

Children's Rights: Consultation on incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland

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Scottish Government
Riaghaltas na h-Alba
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About this consultation

In line with the Programme for Government 2018-19 commitment, this consultation looks at how a new Act could incorporate the UNCRC into domestic law.

It is important that we develop a model of incorporation that will deliver the best outcomes for children, young people and families in Scotland. Consultation is an essential part of that process. It gives us the opportunity to hear your views on this proposed area of work.

To help us do this we have set out below a series of questions under three themes which will enable you to give your views on these themes. The three themes are:

- legal mechanisms for incorporating the UNCRC into domestic law
- embedding children's rights in public services
- enabling compatibility and remedies.

Responding to this Consultation

We are inviting responses to this consultation by 28 August 2019.

Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space (<http://consult.gov.scot>). Access and respond to this consultation online at <https://consult.gov.scot/children-and-families/uncrc>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 28 August 2019.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form to:

UNCRC Incorporation
Scottish Government
2B South
Victoria Quay
Edinburgh, EH6 6QQ

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

To find out how we handle your personal data, please see our privacy policy: <https://beta.gov.scot/privacy/>

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot>. If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or at uncrcincorporation.gov.scot

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.gov.scot>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Children's Rights: Consultation on incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland

Foreword

Children and young people are at the heart of our ambitions for the future and their rights are a key priority. As a Government, our mission is to achieve the National Outcome for children and young people; we grow up loved, safe and respected so that we realise our full potential.

This year marks the 30th Anniversary of the UN Convention on the Rights of the Child (UNCRC); the most complete statement of children's rights ever produced. The UNCRC is the most widely ratified human rights treaty in history. Covering all aspects of a child's life, it makes clear that every child has rights, irrespective of their status and that we, as the government, must work together with adults to make sure all children can enjoy them.

We believe that delivering the rights of children and young people, as enshrined in the UNCRC, is fundamental to making children's rights real and Scotland the best place in the world to grow up. One of the most fundamental tests of our success in respecting and protecting those rights is whether they are part of the day-to-day lived experience of every child and young person in Scotland. We want a Scotland where policy, law and decision making takes account of children's rights and where all children have a voice and are empowered not just to know and understand their rights, but also to assert and defend those rights and the rights of others.

That is why we believe it is now time to incorporate the UNCRC into domestic law. In a number of countries, incorporation into domestic law has been found to have a positive impact on children's lives. Arguably more importantly, the value to children, young people and families in Scotland is that children's rights will be built into policy, law and practice so all children can benefit from and exercise these rights in their daily lives. Incorporating the UNCRC into our domestic law in Scotland will also enable children, and those acting on their behalf, to advance their rights in the Scottish courts.

To underline our commitment, we will deliver new legislation in this parliamentary session to incorporate the UNCRC into our domestic law. We also want to be an example to other countries and so will consider where it may be possible for Scots law to go further than the UNCRC requires, where that is demonstrably beneficial for children and young people.

This consultation seeks views on the best way of incorporating the UNCRC within the context of Scots law, public services and the powers of the Scottish Parliament.

We welcome all views on how a new Act of the Scottish Parliament could best give practical effect to the UNCRC in a way that demonstrates international leadership and works for every child and young person in Scotland.

The proposals consulted on in this paper raise fundamental questions for the laws of Scotland and for the operation of our Parliament. Arguably it has never been more

important for human rights, not least the rights of our young people, to be defended and promoted and this is a chance for the Scottish Parliament to show leadership. This consultation explores the issues which need to be addressed, in order to make our international obligations part of the day-to-day experience of our children.

There is no single right or wrong answer and there will be complex issues to consider in our journey to incorporation. This Government believes, however, that incorporation of the UNCRC has the potential to transform the experience of children and young people in Scotland. Together we have already achieved a lot but we look forward to hearing your views on how we can do much more.

John Swinney
Deputy First Minister and Cabinet Secretary for Education and Skills

Maree Todd
Minister for Children and Young People

Introduction

United Nations Convention on the Rights of the Child (UNCRC)

The UNCRC¹ is one of the core United Nations (UN) human rights treaties. It sets out the civil, political, economic, social and cultural rights of every child, regardless of their race, religion or abilities.

The UK ratified the UNCRC in 1991 and since then has been obliged under international law to give effect to the rights set out in the UNCRC. The UK has also signed the optional protocol on the involvement of children in armed conflict and the optional protocol on the sale of children, child prostitution and child pornography. A further optional protocol which allows complaints to be made to the UN Committee on the Rights of the Child has not yet been signed by the UK. While the UK is bound by the UNCRC in international law, because the UNCRC has not been incorporated into domestic law, those rights are not part of the law which can be enforced directly in Scottish courts².

Implementation of Children's Rights in Scotland

The Scottish Government respects and protects the UNCRC rights to help deliver our aim that children grow up loved, safe and respected, and so that they reach their full potential. It is the policy of the Scottish Government to reflect the UNCRC in legislation and policy.

The approach in Scotland in this area to date has, generally, been to implement rights in international treaties by way of detailed implementing legislation rather than by incorporation into our domestic law of the terms of the treaty itself. Implementation in this way gives effect to the international rights in the Scottish context, ensuring that rights which are set out in an international treaty, and which are expressed in general terms are reflected in detailed provisions, which provide certainty for those who require to rely on the law in Scotland.

Section 1 of the Children and Young People (Scotland) Act 2014 (CYP Act 2014), which commenced in June 2015, places specific duties on Scottish Ministers aimed at furthering the effect of the UNCRC in Scotland. These include consideration and delivery of appropriate action, listening to the views of children and promoting public awareness and understanding of children's rights, including amongst children. These duties also require Ministers to report to the Parliament every 3 years on relevant progress and their plans for the subsequent 3 year period. The Scottish Government report, "Progressing the human rights of children in Scotland: A Report 2015-2018"³ sets out the progress made in relation to children's rights since June

¹ https://downloads.unicef.org.uk/wp-content/uploads/2010/05/UNCRC_united_nations_convention_on_the_rights_of_the_child.pdf?_ga=2.60733477.985627632.1558359430-1881143938.1535966376

² The courts may, though, refer to and rely on the UNCRC where that is relevant to an issue which arises under domestic law, in particular: (i) when interpreting an ambiguity in legislation intended to implement the UNCRC or (ii) when considering an alleged breach of the ECHR or of the EU Charter of Fundamental Rights.

³ <https://www.gov.scot/publications/progressing-human-rights-children-scotland-report-2015-2018/>

2015. This report also provides an update on progress against the UN Committee on the Rights of the Child's "Concluding Observations"⁴ as they relate to Scotland. Since 1 April 2017, section 2 of the CYP Act 2014 has also placed 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.

