

Response to call for views on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill

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Our submission is based on our collective academic and policy work on children's human rights. We draw particularly on two recent foci: the Children (Scotland) Bill's passage through Parliament and the efforts made to ensure that Bill was compliant with the UN Convention on the Rights of the Child (UNCRC)¹; and the independent Children's Rights Impact Assessment undertaken for the children and Young People's Commissioner Scotland, on COVID-19 related policies².

Key points

The introduction of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill to Parliament signifies a major step towards ensuring children's human rights are not only recognised but also implemented in Scotland. We particularly commend the 'maximalist approach' to incorporation and are broadly supportive of the Bill.

However, for the Bill to be truly transformative, we recommend the Bill be revised in 10 areas. It requires provisions for:

1. Systems of child-friendly remedy and redress for children whose rights may have been breached. At a minimum this must include child friendly systems for: children who are subject to the law (public and private) and children who access public authorities.
2. Enhanced systems of advocacy and access to independent legal representation, for children, which is adequately resourced and sufficiently available. This is critical to ensuring that children are able to access systems of redress and claim their rights when they are breached.
3. A national awareness raising programme, which involves children and young people in its development. This includes ensuring children, parents and carers are informed; children's rights becomes embedded in the Curriculum for Excellence; and specialist training for particular professions.
4. A wide interpretation of the definition for public authorities and public functions under section 6. This is necessary because private organisations frequently discharge public functions and duties, in Scotland. The Scottish Parliament should be included as a public authority and subject to the section 6 duty.
5. A system of children's rights indicators to enable effective monitoring of the implementation of the Bill. Such a system must be underpinned by robust data, which are gathered systematically

¹ See Parliamentary briefings available at <https://www.ed.ac.uk/education/rke/our-research/children-young-people/childhood-and-youth-studies-research-group/engaging-with-research-policy-and-practice>

² https://cypcs.org.uk/resource_type/childrens-rights-impact-assessment/

and disaggregated, on how children’s human rights are implemented by courts and public authorities.

6. A duty on courts to have due regard to the authoritative interpretations provided by the UN Committee on the Rights of the Child (General Comments, Concluding Observations for the UK³, and decisions under the Third Optional Protocol on a Communications Procedure).
7. A duty on public authorities to undertake and publish Children’s Rights and Wellbeing Impact Assessments (CRWIA).
8. Require the Scottish Government to undertake an audit of existing legislative compliance with the UNCRC, taking into consideration General Comments, Concluding Observations for the UK⁴, and decisions under the Third Optional Protocol on a Communications Procedure. A subsequent plan for achieving legislative compliance must then be published and implemented.
9. Require the Scottish Government to specify an early commencement date on the face of the Bill.
10. Key statutory guidance is required to support the implementation of the Bill.

Response to specific questions about the UNCRC Incorporation Bill:

1. Will the Bill make it easier for children to access their rights?

Yes. The Bill will set minimum standards for children’s human rights, ensuring a more effective, systematic framework for children’s rights than is currently the case. However, the Bill will remain symbolic unless there are further mechanisms and supports embedded in the Bill to ensure that these rights are fully realised. The Bill must be amended to include:

Systems of child-friendly remedy and redress for children whose rights may have been breached.

At a minimum this must include child friendly systems for: children who are subject to the law (public and private) and children who access public authorities.

The Bill must squarely consider child-friendly redress and complaints. The UN Committee on the Rights of the Child states, in its General Comment No. 5 (2003) on General Measures of Implementation of the UNCRC, that: “For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention ...” (para 24)⁵. A duty to comply needs enforcement for non-compliance. Rights violations require remedies and these must be sensitive, appropriate and accessible to all children.

³ The full reference is to the United Kingdom of Great Britain and Northern Ireland. We will use ‘Concluding Observations of the UK’ in this document.

⁴ The full reference is to the United Kingdom of Great Britain and Northern Ireland. We will use ‘Concluding Observations of the UK’ in this document.

