

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

August 2019

We welcome the opportunity to respond to the Scottish Government's consultation on incorporating the United Nations Convention on the Rights of the Child (UNCRC) into our domestic Scots law. We strongly support the policy intent to develop a model of incorporation which embeds children's rights within our public services, and delivers the best outcomes for children, young people and families.

Through incorporation, children's rights will be embedded more deeply into policy, law and practice; children will be able to seek redress for rights violations; and the advancement of children's rights in the Scottish courts will be enabled. We agree that the key test to the success of enshrining the UNCRC into Scots law is in how children experience the protection and respect of their rights as part of their day-to-day lives. Although a fundamental component, the passage of legislation alone is not sufficient to fully embed children's rights at the heart of our society. A series of implementation measures are necessary to ensure the impact of any legislation is positive, and achieves the aspiration of culture change.

Background

Realising children's rights

UNCRC incorporation is important to children and young people. Following a consultation with over 5,000 young people in Scotland in 2017, Members of the Scottish Youth Parliament developed the [Right Here, Right Now](#) campaign, which specifically calls for UNCRC incorporation. The Children's Parliament published [What Kind of Scotland?](#) in 2017, which reviews the work of the Children's Parliament over its 21 year history and sets out the kind of nation children have told us they want to live in. Across many Children's Parliament programmes, children have expressed the view that their rights should be enshrined in law, so that adults cannot choose when and whether a right is respected or realised. A review of children and young people's experiences and views of issues related to implementing the UNCRC, undertaken to inform the Scottish Government's contribution to the UK State Party's periodic review, found that children and

young people saw full incorporation of the UNCRC as the best way to ensure children's rights are realised.¹

As part of the broad array of civil, political, economic, social and cultural rights protected by the UNCRC, a range of its articles give every child the right to enjoy a supportive, nurturing home environment regardless of their circumstances.² Furthermore, Article 20 establishes the right of children who cannot remain in their family environment (temporarily or permanently) to *special protection and assistance* from the state, acknowledging that an advanced level of protection and support is required to uphold the rights of these children.

Children in need of care and protection

At the Centre for excellence for children's care and protection, our focus is on children and young people living in and on the edges of care, and those in need of protection. Over the last year in Scotland, 10,881 children were referred to the Scottish Children's Reporter on grounds of Care and Protection.³ As of July 2018, 14,738 children are 'looked after' by local authorities in Scotland, and 6,109 young people who were previously 'looked after' are eligible for aftercare.⁴ These children and young people have care experience. They may have experienced different forms of care, including foster care, residential care, kinship care, and living at home with one or both birth parents whilst receiving social work services. Furthermore, in 2018 approximately 2,668 children in Scotland were 'at risk of significant harm' and thus on a Child Protection Register.⁵ There are also children who are in need of care and protection who may not be detected, reported, or recorded within formal child protection systems.⁶ These children and young people come from a range of backgrounds, and like all children, are individuals who have their own unique strengths and needs. Nonetheless, they are all children and young people whose rights are often challenged, and less likely to be fully realised.⁷ Achieving a 'gold standard' of incorporation of the UNCRC into our domestic law is a crucial step in further securing the rights of these children and young people.

Ten years on from the endorsement of the [UN Guidelines for the Alternative Care of Children](#), the UN General Assembly have selected 'Children without parental care' as the theme for the 2019 Rights of the Child Resolution, highlighting the ongoing efforts required to prevent the need for the separation of children from

¹ Elsley, S., Tisdall, K. & Davidson, E. (2013) [Children and young people's experiences of, and views on, issues relating to the implementation of the United Nations Convention on the Rights of the Child](#). Scottish Government Social Research.

² e.g. Articles 5, 9, 10, 11, 18, 20, 21, 25 and 27

³ Scottish Children's Reporter Administration (2019) [Statistical Analysis 2018/19: Ensuring positive futures for children & young people in Scotland](#). Glasgow: SCRA.

⁴ Scottish Government (2019) *Children's Social Work Statistics Scotland 2017/2018*, Edinburgh: Scottish Government.

⁵ *ibid*

⁶ Gilbert, R., Spatz-Widom, C., Browne, K., Fergusson, D., Webb, E. & Janson, S. (2009) Burden and consequences of child maltreatment in high-income countries. *The Lancet* 373: 68–81.