There are a number of additional pieces of Scottish legislation which embody the UNCRC in Scots law. These include:

- Children (Scotland) Act 1995 provides a major part of the legal framework for child welfare and protection in Scotland, it embeds Articles 1, 3, 5, 9, 12, 18, and 20. Section 11 is an example of legislation which goes further than the UNCRC. This provides that when considering whether or not to make an order on matters such as child contact and residence and parental responsibilities and rights, the court "shall regard the welfare of the child concerned as its paramount consideration". This compares to Article 3 of the UNCRC (best interests of the child) which provides that "the best interests of the child shall be a primary consideration" when considering all actions concerning children.
- Standards in Scotland's Schools etc. Act 2000, sets out the provision of school education specifically relating to children's rights and the duty of the education authority and embeds Article 29.
- Commissioner for Children and Young People (Scotland) Act 2003 embeds Articles 3, 12 and 42. It creates the post of Commissioner for Children and Young People in Scotland with the general function of promoting and safeguarding the rights of children and young people.
- Criminal Justice (Scotland) Act 2003. Section 51 of this Act embeds Articles 3, 19 and 37 by protecting children from physical punishment and making it illegal to punish children by shaking, hitting on the head or using an implement.
- Mental Health (Care and Treatment) (Scotland) Act 2003. Section 2 of the Act makes specific provisions as regards securing the welfare of any child in respect of care or treatment given under the Act. This legislation is based on a set of rights and principles which promotes patient's rights which includes that any function should be carried out for the maximum benefit of the patient, with the minimum necessary restriction on the freedom of the patient and having regard to the views of the patient.
- Education (Additional Support for Learning) (Scotland) Act 2004 embeds Articles 6, 23 and 29 in the education system. It provides the legal framework which underpins the system for identifying and addressing the additional support needs of children and young people who face a barrier to learning.
- Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 provides for the protection given to children and young people from

⁴ The UN Committee on the Rights of the Child is a body of independent experts elected by states that are parties to the UNCRC and its purpose is to monitor implementation of the UNCRC at the state level. States that are parties to the UNCRC are also obliged to submit regular reports to the Committee on how UNCRC rights are being implemented. The Committee examines each report and addresses its concerns and recommendations to the state party in the form of "Concluding Observations".

those who would wish to cause them sexual harm, or exploit them for sexual purposes and embeds Article 34. The Act also aims to improve the protection given to children from those convicted of sexual offences who still pose a risk of sexual harm.

- Adoption of Children (Scotland) Act 2007 modernised the system of adoption in Scotland to provide long-term security for children who could not live with their families and embeds Articles 3, 7, 8, 9, 12, and 21 into the adoption system.
- Protection of Vulnerable Groups (Scotland) Act 2007 embeds Articles 3 and 34 by creating the legislative framework for a strengthened, robust and streamlined vetting and barring scheme for those working with children and protected adults in Scotland.
- Children's Hearings (Scotland) Act 2011 reformed the children's hearings system and the Act embeds Articles 3, 4, 6, 8, 9, 12, 25 and 40 into the children's hearing system.

The Scottish Government has also taken forward a wide range of initiatives, such as Getting it right for every child (GIRFEC)⁵ our national programme to support and work with all children and young people in Scotland, which impact positively on the realisation of children's rights.

Human Rights in Scotland

The requirements within Part 1 of the CYP Act 2014 sit within the wider context of Scottish Ministers' obligations to respect and protect human rights. The Scotland Act 1998 requires that all Scottish Parliament legislation and all Scottish Government decisions and actions must be compatible with the rights set out in the Human Rights Act 1998 (HRA) and derived from the European Convention on Human Rights (ECHR). The HRA also makes it unlawful for public authorities in Scotland to act incompatibly with the ECHR. It is open to the Parliament to enact laws to observe and implement other international obligations, including international human rights obligations, so far as these are otherwise within the legislative competence of the Parliament. The Scottish Ministerial Code recognises the responsibility of Scottish Ministers "to comply with the law, including international law and treaty obligations."

Following on from announcements in the Programme for Government 2017-18, the First Minister established an Advisory Group on Human Rights Leadership to work independently of the government to develop recommendations on how Scotland can continue to lead by example on human rights, including economic, social, cultural and environmental rights. The Group presented its report and recommendations⁶ to the First Minister on Human Rights Day, 10 December 2018.

International Experience

International experience suggests that a mixture of law, policy and practice is the best way to progress implementation of the UNCRC. Non-legislative measures that

⁵ <https://www.gov.scot/policies/girfec/>

⁶ <https://humanrightsleadership.scot/>

different countries have used include national strategies and action plans for children, children’s rights training and the establishment of children’s commissioners or ombudspersons. The Scottish Government’s priorities for embedding a children’s rights approach in Scotland over the next three years are set out in, “Progressing the Human Rights of Children in Scotland: 2018-2021 Action Plan”⁷, published in December 2018.

Learning gained from experiences in other countries also indicates that there is no one model of incorporation and that incorporation is most effective when it is implemented in a way that best complements each individual country’s legal system, policies and practices. In the Scottish context, constitutional constraints need to be considered, as some of the UNCRC rights fall within areas of law reserved to the UK Parliament by the Scotland Act 1998⁸. There are also areas where rights within the UNCRC will be affected both by laws reserved to the UK Parliament and those devolved to the Parliament.⁹ Similarly, there are significant overlaps between the rights enshrined in the HRA and the ECHR on one hand and the UNCRC on the other. As a result, the approach to incorporation of the UNCRC must fit within both the devolution settlement, as set out in the Scotland Act 1998, and the human rights framework established by the HRA.

The evidence suggests that in a number of countries incorporation has had a positive impact in providing a platform for the development of other legal and non-legislative measures, underpinned by systematic children’s rights training and a robust infrastructure designed to monitor, support and enforce implementation.

Consultation and engagement with children and young people and the full range of duty bearers and stakeholders is key to successful change in relation to rights awareness raising and incorporation. Such processes take time, but the evidence is clear that an inclusive and consultative approach is essential.

Consultation

In line with the Programme for Government 2018-19 commitment, this consultation looks at how a new Act could incorporate the UNCRC into the law of Scotland. It is important that we develop a model of incorporation that will deliver the best outcomes for children, young people and families in Scotland. Consultation is an essential part of that process. It gives us the opportunity to hear your views on this proposed area of work. To help us do this we have set out below a series of questions under three themes which will enable you to give your views. The three themes are:

- legal mechanisms for incorporating the UNCRC into domestic law
- embedding children’s rights in public services
- enabling compatibility and remedies

⁷ <https://www.gov.scot/publications/progressing-human-rights-children-scotland-action-plan-2018-2021/>

⁸ For example, Article 38 (3) makes provision that countries shall refrain from recruiting children under the age of 15 into their armed forces. Recruitment to the armed forces is covered by the Defence reservation in the Scotland Act.

⁹ For example Article 8 where some elements of a child’s identity will be affected by devolved law (for example family law) and some will be affected by reserved law (such as a child’s nationality).

THEME 1: Legal mechanisms for incorporating the UNCRC into domestic law

When we talk about “incorporation” of an international convention, this is generally understood to mean that the substantive provisions of the convention can be relied upon and applied by the national courts and those provisions must, as a matter of domestic law, be applied by national authorities. Incorporating the UNCRC into our domestic law would be done by introducing a Bill to the Parliament with the overarching intention of embedding the rights in the UNCRC into the law in Scotland. This would further ensure that children’s rights are woven into policy, law and practice in Scotland and enable people to rely on their rights in the domestic courts. Ultimately, incorporating the UNCRC in Scots law aims to improve the outcomes and experiences of our children and young people.

Approach to the options consulted on

There is no single approach to the incorporation of an international convention into domestic law. The United Nations Committee on the Rights of the Child recognises that there are a variety of legal methods of implementing the UNCRC and makes clear that it is for individual states to decide how best to make children’s rights real in their particular country.

This section of the consultation seeks respondents’ views on which approach is most suitable for the Scottish context. Each of the different options presented has different impacts and as the arguments are finely balanced we do not provide a preferred option.

