law within the current Parliamentary session.
- It was also acknowledged by some that the Group would need to take account of the legislative competence of the Scottish Parliament, as set out in the Scotland Act 1998.
- Some Members noted that implementing the UNCRC in devolved areas is within the competence of the Scottish Parliament. They acknowledged that aspects of the Convention have already been implemented by a number of statutory instruments, including the Children (Scotland) Act 1995, the Children's Hearings (Scotland) Act 2011 and the Education (Scotland) Act 1980, as amended, etc. It was noted by some that existing legislation often implements the UNCRC to a higher standard.
- Some Members considered that 'good law' should be clear and effective and enable access to justice. They commented that a forthcoming Scottish Bill should provide clear actionable duties for duty bearers and clarity for rights holders if the risk of litigation over a protracted period is to be avoided.
- It was further suggested by some Members that, to minimise the risk of settled law having to be re-litigated, it would be important for the legal mechanisms for incorporation not to disrupt existing 'good law' and jurisprudence.

Legal Mechanisms for Incorporation - Reserved / Devolved Matters

3. Members discussed possible methods for incorporating the Convention into Scots law, with particular consideration given to reserved and devolved matters:

- It was noted by some Members that it would not be open to the Scottish Parliament to incorporate the UNCRC in the same way as the UK Parliament incorporated the European Convention on Human Rights (ECHR) through the Human Rights Act 1998 - as a Scottish Bill would have to be within the legislative competence of the Scottish Parliament.
- Some Members considered that almost all of the Articles of the UNCRC currently apply to a range of both reserved and devolved matters. For example, Article 22, which relates to reserved matters around refugee children, also provides for the care and support of refugee children in Scotland, which is a devolved responsibility.¹ It was, therefore, suggested by some that it might not be helpful to consider the Articles of the Convention in terms of a clear reserved / devolved split.

Direct Incorporation

4. Members considered the direct incorporation of the UNCRC into Scots law. A range of views were expressed in discussion as follows:

- Some Members expressed a view that the individual Articles of the Convention are interdependent, indivisible and of equal status. In view of this, those Members considered that the UNCRC should be incorporated, in its entirety, directly into domestic legislation, with the caveat that it related to only the exercise of devolved functions.
- It was noted that direct incorporation of the Convention had been adopted by countries, such as Sweden and Norway. A Member suggested that those countries already had in place well-established approaches to incorporating aspects of the Convention on an issue by issue basis, prior to their decision to incorporate the Convention *en bloc* into domestic law.
- The draft Bill developed by the advisory group, convened by the Children's Commissioner and Together Scotland, would provide for the direct incorporation of the Convention into Scots law, with the caveat that the provisions should relate only to devolved functions and powers. Some Members suggested that the use of such a caveat within the proposed Scottish Bill would provide for the direct incorporation of the UNCRC within the legislative competence of the Scottish Parliament. It was suggested that this

¹ However, it was acknowledged that, in these circumstances, the ability of Scottish public bodies to provide that care and support might be influenced by the UK Government.

approach to direct incorporation would also ensure that the new Scottish Act could respond automatically to changes in the terms of the devolution settlement.

- It was noted that not all of the rights in the ECHR were incorporated via the Human Rights Act 1998, for example, Article 13 (right to an effective remedy) was excluded.
- Other Members commented that direct incorporation with respect to devolved functions could present difficulties for public authorities required to deliver both reserved and devolved services. They suggested that there could be a significant burden placed on practitioners to distinguish whether they were undertaking functions based on devolved or reserved powers. This is discussed further below.

Transposition of the Convention Rights

5. Transposition of the Convention into domestic law, as described in the consultation document, was also discussed. The following points were raised:

- Some Members argued that transposition could provide legal clarity on how individual Articles of the Convention might be interpreted and applied. A Member also suggested that children and young people should be involved in the development of understanding of individual Articles.
- A Member suggested that there would be a need to develop over time, a body of law in Scotland that was compliant with the UNCRC.
- Other Members suggested that piecemeal transposition was not equivalent to full incorporation. It was noted that Members of the Scottish Youth Parliament (MSYPs) had expressed concerns that transposition of the Convention could establish precedent for the divisibility of the Convention rights.
- Some Members suggested that, as the UNCRC is universal, applying to all children all over the world, it would not be appropriate to develop a Scottish suite of rights, as this would effectively 'nationalise' children's human rights through the creation of a Scottish version of the Convention.

