

Incorporating the United Nations Convention on the Rights of the Child into Domestic Law in Scotland Working Group

Summary Report



Incorporating the United Nations Convention on the Rights of the Child into Domestic Law in Scotland Working Group – Summary Report

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Incorporating the United Nations Convention on the Rights of the Child into Domestic Law in Scotland Working Group

i. Summary of Majority Views of Members of the Group

This section summarises the majority views expressed by Group members under each of the 3 themes within the Scottish Government's [consultation document](#) on incorporating the United Nations Convention on the Rights of the Child into Scots law. Some Group members also identified matters for further consideration under each of the Themes, which are described in the summary report below and attached Annexes.

Majority Views

Theme 1 – Legal Mechanisms for Incorporating the UNCRC into Domestic Law

- There should be a standalone Scottish Government Bill (the Scottish Bill) which should incorporate as much of the UNCRC as is possible within the legislative competence of the Scottish Parliament.
- The Scottish Bill should incorporate the UNCRC fully and directly into domestic legislation, with the caveat that provisions would relate only to the exercise of devolved functions.
- Accessible guidance and training should be provided for duty bearers to support preparation and planning for UNCRC incorporation.
- Any new legislation should be accompanied by an awareness-raising programme so that children are aware of the UNCRC and other rights protections; how to act to promote rights; and how they might challenge perceived breaches of their rights.

Theme 2 – Embedding Children's Rights in Public Services

- The development of a Scottish Children's Rights Scheme could complement the existing children's rights framework in Scotland and support the implementation of the proposed Scottish Bill to incorporate the UNCRC into Scots law.
- The use of Child Rights and Wellbeing Impact Assessments (CRWIAs) should be continued within any future Scottish Children's Rights Scheme.
- There should be a statutory requirement for CRWIAs to be undertaken on all new Scottish Government policies and legislation.

- A clear timeframe should be provided to duty bearers to allow public authorities adequate time to ensure that services and policies are compliant with the UNCRC prior to commencement of provisions in the Scottish Bill.

Theme 3 – Enabling Compatibility and Redress

- The Scottish Bill should include a scheme which provides for an effective remedy for any infringement of individual rights.
- Children and young people should be effectively supported throughout the process of legal redress. This could include access to advocacy and mediation.

Incorporating the United Nations Convention on the Rights of the Child into Domestic Law in Scotland Working Group – Summary Report

ii. Introduction

1. This paper is the summary report of discussions of the Incorporating the United Nations Convention on the Rights of the Child (UNCRC) into Domestic Law in Scotland Working Group (the Group).

2. In April 2019, the First Minister made a commitment for the Scottish Government to bring forward a Bill to incorporate the UNCRC into Scots law within the current parliamentary session. Following from this, a Working Group was convened with an advisory remit to inform the development of a model for incorporation relevant to the Scottish context and a Scottish Government Bill (the Scottish Bill), which would be introduced in this parliament. The Terms of Reference of the Group can be found at **Annex A**.

3. The Group met eight times from 25 June 2019 to 24 February 2020, with a broad membership drawn from representatives of third sector partners, public bodies, family groups, academics and legal practitioners, acting in a personal capacity. The minutes and summaries of the workshop discussions from the meetings of the Group are available on the Scottish Government website.¹ The full membership of the Group is included at **Annex B**. Where members were unable to attend meetings, they were invited to submit written comments to the secretariat.

4. The Group considered the policy, practice and legislative implications of UNCRC incorporation, using the Scottish Government's consultation document on 'Incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland' as the framework for discussions.²

5. The meetings focused on specific themes in line with the consultation document:

- Theme 1: Legal Mechanisms for Incorporating the UNCRC into Domestic Law;
- Theme 2: Embedding Children's Rights in Public Services; and
- Theme 3: Enabling Compatibility and Redress

Next Steps

6. The Group did not reach a consensus view on all matters relating to the above themes. This report sets out issues where there was a majority view amongst Group members. It also identifies matters on which the Group considered Ministers should give further consideration. The report will be shared with Scottish Ministers and will inform the development of a Scottish Bill to incorporate the UNCRC into domestic legislation.

¹ <https://www.gov.scot/groups/childrens-rights-working-group/>

² <https://www.gov.scot/publications/childrens-rights-consultation-incorporating-uncrc-rights-child-domestic-law-scotland/>

Theme 1 – Legal Mechanisms for Incorporating the UNCRC into Domestic Law

7. The Group considered a range of issues regarding potential legal mechanisms for the incorporation of the UNCRC within the constitutional context of the devolution settlement in Scotland. It was acknowledged that aspects of the UNCRC have already been incorporated into domestic law by a number of statutes. A minute of the Group’s discussion of this issue can be found in **Annex H**. It was recognised by a majority of the Group that, within the timescales available, it was not possible to grapple fully with all of the technical issues raised by different options in terms of the legal mechanisms for incorporation.

Majority View:

- **A majority of members of the Group were of the view that there should be a standalone Scottish Bill which should incorporate as much of the UNCRC as is possible within the legislative competence of the Scottish Parliament.**

8. 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.

9. A paper, which addressed some of the legal issues around incorporation of the UNCRC, was presented by two members of the Group. The paper sought to propose a way forward in terms of a model of incorporation which embodied international best practice, whilst being tailored to the Scottish constitutional framework. The paper can be found in **Annex C**.

10. The Group considered the methods of incorporation which were set out within the Scottish Government’s consultation document. These are discussed below. A minute of the Group’s discussions of this issue can be found in **Annex H**.

Direct Incorporation

11. Under this model, the UNCRC would be enshrined into domestic law at either a legislative or constitutional level. As part of their deliberations, some members of the Group noted that the draft Bill developed by the Advisory Group convened by the Commissioner for Children and Young People Scotland and Together (Scottish Alliance for Children’s Rights) would provide for the full and direct incorporation of the UNCRC, with the caveat that the provisions would relate only to devolved functions and powers.³ It was suggested by some members that the use of such a caveat within the proposed Scottish Bill could allow for full and direct incorporation within the legislative competence of the Scottish Parliament.

³ <https://www.cypcs.org.uk/ufiles/Children's-Rights-Scotland-Bill.pdf>

12. In further discussing the possible benefits of full and direct incorporation of the UNCRC into Scots law, a member noted that Article 41 provides that nothing in the UNCRC shall affect any provisions in international or national law which are more conducive to the realisation of the rights of the child. Some members also suggested that full and direct incorporation would:

- be simpler and easier for a public authority to apply universally across all areas of its activity, with the exception of reserved matters;
- have a significant impact on the delivery of the full spectrum of public services and, in the longer term, could result in better joined-up working in the delivery of a framework of rights-based services; and
- help to maintain the universality of the UNCRC. They argued that piecemeal transposition (see paragraph 14) was not equivalent to full incorporation and could establish precedent for the divisibility of UNCRC rights.

These points are discussed in more detail in **Annex H**.

Majority View:

- **The majority of members considered that the proposed Scottish Bill should incorporate the UNCRC fully and directly into domestic legislation, with the caveat that provisions would relate only to the exercise of devolved functions.**

13. A minority of the Group expressed the view that Scots law is already largely compliant with the UNCRC and, in a number of respects, the protection which Scots law affords to children goes beyond what is required. These members were of the view that the practical benefits, rather than the symbolic benefits, of full and direct incorporation have to be weighed against the potential disadvantages. In that context, they expressed concern that a model involving the full and direct incorporation of the UNCRC could, in addition, present difficulties in relation to the legislative competence of the Scottish Parliament. They suggested that there are potentially significant disadvantages to such an approach which include, but are not necessarily limited to:

- the difficulty of achieving full and direct incorporation in a way which is within the legislative competence of the Scottish Parliament;
- adding to the complexity of child law in Scotland by placing the UNCRC alongside, or on top of, a substantial body of existing domestic law;
- raising expectations that full and direct incorporation would, of itself, improve the position of children in Scotland;
- creating additional demands on resources for what may turn out to be, at best, marginal benefit.

These views were not supported by the majority of members of the Group for the reasons set out in paragraph 12 above.

Other Legal Methods for Incorporating the UNCRC into Scots Law

Transposition of UNCRC Rights

14. A minority of members favoured a transposition model, in terms of which a suite of Scottish children's rights could be developed and the Scottish Bill could apply a framework of duties and requirements to those rights. These members suggested that such a model could provide greater legal clarity on how the individual Articles of the UNCRC might be interpreted and applied to Scots law than that provided by direct incorporation. This view was disputed by the majority of members of the Group, in line with the arguments in favour of full and direct incorporation set out in paragraphs 11 and 12 above.

15. A potential solution to the devolved/reserved issues raised by incorporation was proposed in a discussion paper presented by a Group member. The paper, which can be found in **Annex D**, suggested the possibility of legislating to require listed public bodies to act in a way that is compatible with the UNCRC with respect to all of their functions. If such an approach proved feasible, it was suggested that it would take account of the legislative competence of the Scottish Parliament whilst minimising disruption to existing legislation and established case law. It was also suggested that, under this model, it would be easier for duty holders to understand and implement their duties and make it easier to explain to rights holder what their rights were. An optional additional meeting was held to discuss the paper. The minutes of this meeting are attached at **Annex E**.

16. Some members considered that the discussion paper did not provide a solution to address the issue of legislative competence of the Scottish Bill. For example, there was discussion about the impact of Part III of Schedule 5 of the Scotland Act 1998, which includes provisions relating to public bodies with both reserved and devolved functions.⁴

Duty to Comply/ Duty to have Due Regard

17. The Group also considered how a possible duty to comply with the UNCRC and to have 'due regard' might impact on the work of public authorities in Scotland. A minute of the Group's discussion of this issue can be found in **Annex H**.

For Consideration:

18. Some members of the Group proposed that the Scottish Government should consider:

- the inclusion of a proactive duty (such as a duty to give due regard) within the incorporation framework of the Scottish Bill alongside a duty to comply; and
- whether the Scottish Bill should list those bodies to which the provisions will apply or rather take 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.

⁴ <http://www.legislation.gov.uk/ukpga/1998/46/schedule/5/part/III>.

Articles of the UNCRC – Executing / Self-Executing

19. The Group considered whether some of the UNCRC rights may require further elaboration and guidance, to aid understanding and provide clarity. As part of these discussions, the Group considered in general terms whether or not the Articles of the UNCRC are self-executing, i.e. can be enforced directly by the courts without the need for legislative implementation prior to judicial enforcement. Some members suggested that this question could be viewed as possibly misleading, as they considered that the issue was mainly about whether a right could be directly applied in the courts, rather than being a right that requires legislative implementation before it may be applied by the courts. A minute of the Group’s discussion of this issue can be found in **Annex H**.

Supporting Public Authorities to Fulfil Their Duties

20. The Group also discussed how best to support public authorities to fulfil their duties following incorporation. In particular, 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. A minute of the Group’s discussion on this issue can be found in **Annex H**.

Majority View:

- **The majority of members of the Group considered that accessible guidance and training should be provided for duty bearers to support preparation and planning for UNCRC incorporation.**

For Consideration:

21. Some members of the Group proposed that consideration should be given to:

- how provisions in the Scottish Bill might be supported across public sector delivery, in terms of staffing and resources.
- whether specific bodies should develop their own guidance or codes of practice through their professional associations in addition to the development of statutory guidance.

Rights Awareness and Training

22. The Group also considered the need to promote awareness and understanding of children’s rights amongst children and young people. Members noted that a number of resources currently exist, or are being developed, either in Scotland or internationally, to raise awareness of rights, including, but not exclusively:

- The Scottish Government’s three-year programme to raise awareness of children’s rights across all sectors of society being developed through the “Progressing the Human Rights of Children in Scotland: An Action Plan 2018 – 2021”.⁵

⁵ <https://www.gov.scot/publications/progressing-human-rights-children-scotland-action-plan-2018-2021/>

- The Scottish Government’s “Common Core of Skills, Knowledge & Understanding and Values for the ‘Children’s Workforce’ in Scotland 2012”.⁶
- The Council of Europe’s Human Rights Education for Legal Professionals (HELP) programme to provide training for legal professionals as well as training for the judiciary and prosecutors.⁷
- The UN World Programme for Human Rights Education for public bodies, social workers, teachers, police, children and young people, media, journalists etc.⁸

Point of Consensus:

- **Members of the Group agreed that international experience shows that incorporation of the UNCRC in isolation is insufficient to create a culture change around children’s rights. Any new legislation needs to be accompanied by an awareness-raising programme so that children are aware of the UNCRC and other rights protections; how to act to promote rights; and how they might challenge perceived breaches of their rights.**

Litigation

23. The Group discussed the issue of post-incorporation litigation and access to justice, including the role that litigation could play in ensuring children’s UNCRC rights are upheld. Some members suggested that litigation should only be used as a last resort when all other possible remedies have been exhausted. A minute of the Group’s discussion of these issues can be found in **Annex H**. Mediation and child friendly complaints mechanisms, as alternatives to litigation, are also discussed at paragraph 30 below.

24. 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.

For Consideration:

25. Some members of the Group proposed that consideration should be given to whether the need for children and their representatives to resort to litigation could be reduced by the development of clear guidance to support understanding of the new provisions amongst both duty bearers and rights holders. An explanation of the specific protections provided by individual UNCRC Articles in practice could also help to manage public expectations.

⁶ <https://www.gov.scot/publications/common-core-skills-knowledge-understanding-values-childrens-workforce-scotland/>

⁷ <http://help.elearning.ext.coe.int/>

⁸ <https://www.ohchr.org/EN/Issues/Education/Training/Pages/Programme.aspx>

Age of Majority

26. The Group noted that Article 1 of the UNCRC defines a child as being anyone aged under 18 years, unless the legal 'age of majority' is attained earlier. Some members identified that Scots law sets out a number of different 'ages of majority' within different contexts. A minute of the Group's discussion of this issue can be found in **Annex H**.

For Consideration:

27. Some members of the Group proposed that consideration should be given to how the different 'ages of majority' currently within Scots law might interact with UNCRC incorporation. This was identified as a particular issue for certain front line serves, such as policing.

Theme 2 - Embedding Children's Rights in Public Services

28. The consultation document suggests that, in order to achieve the greatest impact, incorporation of the UNCRC into Scots law should ensure that children's rights are woven into policy, law and decision making. Children should be empowered to know and understand their rights, how to employ them and, if necessary, advance them in court. In considering Theme 2 of the consultation, the Group discussed measures that would oblige public authorities to mainstream children's rights in their practice.

Children's Rights Scheme

29. The Group considered provisions in the Rights of Children and Young Persons (Wales) Measure 2011⁹, which require Welsh Ministers to establish a Children's Scheme, setting out the practical arrangements for ensuring compliance with the Welsh duty to have due regard to the UNCRC. A minute of the Group's discussion can be found at **Annex J**.

Majority View:

- **The majority of members of the Group considered that the development of a Scottish Children's Rights Scheme could complement the existing children's rights framework in Scotland and support the implementation of the proposed Scottish Bill to incorporate the UNCRC into Scots law.**

For Consideration:

30. Members of the Group suggested that consideration should be given to the development of a Scottish Children's Rights Scheme including the following elements:

- Measures to promote practical awareness and understanding of children's rights among rights holders and duty bearers.
- The Child Rights and Wellbeing Impact Assessment (discussed further at paragraph 32).
- Measures to support public authorities and Scottish Ministers in considering the rights of children in budget planning and decision making.
- Procedures for ensuring that children and young people have access to a local complaints process with clear and accessible guidance.
- A system for mediation and early resolution to expedite the complaints process.
- Advocacy support for children and young people.
- A requirement for Ministers and public authorities to report on the steps they have taken, and intend to take, to promote an atmosphere of love, happiness and understanding, in line with the preamble to the UNCRC and the Outcome for Children in the National Performance Framework.¹⁰

⁹ <http://www.legislation.gov.uk/mwa/2011/2/contents>.

¹⁰ The preamble to the UNCRC states "Recognising that the child for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding". The National Performance Framework can be accessed at: <https://nationalperformance.gov.scot/national-outcomes>.

- A participative 3 years review cycle to provide an opportunity to update statutory guidance on new practices and understanding.

31. Some members of the Group also proposed that consideration should be given to:

- a requirement for child rights education to be provided in all educational establishments;
- how to provide parents and carers with appropriate information on children's rights throughout the course of their child's life and of how this is protective of family life; and
- how rights are embedded widely across the regulatory frameworks for public authorities.

The Child Rights and Wellbeing Impact Assessments (CRWIAs)

32. The Group considered whether the current non-statutory requirement for the Scottish Government to carry out a CRWIA on all new Scottish Government policies and legislation should be replaced with a statutory duty. A minute of the Group's discussion can be found in **Annex J**.