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https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11

The Council of Europe Guidelines on Child Friendly Justice⁶ emphasises the importance of child friendly complaints systems. The Guidelines note that children should have recourse to remedies to effectively exercise their rights or act upon violations of their rights. They call on Member States to facilitate children's access to courts and complaints mechanisms and to recognise and facilitate the role of NGOs and other independent bodies or institutions such as children's ombudsmen in supporting children's effective access, both on a national and international level (Guideline 83). Therefore domestic law should facilitate where appropriate access to courts for children who have sufficient understanding of their rights and of the use of remedies to protect these rights, based on adequately given legal advice.

The lack of systems of child-friendly remedy and redress for children whose rights may have been breached was highlighted during the passage of the Children (Scotland) Bill and remains unresolved⁷. There are no clear ways for children, for example, to tell the court that their child welfare report is inaccurate before a decision is made; yet the child welfare report may be critical to the court's decision on child contact. The lack of redress and complaints goes beyond family law: for example, no child-friendly system of complaints exists for children's hearings should a child wish to complain about a decision made. At a minimum the Bill must be amended to provide child-friendly systems of remedy and redress for children who are subject to the law (public and private) and children who access public authorities more generally.

In its response to the consultation, Together calls on the Scottish Government to include a new duty requiring the Government to set out a process for child-friendly complaints as part of the Children's Rights Scheme. We would support this call.

Enhanced systems of advocacy and access to independent legal representation, for children, which is adequately resources and sufficiently available. This is critical to ensuring that children are able to access systems of redress and claim their rights when they are breached.

The need for advocacy for children when implementing their human rights was recognised in the Children (Scotland) Bill, with the Government's welcome commitment to developing advocacy services for children. There will be a need, which is recognised by Government, to coordinate the various forms of advocacy in different areas of children's lives.

As we raised with the Children (Scotland) Bill⁸, children's access to legal representation has already been seriously curtailed by changes in legal aid provision⁹. We recognise that the Government is considering this separately under legal aid reform (para 100 of the Bill's Policy Memorandum) but to underline that it is a significant component that is missing in ensuring children's human rights.

The Council of Europe Guidelines on Child Friendly Justice¹⁰ note that any obstacles to access to court, such as the cost of the proceedings or lack of legal counsel, should be removed (Guideline 35), that children should have the right to their own legal counsel and representation, in their own name,

⁶ Council of Europe (2010) Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, Guideline 34 (1)

https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804b2cf3

⁷ https://www.ed.ac.uk/files/atoms/files/stage_three_children_scotland_bill_-_joint_briefing_-_swa_children_1st_dr_fiona_morrison_prof_kay_tisdall_21-08.pdf

⁸ <https://www.ed.ac.uk/files/atoms/files/mh-ijcc-morrison-friskney-tisdall-evidence.pdf>

⁹ Due to the Advice and Assistance (Scotland) Amendment Regulations 2010 and the Civil Legal Aid (Scotland) Amendment Regulations 2010.

¹⁰ See point 6.

in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties (Guideline 37). They also specify that children should have access to free legal aid, under the same or more lenient conditions as adults (Guideline 38) and that lawyers representing children should be trained in and knowledgeable on children's rights and related issues, receive ongoing and in-depth training and be capable of communicating with children at their level of understanding (Guideline 39). Guideline 43 further calls for adequate representation and the right to be represented independently from the parents to be guaranteed, especially in proceedings where the parents, members of the family or caregivers are the alleged offenders.

On occasion it may not be possible or in the child's best interests to bring a case in his or her name. We therefore welcome the power (under section 10) for the Commissioner to bring in or intervene in proceedings. However, we note that this power will carry significant resource implications.

Ensure a national awareness raising programme, which involves children and young people in its development. This includes ensuring children, parents and carers are informed; children's rights become embedded in the Curriculum for Excellence; and that specialist training is made available for particular professions.

