

INCORPORATION OF UNCRC

SUBMISSION FROM SOCIAL WORK SCOTLAND, TO SCOTTISH GOVERNMENT CONSULTATION

28 August 2019

Social Work Scotland is the professional leadership body for social work, working closely with our partners to shape policy and practice within social services. We welcome this opportunity to comment on the Scottish Government's proposals for incorporation of the United Nations Convention on the Rights of the Child (UNCRC) into domestic law.

In brief summary, Social Work Scotland warmly welcomes this initiative. Enabling all individuals to exercise and defend their human rights is essential to building the modern, just and compassionate society which Scotland aims to be. The UNCRC is an especially important component of the human rights canon, speaking as it does about the unique needs and circumstances of children and young people, the societal group perhaps most likely to have their human rights ignored, marginalised or abused.¹ Incorporation of the UNCRC into Scots law will, as the consultation document acknowledges², not only inform policy and practice to a degree not currently seen, but drive a broader and more nuanced public respect for children's rights. These are objectives which, as a rights-based profession, social work shares.

However, while Social Work Scotland supports full and direct incorporation of the UNCRC into domestic law, we believe that before their introduction more time needs to be given for both public discourse and organisational readiness. Recent experiences around the Named Person show that, no matter how strong the evidence and expert support for a proposal, a failure to identify and address the concerns of a minority of the public can derail legislative implementation indefinitely. Moreover, the shift from a 'duty to give regard' to a 'duty to comply' will, necessarily and positively, shift the balance of power from organisations to children and young people. Local authorities, among many other public organisations, need time to prepare for that shift, thinking through and proactively making changes to systems and practice, rather than being forced into change through the threat or outcome of legal proceedings.

¹ Doek, J.E. (2014), 'Child Well-Being: Children's Rights Perspective', in A. Ben-Arieh, F. Casas, I. Frønes and J. Korbin (eds.), Handbook of Child Well-Being, Dordrecht; Lundy L, Kilkelly, Byrne, Kang (2014) The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries

² Foreword, p.5

1. Are there particular elements of the framework based on the HRA as described here, which should be included in the model for incorporation of the UNCRC in domestic law?

Yes. The Human Rights Act (HRA) provides a robust and tested template on which to model incorporation of UNCRC, including a framework of mechanisms by which rights are given effect in domestic law. Specifically, we would support:

- the inclusion of a mechanism which required Scottish Ministers to assess compatibility of legislation with UNCRC (similar to the HRA's section 19);
- the recommendation that Scottish Courts should be able to determine when a provision in primary legislation is incompatible with UNCRC (similar to the HRA's section 3); and
- making it unlawful (as with HRA section 6) for a public authority to act in a way that is incompatible with UNCRC ('the duty to comply').

These would provide some of the practical means by which we move from existing domestic and international obligations to implementation of the UNCRC (Scotland Act 1998, Schedule 5, Section 7(2)(a)).

2. Are there any other aspects that should be included in the framework?

In the hope that further progress around children's rights in Scotland is driven proactively rather than reactively, we would suggest that a duty on public authorities to give 'due regard' to the UNCRC is included in the framework. We believe this would help cement the progress already made in Scotland, in respect of public bodies using the UNCRC as a guide for strategic planning and policy development.

The consultation report provides a helpful but partial cross referencing of Scottish legislation and the UNCRC, and acknowledges the unique legal context for children domestically (e.g. the Children's Hearing system). To support and facilitate incorporation, we would support the development of comprehensive, accessible guidance, detailing how existing domestic legislation and processes comply with (or potentially go beyond) the UNCRC. To address concerns within public authorities about the potential impact of incorporation, and to support planning and preparation, we believe that this process should be undertaken *before* the UNCRC is given effect in domestic law. And while we appreciate that this process would not be able to provide a definitive statement of compatibility (only an authoritative assessment at best), it would both provide reassurance and a mechanism for identifying areas in need of proactive attention.