Other Legal Methods of Incorporating the Convention

6. Other legal methods for incorporating the UNCRC were also considered, with the following points raised in discussion:

- It was suggested by some Members that it might be possible to legislate to require all public bodies with devolved functions (including those with some reserved functions) to act in a way that is compatible with the UNCRC with respect to all of their devolved functions. It was suggested that this approach would take account of the legislative competence of the Scottish Parliament, whilst minimising disruption to existing legislation and established case law. [See Dr Kenneth Meechan's separate Discussion Paper.]
- Other Members suggested that this method of incorporation would not provide clarity on the face of a Scottish Bill on the extent of the provisions. Those Members suggested that this approach could, therefore, present difficulties for practitioners in distinguishing whether they were undertaking functions based on devolved or reserved powers. It was also suggested that reserved law may compel a body to act in a way that was incompatible with the UNCRC, as UK legislation could effectively overrule devolved obligations.

Duty to Comply / Have Due Regard

7. Members considered how a possible duty to comply with the Convention and to have due regard might impact on the work of public authorities in Scotland. The following points were raised:

- A Member suggested that a study by the EHRC had shown that, in relation to equalities, the duty to have due regard had not been transformative - but had yielded results in terms of enhancing knowledge about rights and bringing about concrete change particularly in terms of ensuring regard is given to rights in policy development processes.²
- A Member questioned whether it would be necessary to include both a duty to comply and to have due regard in the proposed Scottish Bill. They suggested that a duty to comply would effectively evidence that due regard had been given to the Convention.
- However, other Members suggested that the duties to comply and to have due regard were complementary. They suggested that, in certain circumstances, it might be possible for an authority to simultaneously have due regard whilst not being fully compliant with the Convention.
- A Member suggested that, similar to provisions in the Equality Act 2010, a duty to promote or implement the Convention might be more appropriate than a requirement to have due regard.

² <https://www.liverpool.ac.uk/media/livacuk/law/2-research/ilhru/EHRC,Enhancing,the,Status,of,UN,Treaty,Rights.pdf>. See page 5.

8. Members also considered whether the Scottish Bill should list those bodies to which the provisions would apply.

- Some Members noted that the draft Bill prepared by the Children's Commissioner and Together Scotland had taken an approach similar to that of the Human Rights Act, applying the provisions to all those that carry out public functions, including the third sector and businesses subcontracted to fulfil public functions.
- A Member suggested that public bodies contracting out public functions should retain responsibility for ensuring that services were delivered consistent with a rights respecting approach.

Articles – Self-Executing / Not Self-Executing

9. Members also considered the individual Articles of the Convention in terms of whether or not these were self-executing.

- Some Members suggested that this question could be viewed as possibly irrelevant and misleading, as they considered that the issue was mainly about whether or not it was possible for the courts to enforce the rights. It was suggested that the question of whether a right is “self-executing” would depend on the legal mechanism for incorporating the Convention into domestic law and whether a country has a monist or dualist constitution.³
- Some Members suggested that, as the Articles of the UNCRC are interdependent, indivisible and of equal status, it would not be helpful to consider the Convention in terms of a divide between those rights that are self-executing and those that are not.
- Other Members considered that some of the rights may require further elaboration and guidance, to aid understanding and provide clarity. They further suggested that there would be a need to provide clarification until a sufficient body of case law was developed.
- It was noted that countries that have incorporated the UNCRC into domestic legislation, including Sweden, Belgium and Norway, have each incorporated the Convention in different ways, but that all had taken steps post-incorporation to ensure that the rights were self-executing. Some Members suggested that there continues to be debate around non and self-executing rights in countries that have directly incorporated the Convention.

³ Monism: where both national legal rule and international rules that a state has accepted determine whether actions are legal or illegal. Dualism: emphasises the difference between national and international law, and requires translation of international law into domestic law. Without this translation, international law does not exist as law.

How Public Authorities fulfil their duties

10. Members discussed how public authorities would be supported to fulfil their duties following incorporation, linking with the previous discussion on the legal mechanism for incorporation. The following points were raised in discussion.

