

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

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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 Articles¹ of the international treaty of that name and the two² 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

¹ As with the ECHR, some provisions are clearly aimed at signatory nations and would not be appropriate.

² I am assuming that incorporation into Scots law will not extend to the Protocol which the United Kingdom is not a signatory to.

- (c) “listed authority” shall mean those bodies and office holders listed in Schedule 2³
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 secondary⁴] 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 Kingdom⁵.
- (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.
- (4) 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.

³ 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.

⁴ I think this is an important decision which we haven't yet had discussion on.

⁵ 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.