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Entrenching Children's Participation through UNCRC Incorporation in Scotland

(forthcoming in *The International Journal of Human Rights*)

Kasey McCall-Smith

Senior Lecturer in Public International Law, University of Edinburgh Law School, kasey.mccall-smith@ed.ac.uk. The research underpinning this article was developed with the assistance of Lauren Mizen and Sarah McDermott. With many thanks to Rebecca Smyth, Eva Brems, Nicolas Brando and the anonymous reviewers for their comments on a previous version. All errors remain my own.

Keywords: children; young people; participation; decision-making; emancipation rights; Scotland; incorporation

Entrenching Children's Participation through UNCRC Incorporation in Scotland

Abstract:

In March 2021, the Scottish Parliament unanimously adopted the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (Incorporation Bill). This article explores how this law could fulfil children's participation rights in Scotland based on the exercise of UNCRC Article 12 coupled with Article 5, a child's right to be heard in line with their evolving capacity. It begins by introducing the basic concept of children's participation rights before constructing participation as a right of emancipation that is two-dimensional, reflecting both the individual and collective dimensions of a child's right to be heard. To develop the first dimension of the emancipatory right to participation, the article focuses on a child's ability to engage their individual right to participate in private legal proceedings. The article then looks at how the views of children and young people have been included in collective decision-making processes following adoption of the Children and Young People (Scotland) Act 2014, namely views gathered through children's rights impact assessments. The overarching purpose is to demonstrate how the direct incorporation of the UNCRC can ultimately emancipate children from ongoing marginalisation and support them to become active, engaged citizens.

Entrenching Children's Participation through UNCRC Incorporation in Scotland

Introduction

Children's rights enjoy a great deal of support in Scotland where the field has dedicated civil society networks and government groups unparalleled in other areas of law and policy.¹ Though the UK ratified the UN Convention on the Rights of the Child (UNCRC) in 1992, legal implementation of its provisions has been patchwork and indirect, often without any consideration of the overarching framework provided by the Convention.² As a devolved nation within the UK, Scotland is largely responsible for implementation of the UNCRC. Scotland is able to legislate and develop children's rights laws and policies distinct from the UK, the actual State Party to the UNCRC. This ability is enhanced through the Scotland Act 1998 and subsequent amendments to the Act, which further devolved governance in the fields of economic and social rights to Scotland. In April 2019 the Scottish Government pledged to incorporate the UNCRC by the end of the parliamentary term, which ended in March 2021. To realise that pledge, the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (Incorporation Bill) was introduced in Scottish Parliament on 1 September 2020 and was unanimously passed on 16 March 2021.³ The Bill directly incorporates the UNCRC, including Articles 12 and 5, which reinforce a child's right to express their views in line with their evolving capacity in matters that affect them, in other words, their right to participate in decision-making processes that affect their lives.

This article explores the ways in which the Scottish Government's pledge and resulting legislation could fulfil the participation rights of children in Scotland based on the exercise of UNCRC Article 12 coupled with Article 5, a child's right to be heard in line with their evolving capacity. This examination is necessary to reinforce the transformative potential of participation rights to embed children's rights culture across government and society. The analysis has a two-

¹ See discussion in Kasey McCall-Smith, 'Incorporating the CRC in Scotland' in Ursula Kilkelly, Laura Lundy and Bronagh Byrne, eds., *Incorporating the United Nations Convention on the Rights of the Child into National Law* (Cambridge: Intersentia, 2021), 307 et seq.

² Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, entered into force 2 September 1990 (UNCRC). The UK also ratified the first and second protocols to the UNCRC.

³ At the time of writing the UK government has challenged the devolved competence of the Scottish Parliament to legislate in relation to some issues contained in the Bill. The points of contention, however, do not affect the overall incorporation of the UNCRC nor will they alter the participation elements discussed here. Royal assent

fold focus. First, it examines the right of a child to individually participate in decisions that affect their personal life and development as a member of society. Second, it explores children's collective rights to be consulted on legislation and policy that impacts them as members of a specific group of rights holders – non-adults. In Scotland, under-18s are classified in various legal instruments as either children, those aged 0-15, or young people, those aged 16-17,⁴ while other laws refer to all under-18s as children.⁵ For this reason, this work adopts the common Scottish terminology and uses 'children' or 'the child' in reference to all under-18s unless a distinction between children and young people is necessary to align with Scottish practice.

The remainder of this work consists of four sections. The next section introduces the basic concept of children's participation rights before constructing participation as a right of emancipation that is two-dimensional, reflecting both the individual and collective dimensions of a child's right to be heard. The article then moves to an examination of key legal instruments in Scotland that give life to the UNCRC and facilitate the participation of children in decision-making that affects their lives. In the first instance, the Children and Young People Act (Scotland) 2014 is examined due to its indirect incorporation of the UNCRC and its instrumental role in creating a statutory duty on the government to consult with children in the development of new law and policy. Next, the opportunities offered by the UNCRC Incorporation Bill to secure more effective child participation are introduced. The third section charts the successes and failures of children's participation experiences under existing Scots law against the participation standards recognised by the Committee on the Rights of the Child (CRC). To do this, the section first focuses on a child's ability to engage their individual right to participation in private legal proceedings as facilitated by various laws, including the Children (Scotland) Act 1995. The article then turns to look at how the views of children and young people have been included in collective decision-making processes since 2014, namely views gathered through children's rights impact assessments. The examinations of both the individual and collective dimensions of participation will consider the extent to which incorporation of the UNCRC can close the gap

⁴ e.g. Education (Additional Support for Learning) Act 2004, s29(1); Children's Hearings (Scotland) Act 2011, s199. The last population estimate in 2019 indicated that under-18s made up roughly one-quarter of the Scottish population with a combined 921,397 children under-16s and 107,765 young persons aged 16-17, see National Records of Scotland, *Mid-2019 Population Estimates Scotland*, 30 April 2020, <https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/population/population-estimates/mid-year-population-estimates/mid-2019>.

⁵ Children and Young People Act (Scotland) 2014, s97(1) (CYP Act 2014).

between the aims of participation and the outcomes for children and young people. The concluding section explains that the overarching purpose of this article is to demonstrate how the direct incorporation of the UNCRC offers a stronger opportunity to entrench children's participation rights in Scotland. The exercise of participation rights can ultimately emancipate children from ongoing marginalisation and support them to become active, engaged citizens.

Constructing Two Dimensions of Children's Participation as Emancipation Rights

UNCRC Article 12 is the international codification of a child's right to be heard and is recognised not only as an independent right but also as one of the four general principles that should be used to interpret all of the rights in the Convention. The other general principles are non-discrimination (Article 2), the best interests of the child (Article 3) and the right to life, survival and development (Article 6). While not a general principle, it is notable that UNCRC Article 5, which recognises the evolving capacity of children, both tempers and strengthens children's abilities to engage various UNCRC rights in line with each child's personal development. The evolving capacity for autonomy is a distinctive characteristic of the rights outlined in the UNCRC and participation rights build on this capacity.⁶ The inherent nature of 'evolving capacity', or more precisely the assumption that capacity may be deemed absent due solely to age, opens up the role that participation plays in emancipating children. Therefore, it is appropriate to frame the evolved interpretation of the Article 12 right to be heard in concert with Article 5 as a right to participation for children as it reinforces that they should have the opportunity to express their opinions and be part of decision-making processes in all matters that affect them in line with their evolving capacity. Though 'participation' is not expressly used in the Convention, facilitation of the right to be heard is now broadly conceptualised as a right to participation and is derived from the combined reading of UNCRC Articles 12 and 5.⁷

The construction of a basic understanding of a child's right to participation, therefore, is grounded in the Article 12 assurance of the right of all individuals under age 18 to have their views taken into account in decisions that affect them in line with the continuum of evolving

⁶ Eva Brems, 'Lessons for Children's Rights From Women's Rights? Emancipation rights as a distinct category of human rights' in Eva Brems, Ellen Desmet and Wouter Vandenhole, eds., *Children's Rights Law in the Global Human Rights Landscape* (London: Routledge, 2017), 97.