3. Do you agree that the framework for incorporation should include a “duty to comply” with the UNCRC rights?

Yes. Reflecting on the development and public awareness of human rights in the UK over the past twenty years, the introduction of the HRAs ‘duty to comply’ appears an important driver of progress. As the First Minister’s Advisory Group on Human Rights noted, a duty to comply can “focus minds, incentivise and drive change in how a public body performs”.³ We would therefore support to duty to comply being included in the framework for incorporation, in effect making it unlawful for Scottish Parliament, Scottish Ministers and public authorities to act in manner which is incompatible with the convention or the Optional Protocols (if, following consultation, the Option Protocols are included).

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 party to the UNCRC should be given in our domestic law?

In constructing the framework of incorporation, the General Comments and Observations should be included as illustrative of principles, and valuable in offering guidance to those having to plan or adjudicate on potential rights violations. If, as the consultation states, there is no current body of jurisprudence which can help explain the detailed meaning of the UNCRC rights, the General Comments and Observations provide a reliable starting point.

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

Provided that public authorities are afforded time to properly prepare for incorporation of the UNCRC (adapting budgets, processes and practice as necessary), we are confident that Scottish Courts, Children’s Hearings and other relevant tribunals will be able to consistently interpret and apply the UNCRC in domestic cases. There is relevant UK case law to draw on (not least from the HRA), as well as material from those countries who have already incorporated the UNCRC. The framework for incorporation would helpfully draw attention to these.

If a period of preparation is built into the plan for incorporation, learning opportunities could be provided for advocates, reporters and curators, as well as professionals from across the public sector. To enable a proactive approach to giving effect to children’s rights, individuals need to appreciate how incorporation of UNCRC will shape their work. This process of learning and adapting to children’s rights is already well established and well progressed in Scotland, but further work is needed – particularly for those professionals working closely with children and families at times of tension or crisis.

³ First Minister’s Advisory Group on Human Rights Leadership (2018). *Recommendations for a new human rights framework to improve people’s lives: Report to the First Minister*, p.28

We also take this opportunity to draw attention to existing mechanisms which could be built on or expanded, to ensure the courts and public authorities fulfill their duties. For example, in domestic assault cases there is a precedent for a children's rights officer to be allocated, who consults with children and reports directly to the Sheriff. Managed sensitively (i.e. to avoid multiple interviews or advocates with the child), this sort of practice may be helpful in other circumstances too.

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?

Unsure. With so many variables at play it is difficult (for our organisation) to judge the appropriate sequencing. We note that the First Minister's Advisory Group on Human Rights Leadership sees UNCRC incorporation as a separate process, and that the development of a Statutory Human Rights Framework should not hold up incorporation. However, we are unclear how the Convention and Framework would interact in practice, or what other relevant legal and policy changes are in the pipeline (not least changes provoked by Brexit).

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).

The representation of this model in the consultation paper implies that imprecision about the interpretation of some rights in the Scottish context could lead to conflicted legal processes and potentially some 'paradoxical' outcomes. This is a concern. However, weighing up the options in respect to how the UNCRC is transposed into domestic Scots law, we have concluded that direct incorporation (the existing wording of the UNCRC) is the best approach. While we do expect conflicts over interpretation to play out (including in the courts) under this approach, proposals to redraft the language of the UNCRC for the 'Scottish context' risks even greater confusion, untethering our children's rights from the body of international legal opinion, precedent and guidance which has grown up around the UNCRC. The prospect of developing a Scottish framework of children's rights does hold appeal, presenting opportunities to build public understanding and support, to construct them around existing law and Scotland's unique legal system, and as the consultation document states, to take rights further than the UNCRC. But on balance the benefits of remaining consistent to the text of the UNCRC appear to outweigh the downsides, keeping us clearly tied into an international endeavor to improve the wellbeing of children. Moreover, if sufficient time was built in for preparedness, in anticipation of direct incorporation, it should still be possible to accrue many of the benefits associated with developing a set of specifically Scottish rights.