Majority View:

- **The majority of members of the Group considered that the use of Child Rights and Wellbeing Impact Assessments (CRWIAs) should be continued within any future Scottish Children's Rights Scheme; and**
- **There should be a statutory requirement for CRWIAs to be undertaken on all new Scottish Government policies and legislation.**

For Consideration:

33. Some members of the Group suggested that consideration should be given to extending any possible statutory duty to undertake CRWIAs to include public bodies.

Preparation Time for Public Services

34. The Group considered how the Scottish Bill should be implemented so as to allow public authorities adequate time to prepare. This would be necessary whichever approach was taken to incorporation. A minute of the Group's discussion can be found in **Annex J**.

Majority View:

- **The majority of members of the Group considered that a clear timeframe should be provided to duty bearers to allow public authorities adequate time to ensure that services and policies are compliant with the UNCRC prior to commencement of provisions in the Scottish Bill.**

For Consideration:

35. Some members of the Group proposed that consideration should be given to:

- the potential costs of new duties on public bodies.

- how the Scottish Bill would align with other statutory obligations on public bodies.
- arrangements for consulting children and young people in the planning process for implementation of the Bill.

Theme 3: Enabling Compatibility and Redress

36. The consultation document suggests that the goal of incorporation is not just to set out clearly what children's rights are but to create mechanisms which seek to ensure that those rights will be complied with and can be enforced. A scheme of remedies should provide for the ability to challenge actions by public authorities, including the Scottish Government, where children (or those acting on behalf of children) believe that their rights have been infringed by that public body.

Challenging Public Bodies and Seeking Financial Compensation

37. The Group discussed the issues raised in Theme 3 of the consultation document. A minute of these discussions can be found in **Annex L**.

Majority View :

- **The majority of members of the Group considered that the Scottish Bill should include a scheme which provides for an effective remedy for any infringement of individual rights.**

For Consideration:

38. Some members of the Group proposed that consideration should be given to:

- the creation of child-friendly complaints mechanisms which can operate alongside more formal methods of redress. This should include the consideration of mechanisms that enable children to have a remedy as quickly as possible if it is determined that a UNCRC right has been breached.
- measures around redress providing for accountability at all levels of public authorities, including the Scottish Ministers.
- how the method for incorporating the UNCRC into Scots law might provide for both the payment of financial compensation and measures to address wider systemic failures and prevent future violations of rights.
- a requirement for public authorities to undertake an audit on their compliance with the UNCRC. Alternatively, to ensure consistency of approach, such an audit could be undertaken at a national level looking across relevant public services.

Access to Remedies

39. The Group considered how best to ensure that accessing remedies in the case of a breach of rights was clear and accessible for children and young people. A minute of the Group's discussions can be found in **Annex L**.

Majority View:

- **The majority of members of the Group considered that children and young people should be effectively supported throughout the process of legal redress. This could include access to advocacy and mediation.**

Order of Precedence where Secondary Legislation is in Conflict with UNCRC Rights

40. The Group also considered how to address those instances where the UNCRC rights might be in conflict with existing secondary legislation. A minute of the Group's discussion can be found in **Annex L**.

For Consideration

41. Some members of the Group proposed that consideration should be given to the possible need to re-evaluate secondary legislation and to conduct an audit of where secondary legislation may be in conflict with the UNCRC.

Acts of the Scottish Parliament – Statements of Compatibility Challenging Acts of the Scottish Parliament and Interpretation of Acts

42. The Group considered mechanisms for challenging Acts of the Scottish Parliament and a potential requirement for a statement of compatibility with children's rights to accompany legislation on introduction to the Scottish Parliament. The Group also considered whether the Scottish Bill should contain provisions requiring an Act of the Scottish Parliament to be interpreted and applied, as far as possible, in a manner which is compatible with the UNCRC. A minute of the Group's discussion can be found in **Annex L**.

For Consideration:

43. Group members proposed that the Scottish Government should consider whether:

- a Statement of Compatibility should be laid alongside a CRWIA on the introduction of a Bill.
- whether courts should have the opportunity to "strike down" legislation which does not comply with the UNCRC.

Standing to Take Proceedings

44. The Group considered whether any special test for standing to bring a case under the Scottish Bill would be required. A minute of the Group's discussion can be found in **Annex L**.

For Consideration:

45. Some members of the Group proposed that consideration should be given to the inclusion within the Scottish Bill of a provision allowing the Children's Commissioner to bring forward cases on behalf of children and young people, as well as arrangements for standing by groups of people.

Incorporating the United Nations Convention on the Rights of the Child into Domestic Law in Scotland Working Group: Terms of Reference

Remit

1. It is proposed that a working group is convened to inform the development of a model that incorporates the United Nations Convention on the Rights of the Child (UNCRC) into domestic law in Scotland. The membership of the group is set out in **Annex B**.
2. The primary function of the working group will be to discuss options with regard to the models for the incorporation of the UNCRC into Scots law, using the consultation document as a key framework for its work. The output from these discussions, as defined at paragraph 7 below, will inform policy decisions for a draft Bill to incorporate the UNCRC into domestic law within the current session of Parliament. The working group will also consider the findings of the consultation and how the legislation might support wider cultural change and understanding of children's rights.
3. The working group will bring together cross-sector representation and will include representatives of third sector partners, public bodies, family groups and civic Scotland. It will also include academics and legal practitioners acting in a personal capacity. It will be tasked with considering the policy, practice, and legislative implications of incorporation.
4. Each meeting will focus on a specific theme as per the consultation, and respond to views expressed in the consultation:
 - Theme 1 (part 1): Legal mechanisms for incorporating the UNCRC into domestic law;
 - Theme 1 (part 2): Legal mechanisms for incorporating the UNCRC into domestic law;
 - Theme 2: Embedding children's rights in public services;
 - Theme 3: Enabling compatibility and redress; and
 - Consider the analysis of the consultation responses and its implications for the policy specification.

Timeline

5. In order to inform policy decisions for a draft Bill using the themes above, the working group will be convened on the following dates:

Date	Time	Location
Consultation launches 22 May		
25 June 2019	14:00 – 16:00	VQ - Edinburgh
10 July 2019	09:30 – 12:30	VQ - Edinburgh
31 July 2019	10:00 – 12:00	SAH - Edinburgh
27 August 2019	14:00 – 16:30	VQ - Edinburgh

Consultation closes on 28 August		
9 September 2019	10:00 – 12:00	COSLA - Edinburgh
25 September 2019	10:00 – 12:00	COSLA - Edinburgh
Consultation responses published - September		
21 October 2019	13:00 – 16:00	COSLA - Edinburgh
24 February 2020	14:00 – 16:00	VQ - Edinburgh

Indicative Agendas

6. To structure the meetings and drive an output focus, the working group will be invited to consider these indicative items on the following dates:

Date	Agenda
25 June 2019	Introduction to the Working Group and initial discussion of consultation themes
10 July 2019	Legal mechanisms for incorporating the UNCRC into domestic law
31 July 2019	Embedding children's rights in public services
27 August 2019	Enabling compatibility and redress
9 September 2019	The way forward with Themes 2 and 3 of the consultation
25 September 2019	Consider analysis of consultation responses
21 October 2019	Observations post consultation; draft Working Group Report.
24 February 2020	Consideration of final Working Group report.

Output

7. The output will be a report of the Group's discussions (as outlined in summary minutes) organised in terms of themes/questions set out in the consultation document. This report will be shared with Ministers, alongside the outcomes of the formal consultation and separate engagement with other relevant stakeholders, including children and young people.

Governance

8. The working group will be co-chaired by Michael Chalmers, Director, Children and Families and Mairi Macpherson, Deputy Director Creating Positive Futures. The secretariat will be provided by the Scottish Government. The secretariat will:

- circulate an agenda and other relevant papers one week in advance of each meeting; and
- minutes and actions will be taken for each meeting and circulated approximately one week after each meeting.

9. The Terms of Reference, membership of the group and minutes of meetings will be published on the Scottish Government's website.

ANNEX B**Incorporating the United Nations Convention on the Rights of the Child into Domestic Law in Scotland Working Group**

Member	Organisation	Perspective
Michael Chalmers	Scottish Government	Director, Children & Families, Chair
Mairi Macpherson	Scottish Government	Deputy Director, Creating Positive Futures, Chair
Dr Katie Boyle	Associate Professor in International Human Rights Law, University of Stirling	Individual, academic
Lynda Brabender QC	Westwater Advocates	Individual, legal
Michael Clancy OBE	Director, Law Reform, The Law Society of Scotland	Representative, legal
Nicola Dickie	Chief Officer, Children and Young People, COSLA	Representative, local government
David Duncan	Chief Superintendent, Head of Safer Communities, Police Scotland	Representative, policing
Juliet Harris	Director, Together (Scottish Alliance for Children's Rights)	Representative, 3rd sector
Dr Kenneth Meechan	Chair of FOI, Data Protection & Human Rights, Society of Local Authority Lawyers and Administrators in Scotland (SOLAR)	Representative, legal / local government
Dragan Nastic	Senior Policy and Advocacy Advisor, UNICEF	Representative, UNICEF
Prof Aoife Nolan	Professor of International Human Rights Law, University of Nottingham	Individual, academic
Laura Pasternak	Policy and Public Affairs Manager, Scottish Youth Parliament	Representative, children and young people
Lucinda Rivers	Head of UNICEF UK in Scotland	Representative, UNICEF
Douglas Ross QC	Ampersand Advocates	Individual, legal
Hannah Ross	Policy Assistant, COSLA	Representative, local government
Norma Shippin	Director, Central Legal Office and Legal Adviser, NHS	Representative, health
Clare Simpson	Manager, Parenting Across Scotland	Representative, third sector, children and families
Suki Wan	Scottish Youth Parliament	Representative, young person

Incorporation of UNCRC
Draft Working Paper
23 September 2019

Dr Katie Boyle
Associate Professor International Human Rights Law
University of Stirling
 &
Professor Aoife Nolan
Professor of International Human Rights Law
University of Nottingham

Introduction

1. This paper seeks to address some of the legal issues around incorporation of UNCRC, it does so with a view to identifying potential concerns/barriers and proposing ways forward for creating a model of incorporation that embodies best practice internationally and comparatively whilst contextualising the approach within the unique devolved constitutional framework of Scotland. The paper is set out in a question/ answer format for ease of reference.

Question 1: Can Scotland incorporate the UNCRC into domestic law?

2. As with devolution in Northern Ireland and Wales, the Scottish constitutional framework is restricted in terms of legal competence along a reserved v devolved division of power. The Scottish Parliament cannot legislate in relation to matters reserved to Westminster¹¹ and cannot modify protected Acts listed under Schedule 4 of the Scotland Act 1998, including the Human Rights Act and the Scotland Act 1998. Reserved matters remain the sole authority of Westminster legislation and devolved matters primarily fall within the remit of the devolved legislature and executive (Westminster retains power to legislate in devolved matters but by convention does not do so without seeking permission).¹² The Scotland Act 1998 also requires compliance with the ECHR and EU law granting rights derived from these systems constitutional status within the devolved settlement. Section 101 of the Scotland Act compels the reading of Acts of the Scottish Parliament to be read as narrowly as is required to be within devolved competence and any act by the Scottish Ministers is deemed *ultra vires* if it is in breach of ECHR or EU law (section 57) or encroaches on a reserved matter (section 54). Similar provisions constitute the devolved settlements in Northern Ireland¹³ and Wales.¹⁴

¹¹ Section 29 and Schedule 5 Scotland Act 1998

¹² See Sewell Convention, Scotland Act 2016 s 2

¹³ See Northern Ireland Act 1998, s.6(1)(c) (legislative competence); s.24(1)(c) (Ministerial competence); s.83 (interpretation of Acts of the Assembly)

¹⁴ See Government of Wales Act s.81(1) (Ministerial competence); s.94(6)(c) (legislative competence); s.154 (interpretation of Acts of the Assembly)

3. “Observing and implementing international obligations” falls within the devolved competence of the Scottish Parliament.¹⁵ The Scottish Parliament can introduce legislation that implements international obligations, including incorporating international human rights standards into the devolved framework of governance.
4. As Lord Brodie has observed,

‘Section 29(2)(b) [of the Scotland Act 1998] provides that a provision is outside the competence of the Scottish Parliament so far as it relates to the matters which are reserved to the United Kingdom Parliament. Schedule 5, which is given effect by section 30, defines reserved matters. Paragraph 7 has the result of including among reserved matters, "international relations", but excludes from "international relations", observing and implementing international obligations. The Scottish Parliament therefore has the power to legislate with the object of observing and implementing international obligations.’¹⁶
5. The Scottish courts when faced with implementing international obligations through the common law do not consider ratified treaties binding unless the legislature has already incorporated the treaty into domestic legislation.¹⁷ While the courts may have regard to international treaties and reports of international organisations as an interpretative source of law they are not deemed to form part of the domestic legal system and are not binding on the court unless otherwise instructed by the legislature.¹⁸
6. Scotland can incorporate international treaties into domestic law as means of implementing and observing international obligations within the confines of devolution. Incorporation through legislation is required before a court is bound to directly enforce the rights contained therein. In order to meet the threshold of “incorporation”, the rights in the UNCRC would need to be legally binding and enforceable in court. Scotland therefore needs to find a model of incorporation that both respects the devolved v reserved division of power whilst also giving effect to the UNCRC in so far as it is possible to do so within the sphere of devolved competence. Advice from a breadth of constitutional experts on this particular point is key in order to ensure any model devised is within the competence of the Scottish Parliament – i.e. the question is not whether, but how to incorporate.

¹⁵ Schedule 5 para.7(1)-(2) Scotland Act 1998 implementation of international obligations is an exception to the reservation of ‘Foreign Affairs’ to Westminster.

¹⁶ Lord Brodie in *Whaley & Anor v. Lord Advocate* [2003] ScotCS 178 (20 June 2003) para.44

¹⁷ Lord Hodge, *Moohan & Anor v The Lord Advocate* [2014] UKSC 67 (17 December 2014), para.30

¹⁸ International treaties do not form part of the law of Scotland unless they are incorporated into domestic law through legislation – this was confirmed by Lord Brodie in *Whaley & Anor v. Lord Advocate* [2003] ScotCS 178 (20 June 2003) para.44.

Question 2: How can Scotland incorporate UNCRC?

7. Incorporation of international human rights law in a dualist state can take many different forms.¹⁹ It can be understood as means of internalising international law either directly, indirectly or on a sector by sector basis.²⁰ Another approach is to identify the gateway, or 'port' through which international law becomes domestically binding.²¹ For example, is the international obligation imported via the constitution, legislation, the common law, or through opening a channel to an international complaints mechanism?²² Constitutional theory tells us that incorporation of rights ought to impose obligations on the different branches of government: legislative, executive and judicial, where each is held to the same standard and compliance with rights forms part of the rule of law.²³ Regardless of the approach taken, the key component that determines the difference between softer mechanisms of 'implementation' and stronger forms of 'incorporation' is that incorporation ought to ensure access to an effective remedy for a violation. Essentially domestic incorporation of international norms, be that direct, implicit or sectoral, should be both derived from and inspired by the international legal framework and should at all times be coupled with an effective remedy for a violation of a right.²⁴ The key requirement to meet the threshold of "incorporation" rather than implementation is that there is a remedy for a breach of an incorporated right. In other words, as has been stipulated by the UN Committee on Rights of the Child, "incorporation should mean that the provisions of the Convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice."²⁵
8. The position in Scotland is slightly more complex than in a non-devolved entity because the international obligations are state party obligations, i.e. the UK's obligations. As discussed above, it is within the power of the Scottish Parliament to implement and observe international obligations.²⁶ In other jurisdictions, state obligations are presumed to be the responsibility of the

¹⁹ Katie Boyle and Edel Hughes, Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights, (2018) International Journal of Human Rights Vol 22. 43-69. See also Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994)

²⁰ Kasey McCall-Smith, Incorporating International Human Rights in a Devolved Context, European Futures, 17 September 2018 <https://www.europeanfutures.ed.ac.uk/incorporating-international-human-rights-in-a-devolved-context/>

²¹ Judith Resnik, 'Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry', (2006) 115 Yale Law Journal 1564

²² Boyle and Hughes Routes to Remedy for Violations of Economic, Social and Cultural Rights. For a discussion of the incorporation of children's economic and social rights under international law into the domestic law of various jurisdictions, see A. Nolan, *Children's Socio-economic Rights, Democracy and the Courts* (Oxford: Hart Publishing, 2011).

²³ Jeff King, *Judging Social Rights* (Cambridge University Press 2011)

²⁴ Katie Boyle, Models of Incorporation and Justiciability of Economic, Social and Cultural Rights, Scottish Human Rights Commission, (2018) at 14. See also UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19. Para.77-80; UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147. See also UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, para.4.

²⁵ UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, para.22.

²⁶ Para.7

devolved region, such as is evident in the cantonal system in Switzerland. Whilst there is no duty on the Scottish Parliament to enact incorporating legislation, it is within the power of the parliament to do so should it wish. Nonetheless, an important point to note here is that it is not within devolved competence to legislate in such a way that UNCRC prevails over national law. For example, the Scottish Parliament cannot place UNCRC on a higher status to UK primary legislation, it can only make provision within the confines of the devolved powers.