⁷ John Tobin, 'Understanding Children's Rights: A Vision Beyond Vulnerability', *Nordic Journal of International Law* 84 (2015): 155, 157, 177-80.

capacity recognised in Article 5. As explained by the CRC, participation encompasses ‘ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect’.⁸ This includes decisions that impact their individual, personal lives, for example in respect of familial relationships or education, as well as decisions that are made by the government that have the potential to impact the whole of society, including children as a broad or specific group. The distinction is important in terms of assessing when the views of a child, either individually or as part of a group, should be sought and how to facilitate this exchange of views.⁹ The evolving capacity of under-18s is one reason why Scots law has historically differentiated between children and young people. Despite this differentiation, Scots law is riddled with numerous examples of children and young people’s participation rights being suppressed for the simple reason that they are not adults or not a particular age, thus failing to recognise the role of Article 5 in shaping the Article 12 right to be heard. The relationship between Articles 12 and 5 opens up the transformative potential of participation to emancipate children from the constraints imposed by an adult-centred society through its laws.

Emancipating children through participation

The freeing of individuals or groups of individuals from the constraints that stop them from exercising their freedom of choice in their personal actions is one characterisation of emancipation. Despite the concept of emancipation being long associated with the principles and movements that underpin human rights law, there is remarkably little legal literature on the subject in relation to children’s rights. For this reason, the construction of the children’s rights dimension of emancipation briefly mapped out here draws on the term as understood by Booth and Blakely in the field of international studies and then anchors this to children’s rights discourse using Brems’ more recent correlation between women’s and children’s rights. As argued by Booth, the 20th century was a struggle for the emancipation of the colonial world, women, youth and many others in recognition of the ‘reciprocity of rights’ or, framed another way, the belief that ‘my freedom depends on your freedom’.¹⁰ Drawing on the historical

⁸ Committee on the Rights of the Child (CRC), General Comment No. 12: The Right of a Child to be Heard, CRC/C/GC/12, 20 July 2009, para. 3.

⁹ CRC, General Comment No. 12, part III.

¹⁰ Ken Booth, ‘Security and Emancipation’, *Review of International Studies* 17 (1991): 313, 322.

materialist conceptualisation of emancipation and its inherent critique, Blakely builds upon Booth's understanding arguing that 'emancipation involves identifying possibilities for change within the context of the prevailing social order'.¹¹ This understanding of emancipation speaks directly to the driving force behind children's participation rights in both the individual and collective contexts.

The UNCRC demands that states 'transform the decision-making process and make it more inclusive by bringing views into play that would otherwise go unheard.'¹² This is essential to recognising children as evolving, dynamic citizens, which historically has been contested. Transforming the role of children in contemporary society demands that citizenship not be viewed simply as a status, but as the culmination of the 'practices of making citizens – social, political, cultural and symbolic.'¹³ Children face many forms of oppression in their path to citizenship. This oppression is reflected in the range of social, political, cultural and symbolic barriers that have historically driven an ageist, binary construct of personhood – an individual is either an adult or a child. In this binary, children are excluded from engaging in all manner of decision-making processes. It is therefore incumbent on the state to recognise the relationship between social and political projects and the messages that they convey to the wider society about this false binary. As Brems explains, 'the analytical category of emancipation rights indicate those rights that are intended to correct a legacy of structural discrimination of specific groups and to provide to members of such groups equal opportunities and equal enjoyment of their human rights.'¹⁴ Though Blakely is more hesitant about tethering emancipation strictly to the human rights agenda, the combined reading of these different constructions of emancipation presents a coherent understanding about why participation is crucial to children's emancipation.

Individual participation rights

A child's participation in decision-making in relation to their personal lives can be succinctly described as the individual dimension of participation. The individual exercise of participation

¹¹ Ruth Blakeley, 'Human Rights, State Wrongs, and Social Change: the Theory and Practice of Emancipation', *Review of International Studies* 39 (2013): 599, 604.

¹² Tobin, 'Understanding Children's Rights', 179-80.

¹³ Engin F Isin, 'Theorizing Acts of Citizenship' in Engin F Isin and Greg M Nielsen, eds., *Acts of Citizenship* (London: Zed Books, 2008), 17. See also, John Clarke, et al., *Disputing Citizenship* (Bristol: Policy Press, 2014), 29.

¹⁴ Brems, 'Lessons for Children's Rights From Women's Rights?', 94-5.

rights squarely engages Brems' construction of children's rights as emancipation rights and also facilitates the child's freedom to seek, receive and impart information as recognised in UNCRC Article 13 (freedom of expression). Brems notes that a 'crucial feature that these and other emancipation rights have in common is that the sustainable realisation of these rights does not only (or even predominantly) take place in the vertical relations between individuals and the state, but that they present some of their main challenges in the horizontal relations among individuals in society.'¹⁵ Educating society about how children activate their rights supports children in the move away from historic characterisations as property or purely vulnerable beings in need of protection. This transition from being viewed as 'objects' of the law, to 'subjects' of the law that are capable of autonomous, active engagement with other members of society as well as the state and its functions is crucial to reinforcing children's participation rights.¹⁶

Collective participation rights

Participation also encompasses the role of children in democratic decision-making processes corresponding to the evolving recognition of children as active members of society¹⁷ - the collective dimension of participation. Blakeley has explored the power of collective agency as a vehicle for emancipatory change,¹⁸ which is relevant for the purpose of considering how children are able to exercise their voices as representatives of a group, either broadly or narrowly conceived. Collective decision-making processes correspond to areas of policy, services and strategies that see increased involvement of children in their development.¹⁹ The concept of participation in this context is further supported by the Article 13 freedom of expression and Article 15, which recognises a child's right to freely associate and assemble. Raising children's voices as collective agents further emancipates children from the latent effects of historic disenfranchisement that continues to suppress the realisation of children's rights in many societies. Participation may, therefore, reinforce democracy by educating children about

¹⁵ *ibid*, 95 and 100; Clarke, et al., *Disputing Citizenship*, 30.

¹⁶ John Tobin, *The UN Convention on the Rights of the Child: A Commentary*, 1st ed. (Oxford: OUP, 2019), 4; Tobin, 'Understanding Children's Rights', 176-77.

¹⁷ E. Kay M. Tisdall, John M. Davis, and Michael Gallagher, 'Reflecting on Children and Young People's Participation in the UK', *International Journal of Children's Rights* 16 (2008): 343, 344.

¹⁸ Blakeley, 'Human Rights, State Wrongs', 607, though her consideration relates to terrorism studies.

¹⁹ Rachel Hinton, E. Kay M. Tisdall, Michael Gallagher and Susan Elsley, 'Children's and Young People's participation in Public Decision-Making', *International Journal of Children's Rights* 16 (2008): 281, 281.

democratic processes and engendering notions of responsibility to engage in the democratic system of governance. If participation is understood as being meaningful and impactful then it increases the potential to enhance democracy as engaged children develop into engaged adult citizens.