⁷ Harris, J., Millership, L., Moodie, N. & Shepherd, J. (2016) *State of Children's Rights in Scotland*, Edinburgh: Together.

their families, and where this is not possible, to uphold the rights of children to high quality alternative care.

Progressive, rights-based activity has been a welcome feature across the children's policy and practice landscape in Scotland over recent years. For example:

- Celebrating 2018 as the Year of Young People, in celebration of Scotland's young people, and focussing on their participation in decision-making.
- The implementation of Scotland's national approach to improving outcomes and supporting children and young people's wellbeing, [Getting It Right For Every Child](#) (Girfec).
- The implementation of [Part 1 of the Children and Young People \(Scotland\) Act 2014](#), (the 2014 Act) which places a duty on Scottish Ministers and a range of public authorities to report on the steps they have taken to secure better or further effect the requirements of the UNCRC. Measures of indirect incorporation, such as this, are shown to be effective precursors to direct incorporation as they create support for and awareness of the merits of more far-reaching implementation measures among decision-makers.⁸
- The introduction of statutory duties and responsibilities for a range of public sector bodies as corporate parents, through [Part 9 of the 2014 Act](#).
- The commissioning of an independent 'root and branch' review of Scotland's care system, [The Independent Care Review](#), which is placing the views of children and young people with lived experience (and their families and carers) at its heart.
- The launch of the national [Child Protection Improvement Programme](#) (CPIP), which aims to improve all areas of Scotland's child protection system, ensuring children's wellbeing is put first, and they are safe from neglect and abuse.
- Producing guidance to inform the use of Children's Rights and Wellbeing Impact Assessments, which should be undertaken for all new legislation and policy, underpinned by the UNCRC.⁹

In spite of these developments, significant and enduring challenges remain in relation to the rights of children in need of care and protection. In their 2016 Concluding Observations to the UK, the UN Committee on the Rights of the Child highlighted continued concerns in relation to:

- high rates of child poverty;
- issues of discrimination and stigmatisation of children in care;
- insufficient respect for the views of children in matters affecting them;
- inadequate family support;

⁸ Kilkelly (2019) The UN convention on the rights of the child: incremental and transformative approaches to legal implementation, *The International Journal of Human Rights*, 23:3, 323-337

⁹ Scottish Government (2015) [When and how to best use Children's rights and wellbeing impact assessments: Guidance](#), Edinburgh: Scottish Government (pg.4).

- instability in care placements and in children’s relationships with family and previous carers;
- inequalities in educational attainment and access to health services for children in care; and
- the treatment of child witnesses in court proceedings.¹⁰

Incorporation and implementation

A range of measures facilitate progress in the realisation of children’s rights, including law reform/jurisprudence, independent national human rights institutions, international cooperation, and implementation of other relevant international standards.¹¹ Whilst the importance of both legal and non-legal measures of implementation is recognised, Kilkelly (2019: 328) highlights that

“It is in the area of incorporation at legislative level that most progress in the implementation of children’s rights is apparent.”¹²

Incorporation of the UNCRC will ensure its provisions are directly applicable and justiciable in our domestic law, and children’s rights will be embedded into policy, law and practice.¹³ If meaningfully achieved, incorporation has the potential to make a significant difference to the realisation and protection of the rights of children whose rights are often challenged, including those in need of care and protection.

In addition to the legislative change inherent to incorporation, international experience highlights that greater progress in respecting children’s rights is catalysed through incorporation, particularly in regards to culture change; increased awareness throughout civil society, public and media; and routine utilisation of rights-based practices and processes (such as planning, monitoring systems, decision making and budgeting).¹⁴ As well as the legal changes which will allow for redress in the case of rights violations, it is these changes to culture and practice which will ultimately result in meaningful change in children and young people’s day-to-day experiences. Incorporation encourages and catalyses conditions where children and young people are valued and respected, and leads to a sharper focus on protecting and upholding children’s rights, across a range of issues including those highlighted above. International evidence shows that incorporation gives the arguments of politicians, public officials and non-governmental organisations who wish to advance the cause of