The legal and constitutional background

International treaties are not automatically part of the law in Scotland. Treaty provisions only become part of the law enforceable in the Scottish courts if, and to the extent that, they are implemented by legislation. That principle ensures that there is democratic scrutiny of the way that international obligations are translated into our own law. The usual method of implementing treaties such as the UNCRC in Scotland has been through detailed legislation giving effect to the rights set out in the treaty in a way which fits into our existing law, rather than through simply copying out the terms of the treaty. To give greater assurance that UNCRC rights will be respected in all circumstances, we plan either to directly incorporate those rights as closely as is achievable in the Scottish context, or to transpose those rights by enacting a suite of Scottish children’s rights.

The rights protected by international human rights treaties are typically expressed in very general terms. A benefit of the current approach to the implementation of treaty rights is that it means that the Parliament will frame legislation adapted to the circumstances in Scotland, with sufficient detail to provide clear guidance to those who need to apply and rely on the law, including the courts. However, a disadvantage of that approach in the field of human rights is that the rights are less visible as standalone rights, relevant in all circumstances, and it is not possible for

individuals who consider that their rights have been infringed to seek to enforce the treaty rights directly in the Scottish courts¹⁰.

In countries which, unlike Scotland, automatically regard treaty rights as part of their law, the courts are used to considering whether treaty rights are “self-executing” (i.e. can be enforced directly without any further legislation) or, on the other hand, require detailed legislation to give them practical effect. For example, in Belgium, the courts have held that Articles 2(1), 7 and 26(1) of the UNCRC do not have direct effect in Belgian law, but would require further legislation to give them practical effect, though such rights may be used as an interpretive tool¹¹. Because treaty rights are not automatically part of Scots law, the Scottish courts have not had to develop a similar doctrine for treaty rights generally¹².

The current approach to the implementation in the UK of international human rights treaties has already been significantly affected by the Human Rights Act 1998 and by membership of the European Union (EU). All public authorities have an obligation to comply with the ECHR and with the rights granted by EU law, including the rights set out in the EU Charter of Fundamental Rights, and those rights can be enforced directly in the courts. However, in each of these cases, there is a significant body of guidance about the way that the rights apply in particular circumstances, through the caselaw of the European Court of Human Rights and the Court of Justice of the EU and, in the case of EU law, the domestic courts can refer a question to the Court of Justice of the EU to obtain guidance on the application of the Charter of Fundamental Rights.

Regardless of the approach taken to incorporation of the UNCRC, the primary mechanism for the implementation of the UNCRC rights will continue to be through legislation - it will be for the Parliament, in the first instance, to legislate in a way which observes and implements the international obligations contained in the UNCRC. However, the approach to incorporation has significant implications for the respective roles of the Parliament and the courts.

Where an international treaty granting rights has been incorporated directly into domestic law, the courts will require to interpret the rights set out in the treaty, to decide whether the right at issue is or is not self-executing and, if the right is self-executing, to decide how the right applies in a particular context. On the other hand where such a treaty has been incorporated by transposition into domestic law¹³, the courts will interpret the rights as enshrined in domestic law by the Parliament. Of course, whichever approach is taken, the domestic legal system should, in order to comply with the UK’s obligations in international law, comply with the standards set by the treaty.

¹⁰ The courts may, however, look at international human rights treaty provisions, in order to assist with the interpretation of domestic legislation which was enacted to implement those provisions or to inform an allegation that there has been a breach of ECHR rights or rights under the EU Charter of Fundamental Rights.

¹¹ Lundy et al, *The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries*, UNICEF, p. 37.

¹² Similar issues have arisen when the courts have had to consider whether an EU Directive has direct effect.

¹³ See the methods for incorporation described later in this paper for more detail on these approaches.

There is no single right approach to incorporation. There are examples of different approaches in many countries across the world. We would invite respondents to take these considerations into account in responding to the specific questions.

The specific Scottish context

Scotland is not unique in the considerations which arise when considering how to incorporate the UNCRC. As with other countries, it is necessary to consider how incorporation will interact with existing legislation, judicial decisions and policy.

There are particular facets of the Scottish legal system, however, that will need to be borne in mind in the context of incorporation of the UNCRC. For example, the unique Scottish system of Children's Hearings removes children in need of protection, guidance, treatment or control from the court system. This system places the welfare of children at the heart of formal decisions being taken about children. It means that in many cases important decisions in relation to children are taken not by the courts, but by a Children's Hearing. In many respects, this is a successful embodiment of the rights enshrined in the UNCRC. So the method of incorporation will need to be mindful of the unique judicial context in Scotland, where rights under the UNCRC will often have to be applied, in the first instance, by a Children's Hearing.

The constitutional setting also raises particular issues in Scotland. These are discussed below but they concern the operation of the Scotland Act 1998 and the HRA and how these Acts would interact with the Bill. There are areas covered by the UNCRC where the Parliament's ability to legislate will be restricted and it will also be important to consider how to provide as much clarity as possible to rights holders and duty bearers as it is they who will, in the first instance, have to navigate the interaction between the rights set out in the UNCRC and existing legislation, and also, in some circumstances, to determine whether the rights at issue relate to reserved or devolved matters under the Scotland Act 1998.

The framework for incorporation

Whichever method of incorporation is taken, the law will need to set out a framework of requirements on public authorities and the courts.

The HRA provides such a framework as regards the ECHR. The HRA sets out a number of different mechanisms by which the rights and freedoms set out in the ECHR are given further effect in domestic law.

The HRA includes mechanisms designed to promote the compatibility of legislation with the ECHR. Section 19 of the HRA requires a Minister of the Crown to make a statement as to the Bill's compatibility with the ECHR when introducing a Bill at Westminster. The Scotland Act 1998 makes provision for a similar assessment of compatibility (through the requirement to certify that a Bill is within legislative competence) to be made when a Bill is introduced into the Parliament.

Section 3 requires that legislation must be read and given effect to in a way which is compatible with the ECHR, so far as it is possible to do so. Where a court

determines that a provision in primary legislation is incompatible with the ECHR, section 4 provides that the court may make a declaration of incompatibility. A declaration of incompatibility does not, however, mean that the primary legislation is unlawful or affect its validity. The legislation remains in effect, and Ministers can consider how to respond to the declaration.

The HRA goes on to impose duties on public authorities as regards the ECHR. The aim of imposing duties on public authorities is to ensure that the ECHR is worked into policy and practice and that ECHR rights can be enforced in the courts. Section 6 of the HRA makes it unlawful for a public authority to act in a way which is incompatible with the ECHR. The First Minister's Advisory Group on Human Rights Leadership calls this "a duty to comply". This duty to act compatibly with the ECHR applies to courts and tribunals and to "any person certain of whose functions are functions of a public nature".

The HRA also makes provision about how breaches of the HRA may be raised in the domestic courts and provides for a remedial order procedure, which can be followed to address any legislative incompatibility. The Convention Rights (Compliance) (Scotland) Act 2001 makes additional provision about how Scottish Ministers can take action to rectify legislation which is or may be incompatible with the ECHR.

Taken together, these various mechanisms incorporate the ECHR into the domestic law of the UK. To give practical effect to the rights secured in the Bill proposed by this consultation, we envisage that it would be appropriate to have a similar framework. Such a framework has also been suggested in the context of the UNCRC by the model proposed by the advisory group convened by Together and the Commissioner for Children and Young People in Scotland and in a Bill on Children's Rights introduced to the House of Lords in 2009-10.

The duties on public authorities (including the Scottish Government)

To achieve incorporation, the Bill would have to make clear to rights holders what their rights are and also make clear to public authorities their duties under the Bill. The Bill would also require to provide for what is to happen if these requirements are breached.