Summary

Arguably, participation is the *sine qua non* for realising all rights defined in the UNCRC as well as the rights children have under other human rights treaties.²⁰ How incorporation can enhance children and young people's participation in individual and collective decision-making processes is examined below following a brief summary of how the UNCRC is recognised in Scots law, both as it currently stands and the opportunities envisioned by the Incorporation Bill that is currently progressing through Scottish Parliament.

The Legal Landscape of Children's Rights in Scotland

While international relations is a reserved policy matter to the UK Parliament, observing and implementing international human rights obligations relating to devolved matters is the responsibility of the Scottish Ministers and the Scottish Parliament. In line with many jurisdictions, children's rights in Scotland have developed significantly over the past three decades. In Scotland, the role of children in individual and collective decision-making has developed in tandem with their general recognition as rights-holders. The evolution of these twinned developments is a key driver behind incorporation of the UNCRC in Scotland and responds to a variety of political drivers, such as the progress on entrenchment in other parts of the UK – namely Wales – and the increasing mobilisation and engagement of children with their communities. Additionally, in Scotland there has been a great deal of focus on children as human rights defenders and how this has driven incorporation.²¹ From a legal perspective, incorporation

²⁰ Michael Freeman, *Children's Rights* (Aldershot, UK: Ashgate, 2004), 3; UN Committee on the Rights of the Child (CRC), General Comment No.12: The Right of the Child to be Heard, 1 July 2009, CRC/C/GC/12, para. 2; Elaine Sutherland, 'Listening to the Voice of the Child: The Evolution of Participation Rights', *New Zealand Law Review* 13, no. 3 (2013): 335.

²¹ See, eg, Tracy Kirk, 'Children and Human Rights Defenders: A Participatory Approach', *Edinburgh Law Review* 23 (2019): 417; Children and Young People's Commissioner for Scotland, 'Promote, Protect, Defend: A report on children and young people as human rights defenders in Scotland (CYCPS, 2019), <https://www.cypcs.org.uk/ufiles/PromoteProtectDefend.pdf>.

offers a starting point for the assessment of children's rights.²² The two subsections below each outline a comprehensive piece of legislation focused on incorporation of the UNCRC in Scotland. First, the Children and Young People (Scotland) Act 2014 (CYP Act 2014) which indirectly incorporated the UNCRC is presented along with key critiques in terms of actualising children's rights in Scotland. Second, highlights of the recently adopted Incorporation Bill are set out to establish a basis upon which positive change in terms of enforcing children's participation rights through direct incorporation of the UNCRC are presented. Both of these laws are introduced in general before the more extensive examination of the law as it is and as it could be is presented in the following section.

The Children and Young People (Scotland) Act 2014

The CYP Act 2014 provides that 'Scottish Ministers keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the [UNCRC] requirements.'²³ This duty requires Ministers to report to Scottish Parliament in three-year cycles on the steps taken to give further effect to children's rights under the UNCRC. From the outset, the potential of this unenforceable 'duty' on Scottish Ministers was viewed as an ineffective means of progressing the realisation of children and young people's rights.²⁴ Time has reinforced that neither the CYP Act nor the subsequent government action plan for progressing children's rights have lived up to the aim of securing children and young people's rights in terms of participation. The following examines a few of the ways in which exercises of individual and collective participation rights have failed to meet the aspirations behind the CYP Act.

First, the CYP Act 2014 requires local authorities to report on the implementation of child service plans which should include children and young people's participation in education and health decision-making processes. In this context, service plans relate predominantly to the intrapersonal dimension of a child or young person's individual right to participate in decisions that affect them. Ensuring the individual right to participation at this level of government is

²² Kasey McCall-Smith, 'To Incorporate the CRC or Not: Is This Really the Question?', *The International Journal of Human Rights* 23 (2019): 425.

²³ Children and Young People (Scotland) Act 2014 (CYP Act 2014), s1(1).

²⁴ E. Kay M. Tisdall, 'Children's Wellbeing and Children's Rights in Tension?', *International Journal of Children's Rights* 23 (2015): 769, 777.

particularly important because local authorities hold key decision-making power in terms of an individual's access to public services, such as education or disability support services, which give effect to UNCRC Articles 28 and 23 respectively. Some policy decisions may equally impact specific groups of children and young people who experience other, intersecting forms of discrimination such as racism or ableism. Participation in the decision-making process, however, is not an enforceable right under the CYP Act unless it is provided explicitly elsewhere in Scots law. Certain processes have avenues for challenging the decisions but these rarely hinge on lack of participation. The lack of enforcement runs contrary to the UNCRC and deprives children and young people the ability to access their rights.²⁵ To lessen this accountability gap, the CYP Act expanded the Children and Young People's Commissioner Scotland's (CYPCS) authority to investigate the extent to which service providers took children or young people's views into account when making decisions about the delivery of these services.²⁶ While welcomed, the extent to which service providers will implement change in response to the CYPCS finding a failure to meaningfully include children in decision-making processes is the determinative question regarding the effectiveness of the CYP Act 2014 in entrenching children and young people's individual participation rights.

Turning now to the opportunity for group participation in collective decision-making processes, children's rights impact assessment is one of the most direct opportunities for children to engage with government in the development of law and policy. Impact assessment is a non-legal, general measure of implementation designed to complement the duty on Scottish Ministers under s1(a) to develop law and policy that progresses UNCRC requirements in Scotland and give effect to UNCRC Article 4 (general measures of implementation). Section 1(2) requires Ministers to take relevant views of children into account in deciding whether a proposed law or policy will impact the well-being of children and young people. In Scotland, children's rights and well-being impact assessment (CRWIA) is the tool used to ascertain these views.²⁷ While other

²⁵ CRC, General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, 27 November 2003, para. 1.

²⁶ CYP Act 2014, s5.

²⁷ Scottish Government, *When and how to best use the Child Rights and Wellbeing Impact Assessment (CRWIA): Guidance*, updated February 2019 (CRWIA Guidance), <<https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2015/06/childrens-rights-wellbeing-impact-assessments-crwia-guidance/documents/crwia---guidance-for-scottish-government-officials---version-2---february-2019/crwia---guidance-for-scottish-government-officials---version-2---february->

opportunities for engagement are also available and often used in concert with government conducted CRWIA, such as participatory processes filtered through civil society, individual consultation responses or activism through the Scottish Youth or Children's Parliament, the focus of the discussion here is limited in that it contemplates the direct engagement of children and young people by the government for the purposes of determining the impact of policy changes for children and young people as part of Scottish society.

Building upon common understandings of children's rights impact assessments, the Scottish CRWIA adds 'well-being' into the process in order to engage the long-standing well-being indicators that permeate Scots law and policy. CRWIA is the 'process through which you can identify, research, analyse and record the anticipated impact of any proposed law, policy or measure on children's human rights and wellbeing.'²⁸ To complete the participatory process government is required to explain how the new law or policy will advance children and young people's rights in light of the views gathered during the CRWIA process. Ultimately, the CRWIA process fosters both individual and collective participation rights. As discussed above, citizenship should be viewed as the culmination of all of the activities that inform the social and political structures in society. By participating in collective decision-making processes, children and young people activate their individual participation rights, which shapes their personal paths to engaged citizenship. This participation also reinforces and gives voice to the collective interests of children and young people. As will be examined below, the Scottish government's CRWIA process has proved to be adequate in its best examples and otherwise fairly ineffective in terms of realising the participation of children and young people.