¹⁰ UN Committee on the Rights of the Child (2016) [Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland](#). CRC/C/GBR/CO/5

¹¹ Collins, T (2019) The general measures of implementation: opportunities for progress with children’s rights, *The International Journal of Human Rights*, 23:3, 338-356

¹² Kilkelly (2019) The UN convention on the rights of the child: incremental and transformative approaches to legal implementation, *The International Journal of Human Rights*, 23:3, 323-337

¹³ UN Committee on the Rights of the Child (2016) [Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland](#). CRC/C/GBR/CO/5

¹⁴ Lundy, L., Kilkelly, U., Byrne, B. & Kang, J. (2012) [The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries](#). UK: Unicef.; Kilkelly, U. (2019) The UN convention on the rights of the child: incremental and transformative approaches to legal implementation, *The International Journal of Human Rights*, 23:3, 323-337

children's rights greater weight, which is particularly influential when ensuring integration of the UNCRC principles in domestic law and policy.¹⁵

However, in order for any legislative change to be meaningful, proposed changes must be successfully implemented. This can prove equally challenging to securing changes to the law. Reliance on enactment of high-level legal standards and top-down communication, with little attention to the support required by practitioners to understand how to change practice in their own service context, is insufficient to secure meaningful change.¹⁶ Implementing and sustaining meaningful change as a result of legal incorporation requires full, national, multiagency awareness of legislative changes, mechanisms to support new practices, and evaluation of impact. Successful implementation requires excellent leadership, and involves detailed consideration of context, and the use of the best strategies and tools in particular local contexts. Strategies and plans to enable successful implementation are required from the earliest possible stage.

Consultation questions

Legal mechanisms for incorporating the UNCRC into domestic law

1. Are there particular elements of the framework based on the HRA that should be included in the model for incorporation of the UNCRC in domestic law? Please explain your views.

The framework provided by the Human Rights Act 1998 (HRA) to ensure the UK respects and protects the human rights enshrined in the European Convention on Human Rights (ECHR) contains elements which should be included in the model for incorporation of the UNCRC into domestic law. These particularly relate to compatibility, specifically: requirements to make a statement of compatibility of any new legislation with the ECHR; requirements that legislation must be given effect in a way compatible with the ECHR; and imposing a duty on public authorities to comply with the ECHR, making actions which are incompatible with the ECHR unlawful.

Including similar elements which require Scottish Ministers and public bodies to act compatibly with the UNCRC would mean the UNCRC must be complied with, and actions cannot be taken which breach children's rights as set out in the convention. Such provisions are essential in providing redress in the case of rights breaches.

Incorporation would be further strengthened by combining 'act compatibly' duties with duties which seek to prevent rights breaches, such as a 'due regard' duty (see response to Q2).

¹⁵ *ibid*

¹⁶ Ejler, N., Ostensen, J., Graff, D. & Dyrby, T. (2017) *New Approaches to Policy Implementation*. Copenhagen: Ramboll

2. Are there any other aspects that should be included in the framework? Please explain your views.

Placing a duty on Scottish Ministers and public authorities to pay 'due regard' to UNCRC requirements when exercising their functions, and demonstrate such considerations in their decisions, should be included in the framework, as it is in the [Rights of Children and Young Persons \(Wales\) Measure 2011](#) (the Welsh Measure). Including a 'due regard' duty ensures proactive prevention of rights violations, through rights-based decision making. Specifically, this should be achieved by undertaking a Children's Rights Impact Assessment (CRIA) as a statutory requirement.

Rather than seeing duties to 'act compatibly' and to have 'due regard' as a binary choice, a model which contains both has added value and strength, in that it ensures public bodies demonstrate that they have given due consideration to children's rights in all decisions, and that they comply with the UNCRC when these decisions are put into practice.

3. Do you agree that the framework for incorporation should include a "duty to comply" with the UNCRC rights? Please explain your views.

Yes, this is essential in order to make children's rights binding and not just guiding. This should also be strengthened by a 'due regard' duty, as outlined above.

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?

The General Comments and Concluding Observations may be taken into account by courts and public bodies exercising their legal duties. They provide incredibly valuable interpretation of the application of UNCRC and will be highly beneficial for the implementation of UNCRC. The work of the international UN Committee on the Rights of the Child is already highly respected and cited in case law.