There are broadly two approaches potentially which could be taken to imposing duties on public authorities when exercising their functions in relation to human rights. The first would be that used in section 6 of the HRA, where it is made unlawful for a public authority to "act in a way which is incompatible" with rights in the ECHR. There is a similar requirement in EU law to act compatibly with the rights granted by EU law.

The second approach would involve placing a duty on an authority to pay "due regard" to human rights requirements when exercising their functions, and to reflect that consideration in their decisions. These duties oblige public authorities to show that they have considered people's rights when they make relevant decisions. Other formulations of this type of duty are also seen in legislation, for example a duty to have regard, a duty to consider or a duty to take into account in relation to principles or aims, but not in relation to legal obligations from international treaties.

The First Minister's Advisory Group on Human Rights Leadership consider these two approaches in their recommendations. They illustrate the difference between the two approaches by explaining that a "duty to comply" is:

"a duty to provide an outcome which is consistent with the rights of the individual, and [unlike an obligation to give due regard] not simply a duty to provide a process which takes into account the rights of the individual."¹⁴

Obligations to have "due regard" have important applications in many areas but we do not consider, at least in the long term, that a standalone duty to have due regard to the UNCRC rights would be the most effective means of delivering the improvement in outcomes for children that we want to see.

We discuss in this consultation the different approaches to incorporating the UNCRC rights and would intend, whichever approach is taken, to include a "duty to comply" with those rights.

Questions

1. Are there particular elements of the framework based on the HRA as described here, that should be included in the model for incorporation of the UNCRC in domestic law? Please explain your views.
2. Are there any other aspects that should be included in the framework? Please explain your views.
3. Do you agree that the framework for incorporation should include a "duty to comply" with the UNCRC rights? Please explain your views.

THE OPTIONS FOR INCORPORATION

Incorporating the UNCRC directly into domestic law

Direct incorporation is the shorthand for a method of incorporation that takes the content of an international convention and gives it effect in domestic law - essentially by lifting the wording from the international convention and putting it into domestic law. Broadly this is the approach taken by the HRA with regards to the ECHR. That Act defines "Convention rights" as being those in a schedule to the Act and most of the Articles of the ECHR are reproduced in that schedule¹⁵.

Direct incorporation means that rights holders can simply refer to the text of the international convention to identify the rights which form part of domestic law. Under this approach, the legislation would (so far as permissible in relation to devolved

¹⁴ Page 28 of their Recommendations - <https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>

¹⁵ Schedule 1 of the HRA repeats the principal Articles of the ECHR as well as some Articles of additional protocols <https://www.legislation.gov.uk/ukpga/1998/42/schedule/1>

matters) set out a framework of duties and requirements which would apply to the rights as set out in the UNCRC and optional protocols and would introduce remedies in the domestic courts for enforcement of those rights. In this context there is no difference in the wording between the “domestic version” of a right and the international version.

Taking this direct incorporation approach does however mean that the rights, which were drafted for inclusion in an international treaty and intended to impose obligations on states, are not specifically tailored for application by rights holders, duty bearers and courts in our legal system. Because the rights are framed in general terms, and there is no body of jurisprudence by courts which explain the detailed meaning of the UNCRC rights, this could make interpretation of the law less certain for rights holders and duty bearers, and could, paradoxically, mean that the rights would be considered to be less substantive or enforceable than if they had been framed explicitly for application in our legal system.

As we note elsewhere in this paper, this model ultimately gives the courts the power to decide whether or not particular rights are self-executing and to decide authoritatively in a particular case on the correct interpretation of the rights and duties set out in the UNCRC. Because the rights are framed in general terms, it may not always be easy to predict the conclusion which the courts would reach in any particular case, and this approach can accordingly lead to greater uncertainty for rights holders and duty bearers. And because application of the rights in question may require a balancing of competing policy objectives and resources, there may be cases where Parliament, which is democratically accountable, would be better placed than the courts to give these rights concrete expression.

Direct incorporation of the UNCRC in a Scottish Context

A model of direct incorporation has been suggested for Scotland by an advisory group convened by the Commissioner for Children and Young People in Scotland and Together (the Scottish Alliance for Children’s Rights)¹⁶. This model would incorporate the UNCRC into Scots law directly and without any adjustment.

We made a commitment to include the proposal from this group as part of this consultation and we welcome respondents’ views on the proposal. The general issues arising in the context of direct incorporation detailed above are equally applicable to this proposal.

Which rights should be directly incorporated?

It will be necessary for the Bill to identify the rights which are to be the subject of the legislation. The “UNCRC requirements” for the purpose of Part 1 of the CYP Act 2014 are the rights and obligations set out in Part 1 of the UNCRC (Articles 1-42) plus Articles 1 to 6(1) and 7 of the first optional protocol and Articles 1 to 10 of the second optional protocol. However, there are some further issues which would need to be considered in the context of the proposed Bill.

¹⁶ <https://www.togetherscotland.org.uk/about-childrens-rights/monitoring-the-uncrc/incorporation-of-the-un-convention-on-the-rights-of-the-child/>

Interpretation of rights

As discussed above, how the rights in the UNCRC and the optional protocols, which are framed in general terms, are to be interpreted and applied in Scotland will need to be considered.

The HRA in section 2 addresses this issue by placing a requirement on a court or tribunal which is determining a question in connection with an ECHR right, to take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights, particular opinions and decisions of the European Commission of Human Rights, or particular decisions of the Committee of Ministers, so far as these are relevant to the proceedings before it.

In the case of the UNCRC, however, there is no body of authoritative international jurisprudence to which a Scottish court could refer when a UNCRC right requires consideration because there is no international judicial body established under the UNCRC equivalent to the European Court of Human Rights. Under the new communications procedure in the third optional protocol which allows for complaints to be submitted to the UN Committee on the Rights of the Child, a body of decisions is beginning to develop, which may start to provide assistance with interpretation of the UNCRC. However, the UK has not signed optional protocol 3 under which the communications procedure is established so consideration would be needed as to whether the domestic courts should refer to decisions issued by a non-judicial body under a procedure to which the UK is not a party.

Other possible aids to interpretation of the UNCRC include the General Comments of the UN Committee on the Rights of the Child. The Committee is a body of independent experts nominated and elected by states which are parties to the UNCRC. Its purpose is to monitor implementation of the UNCRC at the state level and the General Comments are issued periodically to help states with their implementation of the UNCRC. General Comments provide authoritative guidance¹⁷, but, unlike the UNCRC itself, are not themselves legally binding in international law. They are, moreover, intended to be general in nature, and, accordingly, while they may influence the interpretation of the treaty, cannot drive a conclusion that an Article has been breached in a particular case¹⁸.

Further assistance might also be obtained from the Observations of the Committee on reports made under the UNCRC regime in response to reports made by States which are party to the UNCRC. However, consideration would require to be given to the status to be given by domestic courts to those Observations. The Committee is not a judicial body. Its function is to examine the progress made by States Parties in achieving the realization of the obligations undertaken in the UNCRC. Its Observations are not themselves legally binding in international law.

The courts might also obtain assistance in interpreting UNCRC rights from decisions of courts in other countries, where the UNCRC is part of the domestic law applied by

¹⁷ *Mathieson v. Secretary of State for Work and Pensions* [2015] UKSC 47, para. 39.