In 2018, Scottish government published its 2018-2021 Action Plan for progressing children and young people's rights in Scotland. The Action Plan outlines four strategic actions necessary to drive transformative cultural change across all parts of Scottish society: (1) incorporation of the UNCRC; (2) evaluation of the CRWIA process and promotion of its use; (3) development of a strategic approach to children and young people's participation in decision-making across Scottish society; and (4) raising awareness and understanding of children and young people's

2019/govscot%3Adocument/CRWIA%2B-%2BGuidance%2Bfor%2BScottish%2BGovernment%2Bofficials%2B-%2Bversion%2B2%2B-%2BFebruary%2B2019.pdf.

²⁸ *ibid.*, 4.

rights.²⁹ While each is a welcomed and important feature of entrenching children and young people's participation rights, the interconnection between these four actions appears unacknowledged, which may account for the gaps in effective participation processes for children discussed below. The 2019 Progress Report on the Action Plan reinforces the four separate actions.³⁰ Again, the Scottish government failed to recognise the role that CRWIA could play in supporting children's individual and collective participation rights as part of the decision-making processes that reinforce democracy. There was, however, a consistent foreshadowing of positive things to come in the form of incorporation of the UNCRC, to which this article now turns.

UN Convention on the Rights of the Child (Incorporation) (Scotland) Bill³¹

The Incorporation Bill adopted by Scottish Parliament on 16 March 2021 offers the first, real opportunity to entrench the dynamism of the UNCRC in law and to ensure that children and young people's voices are heard and given due weight. The Bill signals a massive forward step by Scotland to deliver UNCRC Article 4, which requires States Parties to 'undertake all appropriate legislative, administrative, and other measures for implementation' of the UNCRC. Once the Bill takes effect, Scotland will become the leader among the devolved nations of the UK in terms of securing children's rights and also provide a strong signal to the rest of the world about its commitment to promote and protect children's rights. The Bill takes a maximalist approach by directly incorporating the UNCRC both by reference and through direct

²⁹ Scottish Government, *Progressing the Human Rights of Children in Scotland: An Action Plan 2018-2021*, SG/2018/267, (2018-21 Action Plan), <https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2018/12/progressing-human-rights-children-scotland-action-plan-2018-2021/documents/00544482-pdf/00544482-pdf/govscot%3Adocument/00544482.pdf?forceDownload=true>.

³⁰ Scottish Government, *Progressing the Human Rights of Children in Scotland: An Action Plan 2018-2021*, Progress Report 2019 (2019 Progress Report), 4, <https://www.gov.scot/publications/progressing-human-rights-children-scotland-action-plan-2018-2021-update-2019/>.

³¹ United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP 80), Schedule 1 (1 september2020) (Incorporation Bill), <https://beta.parliament.scot/bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill>. At the time of writing the Bill has not yet received Royal Assent so the term 'Bill' rather than 'Act' will be used. This section of the article draws from a blog previously published by the author. See Kasey McCall-Smith, 'Scotland Poised to Deliver Maximal Protection of Children's Rights' (Global Justice Academy blogsite) <https://www.blogs.law.ed.ac.uk/globaljusticeacademy/2020/10/08/scotland-poised-to-deliver-maximal-protection-of-childrens-rights/>.

transposition of the Convention into the proposed legislation.³² Not only does it directly transpose the bulk of the UNCRC articles, it further includes two of the optional protocols³³ to the Convention and keeps open the possibility to easily add further articles of the Convention and protocols in the event of further devolution or UK ratification of the Third Optional Protocol on an individual communications procedure (s5).³⁴ For the purposes of the following analysis, it is relevant to note that UNCRC Articles 12 and 5 are included in Schedule 1.

The Incorporation Bill includes a more comprehensive range of duties with which the different arms of the Scottish government will be required to comply. Firstly, section 6 of the Bill requires all public authorities, including Scottish Ministers, courts, local authorities, health authorities, Children's Hearings panels and any other authority listed under section 16, to act compatibly with the UNCRC. Secondly, section 11 requires Scottish Ministers to develop, publish and review a 'Children's Rights Scheme' detailing the arrangements they are putting in place to ensure they comply with their duties under section 6. The Bill further subsumes the CYP Act 2014 duty on Scottish public authorities to publish reports on how they are ensuring compliance with the UNCRC. The change of language from 'respecting' under the 2014 Act to 'ensuring' is significant and should guarantee greater attention to implementation than ever before.

Under section 7 of the Incorporation Bill a public authority's failure to act on its duty or acting incompatibly with the UNCRC will give rise to a legal claim. This feature of the Bill addresses many of the existing gaps in Scots law by enabling UNCRC rights-holders (under-18s) to directly raise articles of the Convention in any legal proceeding, including the failure to ensure individual or collective participation in decision-making processes. As passed, not only will

³² Schedule 1 of the Bill lists the articles to be incorporated with some notable redactions from the original treaty text in order to exclude matters deemed to be reserved to the UK Government. For example, rights relating to family reunification for migrant children under UNCRC art. 10 were excluded. See, Scottish Government, UNCRC Bill: Rights and Requirements, 1 September 2020, <https://www.gov.scot/publications/united-nations-convention-on-the-rights-of-the-child-bill-rights-and-requirements/>.

³³ Optional Protocol on the Involvement of Children in Armed Conflict, 25 May 2000, 2173 UNTS 222, entered into force 12 February 2002 (CRC-OP1); Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, adopted on 25 May 2000, 2171 UNTS 227, entered into force 18 January 2002 (CRC-OP2). The UK ratified CRC-OP1 on 24 April 2003 and the CRC-OP2 on 20 February 2009.

³⁴ Optional Protocol to the UNCRC on an Individual Communications Procedure, adopted 19 December 2011, UNGA A/RES/66/138 (2011), entered into force 14 April 2014.

Scottish courts have an obligation to determine breaches of the UNCRC, under section 20 they may make a ‘strike down declarator’ against laws predating the legislation coming into force. This will aid in rectifying existing laws that directly or indirectly run contrary to the UNCRC. Additionally, section 21 enables courts to deliver a ‘declarator of incompatibility’ for proposed legislation, thus protecting children’s rights before a conflicting law is adopted. This could include where the government fails to ensure children’s participation in the development of legislation. Prior to the Incorporation Bill, Scottish courts had no obligation to give effect to UNCRC rights. The UNCRC was viewed merely as an interpretive tool. Legalising the justiciability of children’s UNCRC rights offers the strongest option in terms of enforcement and is arguably the crowning achievement of the Bill. Notably, these elements of the Bill have been challenged by the British government as a potential over-reach in terms of the existing devolution settlement; however, at the time of writing, the final decision by the UK Supreme Court has not yet been delivered. Regardless of the outcome, justiciability of UNCRC rights represents a new era in the protection and fulfilment of children’s rights in Scotland, but it will only matter if children’s rights are promoted and reinforced through education, resources and extensive culture change. This article now turns to examine the participation of children as a means of activating their rights on both the individual and collective levels.