- It was noted by some Members that, at an operational level, public authorities would need to know what the rights were and how to apply them. This would be particularly important for those developing staff training. It was suggested by a Member that it would be more important for frontline staff to be aware of how children's rights can be promoted and supported in their everyday practice, than for them to have detailed knowledge of relevant international treaties and domestic legislation, including on reserved and devolved matters.
- A Member suggested that it might be simpler and easier for a public authority to apply the UNCRC universally across all areas of its activity, with the exception of reserved matters.
- It was suggested by some that the terms of the UNCRC do not lend themselves easily to the development of clear, actionable duties. Detailed guidance (possibly statutory) and training would, therefore, be required to provide further clarity for duty bearers on their responsibilities.
- Some Members suggested that statutory guidance might be too rigid to effectively provide for the practice of different service providers. It was proposed that specific bodies should, therefore, also develop their own guidance or codes of practice through their professional associations. It was further suggested that this might increase the ownership of, and compliance with, the guidance.
- Other Members proposed that the development of a Scottish Children's Rights Scheme, that was reviewed every 3 years, could provide an opportunity to update statutory guidance on new practice and understanding.
- It was noted that Sweden was about to publish statutory guidance, and separate guidance for the judiciary.
- Some Members proposed that incorporation could have a significant impact on the delivery of the full spectrum of public services, from education to roads. It was suggested that, whilst services, such as social work and education, would be well-versed in considering children's rights, other services may be less so. However, in the longer-term, it was noted that incorporation could result in better joined-up working in the delivery of a framework of rights-based services.

- Some Members commented that it had been anticipated that the introduction of the Human Rights Act 1998 would present significant challenges across the full range of local service delivery. However, they suggested that this had not been the case as, in general, local authorities had already been delivering their functions broadly consistent with human rights prior to commencement.
- Some Members also questioned how the implementation of provisions in the Scottish Bill might be supported across public service delivery, in terms of staffing and resources. It was suggested that the UN Committee on the Rights of the Child's General Comments [No.5](#) and [No.19](#) could be helpful in this respect.

Rights Awareness and Training

11. Members also discussed the need to promote awareness and understanding of children's rights amongst duty bearers. Some Members also raised the need to make children and young people more aware of the Convention, including how they might challenge perceived breaches of their rights. Members also discussed the following resources:

- The Scottish Government's 3 year programme to raise awareness of children's rights across all sectors of society, being developed through co-production.⁴
- The Council of Europe's Human Rights Education for Legal Professionals programme to provide training for legal professionals as well as training for judiciary and prosecutors.⁵
- The UN World Programme for Human Rights Education for public bodies, social workers, teachers, police, C&YP, media, journalists etc.⁶
- The Scottish Government's [Common Core of Skills, Knowledge & Understanding and Values for the 'Children's Workforce' in Scotland](#) (2012).

It was noted that there will be other resources that would also be relevant.

Litigation

12. Some Members suggested that incorporation could result in increased, and possibly more complex, litigation. It was suggested by some that there had been a marginal increase, rather than a large increase in the number of cases relating to the UNCRC taken to court following incorporation of the Convention in Norway. The following points were also raised in discussion:

⁴ [Progressing the Human Rights of Children in Scotland: An Action Plan 2018-2021](#)

⁵ <http://help.elearning.ext.coe.int/>

⁶ <https://www.ohchr.org/EN/Issues/Education/Training/Pages/Programme.aspx>

- Some Members suggested that the UNCRC does not provide a raft of absolute rights, but instead promotes a balanced approach across its Articles. In view of this, the Scottish Bill could provide for the consideration of a 'reasonable approach', requiring public bodies to take 'reasonable' steps to comply with the Convention. It was suggested by some that the Scottish Bill could also make clear that all other possible remedies should be exhausted before a case might be brought to court.
- Some Members considered that the risk of litigation could be reduced by the development of clear guidance to support the understanding of the new provisions amongst both duty bearers and rights holders. It was also suggested by some that the management of public expectations around the possible meaning of individual Articles in practice, would also be important in this context.

Other Issues Raised

13. Members also discussed the age at which the Articles in the UNCRC might apply:

- Article 1 of the UNCRC defines a child as being anyone aged under 18 years, unless the legal 'age of majority' is attained earlier. A Member noted that different pieces of Scottish legislation set out different ages in relation to particular rights. It was suggested that from the age of 16, parental responsibilities begin to be replaced with parental guidance. It was also noted that 16 and 17 year olds have a range of additional rights under Scots law.
- Members discussed how this established feature of the law of Scotland might interact with UNCRC incorporation. Some Members suggested that the proposed Scottish Bill could stipulate that all rights of the UNCRC should be enjoyed by all children and young people up to the age of 18 years. However, it was again noted that the effective 'age of majority' in practical terms, changes with different sectors. It was suggested that enhanced rights available to 16 and 17 years old were also compliant with UNCRC rights. Article 41 of the Convention was also raised within this context – this provides that nothing in the UNCRC shall affect any provisions in international or national law which are more conducive to the realization of the rights of the child.

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