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

This appears to be a technical legal question, on which we are not qualified to comment.

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?

Social work, and the public and voluntary sector organisations who provide it, already operate within a legal framework which is divided between EU, UK and Scottish competencies. Supporting individuals and communities necessarily demands navigation of UK social security rules, Scottish social care policy and EU procurement directives. This is complex work, but not impossible. A direct incorporation approach, as discussed above, enables individuals and organisations to build on the considerable progress and process already made in respect of UNCRC, and to draw on international precedent and guidance. However, here again we think that building in time for preparation (before the ‘duty to comply’ comes into force) would be desirable, enabling the development of national and/or local guidance, staff training, etc.

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

After considering the options we have concluded that direct incorporation is preferable than multiple small changes. The current piecemeal approach does have advantages, such as providing time for thorough consideration of how changes impact and interact with other developments. It also presents opportunities for taking rights further than the UNCRC. But it also contributes to a confusing landscape, within which it is difficult for individual children and young people, and the professionals supporting them, to determine if rights have been given effect.

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

If by the ‘transposition model’ it is meant either a suite of Scottish Children’s Rights or piecemeal changes to the domestic statute book, such an approach would require a strategy which takes into account varied information and communication needs of all relevant groups. This would be facilitate a detailed public examination of the meaning and impact of proposals, from the perspective of both rights holders (children and young people) and those who are key to giving effect to those rights (parents, teachers, social workers, etc.).

If the transposition model (as described above) were followed, it would also be relevant to carefully map and articulate the major legal changes on the horizon, many of which will have a relationship to children’s rights.

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

Full and direct incorporation of the UNCRC articles into domestic law, prefaced by a period of preparation within which Scottish Government commits to working with public authorities to assess the resource, system and practice changes which may be necessary. In

particular, detailed analysis is needed on how incorporation will impact on existing child protection and care processes, taking into account that the UNCRC defines a child as individuals under the age of 18. It is not possible to predict how full and direct incorporation of the UNCRC articles will play out, but by taking this approach we believe that Scotland can take a bold, progressive step in the confidence that it has prepared as much as possible. Any approach to incorporation which undermines child-and-family facing organisations and professionals, whether by creating legal confusion or through a failure to provide sufficient resources (in the distribution of the Scottish Government budget), will serve only to further erode the public's faith in government.

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?

Yes. The move from 'incorporation' to 'implementation' of children's rights is likely to be complex, and a Children's Rights Scheme (along the lines of the Welsh example) would helpfully set out the Scottish Government's commitments.

Assessed on the basis that it provides a mechanism to ensure congruence between the 'Convention' and Welsh law, the Welsh Scheme does appear to have been partially successful. For example we understand that the Scheme has introduced new opportunities for policy advocacy on behalf of children in Wales, legitimising the language of Convention rights in policy discourse, and providing a foundation for stakeholders to engage with the Welsh Government in dialogue about how to give effect to children's rights. It has also introduced an expectation of compliance with the Convention, which contributes a strong underpinning for advocacy on behalf of children in Wales. A requirement under the Scheme to publish a periodic report on how Ministers have complied with the 'due regard' duty gives opportunity for public debate and scrutiny at assembly level; although we note that this has not been well utilised by members. Non-governmental organisations and the Children's Commissioner for Wales have though made good use of the Scheme as an accountability device.

The 'due regard' duty has enhanced legal accountability through the addition of a new basis for action in public law. However, perhaps because the Welsh approach falls short of a 'duty to comply', legal redress and judicial review have not emerged as significant accountability mechanisms for children's rights compliance.

14. Do you think there should be a "sunrise clause" within legislation?

Throughout this response we have argued for full and direct incorporation, prefaced by a period for further analysis, preparation and adaptation. This position is informed by our experience of public sector adjustments to new legal context, and reflections on the successful process adopted for the Human Rights Act 1998 (which involved a near two year period between the legislation passing and it coming into force).