Children’s Participation in Scotland: As It *Is* and As it *Could Be*

The ways in which the individual and group dimensions of children’s participation rights are given effect in Scotland are now considered. UNCRC Article 12 underpins the concept of participation by mandating that each state ‘shall assure’ that the views of children are taken into account in all matters affecting them and that their views are given due weight in accordance with the age and maturity of the child. Recognising that there are variable ways in which children’s views are and could be assured, this discussion is concerned with the laws and processes that ensure children’s voices are made part of decision-making processes in a meaningful way and serve to emancipate them both individually and as a historically marginalised group. In this sense, ‘meaningful’ entails that children are not just present, but that they are allowed to speak and engage with different issues without being shut down by adults and, also, that their voices play a role in decision-making processes – that their views and

opinions are actually considered. Recalling the explanations provided at the outset of this work, the following analysis is limited to two dimensions of children's rights to participate in decisions that affect them. First, the legalised opportunities to participate in decision-making that impacts an individual child's personal life will be examined in the context of existing Scots law. The second dimension of participation is examined in light of the existing Scottish CRWIA practice and how CRWIA has failed to be used as a rights activating tool that can enable children's engagement with the collective decision-making processes necessary to ensure democracy, namely the development of new law and policy by the Scottish government. Each section will conclude with an overview of how incorporation can strengthen the opportunities for meaningful participation whether in the individual or group context.

Individual Participation Rights

In Scotland, as in other jurisdictions, the ability of children to participate in decision-making processes that affect their lives has been historically constrained by the presumption that age 12 is the minimum age at which children have the requisite competence to formulate views about decisions that affect them. While Scottish policy has, in many instances, worked to facilitate the views of children under age 12, this approach has been uneven in terms of enabling children of varying ages to engage their right to be heard. This is distinct from the recognition that individuals only obtain full legal personality at age 16 in Scotland but many of the discussions surrounding these two positions are similar.³⁵ As a starting point from a human rights perspective, locating the age of 12 as the standard minimum age when children are presumed to be competent to formulate views ignores the evolutionary capacity of children that is recognised in UNCRC Article 5. Scotland's long-standing 'magic 12' presumption does not align with the CRC's views or the opinions of many children's rights practitioners and experts.³⁶ The challenge raised by setting a presumptive age for child participation in decision-making processes is one of several barriers to children's emancipation. A tokenistic approach to participation is another long-recognised impediment to children's abilities to engage and exercise their rights, a notable

³⁵ Age of Legal Capacity (Scotland) Act 1991.

³⁶ CRC, CRC/C/GBR/CO/5, para. 29; CRC, General Comment No. 12: The Right of a Child to be Heard, CRC/C/GC/12, 20 July 2009, paras. 12, 15; Kirsteen Mackay, 'The Approach in Scotland to Child Contact Disputes Involving Allegations of Domestic Abuse', *Journal of Social Welfare and Family Law* 40 (2018): 477, 489.

issue both in family law proceedings as well as CRWIAs.³⁷ The continued need to raise arguments against both minimum age limits and tokenism reinforces the demand for enforceable participation rights as envisioned by the Incorporation Bill. This section highlights some of the current laws that fail to properly recognise children's capacity to formulate personal opinions or enable them to give voice to their views about decisions that impact their personal lives.

Reconciling participation and practicability

The Children (Scotland) Act 1995 (1995 Act) is a key feature of Scots family law and defines the legal rights between children and young people and their parents or guardians. As Sutherland has explained, more than any other area of law,

... child and family law regulates our most intimate personal relationships, it touches upon our most profound beliefs about how we should be living our lives: beliefs that are a product of our personal morality, culture, religion (or absence thereof), history and politics. Its content and reform are of interest, not only to academics, practitioners and politicians, but to the wider public. Ideally, it ought to reflect the views of the people affected by it.³⁸

For this reason, it is important to consider how existing Scots law measures up against the UNCRC. The 1995 Act centres on the welfare of the child and is predominantly concerned with supporting children and their families or children in care as well as ensuring that public authorities may step in if a child's welfare is at risk. Comparing the UNCRC to the 1995 Act a clear distinction is found in sections 6(1)(b) and 16(2) which tracks the Scottish penchant for the 'magic 12'. Furthermore, rather than assure the participation of children in decision-making processes that affect them, the 1995 Act places a potential limitation in that children's views will be taken into account 'so far as practicable' (s6(1), s11(7)(b) and s16(2)).³⁹ The same age and practicability limitation is repeated in the Children's Hearings (Scotland) Act 2011 (Children's Hearings Act) (s27(4)). The practicability limitation is further reflected in Scottish children's

³⁷ General Comment No.12, para 132; Mackay, 'The Approach in Scotland'.

³⁸ Elaine E. Sutherland, 'Child and Family Law: Progress and Pusillanimity' in Elaine Sutherland, Kay Goodall and Gavin Little (eds), *Law Making and the Scottish Parliament* (Edinburgh: Edinburgh University Press, 2011), 59.

³⁹ Children (Scotland) Act 1995 s6(1): '...taking account of the child's age and maturity ... a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view.'

policy. Both the magic 12 presumption and the potential limitation for those views to be heard on the basis of practicability present impediments to active participation in decision-making.

Examining the longstanding barriers to children and young people's individual participation in Scots family law actions, a 2020 study conducted in anticipation of the Children (Scotland) Bill 2019 (amending the 1995 Act) confirmed that children's participation rights were 'inconsistently and inadequately realised', particularly in the context of section 11 of the 1995 Act.⁴⁰ As the most comprehensive, current study of children's participation rights in family law actions, it usefully revealed many of the gaps between the policy and reality of children's participation in Scots family law proceedings.

Meaningful participation for every child

From the outset, the Children (Scotland) Bill 2019 (ultimately the Children (Scotland) Act 2020) was directed at ensuring more meaningful participation of all children in family law and related proceedings.⁴¹ In this sense, the aim was to reinforce that all children, regardless of age, could participate in proceedings and in giving their views there would be a transparent indication of how those views influenced the ultimate decision. The participation related provisions were reshaped during the legislative process to dispense with any potential interpretation that would apply a minimum age threshold for children to be considered competent to participate in family law proceedings. As one submission noted,

Radical reform is necessary, to shift the legal conceptualisation of contested child contact as an adult dispute about parental responsibilities and rights, to one where concerns about contact are squarely about and inclusive of children. Doing this would assist in realising all of children's human rights, including participation rights.⁴²

⁴⁰ Fiona Morrison, E. Kay M. Tisdall, Judith Warburton, Alison Reid and Fiona Jones, *Children's Participation in Family Actions – Probing Compliance with Children's Rights: Research Report*, 28 April 2020, <http://hdl.handle.net/1893/31100>.

⁴¹ Scottish Government, Policy Memorandum, Children (Scotland) Bill, SP Bill 52-PM, 2019, p. 1, <https://beta.parliament.scot/bills-and-laws/bills/children-scotland-bill>.

⁴² Fiona Morrison, Ruth Friskney and Kay Tisdall, *Submission to the Justice Committee on the Children (Scotland) Bill*, 15 November 2019, REF NO. J/S5/19/CH/26, p. 1. Reform of the age 12 presumption was supported by further submissions to the Justice Committee on the Bill, such as: Clan Childlaw, 19 November 2019, REF NO. J/S5/19/CH/52; CYPCS, 15 November 2019, REF NO. J/S5/19/CH/31, Gillian Black, 15 November 2019, REF NO.

As passed, the Act rectified the disenfranchisement of younger children solely on the basis of their age that had prevailed for 25 years.⁴³ It further discarded the age 12 threshold presumption in relation to proceedings under the Adoption and Children (Scotland) Act 2007 (s14) and the Children's Hearings (Scotland) Act 2011 (Children's Hearing Act), which will now be discussed.