¹⁸ *R (DA) v. Secretary of State for Work and Pensions* [2019] UKSC 21, paras. 68-69.

those courts – just as they take assistance from the decisions of courts in other jurisdictions in other areas of the law. And where a right in the UNCRC overlaps with other international human rights – as, for example, the right to freedom of expression¹⁹ or the right to freedom of thought, conscience and religion²⁰ - the courts may obtain assistance from decisions made under other international treaty regimes, including the ECHR.

Questions

4. What status, if any, do you think General Comments by the UN Committee on the Rights of the Child and Observations of the Committee on reports made by States which are party to the UNCRC should be given in our domestic law?
5. To what extent do you think other possible aids would provide assistance to the courts in interpreting the UNCRC in domestic law?

Which rights can and should be enforced directly by the Scottish courts?

We have explained above how, in legal systems which regard treaty rights as part of their law automatically, the courts may have to decide whether or not any particular treaty right is self-executing – i.e. can be enforced directly by the courts without the need for detailed legislation. We have described how the Belgian courts have held that some of the UNCRC rights are not self-executing. However, even though a right may not be self-executing, so that it cannot be directly enforced without implementing legislation, it may still be capable of being relevant to the way that judges interpret and apply the law.

If a model of direct incorporation is adopted, we will need to decide how to deal with this question, and in particular whether the Bill should seek to differentiate between rights which can be regarded as self-executing and those which are not²¹, or whether we should leave it to the courts to develop doctrines for dealing with this issue on a case by case basis.

Rights and reserved functions

In assessing which Articles of the UNCRC and optional protocols can be included in the legislation, it will be necessary to comply with the limits of the Parliament's competence to legislate. Section 29 of the Scotland Act 1998 defines the legislative competence of the Parliament. The Parliament's legislative competence is limited by the UK Parliament's reserved competence over certain subject matters (such as defence and foreign affairs) and the protection of particular statutes (e.g. the HRA, the European Communities Act 1972 or the European Union (Withdrawal) Act 2018)

¹⁹ Article 13.

²⁰ Article 14.

²¹ [e.g. the difference has been illustrated by Article 13 (freedom of expression) as an example of a self-executing right expressed "The child has the right...", while Article 19 (protection from violence) is expressed as "States Parties shall take all appropriate legislative, administrative, social and educational measures..."]

against modification. Section 29 also provides that the Parliament cannot legislate in a way that would be incompatible with ECHR (i.e. the rights protected by the HRA) or, at present, EU law.

Some aspects of the UNCRC and the two optional protocols relate to matters which are reserved to the UK Parliament, such as nationality²², asylum²³ and immigration²⁴, international relations²⁵, misuse of drugs²⁶ and at least some aspects of armed conflict²⁷. Other Articles of the UNCRC and the two optional protocols could apply both in a reserved and a devolved context, such as social security²⁸. The Scottish Parliament would only be able to legislate in relation to reserved areas, if an order under section 30 of the Scotland Act 1998²⁹ were to be passed to devolve those areas to the Parliament.

In the absence of a section 30 Order or similar provision extending competence, because the Bill would have to be within the legislative competence of the Parliament, it will not be possible to include certain Articles or aspects of certain Articles of the UNCRC and the optional protocols in the Bill. It would also be important to consider how far clarity can and should be given to rights holders and duty bearers as to their respective rights and responsibilities where UNCRC rights could apply both in a reserved and a devolved context.

We are keen to minimise the need for those affected to have to judge on their own, in individual cases, whether the requirements in the Bill in respect of the UNCRC apply to particular functions they are exercising. This will be particularly acute for duty bearers in public services which deal both with reserved and devolved matters, for example, police officers and local government officers.

These are issues which such public authorities already have to keep in mind when operating under devolved law. However, one issue which will need to be considered is the extent to which clarity can and should be provided in the terms of the legislation itself; and the extent to which provision can and should be made for guidance, applicable in different sectors to assist rights holders and duty bearers in understanding the legal context.

Incorporation by transposing the UNCRC for the Scottish context

Alternatively, an international convention may be incorporated into domestic law by the rights enshrined in the convention being “transposed” into domestic law.

This has been the method of implementing the UNCRC in Scotland to date. For example, our domestic law has given effect in a number of pieces of legislation to

²² Article 7(1).

²³ Article 22.

²⁴ Article 10.

²⁵ Article 11(2).

²⁶ Article 33.

²⁷ Article 38; Optional Protocol on the Involvement of Children in Armed Conflict.

²⁸ Article 26.

²⁹ An Order under section 30 conferring additional powers on the Parliament requires the consent of both Houses of the UK Parliament and of the Scottish Parliament itself.

Article 12 of the UNCRC. Article 12 requires states to "assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child". Section 27 of the Children's Hearings (Scotland) Act 2011, for example, places requirements on a children's hearing or sheriff when they are making a decision under that Act about a matter relating to a child, to give the child an opportunity to indicate whether the child wishes to express views, to give the child an opportunity to express those views and to have regard to the child's views.

This is also the method by which some EU Law is currently implemented in Scotland. EU directives which place requirements on the UK are given effect in our domestic law by legislation, which may be made by the Parliament or by Scottish Ministers, with Parliament's agreement. The EU law requirements are given effect in a way which is compatible with existing domestic law and which is explicitly tailored to the Scottish context. EU directives may also be implemented by an Act of the UK Parliament or by an order made by UK Ministers.

For instance, one of the ways in which EU Directive 2004/38/EC on the rights of citizens of the EU and their family members to move and reside freely in the territory of EU member states was implemented in Scotland, as it relates to student support, was by detailed regulations set out in the Education (Graduate Endowment, Student Fees and Support) (Scotland) Regulations³⁰.

Implementation in this way gives effect to the international rights in the Scottish context, ensuring that rights which are set out in an international treaty and which are expressed in general terms and are directed towards actions to be taken by the state, are given clear effect at the domestic level after due consideration by the democratically accountable government and parliament.

There are options as to how transposition of the UNCRC could be achieved:

- a suite of Scottish children's rights could be developed and the Bill could apply a framework of duties and requirements to those rights
- specific changes could be made to domestic legislation to ensure that the statute book complies as a whole with the UNCRC

The latter is the current approach to the implementation of the UNCRC, which we have described above. Regardless of the approach which is taken to incorporation, detailed schemes of legislation which give effect to UNCRC rights will continue to be necessary, and the Government and the Parliament will require to keep the law under review. We have concluded that, in order to give greater assurance that UNCRC rights will be respected in all circumstances, we should go further and either directly incorporate those rights, in the manner we have described above, or transpose those rights by enacting a suite of Scottish children's rights.

While they do not directly consider the approach to the UNCRC, the First Minister's Advisory Group on Human Rights Leadership rejects a simple "cut-and-paste"

³⁰ S.S.I. 2006/323

approach to incorporation and recognises the need to ensure legislation works in a Scottish context. They propose a participative process by which people in Scotland are consulted to help define their rights based on the international conventions. They suggest that this will garner greater ownership of people's rights.

The Group's recommendations also noted that in some circumstances, it may be preferable to go above and beyond the rights set out in the UN treaties and provide additional protection that better serves the public interest. These recommendations point to an approach which develops a bespoke set of domestic rights rooted in the UNCRC.

This approach in the Scottish context could also help to ensure that the articulation of the rights respects the devolution settlement. Where a specific Article of the UNCRC relates to a reserved matter it would be carved out from the Bill³¹. Similarly, where Articles span both reserved and devolved areas, provision could be made with a view to limiting the application of the Bill to devolved areas.