5. To what extent do you think other possible aids would provide assistance to the courts in interpreting the UNCRC in domestic law?

The General Comments, Concluding Observations and Optional Protocols are collectively very significant aids to assist the interpretation on the UNCRC. Scottish courts already have a history of using UNCRC in case law, so there is clear competency in the understanding of international law. It is anticipated that incorporation of UNCRC will be fully comprehended and clearly interpreted. A greater consideration is the wider public understanding and awareness of UNCRC as part of the culture change where respecting children's rights becomes a societal norm.

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.

We fully agree. On 28th April 2019, Scotland's First Minister committed to incorporate the UNCRC within the current session of the Scottish Parliament. To allow for the robust legislative scrutiny required on the passage of a Bill through parliament, it is essential that a Bill is introduced this year.

The strong commitment to incorporate the UNCRC has been building in Scotland over a considerable period, and has clearly reached a point at which action is necessary to secure the legal changes the Scottish Government is now seeking. There are no evident benefits to delaying action to incorporate the UNCRC, and Scotland must seize the momentum and capitalise on the opportunity we have before us now. As recognised by the report of the First Minister's Advisory Group on Human Rights Leadership, longer term ambitions to incorporate all human rights treaties should not hold up action to incorporate the UNCRC now.¹⁷

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).

We are supportive of the [draft Children's Rights \(Scotland\) Bill](#) (the draft Bill). The draft Bill is intended to provide the strongest and most effective model of incorporation possible, and its drafting has been informed by a team of international and Scottish experts (the Expert Incorporation Advisory Group) from academic, legal and children's rights backgrounds, with extensive knowledge of the UNCRC, incorporation, and the Scottish legal system. Using international learning from countries such as Norway, Sweden, Finland and Belgium where the UNCRC has already been incorporated, as well as careful consideration of the Scottish context, the draft Bill provides a strong foundation to build the 'gold standard' of incorporation which the Scottish Government is committed to achieving.

Importantly, the Bill fosters a proactive culture of children's rights across all levels of government by embedding rights-based approaches in the early stages of policy and legislative decision-making, including a statutory requirement for a CRIA to identify and prioritise rights issues. Additionally, the model provides redress in cases where children's rights are breached. The Bill proposes the direct incorporation of the substantive articles of the UNCRC and the First and Second Optional Protocols. To ensure the Bill is within the legislative competence of the Scottish Parliament, Part 2 of sets out the scope and extent of the Bill, specifically that it is confined to the regulation of devolved competences, and/or the exercise of powers in devolved areas.

¹⁷ Miller, A. (2018) [Recommendations for a new human rights framework to improve people's lives: Report to the First Minister](#). First Minister's Advisory Group on Human Rights Leadership.

8. How should the issue of whether particular UNCRC rights are self-executing be dealt with?

In Scotland, international law needs to be incorporated into domestic law to be directly applicable. Therefore UNCRC rights are not self-executing in this context and would require legislation for children to exercise their rights set out in the convention.

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?

The rights set out in the UNCRC are considered to be interrelated, indivisible and interdependent, which means that the enjoyment of one right can often be impacted by the fulfilment of another. This requires the holistic consideration of a child's rights, as recognised within Scotland's GIRFEC approach to supporting children's wellbeing.¹⁸

The draft Bill proposed by the Expert Incorporation Advisory Group does not extend the powers of the Scottish Parliament or Scottish Ministers beyond devolved competence. The draft Bill clarifies that all the substantive articles of the UNCRC and Optional Protocols should be part of Scots law, but is clear that the duties within the draft Bill only apply when government is exercising devolved powers, or acting in devolved areas.

Scotland has an opportunity to be bold, and lead the way in strengthening children's rights across other jurisdictions of the UK. International evidence regarding implementation of the UNCRC in devolved or federal regions suggests that regional approaches at the forefront of implementation (such as in Victoria in Australia, Catalonia in Spain, and Berlin in Germany) play an important role in encouraging good practice elsewhere.¹⁹

10. Do you think we are right to reject incorporating the UNCRC solely by making specific changes to domestic legislation? Please explain your views.