A further change brought in by the Children (Scotland) Act 2020 was to enhance the voices of children and young people in the Children's Hearings system as siblings of children referred for a children's hearing. Under the Children's Hearing Act (ss81, 200), siblings are not included as 'relevant persons' necessary to a hearing where, for example, a compulsory supervision order (CSO) is being made. 'Relevant persons' is a necessary category of persons legally required to attend children's hearings and is a designation typically limited to parents, guardians or carers (Children's Hearing Act s200).⁴⁴ The gap that existed meant that the right to family life recognised under the European Convention of Human Rights (ECHR) Article 8 was not given full recognition between siblings for the purposes of making a CSO, which meant that a sibling did not have a legal right to participate in the children's hearing.⁴⁵ For siblings facing potential extended separation from every known member of their family, the desire to ensure contact can be extremely strong and decisions on the matter may have long-reaching impacts.⁴⁶ In the *ABC* case, a 16-year-old challenged the denial of his right to be deemed a 'relevant person' and to have his views heard in a children's hearing that established a CSO governing his contact with his younger brother.⁴⁷ While the legal issues grappled with by the case focused on whether the Children's Hearing Act sufficiently realised ECHR Article 8, it failed to recognise the elder sibling's voice in a process that would undeniably impact his relationship with his younger sibling. The younger child remained subject to a CSO where the elder sibling did not due to his

J/S5/19/CH/28; Scottish Youth Parliament, 14 November 2019, REF NO. J/S5/19/CH/20, all available at <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/113648.aspx>.

⁴³ Children (Scotland) Bill, as introduced, (ss1(2)(1B), 1(4)(11ZB)(2), 1(4)(11ZB)(6)(2A), 2(2)(c), 2(3)(c), 3(2)(4), 15(2)(11E)(3)(a)).

⁴⁴ See discussion by Alan Robertson, 'When is a Person a "Relevant Person"', *The Journal* (Law Society of Scotland November 2014), 17 November 2014, <https://www.lawscot.org.uk/members/journal/issues/vol-59-issue-11/when-is-a-person-a-relevant-person/>.

⁴⁵ ss81 and 200; Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013, rule22 (SSI 2013/194)

⁴⁶ Fiona Jones with Christine Jones, 'Prioritising Sibling Relationships for Looked After Children' (Clan Childlaw.org, February 2018, p. 2, <https://www.clanchildlaw.org/Handlers/Download.ashx?IDMF=3edff743-f3cf-442b-b7c8-b56d6e11a98e>).

⁴⁷ *ABC v Principal Reporter and another (Scotland)*[2020] UKSC 26, on appeal from [2018] CSIH 72.

attainment of age 16, a ‘young person’ under Scots law. The Supreme Court identified the central question as whether the Children’s Hearings Act and its related subordinate legislation ‘if operated sensibly’ afforded ABC a sufficient opportunity to take part in the decision-making process without being recognised as a ‘relevant person’.⁴⁸ Relying on changes to the Children’s Hearings Administration’s Practice Direction and its Practice and Procedure Manual, as well as recourse to other subsidiary regulations, the Court concluded that while this challenge, alongside the accompanying appeal in *In re XY*, uncovered a gap in the children’s hearings system, the Court was satisfied that the matter had been resolved through the changes made to guidance despite interference with ABC’s Article 8 procedural right to have his views taken into account.⁴⁹

The challenges raised by *ABC* and *In re XY* led to the change in practice as noted by the Supreme Court. Now, siblings are given notice of their family member’s children’s hearings and the ability to participate with the discretion of the panel chair.⁵⁰ From an adult perspective, this cures the gap. However, a critical understanding of participation rights in the UNCRC suggests that the failure to legalise a child or young person’s right to participate in a sibling’s children’s hearing leaves this very personal opportunity to express their opinion open to deprivation. Where the opportunity to engage a right to participate is open to the potential for regression through changes to the system administration or members of the panel or, indeed, secondary legislation passed without consultation, the right is not fully respected or protected. Fortunately, the Children (Scotland) Act 2020 amended the Children’s Hearings Act to enable siblings to participate in a children’s hearing despite not being a ‘relevant person’ under the 2011 Act and provided a range of other provisions relating to sibling contact.⁵¹

While the 2020 Act laid the groundwork for removing a number of barriers to individual children’s participation in private and family law proceedings, a host of challenges remain, including a lack of infrastructure for supporting child participation in these actions and no

⁴⁸ *Ibid*, para. 31.

⁴⁹ *ibid*, paras. 32-40.

⁵⁰ *ibid*, para. 32. Children’s Hearings (Scotland) Act 2011, s78(2). See Scottish Children’s Reporter Administration, Practice Direction 3, Relevant Persons, paras. 9.2-9.3. See also, Children’s Hearing System Practice and Procedure Manual, v.3, 17 December 2020, pp. 54, 267-68. <https://www.chscotland.gov.uk/resources/hearings-and-area-support-team-operation/chs-practice-procedure-manual/>.

⁵¹ Children (Scotland) Act 2020, ss10, 10A, modifying Children’s Hearings (Scotland) Act 2011, s29A

specific accountability mechanism open to children for complaints about the failure to have their voices heard. The Incorporation Bill offers all children the opportunity to raise a claim for breach of the UNCRC, including their right to have their voices heard in decision-making processes such as family law proceedings. While court is clearly a last resort, the potential to use this as a lever to drive change in the facilitation of children's voices, particularly younger children, will no doubt increase the resonance of children's voices in these contexts and enable them to exercise their rights where previously they were cast aside as irrelevant.⁵² In exercising their voice in these very personal matters, children transition from being objects of the law to autonomous, active members of society with equal access to the law.

Participation as a multi-dimensional tool enhancing democracy

This section examines the way in which children have collectively participated in decision-making in the context of developing law and policy in Scotland since the passage of the CYP 2014. The meaningful participation of children in designing laws, policies, programmes and services is an issue that has been flagged by the CRC in its Concluding Observations on the UK.⁵³ As explained above, 'meaningful' participation demands that children are not only present, but that they are allowed to speak and engage with different issues and formulate opinions that are demonstrably considered in decision-making processes. Meaningful, collective participation of children in decision-making, therefore, demands that the subject matter is presented in a way that makes sense to children at different ages, stages and abilities. Using the emancipation categorisation recognises that despite the countless differences among the individual group members, all members of the group have faced similar experiences of interference with their rights based on their membership in the group. In short, despite the range of other characteristics individual members of the group might share, their most basic, common characteristic is that they are not adults. For children this is compounded based on the historic, paternalistic approach to viewing children purely as vulnerable members of society in need of protection rather than independent, empowered members of society capable of forming their own views and engaging their rights. Looking at children's rights as representative of the collective, identifying their rights to participation as emancipation rights seems natural in light of the

⁵² Sutherland, 'Progress and Pusillanimity', 61.

⁵³ CRC, CRC/C/GBR/CO/5, paras. 31(a-d)), see also paras. 44, 65(a), 71(g).

similarities and common challenges shared among members the group. The ability to exercise participation rights and have their voices heard and listened to contributes to children's development in terms of both decision-making and preparation for engaged citizenship.⁵⁴

As introduced above, in Scotland, CRWIA is one approach intended to facilitate children's participation rights and is recognised as an important general measure of implementation by the CRC.⁵⁵ The participation dimension of any human rights impact assessment empowers potentially affected individuals by anchoring expert opinion and analysis in lived experience.⁵⁶ The CRC reinforces the value of using a child-focused participation methodology when gathering and analysing data for the purposes of developing children's rights impact assessments in line with the best interests of the child (UNCRC Article 3).⁵⁷ Much like non-child-focused human rights impact assessments, CRWIA drives culture change in the organs of government that are involved in the process.⁵⁸ This type of culture change aids in embedding a human rights-based approach to governance.