We commend the attention to raising awareness and promoting children's rights, as a potential part of the Children's Rights Scheme, which will be required from Scottish Ministers (section 11). It would be stronger if the Scheme had to include such provisions and that they used the wider phrasing of section 1(3) of the Children and Young People (Scotland) Act 2014, which is 'promote public awareness and understanding (including appropriate awareness and understanding among children) of the rights of children'. Given its importance, consideration should be given to whether sufficient resources have been allocated to this in the Financial Memorandum to the Bill.

For children to be able to claim their human rights, children and adults need to know what children's human rights are. There is a need to plan for and implement systematically a programme of public education and training that will help to bring about culture change about how children are viewed and treated in both public and private spheres. In terms of culture change, Lundy and colleagues note that incorporation provides a platform for developing other legal and non-legislative measures, underpinned by systematic children's rights training and an infrastructure which provides a robust approach to monitoring and ensuring effective implementation¹¹.

To maximise the opportunity of the Bill, we need to ensure engagement with those working in public authorities to realise children's human rights. As was found in family law, the gap has not been so much in terms of the legislation itself, but its implementation in practice¹². Investment through initial and subsequent training with particular groups of professions will help ensure that rights are truly realised in children's lives. In all efforts to support those working in public authorities to realise children's human rights, due attention must be given to the authoritative interpretations of the UNCRC, through the General Comments, Concluding Observations for the UK, and decisions under

¹¹ Lundy, L., Kilkelly, U., Byrne, B., and Kang, J. (2012) The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries, UNICEF, <https://www.unicef.org.uk/publications/child-rights-convention-2012-report/> (accessed 12.10.20).

¹² Scottish Government (2019) Review of Children (Scotland) Act 1995 consultation: analysis, <https://www.gov.scot/publications/analysis-consultation-responses-consultation-review-children-scotland-act-1995/> (accessed 12.10.20); Tisdall, E.K.M., Morrison, F., and Warburton, J. 'Challenging undue influence? Rethinking children's participation in contested child contact' (forthcoming) *Journal of Social Welfare and Family Law*.

the Third Optional Protocol on a Communications Procedure, as well as the intertwined obligations of other human rights law.

As noted in the Bill's Policy Memorandum (paras 11-14), all of this is especially relevant in light of the COVID-19 pandemic and its impact on public provision: e.g. the right to an adequate standard of living (article 27), health care rights (article 24), education rights (articles 28 and 29), and access to justice (article 37). The Independent CRIA demonstrated how children's best interests (article 3) and due weight being given to their views (article 12) were often not sufficiently attended to in the responses to the pandemic, despite the good intentions of public authorities, to detrimental effects for children¹³. As recognised by the UN Committee on the Rights of the Child in their 11 recommendations on the pandemic¹⁴, ensuring children's human rights are respected is more -- not less -- important in terms of crisis. Incorporating the Bill into Scottish law will ensure that such attention is given in all circumstances to children's human rights.

2. What do you think about the ability to take public authorities to court to enforce children's rights in Scotland?

We agree. Rights holders must be able to challenge acts of public authorities on the grounds of incompatibility. Public authorities must be held accountable and rights holders must be empowered to invoke their rights. The obligation under section 6 to ensure UNCRC compatibility will have a positive effect on how, for example, local authorities plan and deliver children's services in a way that respects children's rights and views them as rights holders.

As we note above, the Bill must be amended to ensure that children have access to systems of child-friendly remedy and redress. This must include remedy and redress in relation to public authorities. A duty to comply needs enforcement for non-compliance. Rights' violations require remedies and these must be sensitive, appropriate and accessible to children.

The UNCRC requires children's human rights to be considered widely, in all areas of their lives. Thus public authorities and public functions must be maximally interpreted, to ensure children's human rights are respected, supported and promoted. This is the intention of the Scottish Government, as stated in the Policy Memorandum for the Bill (para 182-183). However, the Inner House's recent judgement ([Ali \(Iraq\) v Serco Ltd \[2019\] CSIH 54](#)) narrowed the interpretation of public authorities. There would be a risk then that critical areas of children's lives, which are contracted out to private companies, such as childcare, transport services, housing and sport, may not be sufficiently held to account. The Bill needs to be strengthened in this regard, to ensure the maximal intention of the Scottish Government is reflected in the Bill. Further, given the Parliament's commitment to human rights – including its Equality and Human Rights Committee – it should be included as a public authority and subject to the section 6 duty to act compatibly with the UNCRC requirements.