Can the Scottish Parliament incorporate through legislation?

Legislative Solution – direct and full incorporation within devolved competence

9. The consultation response deals with a number of different means of incorporation. This paper deals specifically with the proposal to consider ‘direct and full’ incorporation in so far as this is possible to achieve. This model of incorporation is most likely to achieve the aims of both making the rights domestically enforceable whilst respecting the interdependent and indivisible integrity of the treaty rights. In other words – how far can Scotland go to achieve the policy of a ‘gold standard’ of incorporation within devolved competence? The draft [Children's Rights \(Scotland\) Bill 2019](#) is a helpful example of how this might be achieved.
10. There are other examples of direct incorporation of international obligations into domestic law including for example incorporation of the ECHR through the Human Rights Act and the Scotland Act; or incorporation of EU law and the EU Charter of Fundamental Rights under the European Communities Act. The EU Continuity (Scotland) Bill also sought to incorporate the EU Charter of Fundamental Rights into Scots law post-Brexit. The Scottish Government conceded that the relevant provision modified the subsequent EU Withdrawal Act (a protected Act under Schedule 4 of the Scotland Act 1998), however, the court left the door open to the Scottish Parliament’s competence to ‘self-regulate’ on other international obligations. When the Scottish Parliament seeks to abide by international obligations in an Act of the Scottish Parliament it is essentially recreating those obligations as a matter of purely domestic law. This can be understood as creating a form of domestic law that reflects and gives effect to international law. While the enabling provisions are derived from international law their juridical source would be “purely domestic”.²⁷ It is within this space that incorporation can occur.

²⁷ Para.31

11. Incorporation Models can follow different approaches:

UNCRC Incorporation Model	Details	Barriers to adopting this route	Constitutional Safeguards	Outcome
<p>MODEL A*</p> <p>Scottish Parliament legislative framework full incorporation (UNCRC Act for Scotland)</p> <p>* This could be based on a Scotland Act or Human Rights Act structure – see UNCRC incorporation advisory group proposal - Children's Rights (Scotland) Bill 2019</p>	<p>Scottish Parliament imposes 'self-regulatory' legislation, which incorporates UNCRC or imposes domestically drafted form of UNCRC rights that ensures indivisible and interdependency.</p> <p>This model can go further than IHRL where appropriate</p>	<p>This would need to comply with the current reserved v devolved framework and carefully crafted to ensure within devolved competence of Scottish Parliament.</p> <p>For example, an incorporation provision that sets out</p>	<p>Enhanced role of the Scottish Parliament in <i>ex ante</i> review of legislation.</p> <p>Equality and Human Rights Committee to assess compliance with UNCRC rights before passage of subsequent legislation.</p> <p>Court has power to oversee compliance with Act and offer remedies for non-compliance (including interpretative obligation, ultra vires remedy, declaration of incompatibility, compliance duties on parliament</p>	<p>Positive enforcement of UNCRC with various options for constitutional safeguards.</p> <p>Most comprehensive form of UNCRC protection with powers and responsibilities shared between institutions.</p> <p>Does not cover reserved areas – cannot compel public/ private bodies, parliament or executive to act in a way that reserved legislation prohibits.</p>

			and executive, court can potentially strike down unlawful legislation ²⁸).	
MODEL B UK/ Scottish Parliament legislative framework based on Human Rights Act structure	Either UK or Scottish Parliament could adopt a similar structure to Human Rights Act that extends to UNCRC	This would need to comply with the current reserved v devolved framework. It is beyond the competence of the SP to amend the HRA.	This option includes an interpretative clause; a duty on public bodies to comply and courts can issue declaration of incompatibility	This is a less robust constitutional framework in terms of judicial overview. Declarations of incompatibility are not binding on Parliament and do not affect the application of the law. There is a strong element of deference to the legislature.
MODEL C UK Parliament legislative framework based on	UK Parliament could extend scope of section 29 of Scotland Act 1998 to include	Requires political support by majority of UK Parliament – it is not within	This framework is how the ECHR is currently	Positive UNCRC enforcement Human rights affirmative

²⁸ Constitutionally it is not clear whether the Scottish Parliament has the power to impose self-regulation by limiting its own competence, binding the Scottish Parliament in relation to subsequent legislation unless expressly repealed. The answer lies in the interpretation of 'modification'. The Scotland Act prohibits modification of the Scotland Act 1998 (Schedule 4). The Scotland Act sets out the Scottish Parliament's competence (section 29). Changing or adding to the list of areas that are beyond the competence of SP does not necessarily 'modify' s29. For a discussion on this see judgment by the Supreme Court EU Continuity Bill case [2018] UKSC 64 (13 December 2018) para.50-51 'the protected enactment has to be understood as having been in substance amended, superseded, disapplied or repealed by the later one.'

Scotland Act structure	rights enshrined in UNCRC or Scottish Parliament could seek s.30 Order to implement.	devolved competence of the SP to amend the Scotland Act 1998.	protected in Scotland. The judiciary are tasked with the responsibility to review compatibility and can declare unlawful legislation ultra vires.	framework providing UNCRC rights with constitutional status in Scotland. Under this model the judiciary play a role in scrutinising substantive compatibility.
MODEL D UK/Scottish Parliament legislative framework based on duty to have due regard to UNCRC (or other international treaties) – this is not incorporation but a means of implementation/ integration that might help support incorporation	Similar to the Equality Act 2010 public sector equality duty or the duty imposed by the Welsh Assembly to have due regard to the UN Convention on the Rights of the Child	This would need to comply with the current reserved v devolved framework.	This option requires that the judiciary play a supervisory role in ensuring compliance with the duty to have due regard. This is a procedural duty to take into consideration and does not necessarily result in a substantive human rights compliant outcome.	Weaker type of enforcement (does not amount to incorporation) Procedural protection of UNCRC rights May help with initial implementation of UNCRC rights as part of decision making process.
MODEL E UK Parliament signs the UK and Scotland up to the	Optional Protocol to UNCRC on a Communications Procedure.	This would require implementation through Westminster.	The decisions of the committees may not necessarily	Weaker type of enforcement unless decisions of

international complaints mechanism	This would not be dissimilar to the way complaints can currently be raised with the European Court of Human Rights or the Court of Justice of the European Union. There is a supranational adjudication body that can determine compliance with UNCRC within remit of the Protocol.		be made automatically binding giving parliament time to implement change in order to comply with any findings of non-compliance.	committees made binding. Improved scrutiny of UNCRC compliance and access to alternative remedies.
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12. The significant challenge facing the Scottish Parliament will be to ensure that a balance is struck between ensuring any proposed Bill is within the legislative competence of the Scottish Parliament whilst respecting the interdependent and indivisible nature of the treaty. Treaties are designed to be read as a whole, and human rights by their nature are both universal and interdependent – meaning to deconstruct them proves difficult as it may undermine their full meaning and risk undermining their full enjoyment. In other words, the question before the parliament will be how best to deal with incorporating the treaty in its fullest sense whilst avoiding encroaching on reserved matters. The UNCRC Incorporation Advisory Group model reflects **Model A** above. It proposes a single incorporation provision which restricts the application to the Convention to the exercise of devolved functions and devolved law:

“Clause 2. On commencement of this Act the Convention and the Optional Protocols are part of Scots law

a. In relation to the exercise of devolved functions.

b. In relation to devolved law as amended from time to time.”

13. This provision seeks to incorporate the treaty but limit its application to areas of devolved governance. It is in some respects a blunt instrument because the treaty engages with both reserved and devolved areas. However, there are some benefits to this approach, including allowing flexibility for complex cases where both reserved and devolved functions are engaged (see below). This is not the first example of a treaty engaging with both reserved and devolved functions across multiple layers of governance. Until such time as EU

departure is secured or not, the EU Charter of Fundamental Rights, for example, forms part of UK law under the European Communities Act 1972. The enforceability of the Charter will only “bite” when the relevant right is invoked within the scope of EU law.²⁹ The EU Charter also applies to across both reserved and devolved areas. The application of the treaty and compliance with it requires a degree of navigation across these multiple jurisdictional spaces. Nonetheless, the Charter remains a standalone text and Member States cannot seek to deconstruct the Charter at the domestic level – it comes as a package. When the UK sought to opt out of some of the Charter provisions³⁰ the Court of Justice of the European Union made it clear that the Optional Protocol did not exempt the UK from its obligations under EU law.³¹ And when the Scottish Parliament sought to retain the binding force of the Charter in the EU Continuity Bill it sought to incorporate the Charter as it applied to devolved law, rather than seek to pick out specific provisions.

14. Of course, any incorporating provision(s) must be in compliance with the unique devolved framework in Scotland. Ultimately the Bill should seek to incorporate the UNCRC in so far as it is possible to do so within the terms of devolved competence. This requires technical expertise of drafting provisions which ensure compliance with UNCRC extends to the Scottish Parliament, the Scottish Ministers, public authorities exercising functions in devolved areas and, where possible, private bodies operating in devolved areas or exercising public functions in devolved areas on behalf of the state.

Question 3: How will decision makers know whether the UNCRC applies in the exercise of their devolved/reserved functions?

15. Decision makers should already be complying with UNCRC as part of the UK’s obligations in international law. It is lawful for public bodies to act in a UNCRC compliant way all of the time (unless prohibited by statute). A provision that restricts the applicability of the treaty when engaging with primary legislation may be helpful (something similar to section 6 HRA that clarifies that a public authority exercising devolved functions must act compatibly with UNCRC unless as the result of primary legislation the authority could not have acted differently).
16. The state party (the UK) has already signed up to the UNCRC and so compliance across both reserved and devolved functions forms part of the state’s obligations. Nonetheless, as discussed above, the treaty is not domestically binding on decision makers unless incorporated into domestic law. Of course, as a matter of good practice decision makers should already be

²⁹ *Åkerberg Fransson*, Case C-617/10, ECLI:EU:C:2013:105

³⁰ Protocol (No 30) on the Application of the Charter of the Fundamental Rights of the European Union to Poland and to the United Kingdom annexed to the TEU and the TFEU

³¹ Joined Cases C-411/10 and C-493/10 *N.S. and M.E.*, judgment of 21 December 2011, ‘Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions’ at para.120

complying with the UNCRC. By seeking to incorporate the rights, however, the Scottish Parliament would be offering the rights a new status in devolved areas of law by making them legally enforceable and making non-compliance in devolved areas unlawful and therefore subject to remedies for non-compliance.

17. If a broad brush approach is taken to an incorporating provision, such as clause 2 of the [Children's Rights \(Scotland\) Bill 2019](#), how will decision makers know whether they are exercising devolved or reserved functions and whether or not the UNCRC is binding? It would be beyond the competence of the Scottish Parliament or Scottish Ministers to encroach on reserved areas or to create new obligations in reserved areas. Nonetheless, UNCRC compliance already forms part of reserved functions under the context of the state party's international obligations, decision makers with both reserved and devolved functions will be acting lawfully when complying with UNCRC (unless primary legislation prohibits them).
18. However, if there is an area of reserved law that prohibits compliance with the UNCRC then reserved law emanating from Westminster (either primary or secondary) will prevail over an Act of the Scottish Parliament. This is not dissimilar to the manner in which the ECHR takes on different legal status under reserved and devolved law. As a general rule, compliance with ECHR is mandatory. Under the Scotland Act 1998, it is unlawful to act in a manner incompatible with the ECHR in devolved areas and any devolved legislation passed that is incompatible with the ECHR is null and void. However, under the Human Rights Act, if the UK Parliament has legislated incompatibly with the ECHR in either reserved or devolved areas of law the statutory provision remains in force and any decision maker bound by the legislation must comply with the incompatible Act until such time as Parliament repeals it. Decision makers should be navigating this complex jurisdictional space by seeking to comply with the ECHR all of the time, unless an Act of the UK Parliament prohibits it.³²
19. In the same manner, incorporation of UNCRC in Scotland can only apply to devolved areas of law, however decision makers can operate on a basis that there is a presumption in favour of UNCRC compliance across both reserved and devolved law, unless reserved law prohibits it. This could be dealt with in guidance around what UNCRC incorporation means for decision makers.
20. The main distinction between the operation of compliance with UNCRC in devolved areas and compliance in reserved areas is that the Scottish Parliament would have competence to provide a remedy for a breach of the former, but not for a breach of the latter.

³² See section 6 HRA and the distinction made in *Limbuela* for example, *Regina v Secretary of State for the Home Department (Appellant) ex parte Adam (FC) (Respondent) Regina v Secretary of State for the Home Department (Appellant) ex parte Limbuela (FC) (Respondent) Regina v Secretary of State for the Home Department (Appellant) ex parte Tesema (FC) (Respondent) (Conjoined Appeals)* 2005 UKHL 66 para. 4-5

Question 4: What role should private bodies play?³³

21. This question is not addressed in the consultation but attention should be drawn to the principle of international law that the contracting out or outsourcing of rights-related functions and services to private bodies does not reduce or remove the state's responsibility as the ultimate bearer of rights duties under the UNCRC.

Question 6: What should be considered in relation to access to justice for a violation of a right?³⁴

22. Access to court

- Ensure legal standing is sufficiently broad (beyond victimhood status)
- Ensure sufficient legal aid provision is in place
- Ensure that cases can be raised in the public interest
- Ensure that rules on standing and other procedural requirements reflect the position of children in different situations (e.g., children with disability or living in poverty).

23. Participation

- Ensure that children are able to participate in proceedings that affect them and that there is sufficient provision in place to ensure their voice is heard and their views accorded due weight.

24. Appropriate intensity of review

- Cases involving human rights violations require a more intense form of judicial review.
- Reasonableness review requires to go beyond irrationality to more closely reflect the test applied at the international level.³⁵
- Proportionality and especially careful scrutiny required.
- Substantive review of the evidence with regard to the inputs of the decision-making process and the outcome of such - and not just the decision making process itself.
- Courts should be in mind the particular dependence of children on courts when it comes to asserting their rights, given the limited degree of control children can exercise over decision-makers at an individual or a systemic level

25. Counter-majoritarian principle³⁶

- Courts should facilitate group proceedings and multi-party actions, in particular for cases of a systemic nature, such as many children facing the same violation who can raise an act collectively

³³ General Comment No.16 (2013) On State obligations regarding the impact of the business sector on children's rights.

³⁴ Please see recent publications on this including Katie Boyle, Models of Incorporation and Justiciability for Economic, Social and Cultural Rights (SHRC 2018) and Katie Boyle, [The First Minister's Advisory Group on Human Rights Leadership: a new path forward on incorporation of economic, social, cultural and environmental rights](#), (2019) 4 European Human Rights Law Review 361-373

³⁵ IBID

³⁶ For more on the position of children with regard to democratic law and policy decision-making, see Aoife. Nolan, *Children's Socio-economic Rights, Democracy and the Courts* (Oxford: Hart Publishing, 2011).

- Courts should acknowledge children’s relative exclusion from democratic law and policy-making decision-making and bear this in mind when considering UNCRC cases that come before them.

26. Remedial

- Remedies should be both flexible and effective.
- Courts can consider whether to play a supervisory role in ensuring compliance with a judgment.
- Innovative approaches to systemic issues and structural cases – courts should be able to respond to a systemic issue. In Scotland it is key any future rights reform engages with the work of the Scottish Civil Justice Council in the process of writing up the new procedural rules under the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.

Question 5: What is an effective remedy?

27. One of the requirements of international law in the area of human rights is that there should be an “effective remedy” for a violation of a right. The definition of an effective remedy is far reaching and goes beyond financial compensation.³⁷ The UN Committee on the Rights of the Child states in General Comment No.5 that for rights to have meaning, effective remedies must be available to redress violations.³⁸ Remedies can include penalties, compensation, judicial action and measures to promote recovery after harm caused or contributed to by third parties. They can also include satisfaction, such as effective measures aimed at the cessation of continuing violations and guarantees of non-repetition.³⁹

28. In many respects our judicial review process is already well equipped to deal with an array of different remedies:

Reduction: This involves the court quashing the original decision and giving the issue back to the decision maker to look at again.

Declarator: An authoritative statement that an individual or body has a specific right or duty.

Suspension and interdict: An order for suspension stops something currently being done. An interdict is used to prevent a threatened wrong occurring or the continuance of current wrongdoing.

Specific performance or specific implement: the court orders the respondent to do something which they are under a legal duty to do.

Liberation: used where there has been wrongful or illegal imprisonment.

Interim orders: Interim orders, such as an interim interdict, can be applied for at the start of a case, pending a final decision as a temporary solution.

³⁷ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*: resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147

³⁸ General Comment no.5 (2003) para.24

³⁹ UN Basic Principles and Guidelines on the Right to a Remedy para.22

Damages financial compensation can be awarded in judicial review actions if there can be shown to be a ground entitling the petitioner to such an award by virtue of another specific part of the law (Convention rights/ EU law).