Yes. We agree it is right to reject this approach, as it is insufficient as the sole way to incorporate the UNCRC. The gradual revision of legislation to ensure its compliance with the UNCRC is recognised as a fundamental general measure of implementation,²⁰ however it is no different to the current approach taken in Scotland to implement the UNCRC, and is not recognised as incorporation.

11. If the transposition model was followed here, how would we best enable people to participate in the time available?

¹⁸ Byrne, B. & Lundy, L. (2019) Children's rights-based childhood policy: a six-P framework, *The International Journal of Human Rights*, 23:3, 357-373

¹⁹ Lundy, L., Kilkelly, U., Byrne, B. & Kang, J. (2012) [The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries](#). UK: Unicef

²⁰ UN Committee on the Rights of the Child (2003) [General Comment 5: General measures of implementation of the Convention on the Rights of the Child](#). CRC/GC/2003/5

We do not agree that the transposition model should be followed, for the reasons set out in our response to Q12. Broad consultation on how to ensure incorporation achieves real change in children's day-to-day lives would be welcome, but consultation as a process to select which rights are incorporated is not supported, because all of the UNCRC rights should be brought into Scots law.

12. What is your preferred model for incorporating the UNCRC into domestic law? Please explain your views.

If Scotland is to achieve a 'gold standard' of incorporation, direct incorporation is required. This view is shared by a wide range of Scotland's legal experts, who attended a seminar held by the Expert Incorporation Advisory Group in May 2019. Direct incorporation will ensure Scotland leads internationally, and children enjoy unrivalled protection of their rights under the UNCRC.

As the rights contained within the UNCRC are indivisible, interrelated and interdependent, incorporation of the UNCRC as a whole is the best way to ensure the holistic nature of children's rights are properly understood. The preservation of the wording of the UNCRC is also important in ensuring meaning is understood, both in Scotland and in the international context.

We note the concerns raised within the consultation document regarding direct incorporation, particularly that the UNCRC rights are not specifically tailored to the Scottish legal system, and that there is no body of international jurisprudence, meaning the interpretation of the law could be less clear. The conclusion to these concerns is the suggestion to incorporate by transposing the UNCRC into the Scottish context, and develop a 'Scottish suite of rights'. We have concerns about this approach, as it falls short of enshrining the UNCRC as a whole, failing to recognise the holistic, indivisible nature of the rights it establishes. Such an approach would not ensure the unrivalled protection of children's rights which can be achieved by direct incorporation. Furthermore, we do not share the concerns outlined regarding direct incorporation, given the UNCRC was written to be incorporated, and does not require to be rewritten to be tailored to domestic legal systems. Countries which have directly incorporated the UNCRC have not had difficulties in interpreting UNCRC rights, in fact direct incorporation provides clarity by allowing courts to look to other countries who have incorporated the UNCRC and draw from wider jurisprudence to inform decisions. It also means that domestic law keeps pace with developments in international human rights law, keeping Scotland at the forefront of rights developments across the globe.

We support the Scottish Government's ambition to go above and beyond the rights set out in UN treaties where this better serves the public interest. However, such ambition does not align with the transposition approach, which affords less protection of rights, rather than more, when compared to direct incorporation. In terms of going above and beyond UNCRC rights, this is entirely supported by direct incorporation. Article 41 of the UNCRC ensures that if higher

standards are set within domestic law than in the UNCRC, the higher standard must prevail.

Given the direct incorporation approach, the proactive embedding of rights-based approaches to policy and legislative decision making, and the mechanisms to provide redress, the model set out in the draft Bill discussed in Q7 is the preferred model for incorporation.

Embedding children's rights in public services

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.