This approach would provide greater legal clarity for rights holders and duty bearers about the UNCRC rights which have been incorporated into domestic law and what duty bearers are required to do with regard to those rights. The Parliament would be responsible for specifying and implementing the rights and obligations, although these would, as with any domestic legislation, be subject to judicial interpretation.

Perhaps the most significant question with regard to this method of incorporation is whether transposition of the rights of the UNCRC into domestic law, by way of the development of a suite of Scottish children's rights, would be preferable to relying on the existing wording of the UNCRC. As noted, the First Minister's Advisory Group on Human Rights Leadership suggest that an approach that fits with the Scottish context is preferable for other human rights conventions. This approach would also allow for protection to go above and beyond the rights provided in the UNCRC.

It would mean that each Article would need to be considered in light of the Scottish context and drafted both to fit that context but also to provide at least the level of protection that the UNCRC does. In their recommendations the First Minister's Advisory Group on Human Rights Leadership were clear that the purpose of this form of transposition was for the rights to be designed and owned by the people of Scotland and civic society.

If this method were to be widely supported, we would welcome views on what would be the best way to engage people in that process while meeting our ambition to pass the Bill before the end of this parliamentary session.

Statutory Human Rights Framework for Scotland

The principal recommendation of the First Minister's Advisory Group on Human Rights Leadership was the creation of a new statutory human rights framework for Scotland. This would involve a new Act of the Scottish Parliament (ASP) which

³¹ Of course, if that were the only change to the UNCRC this could also be seen as a method of direct incorporation as the text of the other Articles would not necessarily need to be changed.

incorporates rights from UN and other human rights treaties, including the UNCRC into Scots law. The First Minister's Advisory Group on Human Rights Leadership proposed that such an Act should set out for the first time and in one place the rights belonging to everyone in Scotland. The group proposed that the Act could be legislated for at the commencement of the next term of the Parliament in 2021.

Rather than delivering a Bill to incorporate the UNCRC in this parliamentary session, it would be possible to achieve this as part of such a comprehensive human rights framework. This would allow all rights to be brought together in one place, including those of children and young people under other human rights treaties.

It would not, however, be possible to pass this legislation before the next Parliament elections in 2021. As a result we are minded to push ahead with the UNCRC incorporation now, even though we will have to ensure that the approach taken here is able to dovetail with the First Minister's Advisory Group on Human Rights Leadership wider approach. The First Minister's Advisory Group on Human Rights Leadership explicitly recognised in its report that longer term ambitions to incorporate all human rights treaties should not hold up action to incorporate the UNCRC.

Questions

6. Do you agree that it is best to push forward now with incorporation of the UNCRC before the development of a Statutory Human Rights Framework for Scotland? Please explain your views.
7. We would welcome your views on the model presented by the advisory group convened by the Commissioner for Children and Young People in Scotland and Together (the Scottish Alliance for Children's Rights).
8. How should the issue of whether particular UNCRC rights are self-executing be dealt with?
9. How could clarity be provided to rights holders and duty bearers under a direct incorporation approach, given the interaction with the Scotland Act 1998?
10. Do you think we are right to reject incorporating the UNCRC solely by making specific changes to domestic legislation? Please explain your views.
11. If the transposition model was followed here, how would we best enable people to participate in the time available?
12. What is your preferred model for incorporating the UNCRC into domestic law? Please explain your views.

THEME 2: Embedding children's rights in public services

Incorporating the UNCRC into Scots law will strengthen existing work to protect and respect children. Incorporation will ensure that children's rights are woven into policy, law and decision making. Children will be empowered to know and understand their rights and, if necessary, advance them in court. Measures that would oblige public authorities to mainstream children's rights in their practice are discussed in this section.

Children's Rights Scheme

The UN Committee on the Rights of the Child recommends the development of a comprehensive national strategy or national plan of action for children, built on the framework of the UNCRC³². One option is the development of a children's rights scheme that sets out the practical arrangements by which the UNCRC is embedded in practice and demonstrates that robust and transparent processes are in place to support the implementation of legislative duties in relation to UNCRC rights.

A recent example of such a scheme is the Welsh Children's Rights Scheme which was published in line with requirements in The Rights of Children and Young Persons (Wales) Measure 2011. Welsh Ministers are required to set out the arrangements they have or plan to have in place to ensure they comply with their duty to have due regard to the UNCRC. The Welsh Government believes that its Children's Rights Scheme will:

- establish robust processes to ensure that the Welsh Ministers act in compliance with their duty under the legislation
- provide transparency about the processes that are being followed
- enable Welsh Government staff to support the Welsh Ministers to comply with the duty
- provide information on how the Welsh Ministers may be held to account in complying with the due regard duty

The Scheme sets out a number of the ways in which the Welsh Government plan to achieve this, including:

- ensuring appropriate awareness raising and training is in place and actively promoted and taken up
- putting a Children's Rights Impact Assessment (CRIA) process in place
- setting out accountability and compliance mechanisms
- providing information and guidance on how Welsh Ministers may be held to account for compliance with their legislative duty
- ensuring that this Scheme is revised when necessary
- ensuring clear understanding of roles and responsibilities in relation to all of these elements

³² https://www.unicef-irc.org/portfolios/general_comments/GC5_en.doc.html

The Children's Rights Scheme in Wales may be updated in light of a suggestion or recommendation made by the UN Committee on the Rights of the Child based on a UK report.

In Scotland, there are already a number of measures in place, through legislation and non-legislative means that seek to embed children's rights in policy and practice. Under section 1 of the CYP Act 2014 the Scottish Government is required to promote public awareness and understanding of the rights of children. Scottish Ministers are required to report on the steps they have taken over a 3 year period to secure better or further effect of the UNCRC requirements and their plans for the next 3 year period. Public authorities too must report on the steps they have taken to secure better or further effect of the UNCRC requirements within their areas of responsibility.

In support of the duties under Part 1 of the CYP Act 2014, from June 2015, the Scottish Government introduced a Child Rights and Wellbeing Impact Assessment (CRWIA). The CRWIA aims to ensure that all areas of the Scottish Government consider the possible direct and indirect impacts of proposed policies and legislation on the rights and wellbeing of children and young people. The CRWIA, which was developed by a children's rights expert, in consultation with relevant stakeholders, is promoted across the Scottish Government as a key tool in the development of policy. The views of children and young people are integral to the CRWIA process. There is a clear Ministerial expectation that CRWIAs will be carried out for all new policies and legislation. The CRWIA guidance and training tool were updated in March 2019 following a review. Guidance on the CRWIA approach has been published for use by public authorities (and other organisations) on a voluntary basis.

The Commissioner for Children and Young People (Scotland) Act 2003 provides for the Commissioner to undertake investigations in respect of how service providers have regard to the rights, interests and views of groups of children and young people in making decisions or taking actions that affect them. Provisions in Part 2 of the CYP Act 2014 build on this by empowering the Commissioner to conduct such investigations on behalf of individual children.

A Children's Rights Scheme in Scotland could bring together and build on these measures.

Question

13. Do you think that a requirement for the Scottish Government to produce a Children's Rights Scheme, similar to the Welsh example, should be included in this legislation? Please explain your views.

Preparation for public authorities

In its recommendations, the First Minister's Advisory Group on Human Rights Leadership recognised that public authorities would need a period of time to prepare for the Bill proposed in their report. This will also be true for public authorities which become subject to duties under a Bill to incorporate the UNCRC. This can be addressed by leaving a sufficiently long period before the Bill is commenced in full.