29. In relation to the UNCRC a violation of a right could result in a declarator, for example - a deferential remedy that allows the decision maker to correct the unlawful act. In other circumstances an interdict or an order for specific implement might be required to either stop an action or require an action to be undertaken in order to ensure compliance.

30. One of the key issues that will come up will be whether the court should have the power to declare an ASP as unlawful (ultra vires – similar to the remedy available under Scotland Act) or whether the remedy available to the court should be restricted to a declaration of incompatibility (similar to the remedy available under the Human Rights Act). This issue was raised in the recommendations of the First Minister’s Advisory Group on Human Rights Leadership.⁴⁰ A declaration of incompatibility may not be sufficient to meet the threshold of an “effective remedy” as defined in international law unless the declarations of the court are systematically given effect to by the government/ parliament.⁴¹

31. As discussed above – this issue also engages the reserved v devolved division of power and at its crux is the question of whether the Scottish Parliament can limit its own competence without modifying the Scotland Act 1998 through a form of self-regulation.⁴² There is uncertainty and disagreement about this point and so careful consideration should be given and a breadth of views taken from constitutional experts.

Question 5: What kind of remedies would work for systemic issues?

32. As with many human rights treaties, particularly those engaging with economic and social rights, new and innovative ways of dealing with systemic issues are required if the legal system is to adjust to new rights and new remedies being incorporated into domestic law.

33. In Scotland multi-party actions have been addressed on ad hoc basis by identifying a lead case that can act as a test case and sisting (suspending) other cases while awaiting for the outcome of the lead case.⁴³ Following suggested reform recommended in reports of both the Scottish Law

⁴⁰ <https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf> p.33

⁴¹ Burden v UK Application No 13378/05, Judgment, 12 December 2006

⁴² See FN 19 and discussion above on ‘self-regulation’

⁴³ See Rule of Court 22.3(6) available at <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap22.pdf?sfvrsn=8>

Commission (1996)⁴⁴ and the Scottish Civil Courts Review (2009)⁴⁵ the Court of Session rules were amended to facilitate the adoption of new procedures for multi-party cases to be initiated at the direction of the Lord President allowing more flexibility for case management by the nominated judge (Rule 2.2).⁴⁶ Multi-party procedures have been facilitated under Rule 2.2 on a number of occasions to deal with systemic issues, including claims under the Damages (Asbestos-related Conditions) (Scotland) Act 2009⁴⁷ and in response personal injury actions relating to the use of vaginal tape and mesh.⁴⁸ Rule 2.2 may offer a potential route to remedy for multi-party cases as part of a cultural shift in human rights adjudication around systemic human rights violations.

34. Further reform under the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 will provide for group litigation in the Court of Session. Further detail on the group procedure for judicial review will be set out in new rules of court to be developed by the Scottish Civil Justice Council.⁴⁹ It is important that the processes engaging with incorporation of international treaties, including the UNCRC, also engage with the Civil Justice Council on the new group procedures. For example, how will these procedures operate in relation to systemic issues specifically around child rights issues, will they be sufficient to ensure access, standing, participation and remedies appropriate to child rights issues?

35. There is more scope for exploring the possibilities that multi-party actions or group cases can provide in terms of dealing with systemic violations. Comparative experience indicates that courts must adapt procedures to deal with systemic violations by facilitating access to a collective procedure with multiple stakeholders, multiple defenders and through the deployment of structural remedies.⁵⁰ Responding to this need in the deployment of effective remedies was something that the First Minister's Advisory Group recommended in December 2018.⁵¹

⁴⁴ Scottish Law Commission, *Report No. 154, Multi-Party Actions* (1996), para.64.

⁴⁵ Scottish Civil Court Review (2009), Volume 2, chapter 13, pp.152-155, available at <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4>

⁴⁶ See Rule of Court 2.2 available at <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap02.pdf?sfvrsn=10>

⁴⁷ Court of Session No.2 of 2012, <https://www.scotcourts.gov.uk/rules-and-practice/practice-notes/court-of-session-directions>

⁴⁸ Court of Sessions Directions No.2 of 2015 and No.2 of 2016, <https://www.scotcourts.gov.uk/rules-and-practice/practice-notes/court-of-session-directions>

⁴⁹ Policy Memorandum, Civil Litigation (Expenses And Group Proceedings) (Scotland) Bill, para.94

⁵⁰ César Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America', (2011) 89 Texas Law Review 1669 at 1671 and David Landau, 'The Reality of Social Rights Enforcement' (2012) 53(1) Harvard International Law Journal 189 at 192

⁵¹ First Minister's Advisory Group on Human Rights Leadership, *Recommendations for a new human rights framework to improve people's lives*, Report to the First Minister (December 2018) available at <http://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-post-10th-December-update.pdf> at 29 and 35

Mythbusting

Myth: Some of the rights in UNCRC are not justiciable and cannot be reviewed or enforced by the court. This is especially true of rights relating to education, housing or social security – in other words, economic and social rights.

Response: The justiciability of economic and social rights is a long misunderstood area. For the avoidance of doubt, it is important to note that the justiciability of such rights already occurs on a day to day basis across the UK. Courts are well-equipped to deal with such claims and often times the remedies employed will be more deferential in nature. From a comparative perspective, where children's economic and social rights form part of legislative and constitutional law in other jurisdictions, the courts in these jurisdictions (e.g., in South Africa and Ireland) have proven well able to apply these rights in the cases before them.

Myth: Some of the UNCRC rights are too vague to have any real meaning.

Response: The indeterminacy critique of some UNCRC rights is also a very much misunderstood area. Many areas of law, including human rights law, requires interpretation in order to give meaning to law. There are numerous sources which help with the interpretation of UNCRC including decisions of the Committee, General Comments, as well as comparative jurisprudence. The court, as well as the parliament, and the executive, each have a responsibility to give substance to the scope and content of rights when they interpret them. An incorporation Bill could contain a provision about what sources of law must be given regard to when interpreting such rights. It should be noted that human rights provisions as often phrased broadly (see, e.g., Article 8 ECHR) and that this has not prevented UK, including Scottish courts, from applying them in their decision-making.

Myth: The existing statutory regime will be replaced by the UNCRC and the existing system is better in many respects.

Response: The UNCRC can be considered as a baseline from which to work from. If the domestic system is already better then incorporation of UNCRC will not reduce rights – it acts as a floor through which no one should fall below. Article 41 of the UNCRC makes clear that '[n]othing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: (a) The law of a State party ...' It is thus clear that even on the terms of the UNCRC itself, incorporation of that instrument could not result in the weakening any aspects of the domestic system that offers superior protection to child rights than the UNCRC.

Myth: The UNCRC does not reflect our complex statutory framework where we have already sought to address complex legal issues, such as different statutory thresholds for the age of majority.

Response: The UNCRC is a flexible and pragmatic instrument. Most international human rights law is flexible, allowing for diverse domestic interpretation of international norms. This means that domestic governments and parliaments can give effect to the international norms in the way most appropriate to that domestic context (not dissimilar to the margin of appreciation principle). It is also important to remember that the vast majority of rights under the UNCRC are not absolute. Interference can be justified if that interference is consistent with the limitations set out in the UNCRC.

Myth: Economic and social rights are positive and resource dependent and therefore not enforceable by courts (see for example Articles 24-28 UNCRC).

Response: Civil and political rights (see for example Articles 15 and 40 UNCRC) are also resource dependent and can be reviewed and enforced by courts. The rights that contain socio-economic dimensions, such as Article 27, require the state to take appropriate measures to ensure children enjoy an adequate standard of living. Courts reviewing whether this duty has been complied with would assess the reasonableness of the steps taken to ensure this right meaning it would be up to government and public authorities responsible for giving effect to the right to justify their approach in doing so.

Myth: Courts are ill-equipped to deal with the flood of litigation that will inevitably flow from the domestic incorporation of a new treaty.

Response: As with all adjustments to statutory right regimes whether derived from international law or not, there are numerous avenues through which remedies can be sought before access to a court is necessary and/or appropriate. Indeed, it is already an established principle in UK human rights adjudication that all other attempts to remedy a matter must be exhausted before a court will consider a case. This means using internal complaints mechanisms, appeal processes, and other administrative remedial processes. Ultimately the best means of ensuring compliance with rights is to embed that compliance early on in law, policy and budget decision-making processes.⁵² Tools that can be used to ensure such *ab initio* law and policy compliance in the context of the UNCRC include child rights impact assessment and child rights budgeting, which have been employed effectively in numerous jurisdictions. Recourse to the courts should not be a means of first resort but should always be available as a means of last resort. As discussed above, the judiciary in Scotland has already established different mechanisms for dealing with large-scale group procedures, and there is an opportunity to refine that process through the multi-party group proceedings legislation and subsequent consultation process.

⁵² For more on this, see Aoife. Nolan, 'Fit For Purpose? Human Rights in Times of Financial and Economic Crisis' (2015) 4 *European Human Rights Law Review* 358.

Discussion paper – Reserved and Devolved Functions in terms of Incorporating the UNCRC into Scots Law

Dr Kenneth Meehan

The UNCRC Working Group meetings on 10 July and 31 July 2019 considered incorporation of the UNCRC in relation to devolved/reserved matters. This paper sets out a proposed way forward which the author considers would be easier and clearer for duty holders to apply and accordingly be clearer for rights holders to understand what rights they enjoy. It also touches on aspects of the mechanics of incorporation.

Current working approach

The current approach considers that UNCRC could be incorporated (using this term in a non-technical sense pending final resolution of the means of making the UNCRC a part of domestic Scots law) in relation to devolved powers exercised by public authorities in Scotland but not in relation to matters which are reserved to the Westminster parliament or the UK government. This view seems to have been based on one interpretation of the limits of the legislative competence of the Scottish Parliament.

The problem with this approach is that public authorities do not routinely think of their functions in terms of whether they are exercising reserved or devolved functions. Proceeding with this approach would place duty-holding authorities in the difficult position of having to act compatibly (or take due account, or whatever formulation is adopted) the UNCRC in relation to some but not all of their functions. This will be difficult to apply in practice and will make it much harder to explain to rights holders what their actual rights are.

Alternative proposal:

It is suggested that the above approach is unnecessarily restrictive in scope as well as being impractical in application. It is recognised that the powers of the Scottish Parliament are limited by the Scotland Act 1998 and that the Scottish Parliament cannot directly legislate for reserved matters.

However translating this limitation into a limitation on the scope of incorporation is considered misconceived and is to conflate inability to legislate for reserved matters with inability to legislate in relation to the bodies exercising those devolved functions. The Scottish Parliament has legislative jurisdiction over all bodies exercising mixed functions or no devolved functions and could legitimately create new obligations for such bodies without offending the limits of the parliament's jurisdiction.

As an example: local authorities in Scotland exercise both reserved and devolved functions – planning, for example, being devolved whereas benefits administration is reserved. The Scottish Parliament cannot amend the core law on benefits administration but it could (theoretically) abolish the existing local authorities and create a completely new public body to administer benefits in Scotland. (It would

also be within the legislative competence of the Scottish Parliament to make consequential changes to benefits law to give effect to such a restructuring.) This shows that the Parliament clearly has power to legislate in relation to bodies and how they carry out reserved functions without offending the limits of its legislative competence.

It is also worth looking more closely at Schedule 5 to the Scotland Act 1998, which sets out what matters are reserved to the UK Parliament. Schedule 5 Part I Paragraph 7 is the relevant section, and in its entirety reads as follows:

Foreign affairs etc.

7(1) International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters.

(2) Sub-paragraph (1) does not reserve—

(a) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under EU law,

(b) assisting Ministers of the Crown in relation to any matter to which that sub-paragraph applies.

The current proposals on implementing the UNCRC clearly fall with the exception in sub-paragraph (2) concerning implementing international obligations and so implementation of the UNCRC is not reserved at all. Given that the Parliament can legislate for any public body with mixed functions or no reserved functions there seems to be no compelling reason not to apply the incorporated UNCRC to all functions of the bodies considered to be in scope for the legislation.

Incorporation

There has been discussion over the merits of different types of incorporation, mostly in relation to “due regards” versus the duty to comply, i.e. a more concrete obligation more akin to the means of incorporating the ECHR. There seems to be no obvious reason why the two could not run in tandem, producing an incorporation formula which would look something like the following suggestion. In drafting the following wording, it became apparent that the bigger question in some ways is not the extent to which the UNCRC can be applied but the effect of incorporation on other laws. However regardless of the position adopted by the working group, I do not think it is within the legislative competence of the Parliament to get to the position favoured by the UN Committee, that CRC rights should prevail over domestic law in the event of inconsistencies.

Outline draft legislation (partial only):

1. Definitions

(1) In this Act -

(a) “UNCRC” means the United Nations Convention on the Rights of the Child;

- (b) “the United Nations Convention on the Rights of the Child” means those Articles⁵³ of the international treaty of that name and the two⁵⁴ optional Protocols to the treaty as set out in Schedule 1 and “UNCRC right” means any right conferred on a child or young person, or protected by, the UNCRC; and
- (c) “listed authority” shall mean those bodies and office holders listed in Schedule 2⁵⁵

2. Duty to have due regard to the UNCRC.

- (1) In carrying out its functions, a listed authority shall have due regard to the provisions of the UNCRC to the extent that these provisions, or any of them, are relevant to the function being exercised.
- (2) In having due regard to the UNCRC a listed authority shall also take into consideration any relevant concluding observations issued by the United Nations Committee on the Rights of the Child.

3. Acts of listed authorities.

- (1) It is unlawful for a listed authority to act in a way which is incompatible with a UNCRC right.
- (2) Subsection (1) does not apply to an act –
 - (a) If, as the result of one or more provisions of primary [or secondary⁵⁶] legislation, the authority could not have acted differently; or
 - (b) where the authority is exercising a reserved function, if it is acting in accordance with binding instructions issued to the authority by a Minister of State or a department of the government of the United Kingdom⁵⁷.
- (3) Where a listed authority procures or otherwise arranges for a person or body which is not a listed authority to act or provide services on behalf of the listed authority, the listed authority shall ensure that the arrangements under which the other person or body is appointed oblige the other person or body to act or provide those services in a way which is compatible with UNCRC rights.

⁵³ As with the ECHR, some provisions are clearly aimed at signatory nations and would not be appropriate.

⁵⁴ I am assuming that incorporation into Scots law will not extend to the Protocol which the United Kingdom is not a signatory to.

⁵⁵ Or alternatively an existing group could be used such as the authorities which are subject to the provisions of the Public Records (Scotland) Act 2011 or to the Freedom of Information (Scotland) Act 2002 (the latter of which is the approach adopted in the Data Protection Act 2018). Schedule 1 of the Children and Young People (Scotland) Act 2014 is a promising candidate in that it does appear to cover all the bodies most likely to be in a position to implement UNCRC rights. A final alternative is to use a functional description rather than a list but this runs the risk of making the actual extent of the law unclear.

⁵⁶ I think this is an important decision which we haven't yet had discussion on.

⁵⁷ If we decide under 3(2)(a) to go for primary legislation only it would probably be necessary to include secondary legislation relating to reserved matters as part of this sub-section.

A listed authority is not to be considered as acting in a way which is incompatible with a UNCRC right if the authority acts in accordance with legislation which provides for a higher degree of safeguarding the rights of children and young people than the UNCRC does.

The above text has been produced to stimulate discussion and is not intended to represent a proposal for final wording of a Bill.

Annex E

Incorporating the United Nations Convention on the Rights of the Child into Domestic Law in Scotland Working Group

Discussion on paper from Dr Kenneth Meechan (See Annex D)

Minutes of Meeting Held by teleconference at 3 pm on Monday, 9 September 2019

Present: Mairi Macpherson, Deputy Director, Creating Positive Futures (Chair)
Dr. Katie Boyle, University of Stirling
Michael Clancy OBE, The Law Society of Scotland
Chief Superintendent David Duncan, Police Scotland
Juliet Harris, Together (Scottish Alliance for Children's Rights)
Dr. Kenneth Meechan, SOLAR

In Attendance: Liz Blair, SG Legal Directorate⁵⁸
Nicola Guild, SG Legal Directorate⁵⁸
Alexandra Devoy, SG, Children's Rights
Lawrence Mearns, SG Children's Rights

Welcome and Introduction

1. The Chair thanked Members for attending the meeting and invited Dr Kenneth Meechan, to present his discussion paper, which had been previously circulated. The paper aimed to provide a way through the challenges of incorporating the UNCRC into Scots Law as the Convention covered both devolved and reserved matters and suggested an option to address these. The paper can be accessed at **Annex D**. The Chair thanked Dr Meechan for his presentation and invited reflections from the Members.
2. Members raised the following points:
 - There was discussion about the focus on what would be required at a front line level. An operational perspective was provided by Police Scotland who have experience of working with both devolved and reserved legislation. They noted that it would not be desirable to get to the point where children are treated differently depending upon what functions are being exercised. Clarity is required for front line operations.
 - A Member suggested that it would be helpful to have a consistent and clear definition of a child in Scots law to help to avoid confusion and

⁵⁸ Staff from the SG Legal Directorate were present at meetings of the working group to listen to discussions and not to provide legal advice to members of the working group.

possible unintentional breaches in the delivery of frontline services. At present there are a number of different definitions of a child in Scots law for different purposes.