The following critique is predominately a process-driven analysis of children and young people's participation in the CRWIA system employed by the Scottish civil service but also touches upon the outcomes of CRWIA processes. The analysis is largely informed by two 2019 studies which highlighted both positive practice and shortcomings in Scottish CRWIA processes.⁵⁹ Both studies analysed academic literature, CRC jurisprudence, available international policies on and examples of child rights impact assessments, and compared these against all Scottish CRWIAs

⁵⁴ Elaine E. Sutherland, 'Listening to the Voice of the Child: The Evolution of Participation Rights' *New Zealand Law Review* [2013] 335, 337, referring to the 2011 UNICEF study by Gerison Lansdown, *Every Child's Right To Be Heard: A Resource Guide on the UN Committee on the Rights of the Child General Comment No. 12* (UNICEF, 2011), 3-18.

⁵⁵ CRC, General Comment No. 5, para. 45.

⁵⁶ See Gauthier de Beco, 'Human Rights Impact Assessments', *Netherlands Quarterly of Human Rights* 27:2 (2009): 139, 148, 164; James Harrison, 'Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment', *Journal of Human Rights Practice*, 3:2 (2011): 162, 167.

⁵⁷ CRC, General Comment No. 14: The Right of the Child to Have His or Her Best Interests Taken as Primary Consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14, para. 1; CRC, General Comment No. 5, CRC/GC/2003/5, 27 November 2003, para. 45.

⁵⁸ Lisa Payne, 'Child Rights Impact Assessment as a Policy Improvement Tool', *The International Journal of Human Rights* 23 (2019): 408, 409.

⁵⁹ Both projects were supervised by the author in conjunction with Together (Scottish Alliance for Children's Rights) director, Juliet Harris. See Maren Backbier, et al., *A Children's Rights Approach: Recommendations to the Scottish Government on Refining Children's Rights and Wellbeing Impact Assessments in Scotland*, May 2019, <http://bit.ly/2teQYI6>; Ivane Chitashvili, et al., *Recommendations and Notes on Scottish Children's Rights and Wellbeing Impact Assessments*, May 2019 <http://bit.ly/36LOIFQ>.

published as of February 2019. Human rights impact assessments, including child-focused assessments, are unique, locally responsive tools thus establishing an international baseline for effective child participation CRWIA was a challenge.⁶⁰ Admittedly, as Hoffman has concluded, ‘securing the participation of children is likely to be one of the most challenging aspects’ of the CRWIA process.⁶¹

Understanding the UNCRC

For CRWIAs to be an effective tool for facilitating children’s participation a number of issues must be ensured, including taking a rights-based approach grounded in the UNCRC and critical engagement with children, young people and all relevant stakeholders. Of the CRWIAs examined, both of these issues were invariably inconsistent. As a starting point, CRWIAs are typically conducted by civil servants who are often the policy-makers behind UNCRC implementation. Both 2019 studies demonstrated that practical engagement with the UNCRC by the CRWIA assessors was very limited. Conducting CRWIA without substantive training in or advanced understanding of the UNCRC is problematic for a number of intertwined reasons. As de Beco notes, civil servants’ ‘can play a dynamic role in adapting their State’s behaviour’ as ‘governmental norm sponsors’.⁶² To fulfil this role, however, they must understand the basis of the norms and how to apply them. Misidentification of UNCRC articles and a failure to recognise the interrelated and indivisible nature of children’s rights offered by the UNCRC impacts every stage of the CRWIA process, from the identification of appropriate children’s rights indicators to consultation through participation to the formulation of recommendations

⁶⁰ There are a few good starting points for a more thorough overall analysis of child rights impact assessments in the UK, for example: Payne, ‘Child Rights Impact Assessments’; Lisa Payne, *Child Rights Impact Assessment (CRIA): A Review of Comparative Practice Across the UK* (London: UNICEF UK, 2017), https://downloads.unicef.org.uk/wp-content/uploads/2017/09/Unicef-UK-CRIA-comparative-review_FOR-PUBLICATION.pdf; Simon Hoffman and Catherine Morse, *Evaluation of the Welsh Government’s Child Rights Impact Assessment Procedure under the Children’s Rights Scheme Pursuant to the Rights of Children and Young Persons (Wales) Measure 2011* (Swansea: Wales Observatory on Human Rights of Children and Young People, 2015), <https://cronfa.swan.ac.uk/Record/cronfa30963>.

⁶¹ Simon Hoffman, ‘Ex Ante Children’s Rights Impact Assessments of Economic Policy’, *The International Journal of Human Rights* 24:9 (2020): 1333, 1345. See also, Tara M. Collins, ‘The General Measures of Implementation: Opportunities for Progress with Children’s Rights’, *The International Journal of Human Rights* 23:3 (2019): 338, 340-41.

⁶² de Beco, ‘Human Rights Impact Assessments’, 160. ‘Governmental norm sponsor’ is attributed to Harold H. Koh, ‘The 1998 Frankel Lecture: Brining International Law Home’, *Houston Law Review* 35 (1998-99): 623, 648.

based on the evidence gathered.⁶³ In terms of children's participation, the lack of substantive understanding of the UNCRC may also prevent those conducting CRWIA from taking steps to engage a representative range of potentially affected children in consultation processes (discussed further below). To guard against ineffective participation processes it is not uncommon for government to consult experts in the field, including individuals or civil society. However, this does not expend the need for substantive human rights training as policy-makers, interested children and experts will all have different perspectives that need to be harnessed in the analytical dimension of the CRWIA.

Existing training for Scottish civil servants conducting CRWIAs is minimal at best considering the complex nature and relationship between the variable civil, political, economic, social and cultural rights outlined in the UNCRC.⁶⁴ This issue is further compounded by the fact that even specialised children's rights experts are constantly learning about how children's rights are evolving and what this means for implementation of the Convention, particularly in relation to participation. The lack of substantive training represents a failure to ensure awareness of the evolving nature of UNCRC obligations and how to implement them, arguably a key feature of the CRC as the monitoring mechanism for the UNCRC. Furthermore, how UNCRC rights interact with other legalised human rights is not an analysis that can be frozen in time. As with all human rights, a UNCRC right must be interpreted at various points on the implementation continuum. It is only through extensive training that those conducting CRWIAs can begin to understand how to fully engage the general principles that underpin every aspect of the UNCRC. In this way, they can ensure to engage all potentially impacted children and keep their views available as implementation of a new law or policy is monitored for latent, unanticipated impacts.

Age and stage engagement

Many CRWIAs conducted in Scotland fail to engage with children that stand to be significantly impacted by new legislation, either directly or indirectly. As a result, Scotland is not realising the

⁶³ Chitashvili, et al., *Recommendations and Notes*, 8-10; Backman, et al., *State of Children's Rights 2019*, 21. See generally, de Beco, 'Human Rights Impact Assessments'.