The Welsh Measure is currently the only general legislative measure of implementation of the UNCRC in the UK, and utilises a duty on the Welsh ministers to have due regard to Part 1 of the UNCRC when exercising any of their functions as a means of embedding the UNCRC into policy.²¹ The Measure also requires Welsh Ministers to publish a Children's Rights Scheme, setting out arrangements made for securing compliance with the due regard duty. Amendments to the Children's Rights Scheme must be considered at least every five years, and within six months of each periodic report to the UK by the UN Committee. The preparation of the Children's Rights Scheme must involve children, young people, and the Children's Commissioner for Wales. The Children's Rights Scheme sets out a number of ways in which Ministers will ensure compliance with the due regard duty, including:

- ensuring awareness raising and training is in place, and actively promoted and taken up;
- establishing a CRIA process;
- providing information and guidance on how Welsh Ministers may be held to account;
- ensuring that this Scheme is revised when necessary; and
- ensuring clear understanding of roles and responsibilities.²²

We support the establishment of a similar scheme in Scotland, which the 'due regard' duty discussed in our responses to Q1-3 would encourage. Whilst related to existing requirements under Part 1 of the 2014 Act, the establishment of such a scheme could usefully place additional requirements on Scottish Ministers, and ensure detailed consideration of the matters listed above, enhance transparency, and ensure greater participation.

14. Do you think there should be a "sunrise clause" within legislation? Please explain your views.

²¹ Hoffman, S. (2019) The UN convention on the rights of the child, decentralisation and legislative integration: a case study from Wales, *The International Journal of Human Rights*, 23:3, 374-391

²² Welsh Government (2014) [Children's Rights Scheme 2014: Arrangements for having due regard to the United Nations Convention on the Rights of the Child \(UNCRC\) when Welsh Ministers exercise any of their functions](#). Welsh Government.

No. The UK ratified UNCRC in 1991 so should have nearly 30 years of experience of compliance to UNCRC. In particular, Article 4 of the UNCRC requires governments 'to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the UNCRC'. Furthermore, Part 1 of the 2014 Act places duties and certain public bodies (including all local authorities and relevant health boards) to report, as soon as practicable after the end of each three-year period, on the steps they have taken to better secure, or give further effect to, the requirements under Part 1 of the UNCRC. Although limited in requiring Scottish Ministers and public bodies only to *report* on UNCRC implementation, this should have created a stepping stone for full incorporation.

Utilising a sunrise clause would be an unusual step for incorporating the UNCRC, given the long-standing government commitment to making rights real and for Scotland to be the best place in the world to grow up. As discussed above, international experience highlights that greater progress in respecting children's rights is catalysed through incorporation into domestic law, particularly in regards to culture change; increased awareness throughout civil society, public and media; and routine utilisation of rights-based practices and processes (such as planning, monitoring systems, decision making and budgeting).²³ Therefore, there is a clear programme of committed work required to embed children's rights into legislation, policy and practice over a period of time. A sunrise clause has the potential to build in delay, slow the current momentum, and it is unclear how such a clause would improve UNCRC implementation.

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.

n/a

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

In addition to legal changes, the requirement for non-legal measures to effectively implement the UNCRC is well recognised.²⁴ To be effective, legal incorporation must particularly be supported by comprehensive awareness raising, both across all sectors of Government, and in civil society. The UNCRC's [General Measures of Implementation](#) offer a useful, practical framework of measures which support the realisation of child rights, including non-legislative measures such as budgeting; national plans of action; monitoring processes;

²³ Lundy, L., Kilkelly, U., Byrne, B. & Kang, J. (2012) [The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries](#). UK: Unicef.; Kilkelly, U. (2019) The UN convention on the rights of the child: incremental and transformative approaches to legal implementation, *The International Journal of Human Rights*, 23:3, 323-337

²⁴ Kilkelly (2019) The UN convention on the rights of the child: incremental and transformative approaches to legal implementation, *The International Journal of Human Rights*, 23:3, 323-337

education, awareness and training; and participation of civil society.²⁵ Training and awareness raising are particularly crucial, with evidence indicating that at every level, effective implementation is contingent upon awareness of children's rights, not simply as Articles within the UNCRC, but as an understanding of children's entitlement to be treated with dignity and respect, and to exert influence on their own lives.²⁶ Despite this, evidence suggests there are few examples of systematic training for duty bearers internationally. An important example of good practice which could be replicated in Scotland is training for the legal profession and judiciary (e.g. in Norway and Belgium), which has led to an increased number of cases where the UNCRC is cited.²⁷

The Scottish Government's [Progressing the Human Rights of Children in Scotland: 2018-2021 Action Plan](#) provides an overview of three areas of activity (in addition to legal incorporation) to progress children's rights. These are:

- evaluating and further promoting of the use of the CRIA process;
- developing a strategic approach to children and young people's participation in decision-making; and
- raising awareness of children's rights across all sectors of society in Scotland.