- There was also discussion about the fact that clarity would be desirable for children also. It was acknowledged that it would not be desirable to raise an expectation that the Act would, for example, require certain action to be taken which in fact would not be the case because of the restrictions of legislative competence.
 - It was suggested that the reference to the European Charter of Fundamental Rights in the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill could be considered for any applicable lessons.
 - A Member suggested that UNCRC rights and obligations can be categorised into 3 themes: those that relate fully to devolved functions; those which relate to both devolved and reserved functions; and those which relate solely to reserved functions. It is important to navigate this complexity in order to find a way to directly incorporate the UNCRC within the devolved competence of the Scottish Parliament.
3. On closing the meeting, the Chair thanked Dr. Meechan for his thought-provoking paper and thanked Members for their active participation in the discussion.

September 2019

Annex F

Incorporating the United Nations Convention on the Rights of the Child into Domestic Law in Scotland Working Group, 1st Meeting

Minutes of Meeting Held in Victoria Quay, Edinburgh at 2pm on Tuesday, 25 June 2019

Present: Mairi Macpherson, Creating Positive Futures, Scottish Government (SG) (Chair)
Chief Inspector Lex Baillie, Police Scotland
Dr. Katie Boyle, University of Stirling
Michael Clancy OBE, The Law Society of Scotland
Nicola Dickie, COSLA
Hannah Ross, COSLA
Juliet Harris, Together (Scottish Alliance for Children's Rights)
Dragan Nastic, UNICEF
Lucinda Rivers, UNICEF
Prof. Aoife Nolan, University of Nottingham
Laura Pasternak, Scottish Youth Parliament
Suki Wan MSYP, Scottish Youth Parliament
Douglas Ross QC, Ampersand Advocates
Norma Shippin, NHS
Clare Simpson, Parenting Across Scotland

In Attendance: Liz Blair, SG Legal Directorate⁵⁹
Alex Devoy, SG Children's Rights
Nicola Guild, SG Legal Directorate⁵⁹
Duncan Isles, SG Human Rights
Gita Sharkey, SG Children's Rights
Sarah Douglas, SG Children's Rights (Secretariat)
Agnes Rennick, SG Children's Rights (Secretariat)

Apologies: Lynda Brabender QC, Westwater Advocates
Chief Superintendent David Duncan, Police Scotland (represented by Chief Inspector Lex Baillie)
Dr. Kenneth Meehan, SOLAR

Welcome and Introductions

1. The Chair welcomed Members to the meeting and thanked them for agreeing to participate on the Working Group.
2. Attendees discussed the membership of the Group. It was raised that representation from ethnic minority and disability groups should be explored. It

⁵⁹ Staff from the SG Legal Directorate were present at meetings of the working group to listen to discussions and not to provide legal advice to members of the working group.

was also suggested that representation from the Scottish Human Rights Commission, the Equality and Human Rights Commission, and the judiciary might be considered.

3. The Chair agreed that further consideration should be given to the membership of the Group, taking account of separate engagement activity being organised with specific stakeholders and groups as part of the Consultation exercise. The Secretariat agreed to forward a summary of this separate engagement activity to Group Members.

Action: The SG agreed to:

- **consider possible additional Members of the Group.**
- **update the Group on the separate engagement being undertaken as part of the consultation.**

Scene Setting and Aims for the Working Group

4. The Chair provided brief background on progress made in relation to children's rights in Scotland, including the duties in Part 1 of the Children and Young People (Scotland) Act 2014 and culminating in the First Minister's commitment to incorporate the UNCRC into domestic law within the current Parliamentary session.

5. The Chair noted that the aim for the Working Group was to support Ministers in obtaining a richer understanding of the issues and implications of the policy options set out in the consultation document.

6. The Chair further commented that the Minister for Children and Young People was keen to hear Members' views and was planning to attend the meeting on 27 August, diary permitting.

Consideration of 'Ground Rules' for Meetings

7. The Group considered possible 'ground rules' for Members. In discussion, the following points were agreed:

(a) Summary minutes would be produced to reflect the Group's discussions. These would not attribute specific comments to individuals but would seek to capture the specific expertise and insights of Group Members.

(b) Members would adhere to the Chatham House Rule.

(c) Where Members were unable to attend a meeting, and where possible, they would arrange for a representative to attend on their behalf. Where this was not possible or appropriate, Members would be able to feed-in their views directly to the Secretariat, for example, by e-mail.

(d) Being part of the Group would not limit individuals or organisations from submitting their own responses to the formal consultation.

Terms of Reference / Timeline for the Group's Work

8. In relation to the Terms of Reference, the Chair noted that the consultation document would form the basis of the discussions of the Working Group and further noted that the timetabling of, and indicative agendas for, meetings were dictated by the timescales for delivering legislation by 2021. The following points were raised in discussion:

(a) Amendments were suggested to the phrasing of specified sentences in the draft Terms of Reference in relation to the purpose of the Group.

(b) It was proposed that the list of Members of the Group should confirm the roles and perspectives of Members and whether they are contributing as an individual or as a representative of an organisation or body.

(c) Whilst the primary function of the Working Group would be to discuss the options with regard to the possible models for incorporation of the UNCRC into Scots law, it was accepted that the Group may not be able to reach a consensus view in this regard. It was, therefore, agreed that the summary minutes would capture the range of views and different perspectives expressed by individual Members.

d) Further consideration should be given by the Secretariat to the format of the output of the Group. For example, it was suggested that it might be appropriate to organise the Group's observations under specific themes from the consultation.

(e) Once agreed with Members, the Terms of Reference, membership of the Group and summary minutes of meetings would be published on the SG website.

Action: The SG agreed to circulate to Members:

- **revised membership of the Group, confirming the roles and perspectives of Members as set out in paragraph 8(b) above.**
- **revised draft Terms of Reference**

Consultation: Group Members' Perspectives

9. Group Members provided their initial impressions of the consultation document. Members expressed a wide range of views in discussion as follows:

(a) The Group were reminded that the Scottish Youth Parliament's Right Here, Right Now campaign had advocated for children's rights to be 'binding not guiding'.

(b) There was a need to consider how legislation to incorporate the UNCRC into domestic law would interact with existing legislation. Ideally, the new

provisions should not make the law overly complicated for practitioners to interpret and apply. The potential challenges of this should not be underestimated.

(c) The Group’s attention was drawn to the following lines in the consultation:

“The ultimate goal of incorporating the UNCRC into domestic law is to improve outcomes for children and young people in Scotland. That goal will not be met simply by an increase in the amount of litigation relating to children’s rights.”
(p.28).

It was suggested that this goal may not be achieved, if what was introduced was a further layer of law that interacts in an unclear way with existing case law.

(d) Some Members considered that the Convention as a whole should be incorporated directly into domestic law. It was further suggested that, whilst not a panacea, incorporation could provide a clear impetus for improved understanding and better implementation of the UNCRC.

(e) It was suggested that appropriate consideration should be given to the legislative competence of the Scottish Parliament. It was noted that the consultation paper (p.18-19) discussed the issue of devolved and reserved matters in further detail.

(f) The need for consideration of how incorporation would impact on the delivery of front-line services was noted.

10. Members drew the Group’s attention to the following resources, for awareness:

- the draft Bill developed by an external advisory group convened by the Commissioner for Children and Young People in Scotland and Together (Scottish Alliance for Children’s Rights).
- Together (Scottish Alliance for Children’s Rights) State of Children’s Rights in Scotland Report 2016.
- Together (Scottish Alliance for Children’s Rights) Blog series on incorporation (May 2019).
- UNICEF Report: The UN Child Rights Convention: A Report on Implementation in 12 Countries.

It was noted that other resources were also available.

11. Attendees also requested information on Scottish Government officials’ recent fact finding trip to Iceland to learn about the Icelandic experience of incorporation of the UNCRC into domestic law.

Action: The SG agreed to provide a note of information to the Group about officials’ recent fact finding visit to Iceland. This will be made available at the next meeting of the Working Group on 10 July.

Communication Arrangements around the Consultation

12. The Chair noted that the SG was keen for duty bearers and rights holders to have their views heard through the consultation process and would be grateful if Members, where appropriate, could assist in ensuring wide awareness of the consultation. The Chair asked Members to contact the secretariat if they needed further information or resources.

Next Meeting: Wednesday 10 July, Victoria Quay, 09:30-12:30

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

Minutes of Meeting Held in Victoria Quay, Edinburgh at 9.30 am on Wednesday, 10 July 2019

Present: Mairi Macpherson, Creating Positive Futures, Scottish Government (SG) (Chair)
Superintendent Ann Bell, Police Scotland
Lynda Brabender QC, Westwater Advocates
Dr. Katie Boyle, University of Stirling
Michael Clancy OBE, The Law Society of Scotland
Jack Dudgeon MSYP, Scottish Youth Parliament
Laura Pasternak, Scottish Youth Parliament
Juliet Harris, Together (Scottish Alliance for Children's Rights)
Dr. Kenneth Meechan, SOLAR
Dragan Nastic, UNICEF
Prof. Aoife Nolan, University of Nottingham (by Skype)
Hannah Ross, COSLA
Clare Simpson, Parenting Across Scotland

In attendance: Alexandra Devoy, SG Children's Rights
Helen Fogarty, SG Children's Rights
Nicola Guild, SG Legal Directorate⁶⁰
Ceri Hunter, SG Children's Rights
Duncan Isles, SG Human Rights
Gita Sharkey, SG Children's Rights
Sarah Douglas, SG Children's Rights, Secretariat
Agnes Rennick, SG Children's Rights, Secretariat

Apologies: Nicola Dickie, COSLA
Chief Superintendent David Duncan, Police Scotland (represented by Superintendent Ann Bell)
Lucinda Rivers, UNICEF
Douglas Ross QC, Ampersand Advocates
Norma Shippin, NHS
Suki Wan, Scottish Youth Parliament (represented by Jack Dudgeon)

⁶⁰ Staff from the SG Legal Directorate were present at meetings of the working group to listen to discussions and not to provide legal advice to members of the working group.

Welcome and Introductions

1. The Chair welcomed new Members to the meeting and thanked them for agreeing to participate on the Working Group. They are:

- *Lynda Brabender QC*
- *Jack Dudgeon MSYP, newly appointed Chair of SYP*
- *Superintendent Ann Bell who is representing David Duncan*

Minutes of Previous Meeting and Action Points

2. Update on Action Points

Action 1: *The SG agreed to consider possible additional members of the Group e.g. representatives from ethnic minority and disability groups, the SHRC, EHRC and the judiciary; and*

Action 2: *Update the Group on the separate engagement being undertaken as part of the consultation.*

Update: The Chair confirmed that the Scottish Government was engaging separately with a large number of key stakeholders and groups as part of the consultation exercise. A paper was circulated to the Working Group outlining the organisations who had been invited to consultation meetings at the time of circulation. Further meetings and stakeholder engagement events had since been arranged. **Action 2A** - An updated paper reflecting the full span of engagement activity would be circulated.

In light of the wide-ranging engagement currently underway which included the groups mentioned, the Chair proposed to maintain the Working Group membership as it stood, but to keep this under review.

Action 3: *The SG to circulate the revised membership of the Group, confirming the roles and perspectives of Members.*

Update: The Chair confirmed that the revised membership list was now attached in an Annex to the Terms of Reference. Members were invited to submit any proposed amendments.

Action 4: *Circulate revised Terms of Reference.*

Update: The Chair noted that revised terms of reference had been circulated. Further amendments were suggested at the meeting to simplify and clarify these. The Group agreed that its output would include a report. **Action 4A** – Secretariat to circulate a further iteration of the Terms of Reference.

Action 5: *The SG agreed to provide a note of information to the Group about officials' recent fact finding visit to Iceland arranged by UNICEF.*

Update: A note of the findings from the Iceland visit was tabled at the meeting. SG officials would welcome feedback or further discussion.

Workshop

3. The membership received a presentation on the UNCRC. This was followed by workshop-style discussions covering the following themes:

- UNCRC Articles: reserved / devolved matters.
- How public authorities might fulfil their duties.
- Language of the articles.

4. The output from this workshop is covered by a separate note which is attached at **Annex H**.

AOB

5. Members were invited to advise the Secretariat on whether they were content for their contact email to be shared with the other members of the Group.

Next Meeting: Wednesday 31 July, St Andrew's House at 10 am.

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

Attendees as set out in the minutes of the 2nd meeting at Annex G.

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.⁶¹ 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 (Scottish Alliance for Children's Rights), 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

⁶¹ 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.

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 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 at Annex D.]**
- 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.⁶²
- 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.

⁶² <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 (Scottish Alliance for Children's Rights) 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 a right could be directly applied in the courts, rather than being a right that requires legislative implementation before it may be applied by the courts.
- 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.
- More broadly, other Members considered that some of the rights may require further elaboration and guidance, to aid understanding and provide clarity in the context of the domestic incorporation of such rights. They further suggested that there would be a need to provide such 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 justiciable. Some Members suggested that there continues to be debate around justiciability in countries that have directly incorporated the Convention.

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.⁶³
- 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.⁶⁴
- The UN World Programme for Human Rights Education for public bodies, social workers, teachers, police, children and young people, media, journalists etc.⁶⁵
- 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:

- 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'

⁶³ [Progressing the Human Rights of Children in Scotland: An Action Plan 2018-2021](#)

⁶⁴ <http://help.elearning.ext.coe.int/>

⁶⁵ <https://www.ohchr.org/EN/Issues/Education/Training/Pages/Programme.aspx>

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.

August 2019

ANNEX I

Incorporating the United Nations Convention on the Rights of the Child into Domestic Law in Scotland Working Group, 3rd Meeting

Minutes of Meeting Held in St Andrew's House, Edinburgh, at 10 am on Wednesday, 31 July 2019

Present: Michael Chalmers, Children and Families, Scottish Government (SG) (Chair)
Mark Allison, The Law Society of Scotland
Lynda Brabender QC, Westwater Advocates
Nicola Dickie, COSLA
Juliet Harris, Together (Scottish Alliance for Children's Rights)
Mairi Macpherson, SG, Creating Positive Futures
Ben McKendrick, Scottish Youth Parliament
Dr. Kenneth Meechan, SOLAR
Dragan Nastic, UNICEF (by Skype)
Lucinda Rivers, UNICEF
Douglas Ross QC, Ampersand Advocates
Clare Simpson, Parenting Across Scotland

In Attendance: Liz Blair, SG Legal Directorate⁶⁶
Helen Fogarty, SG, Children's Rights
Nicola Guild, SG Legal Directorate⁶⁶
Ceri Hunter, SG, Children's Rights
Sarah Douglas, SG Children's Rights (Secretariat)
Agnes Rennick, SG Children's Rights (Secretariat)

Apologies: Dr. Katie Boyle, University of Stirling
Michael Clancy OBE, The Law Society of Scotland (represented by Mark Allison)
Chief Superintendent David Duncan, Police Scotland
Prof. Aoife Nolan, University of Nottingham
Laura Pasternak, Scottish Youth Parliament (represented by Ben McKendrick)
Hannah Ross, COSLA
Norma Shippin, NHS
Suki Wan, Scottish Youth Parliament

⁶⁶ Staff from the SG Legal Directorate were present at meetings of the working group to listen to discussions and not to provide legal advice to members of the working group.

Welcome

1. The Chair thanked Members for attending the meeting.

Minutes of Previous Meeting and Action Points

2. Members agreed the minutes of the previous meeting. The Chair then provided an update on the following actions:

Action 4A: *Secretariat to circulate a further iteration of the Terms of Reference.*

Update: The revised draft of the Terms of Reference, which was informed by the additional views of Members, was circulated on 24 July. Attendees confirmed that they had no further amendments to make and that they were content to now clear the Terms of Reference for publication on the SG website.

Action 5: *The SG agreed to provide a note of information to the Group about officials' recent fact finding visit to Iceland arranged by UNICEF.*

Update: The Chair confirmed that this note was circulated on 24 July. Members discussed the content of the paper briefly. It was agreed that, subject to final checking, the note would be published on the SG website as part of the papers for the Working Group, but would not be included within the Group's final Report to Ministers.

Summary of the Workshop discussions from 10 July Meeting

3. The Chair invited comments on the summary of the workshop discussions that took place at the 10 July meeting. Members confirmed that the note reflected that there were diverging views around the legal issues raised when considering how best to incorporate the UNCRC into domestic law. A number of amendments to the summary were suggested. The SG agreed to reflect these in a revised summary and to prepare a more refined and concise note of the workshop discussions, setting out the points raised under key themes. This note would be used as a basis for further discussion with Members to identify possible ways forward in addressing some of the issues raised.