The Bill should be amended to:

Require a wide interpretation of the definition for public authorities and public functions. This is necessary because private organisations frequently discharge public functions and duties, in

¹³ https://cypcs.org.uk/resource_type/childrens-rights-impact-assessment/

¹⁴ https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CRC/S/TA/9095&Lang=en (accessed 12.10.20)

Scotland. The Scottish Parliament should be included as a public authority and subject to the section 6 duty.

3. What more could be done to make children's rights real?

States Parties have a duty to take 'all appropriate legislative, administrative, and other measures' to implement the UNCRC (article 4). The UN Committee on the Rights of the Child has underlined the importance of incorporation, justiciability as well as non-legal measures of implementation. Based on our collective research evidence, we would highlight three priorities:

To develop a system of children's rights indicators to enable effective monitoring of the implementation of the Bill. Such a system must be underpinned by robust data, which is gathered systematically and disaggregated, on how children's human rights are implemented by courts and public authorities.

In assembling the evidence for the independent CRIA¹⁵, we confirmed that Scotland collects considerable amounts of statistics and other data in relation to children and young people. However, the data do not allow fundamental questions on children's human rights to be answered. It is particularly weak in providing disaggregated data, to know whether particular groups of children and young people are more at risk of having their rights violated than others. The Bill provides an impetus to set up systems to effectively monitor the implementation of the Bill, in order to provide the necessary data to know how well children's human rights are being met. This needs to apply to courts, as it does other public authorities.

Recognise courts to have due regard to the authoritative interpretations provided by the UN Committee on the Rights of the Child (General Comments, Concluding Observations for the UK¹⁶, and decisions under the Third Optional Protocol on a Communications Procedure).

Courts must be familiar with up to date jurisprudence relating to children's rights. When courts and tribunals are interpreting the UNCRC rights, they should be under a duty to have regard to the interpretive instruments from the UN Committee on the Rights of the Child. This would cover for example: General Comments of the UN Committee on the Rights of the Child; Concluding Observations on the United Kingdom and decisions under the Third Optional Protocol on a Communications Procedure. This echoes the First Minister's Advisory Group on Human Rights Leadership's recommendations on interpreting international treaty rights¹⁷.

Require public authorities to undertake and publish Children's Rights and Wellbeing Impact Assessments (CRWIA).

We are pleased to see the requirement on Scottish Ministers to prepare Children's Rights and Wellbeing Impact Assessments in relation to strategic decisions around the rights and wellbeing of children (section 14 of the Bill). We also welcome the requirement on Ministers to include in their

¹⁵ https://cypcs.org.uk/resource_type/childrens-rights-impact-assessment/

¹⁶ The full reference is to the United Kingdom of Great Britain and Northern Ireland. We will use 'Concluding Observations of the UK' in this document.

¹⁷ <https://humanrightsladership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf> (accessed 13.10.20) (page 31).

children's rights scheme a statement that sets out when it is appropriate for them to prepare a child rights and wellbeing impact assessment (section 11 of the Bill).

The duty to prepare and publish such impact assessments should be extended to public authorities so that children's rights can be given priority when decisions are taken which affect them. This would help to anticipate the potential impact of proposed policies or budgetary allocations and would complement the reporting duty placed on public authorities under section 15 of the Bill. Public authorities are often undertake equality impact assessments, in order to meet the Public Sector Equality Duty, so this requirement will expand and enhance already existing practices.