This could be done in a number of ways. The First Minister's Advisory Group on Human Rights Leadership report suggested a "sunrise clause" for the Bill proposed in their report which would create a two-stage process of the Bill coming into force. There would be a first transitional period in which public authorities were given time to ensure that their policies and practices were aligned with the rights in the Act. At the end of that transitional period, public authorities would automatically be under a duty to comply. Under this approach, the date for the duty to comply would be stated in the Bill and if the Bill were passed Ministers would have no discretion as to when it came into force.

The First Minister's Advisory Group on Human Rights Leadership propose that this would give rights holders certainty on when their rights will be incorporated into domestic law. An alternative, and the more common way of addressing the need to give those affected time to adjust to the change in the law, would be to simply delay commencement of the Bill in order to allow public authorities a period of time to prepare for commencement of a compliance duty, and to allow Ministers to bring the Bill into force at the appropriate time. This is the approach which was used for the HRA which was enacted in November 1998 but not fully commenced until October 2000.

It would be possible to include a provision to enable public authorities to prepare for a new Bill incorporating the UNCRC, whichever approach was taken to incorporation.

Question

14. Do you think there should be a "sunrise clause" within legislation? Please explain your views.
15. If your answer to the question above is yes, how long do you think public bodies should be given to make preparations before the new legislation comes into full effect? Please explain your views.

Additional non-legislative activities to progress implementation of the UNCRC

In their General Comment 5 on, 'general measures of implementation of the UNCRC', the UN Committee on the Rights of the Child describes a range of administrative and other non-legislative measures that states should undertake to implement the UNCRC³³.

There are many non-legislative actions that can help make children's rights real. We want to be an example to other countries and so will consider where it may be possible for Scots law to go further than the UNCRC requires, where that is demonstrably beneficial for children and young people.

³³ https://www.unicef-irc.org/portfolios/general_comments/GC5_en.doc.html

As well as incorporating the UNCRC into domestic law, Scottish Government “Progressing the Human Rights of Children in Scotland: 2018-2021 Action Plan”³⁴ published in December 2018 outlines three further strategic actions:

- develop through co-production, an ambitious programme to raise awareness and understanding of children’s rights across all sectors
- develop a strategic approach to all children and young people’s participation
- evaluate the Child Rights and Wellbeing Impact Assessment (CRWIA)

Develop and deliver through co-production, an ambitious programme to raise awareness and understanding of children’s rights across all sectors of society in Scotland. We will do this by:

- mapping existing rights-based awareness resources, programmes and training packages
- recruiting young leaders to organise and co-facilitate 5 un-Conference³⁵ events and local discussion groups in different locations across Scotland
- where gaps or weaknesses have been identified we will, through co-production, develop resources and training programmes to strengthen rights awareness and understanding across all areas of society
- working alongside Education Scotland to strengthen awareness and understanding of children’s rights through a range of activities which supports the development of a right based culture and ethos in schools and early learning and childcare centres

Develop a strategic approach to all children and young people’s participation, as part of the Year of Young People (YoYP) legacy. Our aim is to mainstream the participation of children and young people in decision-making across Scottish society. We will do this by:

- working in partnership with our stakeholders, and importantly with children and young people, to develop our strategic approach
- making sure that we listen to ‘representative’ voices of children and young people, in particular ensuring that the voices of the seldom heard, vulnerable and younger children are routinely heard
- considering resourcing and how participation is made sustainable
- considering access, including digital technology, to support wider engagement
- publishing an evidence base of existing research, good practice and policy areas that have consulted with children and young people

Evaluate the Child Rights and Wellbeing Impact assessment (CRWIA) process and support and promote its use. We will do this by:

³⁴ <https://www.gov.scot/publications/progressing-human-rights-children-scotland-action-plan-2018-2021/>

³⁵ An un-conference event is a participant- driven meeting, where participants are given the power to set the agenda under a designated theme. Participants will be invited to attend from across different areas of society and particular attention will be paid to engaging with those seldom heard.

- updating the templates, guidance and training materials for the CRWIA process and make these publicly available on the Scottish Government Website
- encouraging the use of the CRWIA materials by Public Authorities and children & young people's organisations
- developing an impact evaluation process for the CRWIA

Question

16. Do you think additional non-legislative activities, not included in the Scottish Government's Action Plan and described above, are required to further implement children's rights in Scotland? Please explain your views.

THEME 3: Enabling compatibility and redress

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. We seek views here on the approach which should be taken to actions which are alleged to infringe on those rights.

Certification of Scottish Parliament Bills

At present as part of their compliance with the CYP Act 2014 Scottish Ministers carry out a Children's Rights and Wellbeing Impact Assessment (CRWIA) when they develop new legislation. These assessments help Scottish Ministers consider how to advance the rights of children in Scotland; and how to protect and promote the wellbeing of children and young people. In some cases the preparatory work in the development of legislation determines that a full impact assessment is not required. We would intend to retain this practice whatever approach is taken to incorporation.

One suggested addition to this process would be to require a statement of compliance relating to any Bill introduced in the Parliament. There is a precedent for requiring statements of compliance under the Scotland Act 1998. A person introducing a Bill must make a statement on or before introduction of the Bill that it is within the legislative competence of the Parliament. This includes the consideration of whether the Bill is compatible with the rights secured by the HRA and by EU law. The majority of Bills are government Bills and, as a result, the Scottish Government must satisfy itself prior to introduction of any Bill that it complies with ECHR and with the fundamental rights protected by EU law (as well as the other tests of legislative competence).

Ultimately, the question of whether legislation does comply with ECHR rights or with EU law can only be authoritatively determined by the courts, but a requirement to give a certificate of compliance ensures that Government addresses, in advance, the question of whether proposed legislation is compatible with human rights. It might be possible to require any person introducing a Bill in the Parliament to declare that it is compatible with the rights in the UNCRC Bill - though consideration would need to be given to how this could and should be done.

Question

17. Do you agree that any legislation to be introduced in the Parliament should be accompanied by a statement of compatibility with children's rights? Please explain your views.

Remedies and Redress

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. It will happen through our public bodies working with and listening to children and young people and finding innovative and engaging ways to respect their rights.

If public authorities respect the UNCRC rights, then it would not be necessary for rights holders to resort to the courts to vindicate their rights. But the ability of rights holders to go to court to vindicate their rights is not only a basic feature of a constitutional democracy, it helps to guarantee compliance, and provides an authoritative forum for deciding whether or not rights have been complied with. The available remedies for breaches of rights set out in the Bill will be vital in securing the Bill's effectiveness.

The scheme of remedies should accordingly 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.

More complex questions arise in relation to situations where children (or those acting on behalf of children) believe that their rights are infringed by a provision in legislation.

Actions to challenge the acts or omissions of public bodies

Children (and those acting on their behalf) who believe that their rights have been infringed by the acts or omissions of a public body should have the ability to challenge those public bodies.

Under the Scotland Act 1998 (for the Scottish Government) and HRA (for the Scottish Government and all other public bodies), an alleged breach of ECHR rights can be raised during any court proceedings. Such a challenge may be brought directly by way of an application for judicial review of the public body, or in other proceedings (for example in proceedings before a Children's Hearing or as part of other civil or criminal proceedings), where the issue relevantly arises.

For challenges under the HRA (but not the Scotland Act 1998), the public body has a defence to the challenge if, as a result of provisions in an Act of the UK Parliament, the public body could not have acted differently. In such circumstances, the courts may make a declaration that the legislation is incompatible with Convention rights, which may result in the law being amended to reflect those rights, but would not affect the decision in the particular case.