Actions:

- **the SG agreed to amend the summary of the workshop discussions from the 10 July meeting to reflect suggested amendments and to circulate a draft concise note for comments and further discussion;**
- **Members of the Working Group are encouraged to circulate their ideas for possible ways forward in addressing the issues related to the legal mechanisms for incorporation; and**
- **SG to work with members of the Group to seek ways to address the issues raised.**

Workshop on Embedding Children's Rights in Public Services

4. Members participated in workshop discussions around the following themes:

- Children's Rights Scheme
- Sunrise Clause and preparation of the sector
- Non-legislative activities required for further implementation

5. A summary of these discussions will be provided in a separate note, to be circulated ahead of the next meeting.

Action: the SG agreed to circulate a summary of the workshop discussions from this meeting with the papers for the next meeting.

AOB

6. The Chair confirmed that, to provide for school holidays, the meeting of the Group, which was due to take place on 16 October, would now take place on **21 October, at Victoria Quay, Edinburgh, 13:00 – 16:00**. The Terms of Reference will be amended to reflect this revision.

7. The Chair reminded Members that, should they be unable to attend the scheduled meetings of the Group, they can ask a representative to attend on their behalf or feed their views in to the Secretariat separately.

Next Meeting: Tuesday 27 August, Victoria Quay, 14:00 – 16:30

Incorporating the United Nations Convention on the Rights of the Child into Domestic Law in Scotland Working Group, 3rd Meeting, 31 July 2019

Summary of Workshop Discussions

Attendees as set out in the minutes of the 3rd meeting at Annex I

Introduction

1. At the third meeting of the Working Group, which took place on 31 July 2019, facilitated workshop-style discussions were held around issues raised in Theme 2 of the [consultation](#) on Embedding Children's Rights in Public Services, including the following:

- Children's Rights Scheme;
- Preparation of the sector; and
- Non-legislative activities required for further implementation of the Convention

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

Scottish Children's Rights Scheme

3. Members discussed steps taken to incorporate the Convention in Wales, including provisions in the Rights of Children and Young Persons (Wales) Measure 2011, which require Welsh Ministers to establish a Children's Scheme, setting out the arrangements for ensuring compliance with the due regard duty.

4. Some Members considered that the Welsh model for a Children's Rights Scheme could complement the existing child rights framework in Scotland. However, it was noted that a Scottish Scheme would need to align with the proposed mechanisms for incorporating the UNCRC into Scots law. Also relevant is Part 1 of the Children and Young People (Scotland) Act 2014 (2014 Act), which already places duties on Ministers and specified public authorities in relation to children's rights. Members also noted that the current non-statutory requirement for a Child Rights and Wellbeing Impact Assessment to be undertaken for all new Scottish Government policies and legislation was also an important starting point.

5. Some Members proposed that a Scottish Children's Rights Scheme could support the embedding of a child rights-based approach to the delivery of public services. Some suggestions for the purpose of such a scheme could be to raise awareness and understanding of children's rights; specify and deliver effective training; and establish clear, supporting infrastructure to ensure that all children and young people, particularly the most vulnerable, can experience all of their rights when the Bill is implemented.

6. Individual Members discussed in more detail that the Scheme could include the following elements:

i. The promotion of awareness and understanding of children's rights.

- It was stressed by a number of Members that there should be a requirement for children's rights education to be provided in schools. It was also considered important for appropriate information to be provided for parents, throughout the course of their children's lives. The relationship between children's rights and parents' rights was also discussed.
- It was also noted that effective advice and training on how to embed children's rights should be made available across all levels of public authorities, with dedicated training provided on the responsibilities of duty bearers. The current trauma-informed training in Scotland and approach utilised in Sweden were cited as possible examples.
- Members also discussed the common misconception that children's rights are linked with responsibilities. The importance of promoting understanding that an individual's entitlement to their human rights is not dependent on the acceptance of responsibilities was stressed by some Members.

ii. The Child Rights and Wellbeing Impact Assessment (CRWIA)

- Some Members considered that there should be a statutory requirement for CRWIAs to be undertaken on national policies and legislation and noted that this was a recommendation of the advisory group convened by the Children's Commissioner and Together (Scottish Alliance for Children's Rights).
- Members noted that section 2 of the 2014 Act currently places a reporting duty on specified public bodies in relation to the UNCRC.⁶⁷ It was suggested by some Members that it might be possible to place obligations in relation to the CRWIA on public authorities, as well as on the Scottish Government. However, other Members suggested that, whilst the Scottish Government might be required to undertake CRWIAs, public authorities should have discretion in their use of this impact assessment.
- It was also suggested that the use of integrated impact assessments, covering a breadth of human rights, could also be helpful.

iii. Child Rights Budgeting

⁶⁷ Section 2 of the 2014 Act places a duty on a wide range of public authorities to report every 3 years on the steps they have taken to secure better or further effect of the UNCRC requirements within their areas of responsibility. The first reports are due as soon as practicable after 1 April 2020.

- Some Members suggested that measures to support public authorities and Scottish Ministers in considering the rights of children in budget planning and decision making should also be included in a Children's Rights Scheme. It was also noted that there was a need for effective examples of such budgeting arrangements.

iv. Complaints Procedure

- It was suggested by some Members that, to ensure that all children and young people can experience their rights, they should have access to a local complaints scheme and a clear and accessible complaints procedure. It was considered that these arrangements would be necessary to bridge the current gap between issues being raised by children with individual practitioners, for example, teachers and social workers, and a formal judicial process. It was also suggested that there should be an assumption of early resolution.
- Some Members also considered that advocacy support for children and young people should also be included in the Children's Rights Scheme.
- The role of the Children's Commissioner and the Scottish Public Services Ombudsman in dealing with complaints was discussed. However, it was suggested that children may not be aware of these arrangements, including the conditions that have to be met before these mechanisms can proceed. It was recognised that current investigation processes can take time to be fully resolved.

Preparation time for public services

7. Members also discussed issues around the preparation time as discussed in the consultation paper.⁶⁸

8. Some Members suggested that some public services would require time to be able to meet the required standards of new duties. It was also suggested that the courts and judiciary would need to be ready to consider possible legal challenges and would need time to prepare for this. It was further noted that there was a risk of losing the goodwill of public authorities if the new duties were commenced before services were able to prepare. It was also suggested that children and young people would lose faith in incorporation of the UNCRC if public bodies were not given time to further embed children's rights in their services, as children's experiences of services would still be the same as before the new duties.

9. Members also discussed the experiences of other countries that have incorporated the Convention into domestic law. It was suggested that staged commencement was common practice and provides time for improvements in services to be made. It was noted that Sweden had allowed 2 years before its Act

⁶⁸ [Incorporating the UN Convention on the Rights of the Child into Scots Law: Consultation](#), p24/25.

commenced to allow sufficient time for public authorities and the judiciary to prepare. If it was considered desirable to give bodies time to prepare for implementation, as would be the norm with introduction of any new statutory duties, some Members suggested that this should be provided for.

10. However, other Members noted that provisions in Part 1 of the 2014 Act, already require specified authorities to publish a report every 3 years on the steps they have taken to secure better or further effect of the UNCRC. It was suggested that it should, therefore, be assumed that those specific public authorities are already taking steps towards compatibility. It was also suggested by some that an explicit commitment on the date for enforcement of the duties on the face of the Bill would be welcomed. It was also noted that many children and young people had asked for the provisions to be commenced as soon as possible.

11. Some Members suggested that the Bill could include a duty to plan for commencement (ahead of other duties in the Bill coming into force) and for children and young people to be consulted in the resulting planning process. Other Members suggested that a duty to plan and prepare could also apply to the Scottish Government, and would allow time for the resources to support implementation of the new Act to be identified and provided to public authorities.

12. It was also noted that consideration of where the Convention had already been implemented in Scotland would help in preparing public authorities for implementation of new duties.

Non-legislative activities required for further implementation

13. Members were also asked to consider additional non-legislative measures that might better support children and young people in experiencing their rights.

14. It was acknowledged that the potential costs of new duties and delivery of rights-based services must be considered. Some Members considered that funding would be one of the biggest challenges that public authorities would face in implementing the new provisions. Members also suggested that consideration of how the new Act would align with the other statutory obligations on public bodies was needed.

15. It was suggested that advocacy, mediation and youth work services are services which enable children to claim their rights. It was suggested that, in the context of tight resources, non-statutory services such as these are often not prioritised for funding. It was suggested that the delivery of these supporting services needs to be given a statutory basis or have dedicated funding made available to ensure that children across Scotland can experience their rights fully. Similarly, it was also suggested that it would be important to ensure that the strategic approach to participation included in the [Progressing the Human Rights of Children in Scotland: An Action Plan 2018-2021](#) was adequately resourced. It was also suggested that existing participation capacity could be utilised more effectively to avoid duplication

August 2019

Incorporating the United Nations Convention on the Rights of the Child into Domestic Law in Scotland Working Group, 4th Meeting

Minutes of Meeting Held at Victoria Quay, Edinburgh, at 2 pm on Tuesday, 27 August 2019

Present: Michael Chalmers, Director, Children and Families, Scottish Government (SG) (Chair)
Chief Inspector Lex Baillie, Police Scotland
Dr. Katie Boyle, University of Stirling
Nicola Dickie, COSLA
Hannah Ross, COSLA
Dr Simon Hoffman, Swansea University
Mairi Macpherson, Creating Positive Futures, SG
Dr. Kenneth Meechan, SOLAR
Dragan Nastic, UNICEF
Prof. Aoife Nolan, University of Nottingham (by teleconference)
Laura Pasternak, Scottish Youth Parliament
Suki Wan, Scottish Youth Parliament
Clare Simpson, Parenting Across Scotland

In Attendance: Liz Blair, SG Legal Directorate⁶⁹
Alexandra Devoy, SG, Children's Rights
Helen Fogarty, SG, Children's Rights
Nicola Guild, SG Legal Directorate⁶⁹
Ceri Hunter, SG, Children's Rights
Duncan Isles, Human Rights
Gita Sharkey, SG, Children's Rights
Agnes Rennick, SG Children's Rights (Secretariat)

Apologies: Lynda Brabender QC, Westwater Advocates
Michael Clancy OBE, The Law Society of Scotland
Chief Superintendent David Duncan, Police Scotland (represented by Chief Inspector Lex Baille)
Juliet Harris, Together (Scottish Alliance for Children's Rights) (represented by Simon Hoffman)
Lucinda Rivers, UNICEF
Douglas Ross QC, Ampersand Advocates
Norma Shippin, NHS

Welcome

1. The Chair thanked Members for attending the meeting.

⁶⁹ Staff from the SG Legal Directorate were present at meetings of the working group to listen to discussions and not to provide legal advice to members of the working group.

Minutes of Previous Meeting and Action Points

2. Members agreed the minutes of the previous meeting. The Chair then provided an update on the following actions:

Action 1: *The SG agreed to amend the summary of the workshop discussions from the 10 July meeting to reflect suggested amendments and to circulate a draft concise note for comments and further discussion.*

Update: The Chair confirmed that this paper was being finalised and would be circulated to Members shortly. The Chair further confirmed that the Secretariat would be happy to receive any comments on this note by email.

Action 2: *Members of the Working Group are encouraged to circulate their ideas for possible ways forward in addressing the issues related to the legal mechanisms for incorporation; and*

Action 3: *SG to work with members of the Group to seek ways to address the issues raised.*

Update: The Chair thanked the author of a discussion paper submitted to the Secretariat on the legal mechanisms for incorporation with reference to the devolved settlement. The paper would be circulated to Members and a meeting convened ahead of the 9th September to discuss this paper. Members were asked to alert the secretariat to their interest in taking part in this discussion.

The Chair invited Members to submit views and papers to the secretariat on the possible ways forward in addressing issues that Members have raised at previous meetings.

The Chair sought Members' agreement for the publication of discussion papers alongside other papers of the Working Group. This was agreed by the membership.

Action: The SG agreed to clarify the Terms of Reference for discussions with Members outwith the plenary meetings of the Working Group through correspondence.

Summary of workshop discussions at the 3rd meeting of the Group

3. The Chair invited comments on the summary of the workshop discussions that took place at the 31 July meeting. The group raised the Welsh Children's Rights Scheme and the progress which had been made to embed this in Wales.

4. A number of amendments to the summary were suggested. The SG agreed to reflect these in a revised summary. This note would be used as a basis

for further discussion with Members through both correspondence or through meetings to identify possible ways forward to some of the issues raised.

Action: the SG agreed to amend the summary of the workshop discussions from the 31 July meeting to reflect suggested amendments.

Workshop – Enabling Compatibility and Redress

5. Members participated in workshop discussions around the following themes:

- Challenging public bodies and seeking financial compensation.
- Order of precedence where secondary legislation is in conflict with UNCRC rights.
- Acts of the Scottish Parliament - statements of compatibility, challenging Acts of the Scottish Parliament and interpretation of Acts.
- Standing to take proceedings

6. A summary of these discussions will be provided in a separate note, to be circulated ahead of the next meeting.

Action: the SG agreed to circulate a summary of the workshop discussions from this meeting with the papers for the next meeting.

AOB

7. Members requested a change of location for the next meeting.

Action: the SG agreed to find a new location and will circulate an update to Members once confirmed.

Next Meeting - Monday 9 September, COSLA, 10:00 – 12:00

8. Diary permitting, the Minister for Children and Young People, Maree Todd MSP, will attend this meeting.

Incorporating the United Nations Convention on the Rights of the Child into Domestic Law in Scotland Working Group, 4th Meeting, 27 August 2019

Summary of Workshop Discussions

Attendees as set out in the minutes of the 4th meeting at Annex K

1. At the fourth meeting of the Working Group, which took place on 27 August 2019, facilitated workshop-style discussions took place around issues raised in Theme 3 of the [consultation](#): Enabling Compatibility and Redress including issues around:

- Challenging public bodies and seeking financial compensation.
- Order of precedence where secondary legislation is in conflict with UNCRC rights
- Acts of the Scottish Parliament – statements of compatibility, challenging Acts of the Scottish Parliament and interpretation of Acts
- Standing to take proceedings

2. This note seeks to summarise the varying views and opinions expressed by individual Members, setting out the points raised under key themes. It should be noted that, as the points outlined below were made in separate workshop-style discussions, they were therefore not discussed by the group as a whole. Thus the lack of response to individual points or the lack of provision of solutions should not be taken to indicate unanimous agreement on the points made or the lack of existence of potential response to issues raised by individual members in workshop discussion.

Challenging public bodies and seeking financial compensation

3. As discussed in the consultation document, it was noted that the goal of incorporation would be, not only to set out clearly what children's rights are, but also to create mechanisms which seek to ensure that those rights will be complied with and enforced. The following points were raised by individual Members in discussion, emphasising points made in the consultation:

- It was considered by some that the development of a scheme of remedies, which would provide mechanisms for rights holders to challenge perceived infringements of their rights, would be a key step towards ensuring that rights are 'binding not guiding'.
- A Member suggested that there could be a range of ways in which the courts might consider the duties attached to the individual rights included in the UNCRC and that the development of the Scottish Bill should therefore give careful consideration to the:
 - individual convention rights

- duties attached to the rights – and the possible expectations of duty bearers and the courts in relation to these; and
 - possible remedies for infringement of individual rights.
- It was also suggested by some that it would be important for there to be clarity on the duties around the rights, particularly where these may be in conflict with existing legislation.
 - A Member also expressed a view that there should be a clear expectation that public authorities should provide what is practical with the resources available to them.

Remedies and Redress

4. Members considered the possible remedies that might be associated with alleged violations of the Convention rights. The following points were made by individual Members in discussion:

- A Member suggested that, although the ECHR HRA model is a helpful comparator, this may not meet the “considered standard” for effective remedy in international law.
- A Member proposed that Child centric complaints mechanisms should be available alongside more formal methods of redress.
- A Member suggested that, for certain cases, there may be a need for clear guidance on remedies to be placed in statute, as the less provision that is made about remedies in the Bill, the more reticent the courts might be to intervene in some cases. The Member also noted that, in addition to standard remedies which may be provided for, there may be an opportunity for new remedies to be added.
- Some Members proposed that the Scottish Bill could provide for a more expansive standard of reasonableness to be applied. It was also suggested by some that there would be a need to consider proportionality when considering whether or not a decision was reasonable.
- Other Members noted that the Bill, developed by an advisory group convened by the Children’s Commissioner and Together (Scottish Alliance for Children’s Rights), provides that a court may grant any relief, remedy or order that is within the power of a civil court and may make an award of damages.⁷⁰
- Some Members suggested that measures around redress should provide for accountability at all levels of public authorities, including the Scottish Ministers. It was noted by some that a first line of defence for public authorities might be to escalate to Scottish Ministers on grounds of having

⁷⁰ <https://www.cypcs.org.uk/ufiles/Children's-Rights-Scotland-Bill.pdf>

insufficient resources to design and deliver services consistent with meeting children's rights.