We are pleased to see that the Bill does not include a 'victim test' - in contrast to the Human Rights Act. We echo concern raised by Together¹⁸ that, while a victim test has not been included in the Bill, the rules on 'standing' are not entirely clear from the face of the Bill. We support Together's call for the test of 'sufficient interest' to be made explicit on the face of the Bill

4. What resources do you need?

n/a

5. Are there any relevant equalities and human rights issues/ potential barriers to rights?

We would highlight several areas that require attention, that are addressed elsewhere in this submission. These are the need for:

- A system of children's rights indicators, that are robust and disaggregated
- Systems of child-friendly remedy and redress
- Enhanced systems of advocacy and access to independent legal representation, for children
- A duty on public authorities to undertake Children's Rights and Wellbeing Impact Assessments
- The power for the Children's Commissioner to bring in or intervene in proceedings must be accompanied with adequate resourcing.

6. Views on the strike down provisions (sections 20 and 21)

We welcome the power for courts to strike down certain kinds of legislation THAT it deems to be incompatible with the UNCRC requirements. We also welcome the provision to afford the Lord Advocate and the Commissioner for Children and Young People in Scotland an opportunity to make representations prior to a strike down.

We note that the strike down provision does not extend to future legislation and acknowledge that this would be beyond the powers of the Parliament. As it stands therefore, this power is limited, although the courts' power to issue an incompatibility declarator, where the provision is in legislation which post-dates the Act, will help to address this limitation.

¹⁸ https://www.togetherscotland.org.uk/media/1727/crc_ehric_response_071020.pdf

An incompatibility declarator also triggers a duty on the Government under section 23 to make a statement to the Scottish Parliament, which will help to ensure transparency. Ministerial action following a strike down declarator or incompatibility declarator is also provided through a duty to prepare a report within six months of an incompatibility or strike down declarator. This duty to report rather than take action is strengthened by a requirement to lay the report before Parliament, which will provide increased scrutiny.

We thus support these combined requirements, so that the Bill provides a strong framework to ensure compatibility of all legislation with children's rights.

7. Views on the children's rights scheme and the requirement to report

We support the duty on Scottish Ministers to make a Children's Rights Scheme, setting out the arrangements that are in place, or are to be put in place, to ensure that they comply with the duty to act compatibly with UNCRC requirement (section 6). The duty to consult with children, the Commissioner for Children and Young People in Scotland and other appropriate persons is also welcome.

As noted above, we would recommend stronger phrasing in section 11(3), to require Scottish Ministers to 'promote public awareness and understanding (including appropriate awareness and understanding among children) of the rights of children'. This would mirror the duty currently within section 1(3) of the Children and Young People (Scotland) Act 2014 that will be repealed through this Bill.

We are pleased to note the requirement to report and to have regard to relevant UN documents when making, amending and remaking the scheme (section 12(2) of the Bill). It is worth noting that the Third Optional Protocol to the Convention, whilst not yet ratified by the UK Government, is proving to be an effective means of protecting children's rights. The Committee on the Rights of the Child is developing valuable jurisprudence in this regard and a reference to this should be included.

8. Anything else?

This Bill represents a major milestone in advancing children's human rights in Scotland. As we note above, the Bill must be strengthened to ensure it is more than symbolic. In this regard the Bill must be amended in three ways:

Require the Scottish Government to undertake an audit of existing legislative compliance with the UNCRC.

This audit must use the General Comments, Concluding Observations for the UK¹⁹, and decisions under the Third Optional Protocol on a Communications Procedure. This will ensure depth and rigour in its analysis and achieve a maximalist approach to incorporation. A subsequent plan for achieving legislative compliance must then be published and implemented.

¹⁹ The full reference is to the United Kingdom of Great Britain and Northern Ireland. We will use 'Concluding Observations of the UK' in this document.

Require the Scottish Government to specify an early commencement date on the face of the Bill

We note that no commencement date is specified on the Bill. However, if the COVID-19 pandemic has taught us anything, it is how easily children's rights can be eroded and curtailed, unless strong protections are put in place. This suggests that some urgency is required around incorporation to embed a strong culture of children's rights at every stage of decision making.

An early date for commencement following Royal Assent should be specified on the face of the Bill.

Produce key statutory guidance to support the implementation

The Bill would be substantially strengthened by statutory guidance. This would help to provide clarity around how the legal obligations laid out in the legislation should be followed. For instance, it would clarify the requirements and duties it places on public authorities.