Whilst these are important areas of activity, the detail provided in the Action Plan is limited. Given the paramount importance of non-legislative measures to support legal incorporation and embed children's rights, much more detail is required, as well as a number of additional areas of activity, including:

- Further clarity regarding the nature and extent of the awareness-raising programme, including public and media engagement. A range of stimulating approaches are required for successful public engagement, and these will require sufficient human and financial resources, and to be sustained over time;²⁸
- Systematic collection of comprehensive data to monitor implementation, and reflection of this within national plans. Developing and using children's rights indicators (which cover the full range of rights) rather than focusing on child development or wellbeing indicators is crucial to this;²⁹
- Engagement by all levels of government. This can be built in a number of ways, such as developing 'champions' who can influence others across departments of national government and local authorities, and

²⁵ Collins, T (2019) The general measures of implementation: opportunities for progress with children's rights, *The International Journal of Human Rights*, 23:3, 338-356

²⁶ Lundy, L., Kilkelly, U., Byrne, B. & Kang, J. (2012) [The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries](#). UK: Unicef

²⁷ *ibid*

²⁸ Collins, T (2019) The general measures of implementation: opportunities for progress with children's rights, *The International Journal of Human Rights*, 23:3, 338-356

²⁹ Lundy, L., Kilkelly, U., Byrne, B. & Kang, J. (2012) [The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries](#). UK: Unicef

- constructive engagement by a wide range of staff in the reporting processes of children's rights; and
- Embedding rights-based approaches in policy-making and practice across all sectors. This involves addressing six core areas³⁰:
 - understanding and reflection of the specific and relevant principles/provisions of the UNCRC to the policy area in question;
 - continually engaging in the process of children's rights impact assessment (both in advance of decision-making, and afterwards to assess and evaluate impact);
 - ensuring the meaningful participation of children and young people, both as a right, and also to ensure better decision-making and increased accountability;
 - undertaking rights-based budgeting to ensure that the resources are in place for implementation;
 - working in partnership across agencies and government departments to identify and respond to need, and improve children and young people's enjoyment of their rights; and
 - publicity to make policies known to children and young people, and ensuring they are co-designed and presented in child-friendly ways.

The array of non-legislative measures required to implement change, and maximise the impact of legislative incorporation of the UNCRC to ensure children's day-to-day experiences of the protection and respect for their rights are improved, are considerable. Their consideration, planning, resourcing and implementation thus require commensurate attention and commitment. In this, as in all areas of policy and legislative change, is necessary to have both legislation *and* implementation support to ensure socially significant change is achieved.³¹

Enabling compatibility and redress

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.

Yes. Law and policy should not only be consistent with the standards in the UNCRC, but should also be developed in a way that is child rights compliant.³² Placing a CRIA on a statutory footing and thus including a requirement that any future Bill introduced to the Scottish parliament be accompanied by a CRIA would support scrutiny of compliance, and will ensure the process of developing legislation itself enhances children's rights.

³⁰ Byrne, B. & Lundy, L. (2019) Children's rights-based childhood policy: a six-P framework, *The International Journal of Human Rights*, 23:3, 357-373

³¹ Fixsen, D., Naoom, S., Blase, K., Friedman, R., and Wallace, F. (2005) *Implementation Research: A synthesis of the literature*. Tampa: University of South Florida

³² Byrne, B. & Lundy, L. (2019) Children's rights-based childhood policy: a six-P framework, *The International Journal of Human Rights*, 23:3, 357-373

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.