- Some Members suggested that it would be important not to develop a 'compensation culture', but to instead focus on resolution and improvement. However, other Members noted that it would be important to maintain a position whereby judges can grant the remedy they think most appropriate in the circumstances. Those Members also suggested that financial compensation should also be available, where relevant.
- Some Members expressed a view that the payment of financial compensation was unlikely to address cases involving significant systemic violations of rights in isolation. However, it was acknowledged that, on occasion, the payment of damages could assist in encouraging a body to address systemic failures. The human rights cases involving 'slopping out' by prisoners were cited as an example. A Member also suggested that individual cases may involve the courts being asked to address systemic failings.
- Members' attention was drawn to the views of young people. At SYP's recent day of discussion, young people suggested that the method for incorporating the UNCRC into Scots law should provide for both the payment of financial compensation and measures to address wider systemic failures and prevent future violations of rights.⁷¹
- Some Members also suggested that there would be a need to manage the expectations of rights holders when raising awareness of provisions in the Scottish Bill (once finalised) around the right to challenge and seek redress. They suggested that some rights holders might expect any potential provisions to guarantee that certain decisions would be reversed or financial compensation awarded.

Access to Remedies

- It was also suggested by some that, where appropriate, it would be in a child's best interests to have a remedy for the violation of a right as quickly as possible. In view of this, it was proposed that there would be a need to consider how to shorten the timeframes for rights holders to hold public authorities to account for alleged infringements of rights. Some Members suggested that a dedicated independent body could have a role, that would allow for early resolution of violations, without the requirement for formal court proceedings. Other Members considered that the ability to develop early resolution in individual cases would be dependent on how the duties were defined in legislation.
- A Member proposed that international models for fast tracking complaints, for example, the Tutela system in Columbia, may provide helpful examples.

⁷¹https://d3n8a8pro7vnm.cloudfront.net/scottishyouthparliament/pages/281/attachments/original/1564484934/SYP's_response_to_UNCRC_consultation_.pdf?1564484934.

- Some Members also expressed a view that children and young people would need support to raise claims, for example through awareness raising and the provision of advocacy support. Other Members suggested that ‘soft’ complaints procedures for example, the use of mediation, could help to speed up the resolution of complaints. It was also suggested by some that, due to the limited capacity of the court system, cases should only be taken to court as a last resort.
- A Member suggested that the Scottish Bill should focus only on incorporation of the UNCRC into Scots law. They suggested that measures in relation to the management of court processes and the development of new complaints systems should be taken forward outwith the Bill.

Interim Measures

5. Members also discussed interim measures particularly where there was an imminent risk of harm. Rule 39 of the Rules of Court of the ECHR was referenced in this respect.⁷² A Member suggested that there were a range of existing interim measures available to the courts.

Order of precedence where secondary legislation is in conflict with UNCRC rights

6. Members also considered how to address those instances where the UNCRC rights might be in conflict with existing secondary legislation. The following points were raised in discussion:

- Some Members suggested that the interaction of provisions in the Scottish Bill with current secondary legislation may create difficulties for public authorities, where duties may be in conflict with the UNCRC.
- Some Members suggested that there could be a need to re-evaluate secondary legislation and conduct an audit of where secondary legislation may be in conflict with the Convention. Such an exercise would take time to complete.
- As noted in previous discussions, some Members suggested that there would be a need for public authorities to distinguish between their devolved and reserved functions in considering incompatibility and the prioritisation of legislation.

⁷² https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf

Acts of the Scottish Parliament – statements of compatibility

Challenging Acts of the Scottish Parliament and interpretation of Acts

7. Members also considered whether there should be a requirement for a statement of compatibility with children’s rights to accompany legislation on introduction to the Scottish Parliament. The following points were raised in discussion:

- Members noted that the First Minister’s Advisory Group on Human Rights Leadership was supportive of the use of compatibility statements and a robust pre-legislative scrutiny process conducted by Parliament.
- A Member asked how any statement of compatibility with children’s rights will address the General Comments and Concluding Observations.
- Some Members suggested that the current non-statutory Child Rights and Wellbeing Impact Assessment (CRWIA) for all new legislation provides a more in-depth consideration of compliance with the Convention than a statement of compatibility. However, it was suggested by some that such a statement, in addition to the CRWIA, could be helpful. Other Members suggested that the use of CRWIAs should be a statutory requirement. It was also proposed by some that CRWIAs should be further promoted as a key tool in the development of policy.

8. Members also considered whether the Scottish Bill should contain provisions requiring an Act of the Scottish Parliament (ASP) to be interpreted and applied, as far as possible, in a manner which is compatible with the UNCRC. They also considered the issue of guidance on compliance:

- Some Members suggested that there is a need for the Scottish Government to provide clarity on the relationship between provisions in the Scottish Bill and existing legislation.
- A Member proposed that individual sectors should develop their own guidelines on compliance. They further suggested that the Children’s Commissioner could have a role in development and review of different sectoral guidance.
- A Member cited the Well-being of Future Generations (Wales) Act⁷³ and suggested that the Future Generations Commissioner worked with the Children’s Commissioner in Wales to produce helpful guidance for public authorities on implementation of the provisions.

9. Members also considered whether the Scottish Bill should provide for a regime which would enable rulings to be obtained from the courts on the question of whether a provision in an Act of the Scottish Parliament was incompatible with the rights secured in the Bill. The following points were raised in discussion:

⁷³ <https://futuregenerations.wales/about-us/future-generations-act/>.

- Some Members expressed a view that Acts of the Scottish Parliament should be subject to judicial review on the grounds of incompatibility with the rights in the Scottish Bill.
- Some Members stressed the need for enhanced scrutiny of provisions in the pre-legislative phase, including the use of dedicated committee procedure and Standing Orders of the Scottish Parliament, to enhance provisions. The Finnish model of enhanced pre-legislative scrutiny was cited as a good practice example.
- A Member suggested that the Welsh Measure, including the duty to have due regard and the use of a Child Rights Impact Assessment, has enhanced pre-legislative scrutiny in Wales.
- Some Members suggested that the courts should have the opportunity to strike down legislation passed that does not comply with the UNCRC after the commencement of provisions in the Scottish Bill. However other Members considered that this would be a considerable power to give to the courts, diminishing the power of the Parliament. Some Members suggested that strike down powers should only relate to secondary legislation.

Standing to take proceedings

10. Members also considered whether any special test for standing to bring a case under the Scottish Bill should be required. The following points were raised in discussion:

- Some Members considered that arrangements for standing similar to or beyond those for the Human Rights Act should be adopted. For example, this might include group proceedings or public interest litigation.
- Other Members considered that children over the age of 12 who had capacity should be able to make representations. It was further suggested by some that the parents or carers of children under 12 years could represent their child's interests.

September 2019

Incorporating the United Nations Convention on the Rights of the Child into Domestic Law in Scotland Working Group, 5th Meeting

Minutes of Meeting Held at COSLA Offices, Edinburgh, at 10 am on Monday, 9 September 2019

Present: Maree Todd, Minister for Children and Young People
Michael Chalmers, Director, Children and Families, Scottish Government (SG) (Chair)
Dr. Katie Boyle, University of Stirling
Michael Clancy OBE, The Law Society of Scotland
Chief Superintendent David Duncan, Police Scotland (by teleconference)
Nicola Dickie, COSLA
Juliet Harris, Together (Scottish Alliance for Children's Rights)
Mairi Macpherson, Creating Positive Futures, SG
Dr. Kenneth Meechan, SOLAR
Dragan Nastic, UNICEF
Laura Pasternak, Scottish Youth Parliament
Clare Simpson, Parenting Across Scotland

In Attendance: Liz Blair, SG Legal Directorate⁷⁴
Alexandra Devoy, SG, Children's Rights
Nicola Guild, SG Legal Directorate ⁷⁴
Ceri Hunter, SG, Children's Rights
Lawrence Mearns, Children's Rights
Agnes Rennick, SG Children's Rights (Secretariat)

Apologies: Lynda Brabender QC, Westwater Advocates
Prof. Aoife Nolan, University of Nottingham
Lucinda Rivers, UNICEF
Douglas Ross QC, Ampersand Advocates
Hannah Ross, COSLA
Norma Shippin, NHS
Suki Wan, Scottish Youth Parliament

Welcome

1. The Chair thanked Members for attending the meeting. The Chair also thanked COSLA for hosting the meeting at its central offices.
2. The Chair extended a warm welcome to Maree Todd MSP, Minister for Children and Young People, who was attending this meeting to learn more about the work of the Group and to thank Members for their contributions.

⁷⁴ Staff from the SG Legal Directorate were present at meetings of the working group to listen to discussions and not to provide legal advice to members of the working group.

Minutes of Previous Meeting and Action Points

3. Members agreed the minutes of the previous meeting. The Chair then provided an update on the actions from previous meetings of the Group as follows:

From meeting of 31 July

Action: *The SG agreed to circulate a draft concise note of the workshop discussions from the 10 July meeting for comments and further discussion.*

Update: The Chair confirmed that this paper was being finalised and would be circulated to Members shortly. The Chair further confirmed that, once issued, the Secretariat would be happy to receive any comments on this note by email.

Actions: *Members of the Working Group are encouraged to circulate their ideas for possible ways forward in addressing the issues relevant to the legal mechanisms for incorporation and SG to work with members of the Group to seek ways to address the issues raised.*

Update: The Chair confirmed that a number of Members of the Group had agreed to participate in a teleconference meeting to consider in detail, the issues raised in a discussion paper prepared by a Group Member. This meeting was due to take place on 9 September at 3pm in Victoria Quay. The Chair extended the invitation to any other Members who would like to attend this meeting.

From Meeting of 27 August

Action: *The SG agreed to clarify the Terms of Reference for discussions with Members outwith the plenary meetings of the Working Group through correspondence.*

Update: The Chair confirmed that the Secretariat had forwarded an email to Members on 28 August proposing the following:

- Discussions with Members outwith the plenary meetings will adhere to the Terms of Reference for the plenary UNCRC Working Group.
- Papers produced by Members, or following from discussions with Members outwith the plenary meetings, will be clearly marked as 'Discussion Papers' and will be published on the Website as part of the suite of papers developed by the Working Group.
- 'Discussion Papers' developed by Members or following from discussions with Members outwith the plenary meetings will also inform the report that the Group will develop and share with Ministers.

Summary of Workshop discussions at the 4th meeting of the Group on 27 August

4. The Chair invited comments on the summary of the workshop-style discussions on Compatibility and Redress that took place at the 27 August meeting. A number of amendments were suggested.

5. A Member noted that, although the summary note reflected the wide range of views and opinions expressed by Members, the workshop discussions had not considered the issues around Compatibility and Redress in detail, including how these might be resolved. It was agreed that the summary would be amended to reflect that further detailed consideration would be required around the issues set out in note.

Actions: the SG agreed to amend the summary of the workshop discussions from the 27 August meeting to reflect suggested amendments and to circulate a revised draft for Members' consideration and clearance.

Consultation and Engagement Feedback

6. The SG provided an overview of the initial findings of the independent contractor commissioned to analyse the responses received to the [consultation](#) on incorporating the UNCRC into domestic law, which closed on 28 August. The SG noted that over 160 responses had been received and that, in line with SG guidance, these would be published on the SG website within 20 working days from the close of the consultation. The SG also confirmed that a more detailed update on the findings of the consultation would be provided at the next meeting of the Working Group, which was due to take place on 25 September.

7. Some Members asked for clarity around how separate engagement with children and young people would be reflected in the consultation analysis. Other Members asked for the reports of the bespoke consultation events involving children and young people to be made available on the SG website.

8. The SG confirmed that the Directorate for Children and Families had supported 7 engagement events involving 180 children and young people, including 'seldom heard' children, and that these bespoke events would provide an important supplement to the formal consultation process. The SG noted that reports from these events would also be published as standalone documents on the website.

9. The SG further noted that outcomes from other events organised by stakeholders, involving children and young people, that had been submitted as part of formal consultation responses would be analysed as part of the independent consultation analysis.

Action: The SG agreed to provide a more detailed update on the responses received to the consultation at the next meeting.

Discussions on the way forward regarding Themes 2 and 3 of the Consultation document.

Theme 2 – Embedding Children’s Rights in Public Services

10. Members were invited to consider the possible ways forward in relation to the issues raised during the workshop discussions around Theme 2 of the consultation, which took place at the meeting of 31 July. The following points were raised by Members in discussion:

- A Member expressed a view that no devolved nation had previously incorporated the UNCRC into domestic law and that Scotland faces particular issues arising from the devolution settlement. However, there would still be many opportunities to learn from the international experience of incorporation.
- A Member suggested that it would be important for Scottish Ministers to continue to lead on children’s rights and to engage in wide ranging and cross-sectoral dialogue to ensure that all sectors were engaged in the process and prepared for incorporation prior to implementation of the Bill.
- A Member suggested that the summary note did not consider or reflect the role of regulators, for example, those in relation to housing, care, education etc. They suggested that, if children’s rights were to be genuinely mainstreamed across public service delivery, it would be important to consider how rights might be embedded widely across the regulatory frameworks for public authorities.
- A Member suggested that there were a range of smaller, specific actions that could be highly effective in helping to mainstream rights across public authorities. For example, through regular reports on rights to local authority committees and the use of the Child Rights and Wellbeing Impact Assessment, etc. Ultimately, however, they suggested that the development of a rights based approach would require culture change amongst leaders and at the level of the individual practitioner.
- Some Members suggested that legislation to incorporate the Convention into domestic law must be supported by courageous leadership to ensure that a rights-based approach underpins the development of all relevant public services. For example, it was suggested that there would need to be clear leadership from Scottish Ministers and other key leaders and influencers across public authorities and through local partnership arrangements etc.
- It was noted by some Members that there would be a need to provide clarity to duty bearers early in the implementation process on the rights and duties provided for in the Scottish Bill and a way to make them meaningful to frontline workers, such as police officers.

- A Member reported that there was broad support from civil society organisations and from children and young people to use the proposed Children's Scheme to build on the reporting requirements on Ministers and public authorities under Part 1 of the Children and Young People (Scotland) Act 2014, particularly in relation to ensuring that children and young people are engaged in all levels of decision-making. They also noted that Care Experienced children and young people have suggested that the Children's Rights Scheme could include the requirement for Ministers and public authorities to report on the steps they have both taken, and intend to take, to promote an atmosphere of love, happiness and understanding. The preamble to the Convention states "Recognising that the child for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding".
- A Member expressed a view that the current duties to have due regard or to consider and raise awareness of children's rights in Wales and Scotland respectively are about mainstreaming the Convention, rather than incorporation. In contrast, incorporation of the UNCRC into domestic law would seek to ensure that the outcome of any policy decision or service delivery would be compliant with the Convention.
- A Member suggested that the delivery of children's rights on the ground would need to be sufficiently resourced. The Scottish Government would need to consider funding when taking forward the Scottish Bill.
- Members were asked if they had a sense of how far reaching incorporation might be in terms of the delivery of public services. Some Members expressed concerns about current provision for certain groups of children and young people.

Theme 3: Enabling Compatibility and Redress

11. Members were also invited to consider the possible ways forward in relation to the issues raised at the workshop discussions around Theme 3 of the consultation, which took place at the meeting of 27 August. The following points were raised by individual Members in discussion:

- Some Members suggested that it may be appropriate for public authorities to undertake an audit on compliance with the UNCRC. This would help authorities identify where there might be gaps in their current practice and delivery. A similar exercise was undertaken by public authorities prior to commencement of the Human Rights Act 1998.
- Alternatively, to avoid duplication of effort and to ensure consistency in approach, some Members suggested that the proposed audit could be undertaken at a national level, looking across relevant public services.

- A Member noted that incorporation of the Convention will mean that where there is a right, there is a corresponding remedy for any infringement.
- A Member suggested that there would be a need to determine whether the Scottish Bill should make provision about remedies or whether this should be left to the discretion of the courts. In some circumstances, it would be more appropriate to seek to achieve system change, in order to remedy a violation of a right, rather than focus on providing financial compensation.
- A Member suggested that consideration should also be given to how new types of rights might be adjudicated upon. For example, following incorporation, an application for redress might involve multiple duty bearers with distinct, but interconnected roles and functions. It would be important, therefore, for the Scottish Government to have early contact with the Scottish Civil Justice Council.