Whether this period of preparation is provided for by a “sunrise clause”, or simply a planned delay to commencement, seems to us to be a political consideration. If there is a fear that a future administration may delay commencement indefinitely, then a sunrise clause provides insurance, significantly raising the costs of political action against incorporation. But if the Scottish Government is confident that any future administration will progress to commencement when the time is judged right (within the next few years), then a sunrise clause would not be necessary.

The priority for Social Work Scotland is that organisations and professionals are given a window of opportunity to review their budgets, systems and practice through the new lens of full and direct incorporation of UNCRC, with its associated duties of ‘due regard’ and ‘to comply’. We acknowledge that the foundations and much of the scaffolding for children’s rights is already well established in Scotland, and that current, existing expectations are for organisations and professionals to work in a way which respects and gives effect to children’s rights. And for most children and young people, the reality is that Scotland goes beyond what the UNCRC demands. But a determination and commitment to incorporate the UNCRC should not obscure the reality that systems and practice are managed in a context where the legal obligation is to ‘secure better or give further effect’ to children’s rights. For organisations concerned about risk and litigation, ‘secure better or give further effect’ is a very different threshold than a ‘duty to comply’. Particularly when the precise domestic legal interpretation of the UNCRC is unknown. Although the consultation paper suggests that “if public authorities respect UNCRC rights then it would not be necessary for rights holders to resort to the courts to vindicate their rights”, there is concern that differences in perspective or interpretation (in situations like child protection and permanence proceedings) will lead to legal challenges. The prospect of litigation is a useful driver for improvement, which is why we support the duty to comply. But a rise in litigation, taking up time and money, and impacting on the wellbeing of all concerned, will not be a mark of success. It would be better, we believe, to build in some time prior to incorporation for scenario planning and mapping, helping organisations to anticipate, and where necessary adapt, to the incoming legal context. We hope that, once that process has concluded, little change will have been needed.

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?

Referencing again the Human Rights Act 1998, two years seems an appropriate length of time; long enough to assess, adapt, develop guidance, etc., but not too long that it pushes it beyond most planning horizons. However, the precise period for preparation is again something of a political calculation. If the legislative process itself is likely to take up until 2021, and a successful passage through the Scottish Parliament is expected, then preparation can begin in parallel. The length of the time after the passing of the Act could then be shortened accordingly.

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?

Yes. A comprehensive strategy is needed that knits a potentially disintegrated range of positive changes, recent and in progress, within a children's rights and human rights framework. The GIRFEC Practice model, underpinned by UNCRC, anticipated some of this,⁴ but we believe incorporation provides an opportunity for Scottish Government and its partners to go further, clearly articulating the natural alignment of the UNCRC with GIRFEC, as well as other frameworks such as the Health and Social Care Standards. Synergy and clarity between these different elements will serve to reinforce the value and impact of each individually.

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?

Yes.

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?

Yes.

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?

Unclear. While this seems reasonable, we do not feel we have sufficient information within to form a balanced view. Proportionality is key, and we would want to avoid the development of any combative, 'no win, no fee' litigation that will do little to protect rights and might conceivably have a negative impact on services and practice.

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, this principle seems sound. If there are specific elements of subordinate legislation that can be challenged on UNCRC grounds then there should be a mechanism for review and amendment.

Difficulties could emerge if some provision in secondary legislation, challenged under UNCRC, is key to specific care and protection processes for children. In the period of time

⁴ Aldgate J 2013 UNCRC, The Foundation of Getting it right for every child. (Scottish Government).

for review and amendment local systems could be frozen, leading to delay and increased risk. However, a period of preparation in advance of incorporation provides the chance to identify these particularly sensitive processes, and to test and adapt them where necessary.

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?

Yes.

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?

Yes.

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

The recommendation that the ordinary test of standing in Scots Law, which applies to challenges on judicial review (the test of sufficient interest), would seem reasonable and appropriate. However, this is again a technical question upon which other contributors will be more expert.

For further information, please do not hesitate to contact:

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