Yes. Justiciability of children's rights, including where children themselves can claim their rights through redress, is a crucial part of UNCRC implementation.³³ Whilst legal mechanisms for redress, and effective systems through which children can access redress are critical, the need for a breaches of child's rights to be challenged through the courts should never be celebrated. A focus on prevention of rights breaches must be a priority, such that legal redress is required rarely and is a matter of last resort. This closely aligns with Girfec, which is underpinned by a preventative approach, and aims to support children and families to reduce the escalation of difficulties and need for formal state intervention. Supporting families at an early stage, before the need for high level formal interventions (for example, by courts and Children's Hearings) is only possible with the full, properly resourced implementation of Girfec. The use of mediation and Family Group Decision Making approaches are important in the prevention of avoidable state intervention. The ethos underpinning such approaches is strengths based and solution focused, recognising the strengths and abilities of families to identify their own solutions to challenges. The approaches enable children and young people to be an integral part of decision making, and evidence indicates that families engage positively in these decision making processes concerning child welfare.³⁴ [Part 12: Children at risk of becoming looked after](#) of the 2014 Act places duties on local authorities to provide relevant services, including Family Group Decision Making services and support for parenting services, where children are at risk of becoming looked after. However, a recent review of the implementation of this legislation found this to be inconsistent, highlighting the need for attention to drivers of culture change, relationships and skillsets, and resources, in addition to changes to law and policy.³⁵

Access to legal aid and assistance continues to be an area of concern in some circumstances, and we have particular concerns about the rights challenges for some children in need of care and protection in relation to access to a fair and just trial (UNCRC Article 40). Many children in need of care and protection will have limited support to seek redress, and may be seeking redress against their carers or corporate parents, further heightening their need for advocacy. Children should be made aware of their right to instruct a solicitor, and to have access to legal aid, to ensure this. A solicitor assessing a child or young person who applies for legal aid when seeking civil advice and assistance must take into account the financial circumstances of anyone who owes a 'duty of aliment' to

³³ Kilkelly (2019) The UN convention on the rights of the child: incremental and transformative approaches to legal implementation, *The International Journal of Human Rights*, 23:3, 323-337

³⁴ Frost, N, Abram, F, & Burgess, H (2014) 'Family Group Conferences: Evidence, outcomes and future research', *Child & Family Social Work* 19:501-507

³⁵ Hill, L., Fowler, N. & Porter, R (2019) Supporting families: A review of the implementation of Part 12: children at risk of becoming looked after, as set out in the Children and Young People (Scotland) Act 2014, Glasgow: CELCIS.

that child or young person. There is an exemption to this rule, whereby if it would be unjust or inequitable to treat the resources of persons with an obligation for aliment as the child's resources they can be disregarded, in accordance with guidance in Chapter 2.16 of the [Scottish Legal Aid Board's Civil Assistance Handbook](#). The onus is on the solicitor to provide reasons to the Scottish Legal Aid Board as to why it would be unjust or inequitable, and decisions are made on a case by case basis. Thus, whilst children and young people who are looked after away from home would be considered exempt and should not experience complications accessing legal aid in their own right, children who are looked after at home or with other family members are in a more complex position. An application for legal aid may require the involvement of family members, breaching the child's right to confidentiality.

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.

Yes. If children's rights are breached, the UN Committee is clear that there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration.

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?

Yes, as they will be incorporated into primary legislation, the UNCRC rights must take precedence over secondary legislation. Moreover, secondary legislation should be in line with UNCRC rights.

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.

Yes, for the reasons given in our response to Q17.

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.

Yes. To protect children's rights, if an Act of the Scottish Parliament is incompatible with the UNCRC, the courts must have powers to declare such an Act unlawful if changes are not made to ensure it is compliant.

23. Do you consider any special test for standing to bring a case under the Bill should be required? Please explain your views.

No. Full incorporation of the UNCRC means that children are protected under domestic law and are therefore able to take a case in their own name. Under

Scots law, children have legal capacity at age 16 and are presumed to be able to instruct a solicitor over the age of 12. However, it is recognised that taking a case to court for a rights violation is rarely desirable for an individual child and preventative measures so that court action is a last resort are required. It should be considered that taking a court case for a collective group of children (e.g. led by the Children and Young People's Commissioner Scotland) would be preferable. There is also an option of strategic litigation in the public interest on behalf of children to be taken without individual children having to face a court case.

About CELCIS

CELCIS is a leading improvement and innovation centre in Scotland. We improve children's lives by supporting people and organisations to drive long-lasting change in the services they need, and the practices used by people responsible for their care.

Thank you for providing us with this opportunity to respond. We hope the feedback is helpful; we would be happy to discuss any aspect in further detail.

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