September 2019

Incorporating the United Nations Convention on the Rights of the Child into Domestic Law in Scotland Working Group, 6th Meeting

Minutes of Meeting Held at COSLA Offices, Edinburgh, at 10 am on Wednesday, 25 September 2019

Present: Mairi Macpherson, Deputy Director, Creating Positive Futures, Scottish Government (SG)(Chair)
Superintendent Ann Bell, Police Scotland
Dr. Katie Boyle, University of Stirling
Nicola Dickie, COSLA
Jack Dudgeon, Scottish Youth Parliament
Juliet Harris, Together (Scottish Alliance for Children's Rights)
Dr. Kenneth Meechan, SOLAR
Dragan Nastic, UNICEF
Prof. Aoife Nolan, University of Nottingham
Laura Pasternak, Scottish Youth Parliament
Lucinda Rivers, UNICEF
Douglas Ross QC, Ampersand Advocates
Clare Simpson, Parenting Across Scotland

In Attendance: Liz Blair, SG Legal Directorate⁷⁵
Nicola Guild, SG Legal Directorate⁷⁵
Lawrence Mearns, Children's Rights (Secretariat)
Agnes Rennick, Children's Rights

Apologies: Lynda Brabender QC, Westwater Advocates
Michael Clancy OBE, The Law Society of Scotland,
Michael Chalmers, Director, Children and Families
Chief Superintendent David Duncan, Police Scotland
(represented by Superintendent Ann Bell)
Hannah Ross, COSLA
Norma Shippin, NHS
Suki Wan, Scottish Youth Parliament (represented by Jack Dudgeon)

Welcome

1. The Chair thanked Members for attending the meeting of the Working Group (Group). The Chair also thanked COSLA for hosting the meeting at its central offices.

2. The Chair asked Members to note that, whilst the Terms of Reference billed this meeting as considering an analysis of the consultation responses, officials

⁷⁵ Staff from the SG Legal Directorate were present at meetings of the working group to listen to discussions and not to provide legal advice to members of the working group.

were unable to share the full analysis at the meeting, however, a presentation of the information that was available would be given.

Minutes of Previous Meeting and Action Points

3. Members agreed the minutes of the previous meeting, subject to an amendment suggested by a Member. The Chair then provided an update on the following actions:

Action 1: *The SG agreed to amend the summary of the workshop discussions from the 27 August meeting on Compatibility and Redress, to reflect suggested amendments, and to circulate a revised draft for Members' consideration and clearance.*

Update: The Chair confirmed that the revised summary of the workshop discussion on Compatibility and Redress, was circulated with the papers for this meeting.

Action 2: *The SG agreed to provide a more detailed update on the responses received to the consultation at the next meeting.*

Update: The Chair noted that officials had prepared a further update which would be presented and discussed at item 3 on the Agenda for the meeting.

Publication of Papers from Meetings on the SG Website

4. The Chair confirmed that papers from the first meeting of the Group and its Terms of Reference were now published on the SG website.⁷⁶ Minutes and summaries of workshop discussions from the subsequent meetings would be uploaded onto the website once they had been approved by the Group.

5. Some Members noted that the external link to the Group's papers on the SG website appeared not to be working.

Actions:

- **Members agreed to forward any further amendments to both the minutes and the summaries of workshop discussions to officials by 9 October 2019.**
- **The SG agreed to fix the website link.**

Consultation Analysis – Update

6. The SG provided an overview of the initial findings of the independent contractor commissioned to analyse the responses received to the [consultation](#) on

⁷⁶ <https://www.gov.scot/groups/childrens-rights-working-group/>

incorporating the UNCRC into domestic law, which closed on 28 August. The SG noted that over 160 responses had been received and that, in line with SG guidance, the non-confidential responses would be published on the SG website by 26 September 2019.⁷⁷ The following points were raised in discussion:

- A Member noted that the majority of responses to question 12 of the consultation were in favour of full and direct incorporation of the Convention into domestic law. Members engaged in a discussion around the breakdown of the responses to this question.
- A Member questioned the methodology used by the independent contractor. The SG confirmed that information on the contractor's approach to the analysis would be included at the start of their report.
- Some Members asked for clarity on how the independent contractor would capture the comments made by either respondents who had not responded quantitatively or those who had included comments which were not directly relevant to the question. The SG confirmed that information on the contractor's methodology would be included within their report.

Action: SG agreed to share the final consultation analysis with Members as soon as they were able.

Feedback on follow-up discussion with Members on reserved / devolved matters.

7. The Chair referred Members to the previously circulated discussion paper developed by Dr. Kenneth Meechan which discussed the challenges of incorporating the UNCRC into domestic law in terms of legislative competence and suggested an option to address these issues. Members were reminded that this paper was discussed at an additional meeting (by teleconference) which took place on 9 September. This was an optional meeting in which five Members had been able to participate.

8. Some of the Members who attended the optional meeting suggested that the draft minute did not fully reflect the complex and technical issues raised and some of the nuances of the discussion.

Action: It was agreed that Members who attended the meeting should submit their comments to officials so that the minute could be amended to reflect more of the discussion which had taken place.

9. Members welcomed Dr Meechan's paper as a means of initiating discussion on the complexities of the issues. The following points were raised by Members:

⁷⁷ https://consult.gov.scot/children-and-families/uncrc/consultation/published_select_respondent

- A Member suggested that it could be helpful for the Group to understand the SG's position.
- A Member noted that the model for incorporation developed by an advisory group convened by the Children's Commissioner and Together (Scottish Alliance for Children's Rights) proposed direct incorporation of the UNCRC in full but included a caveat to restrict application to devolved areas.
- A Member noted that consideration should be given to the lessons learned from other nations who have incorporated the UNCRC

10. The Chair noted that legislative competence is a matter for Ministers to consider as the detail of the Bill is further developed. The SG's position is laid out in the consultation. The SG is considering all received contributions, including those from consultation respondents, attendees at engagement events and those made by Members of the Group.

Discussion on next steps

11. The Chair invited Members to provide their views on the Group's final output. The following points were raised by Members in discussion:

- A Member noted that if the output of the Group takes the form of a summary report, this should contain a recommendation that the SG listen to opinions from the legal community.
- A Member suggested that a summary report should identify not only those issues on which consensus had been reached but also those on which the Group had failed to reach consensus, so that these could be highlighted as requiring careful consideration by the SG.
- A Member suggested that consensus had been reached on the following:
 - The Bill should incorporate as much of the UNCRC as was within the legislative competence of the Scottish Parliament;
 - The need for a child centric complaints mechanism for those who feel that their rights have not been upheld;
 - The Children's Commissioner should be able to bring forward cases on behalf of children and young people; and
 - The continued use of the Child Rights and Wellbeing Impact Assessment.
- Some Members suggested that a summary report should focus its recommendations on the Group's desired outcomes of UNCRC incorporation and how a culture change around children's rights could be created.
- Some Members noted that a summary report should make recommendations on how duty bearers can start to prepare for commencement.

12. Some Members expressed concern that the Bill was not scheduled to be introduced to Parliament before Year 5 and commented that, on average, Bills take around 14 months to progress through Parliament. A Member suggested that information should be provided to reassure stakeholders on the proposed timeline for the Bill. Some Members also discussed whether the Group's final output could include a 'no later than' deadline for legislation to be introduced to Parliament and suggested that further thought and discussion was required on this point. The Chair noted that the Bill would be introduced in Year 5 in line with the commitment in the Programme for Government 2019/20. The legislative programme for Year 5 will be published in September 2020. The Chair restated the First Minister's commitment to incorporate the UNCRC within the current parliamentary session.

13. Some Members requested that an additional meeting to that scheduled for 21 October was required to allow the Group to discuss the full analysis of the consultation responses as well as reach agreement on a summary report.

Action: The SG agreed to investigate if another meeting could be held in mid-November.

September 2019

ANNEX O

Incorporating the United Nations Convention on the Rights of the Child into Domestic Law in Scotland Working Group, 7th Meeting

Minutes of Meeting Held at COSLA Offices, Edinburgh, at 1 pm on Monday, 21 October 2019

Present: Mairi Macpherson, Deputy Director, Creating Positive Futures, Scottish Government (SG)(Chair)
Superintendent Ann Bell, Police Scotland
Michael Chalmers, Director, Children and Families, SG
Michael Clancy OBE, The Law Society of Scotland (Teleconference)
Juliet Harris, Together (Scottish Alliance for Children's Rights)
Dr. Kenneth Meechan, SOLAR
Prof. Aoife Nolan, University of Nottingham (Video conference)
Laura Pasternak, Scottish Youth Parliament
Douglas Ross QC, Ampersand Advocates
Clare Simpson, Parenting Across Scotland

In Attendance: Liz Blair, SG Legal Directorate⁷⁸
Nicola Guild, SG Legal Directorate ⁷⁸
Gita Sharkey, Children's Rights
Alexandra Devoy, Children's Rights (Secretariat)
Sarah Douglas, Children's Rights (Secretariat)

Apologies: Dr. Katie Boyle, University of Stirling
Lynda Brabender QC, Westwater Advocates
Nicola Dickie, COSLA
Hannah Ross, COSLA
Chief Superintendent David Duncan, Police Scotland (represented by Superintendent Ann Bell)
Dragan Nastic, UNICEF
Lucinda Rivers, UNICEF
Norma Shippin, NHS
Suki Wan, Scottish Youth Parliament

Welcome

1. The Chair thanked Members for attending the meeting of the Working Group. The Chair also thanked COSLA for hosting the meeting at its central offices.
2. The Chair noted that this was the penultimate meeting of the Group and that a further meeting had been organised, at the request of the Group, for 11

⁷⁸ Staff from the SG Legal Directorate were present at meetings of the working group to listen to discussions and not to provide legal advice to members of the working group.

November at 11 am in Victoria Quay. [Update: This meeting was postponed until the New Year.]

Minutes of Previous Meeting and Action Points

3. Minutes of the previous meeting:

Action: Members proposed that the minutes of the 6th Working Group be re-circulated to the Group; the Chair agreed and requested that comments should be returned by 25 October, close of business.

Update: The Minutes were re-circulated to the Group on 22 October.

4. The Chair provided an update on the following actions from previous meetings:

Action: *The SG agreed to share the final consultation analysis with the Group as soon as possible; this is expected to be by the end of October.*

Update: The Chair confirmed that the Scottish Government was not in a position to share the consultation analysis drawn up by ARAD at this time due to:

- The need for further quality assurance to ensure that all responses have been captured accurately;
- The addition of a dedicated section which summarises the views of children and young people who were consulted (as requested by the Group); and
- The production of an easy-read version of the report which will enable children and young people to access the report.

Action: *The Chair thanked Members for their comments on the legal mechanisms discussion paper. Members asked for the minute of the optional meeting, which took place on 9 September, to be re-circulated to the Group; the Chair agreed and requested that final comments should be submitted by the 25 October, close of business.*

Update: The Minute was re-circulated to the Group on 22 October.

Discussion paper on the legal issues around incorporation of UNCRC

5. The Chair invited one of the co-authors to speak to the paper, which sought to address some of the legal issues around incorporation of the UNCRC with a view to identifying potential concerns/barriers and proposing ways forward.

6. The Chair thanked both of the authors for drafting the paper; and thanked the Member for the presentation. The Chair opened up the item for discussion.

Action: Members agreed to share any further comments.

Working Group Report – First Draft.

7. The Chair introduced this item and invited Members to comment on the draft report. The following points were made in discussion: the updated report should:

- Continue to be structured around the three consultation paper themes as described in paragraph 7 of the Terms of Reference.
- Reflect that different views were held amongst the Members, and therefore refer to ‘majority views’ rather than ‘areas of consensus’.
- Rather than include a summary of previous discussions, the report should include the minutes, concise notes and discussion papers drafted by Members as Annexes.
- A list of Acts of the Scottish Parliament which already implement the UNCRC should also be included as an Annex.
- Where the report refers to a course of action as being “difficult” or “complex”, an explanation of why should be included.
- One Member voiced concerns about the risks of incorporating the UNCRC into Scots Law and asked that those views be included in the report.
Action: Member to draft wording
- Section 14 points (c) and (d) (points of consideration) describe a duty to comply and duty to have due regard, one Member asked for more detail to be included and agreed to provide draft wording.
Action: Member to draft wording
- Section 15 needs to be reworded to more accurately describe the implementation of self-executing rights.
Action: Member to draft wording
- Section 16 point (e) (point of consensus), (f) and (g) (points of consideration) need to include some of the material currently in bullet point format above to provide the context to the discussion on the production of supporting guidance.
- Section 17 point (h) (point of consensus) needs to include reference to empowerment.
- Section 24 point (p) (point of consensus), (q) and (r) (points for consideration), need to reflect the broad support for retaining the practice of undertaking CRWIAs, expanding their use across the public sector, and the possibility of making them a statutory requirement.

Action: The Scottish Government will re-work the report in line with the comments made by the membership and circulate for comment to the Group ahead of the next meeting.

November 2019

Incorporating the United Nations Convention on the Rights of the Child into Domestic Law in Scotland Working Group, 8th Meeting

Minutes of Meeting held at Victoria Quay, Edinburgh, at 2 pm on Monday, 24 February 2020

Present: Michael Chalmers, Director, Children and Families
Directorate, Scottish Government (SG)(Chair)
Lynda Brabender QC, Westwater Advocates
Michael Clancy OBE, The Law Society of Scotland
Chief Superintendent David Duncan, Police Scotland
(teleconference)
Juliet Harris, Together (Scottish Alliance for Children's Rights)
Mairi Macpherson, Deputy Director, Creating Positive Futures,
(SG)
Dr. Kenneth Meechan, SOLAR
Kirsty Morrison, Scottish Youth Parliament (SYP)
Dragan Nastic, UNICEF
Lucinda Rivers, UNICEF
Prof. Aoife Nolan, University of Nottingham (teleconference)
Douglas Ross QC, Ampersand Advocates
Clare Simpson, Parenting Across Scotland

In Attendance: Alexandra Devoy, Children's Rights (Secretariat)
Agnes Rennick, Children's Rights (Secretariat)

Apologies: Dr. Katie Boyle, University of Stirling
Norma Shippin, NHS
Suki Wan, Scottish Youth Parliament

Welcome

1. The Chair thanked Members for attending the 8th meeting of the Working Group. The Chair noted that Nicola Dickie and Hannah Ross from COSLA and Laura Pasternak from SYP had moved on to other positions. The Chair thanked these Members for their contributions to the Group. It was noted that Kirsty Morrison was representing SYP at the meeting.

2. The Chair stated the intention for this to be the final meeting of the Group and suggested that any further comments or follow up points would be taken by correspondence.

Minutes of Previous Meeting and Action Points

3. Members agreed the minutes of the previous meeting, dated 21 October 2019. The Chair noted that Actions 1, 2 and 6 were completed. The Chair advised that Actions 3, 4 and 5 would form part of the discussion of item 3 of the agenda (Working Group Report).

Working Group Report – Final Draft

4. The Chair introduced the draft Report, describing its structure and content, and thanked the membership for their participation and contributions to its development. Comments received in correspondence had been taken into account in the current draft. The Chair noted that there had been some differences of opinion as to the most appropriate presentation of views, and proposed that these should be discussed in this final meeting ahead of the Report being agreed.

5. Members discussed in detail how the draft Report might be amended to better reflect the views of all Members. It was agreed that, to address a perceived imbalance in the presentation of views relating to the majority and minority viewpoints, additional context and clarification should be added to paragraph 11 of the draft Report, which described direct incorporation and the views of the majority of Members around the possible benefits of this approach.

6. Further amendments were also agreed to paragraph 12 of the draft, which described the minority of Members' views around issues relating to full and direct incorporation of the UNCRC and the legislative competence of the Scottish Parliament. A specified amendment was also agreed to paragraph 13 of the draft on the transposition of UNCRC rights. Members agreed that these amendments would ensure a balanced presentation of the issues, whilst also appropriately reflecting the views of both the majority and minority of Members.

Action: It was agreed that paragraphs 11, 12 and 13 would be amended to ensure a balanced presentation of the views of Members.

7. The Chair invited any further final comments on the draft Report. The following points were raised:

- There was some discussion about the consistent use of language across the Report, including its Annexes, and whether published documents could be retrospectively amended. Members agreed that there should not be changes to the substance of previously agreed papers. [The Scottish Government will consider any smaller, non-substantive adjustments, as required].
- Members agreed that the final Report should be published in two formats: one which would contain the Report and all of its Annexes in full; and a

second that would include the Report with the Annexes attached as hyperlinks.

- A Member suggested that the Report should be made accessible to children and young people, and should be brought to their attention when further engagement events are held. The Chair agreed to consider this.

Action: The secretariat agreed to:

- **publish two versions of the Report as discussed at paragraph 7; and**
- **consider the development of an accessible version of the Report, once published.**

AOB

8. The Chair advised Members that the secretariat would circulate a further version of the Report alongside the minutes of this meeting and invite any final comments. The Chair noted that, when Members are content, the Report would be sent to Ministers and published on the Scottish Government website.

9. The Chair thanked Members, on behalf of Scottish Ministers, for their assistance in considering different potential models for the incorporation of the UNCRC into domestic law in Scotland. The expertise of the membership was invaluable in taking this work forward.

February 2020



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