Where a challenge is successful, it is for the court to decide what remedy to grant in order to address the breach of ECHR rights. The possible orders include an order declaring that the applicant's rights have been infringed, an order setting aside a decision of the public authority, and in some cases an order requiring the public authority to pay financial compensation for the breach of rights.

In the context of breach of ECHR rights, which provides for financial compensation where that is necessary in order to provide "just satisfaction" for the breach of rights, the caselaw of the European Court of Human Rights makes clear that it is not always necessary to prove actual loss before "just satisfaction" damages are payable and helps to provide guidance about the appropriate levels of award in particular circumstances.

As part of the process of incorporating the UNCRC, we will need to consider how to address those instances where UNCRC rights may be in conflict with secondary legislation such as regulations and orders made by Scottish Ministers or, sometimes, local authorities. Where such a conflict arises between secondary legislation and the ECHR, the HRA resolves this conflict by requiring a public authority to act compatibly with the ECHR even if this would require the authority to act in a way which would be contrary to the requirements in the secondary legislation. If we took this same approach with respect to the UNCRC, the absence of authoritative caselaw on the UNCRC means that this would create some uncertainty in the system – public authorities could have to decide, in individual cases, whether they were required to ignore secondary legislation because of a UNCRC right. On the other hand, we are aware that there are some sources of guidance in relation to the UNCRC, including the ECHR rights where there is an overlap with those rights, and the General Comments and Observations on State reports which mitigate that uncertainty. We would welcome views on whether it would be appropriate for UNCRC rights to take precedence over provisions in secondary legislation as is the case under the HRA for ECHR rights.

We consider that with respect to challenges to the acts or omissions of public bodies, a regime generally similar to that in place under the HRA should be established in relation to the rights given effect in the Bill. However, we would welcome views on whether there should be any modifications to that regime in the context of those rights. In particular, we would welcome views on whether the approach to awards of financial compensation should broadly follow the approach which the courts take in relation to breaches of the ECHR.

Challenges to primary legislation

More complex questions arise in relation to situations where children (or those acting on behalf of children) believe that their rights are infringed by a provision in primary legislation.

In the Scottish and UK human rights context there are currently two different models which apply to challenges to primary legislation.

(i) Under the Scotland Act 1998, section 29, a provision in an ASP is “not law” insofar as the provision is outwith the legislative competence of the Parliament – and it follows that such a provision is “not law” insofar as it is incompatible with the ECHR. That means that such a provision has no legal effect insofar as it is incompatible with the ECHR; and all public authorities, and the courts, must ignore the legislation once it has been found to be incompatible with the ECHR. The Scotland Act 1998 contains mechanisms which allow the question of whether or not a provision in an ASP is or is not law to be raised in any legal proceedings, and which enable the Law Officers to seek authoritative rulings from the courts.

(ii) Under the HRA, courts cannot hold that a provision in an Act of the UK Parliament which is incompatible with the ECHR is “not law”. Instead, the HRA, section 4, allows courts to make a declaration of incompatibility – a formal statement that the legislation is not compatible with the ECHR. If a declaration of incompatibility is made, the law may be changed – either by an Act of the UK

Parliament, or by subordinate legislation made under section 10 HRA, or (if the matter is not reserved) by an ASP. Because the incompatibility does not affect the quality of the legislation as law, the legislation must still be applied by public authorities and the courts unless and until it has been changed.

Under both the Scotland Act and HRA regimes:

(i) There are strong provisions (section 3 of the HRA; section 101 of the Scotland Act 1998) requiring the courts, so far as possible, to interpret and apply legislation, and to read it narrowly, in a way which is compatible with the ECHR. This minimises the risk that the legislation itself will be found to be incompatible with the ECHR.

(ii) There are provisions which facilitate the correction of any incompatibility between legislation and the ECHR. The HRA gives the UK Government - and the Scottish Government (where the matter is not reserved) - power to do this by order; and similar and in some respects wider provision is made in relation to ASPs and other Scottish legislation by the Convention Rights Compliance (Scotland) Act 2001.

The Scotland Act 1998 also provides (section 102) that the Courts can, among other things, suspend the effect of any ruling that a provision is “not law” in order to allow the defect to be corrected.

It would not be open to the Parliament to create new limitations on its own legislative competence: that could only be done by amending provisions of the Scotland Act 1998 that the Parliament cannot modify. It follows that the Bill incorporating the UNCRC could not provide that a provision in an ASP (whether an existing ASP or a future ASP) is not law so far as it is incompatible with the UNCRC rights.

If challenges to provisions in primary legislation are to be permitted on the grounds of incompatibility with the UNCRC rights, there would accordingly need to be a bespoke set of provisions, along the lines of those in the HRA, empowering the Courts to declare that a provision in primary legislation is incompatible with the UNCRC rights. The provisions would require to be carefully considered to ensure that they are compatible with, and operate within, the legislative competence of the Parliament.

In the context of UNCRC rights which are framed in general terms, and where (by contrast with the ECHR) there are limited sources of authoritative guidance about the detailed application of those rights this approach would, in any event, provide greater certainty for duty bearers - since they would not be faced with having to decide whether or not they are required, by the UNCRC rights, to ignore a provision in an ASP. This approach would enable an authoritative ruling to be obtained from the courts as to whether or not a provision in an ASP is incompatible with the UNCRC rights, but would leave it to the democratically elected Government and Parliament to decide how to respond to that ruling³⁶.

³⁶ It would also be possible to provide for a remedial order procedure, so that the Scottish Government could remedy the incompatibility, as under the Convention Rights Compliance (Scotland) Act 2001.

We envisage that any Bill should include provisions equivalent to section 3 of the HRA and to section 101 of the Scotland Act 1998, requiring provisions in ASPs to be interpreted and applied, and to be read narrowly, in order to be compatible so far as possible with the UNCRC rights provided for under the Bill.

Standing to take proceedings

The HRA and the Scotland Act 1998 require someone raising a human rights challenge to be a victim of a violation of their rights in accordance with the rules which govern applications to the European Court of Human Rights.

In the UNCRC there are no directly equivalent rules. We consider that the ordinary test of standing in Scots law which applies to challenges on judicial review can apply. This uses a test of sufficient interest in the issues raised following the case of *AXA General Insurance Limited v the Lord Advocate*³⁷.

We envisage that provisions should be included in the Bill, similar to those in the Scotland Act 1998, to enable Law Officers to participate in and to initiate proceedings.

Questions

18. Do you agree that the Bill should contain a regime which allows right holders to challenge acts of public authorities on the ground that they are incompatible with the rights provided for in the Bill? Please explain your views.
19. Do you agree that the approach to awards of financial compensation should broadly follow the approach taken to just satisfaction damages under the HRA? Please explain your views.
20. Do you agree that the UNCRC rights should take precedence over provisions in secondary legislation as is the case under the HRA for ECHR rights? Are there any potential difficulties with this that you can see?
21. Do you agree that the Bill should contain strong provisions requiring an ASP to be interpreted and applied so far as possible in a manner which is compatible with the rights provided for in the Bill? Please explain your views.
22. Should the Bill contain a regime which would enable rulings to be obtained from the courts on the question of whether a provision in an ASP is incompatible with the rights secured in the Bill? Please explain your views.
23. Do you consider any special test for standing to bring a case under the Bill should be required? Please explain your views.

³⁷ [2011] UKSC 46

Children's Rights: Consultation on incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:
<https://beta.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
 Publish response only (without name)
 Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No



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