⁶⁴ Training is a less than half hour virtual seminar plus a handful of guidance documents, see, e.g., Scottish Government, UN Convention on the Rights of the Child: Training Tool, 21 June 2018, <https://www.gov.scot/publications/un-convention-on-the-rights-of-the-child-training-tool/>.

right to be heard despite this being one of the four principles deemed instrumental to delivering the UNCRC.⁶⁵ The CRWIA conducted for the Homeless Persons (Unsuitable Accommodation) (Scotland) Amendment Order (2017) presents a useful illustration. Stage 1 of the CRWIA only considered children aged 0-15. It did not specifically consider young people (ages 16-17) despite recording 6041 ‘children’ in temporary accommodation in March 2017. The statistics used provided no clarity on whether the 16-17-old age group is considered as part of the over 10,000 households in Scotland in temporary accommodation.⁶⁶ Unlike other CRWIAs, no efforts were made to directly engage children over and above the general public consultation on the amendment. Though secondary legislation of this nature does not currently require a CRWIA, the comparison is instructive for the purposes of ascertaining consistency and a commitment to children and young people’s participation.

In order to address children’s participation issues, special methods of engaging with children and age and stage-appropriate materials with which to inform participants are necessary to underpin the effective participation of children in CRWIA.⁶⁷ This should include ensuring the participation of historically marginalised groups of children as well as the provision of materials that are accessible to ethnic and language minorities. Importantly, organisations representing children are recognised as a useful, and often safer, more successful, conduit through which children may express their views for the purposes of engaging with government.⁶⁸ Meaningful participation and transparent reporting of the views expressed by participants are essential to effective impact assessments not focused on children.⁶⁹ Child-focused impact assessments should be no different. The CRWIAs on the Age of Criminal Responsibility (Scotland) Bill

⁶⁵ Laura Lundy and Bronagh Byrne, ‘The Four General Principles of the United Nations Convention on the Rights of the Child: the Potential Value of the Approach in other Areas of Human Rights Law’, in Eva Brems, Ellen Desmet and Wouter Vandenhole (eds), *Children’s Rights Law in the Global Human Rights Landscape* (London: Routledge, 2017), 52-67.

⁶⁶ Homeless Persons (Unsuitable Accommodation) (Scotland) Amendment Order 2017: CRWIA, p. 2, <https://www.gov.scot/publications/homeless-persons-unsuitable-accommodation-scotland-amendment-order-2017-child-rights-9781788512251/>.

⁶⁷ Hoffman, ‘*Ex Ante* Children’s Rights Impact Assessments’, 1346, discussing children’s participation in economic policy and budgeting.

⁶⁸ UNCRC art. 12(2); CRC, CRC/GC/2003/5, para. 12.

⁶⁹ Deanna Kemp and Frank Vanclay, ‘Human Rights and Impact Assessment: Clarifying the Connections in Practice’, *Impact Assessment and Project Appraisal* 31:2 (2013): 86, 93;

(2018), the Children (Scotland) Bill (2019)⁷⁰ and the Incorporation Bill (2020)⁷¹ indicate a growing commitment to direct engagement with children and young people reflecting their evolving capacity and autonomy in an effort to ascertain their views about how proposed legislation will impact children's lives.

The CRWIA on the Age of Criminal Responsibility (Scotland) Bill (2018), for example, engaged a range of children and young people aged 8-22, specifically targeting those with experience of the criminal justice system as youths, and also engaged with children and young people from a range of youth-led organisations, such as the Children's Parliament and Who Cares? Scotland.⁷² Those conducting the CRWIA employed special methods to engage under-18s, including 'scenario storytelling to quizzes, timelines, discussion groups, voting cards and artwork.'⁷³ This CRWIA demonstrates extensive efforts to engage with a wide range of children and young people in a meaningful way in order to gather a complete picture about how the law will impact children and young people. Similarly, the CRWIAs on the Children (Scotland) Bill (2019)⁷⁴ and the Incorporation Bill (2020)⁷⁵ extensively document the assessors engagement with children through traditional consultation processes, direct engagement with children's organisations, roundtables and surveys, among other methods. In the case of the Incorporation Bill CRWIA, this included Scottish government hosting seven stand-alone events engaging over 180 children and young people.⁷⁶

Non-discrimination

⁷⁰ Scottish Government, Children (Scotland) Bill (2019): CRWIA, 3 September 2019, <https://www.gov.scot/publications/child-rights-wellbeing-impact-assessment-children-scotland-bill/#:~:text=The%20Articles%20of%20the%20UNCRC,undocumented%20children%20and%20young%20people.>

⁷¹ UNCRC Incorporation (Scotland) Bill (2020): CRWIA, 2 September 2020, [https://www.gov.scot/publications/united-nations-convention-rights-child-incorporation-scotland-bill-child-rights-wellbeing-impact-assessment-crwia/.](https://www.gov.scot/publications/united-nations-convention-rights-child-incorporation-scotland-bill-child-rights-wellbeing-impact-assessment-crwia/)

⁷² Scottish Government, Age of Criminal Responsibility Bill: CRWIA, 14 March 2018, p. 3, [https://www.gov.scot/publications/age-criminal-responsibility-scotland-bill-childrens-rights-wellbeing-impact-assessment/.](https://www.gov.scot/publications/age-criminal-responsibility-scotland-bill-childrens-rights-wellbeing-impact-assessment/)

⁷³ *ibid.*

⁷⁴ Scottish Government, Children (Scotland) Bill (2019): CRWIA, 3 September 2019, <https://www.gov.scot/publications/child-rights-wellbeing-impact-assessment-children-scotland-bill/#:~:text=The%20Articles%20of%20the%20UNCRC,undocumented%20children%20and%20young%20people.>

⁷⁵ UNCRC Incorporation (Scotland) Bill (2020): CRWIA, 2 September 2020, [https://www.gov.scot/publications/united-nations-convention-rights-child-incorporation-scotland-bill-child-rights-wellbeing-impact-assessment-crwia/.](https://www.gov.scot/publications/united-nations-convention-rights-child-incorporation-scotland-bill-child-rights-wellbeing-impact-assessment-crwia/)

⁷⁶ UNCRC Incorporation (Scotland) Bill (2020): CRWIA, 2 September 2020, [https://www.gov.scot/publications/united-nations-convention-rights-child-incorporation-scotland-bill-child-rights-wellbeing-impact-assessment-crwia/.](https://www.gov.scot/publications/united-nations-convention-rights-child-incorporation-scotland-bill-child-rights-wellbeing-impact-assessment-crwia/)

All of the CRWIAs considered up to this point note only positive benefits for all under-18s in Stage One, except for the Unsuitable Accommodation CRWIA, which only considered children aged 0-15. These CRWIAs rarely, if at all, engaged separately with children and young people identifying with one or more protected characteristic that might render them particularly vulnerable or lead to intersectional discrimination. Non-discrimination (Article 2) is another of the four general principles underpinning the UNCRC. CRWIAs conducted after 2017 actively engaged children and young people and took special care to facilitate their participation; however, they still failed to recognize the ways in which law and policy might impact different groups.⁷⁷ The Unsuitable Accommodation CRWIA demonstrates the bare minimum in terms of participation without any proactive engagement of either children or young people, particularly those with experience of temporary accommodation who are likely to identify as vulnerable for any number of reasons. This scratches the surface of a key barrier to the emancipatory nature of children's participation in CRWIAs – the lack of representation of a diverse range of children. It also underscores why entrenchment of participation rights for all members of society is necessary, including children from diverse backgrounds and those who identify with one or more protected characteristics. Different vulnerable groups are increasingly isolated when they are not consulted about the way new policies might impact their everyday lives.⁷⁸ Understandably, the predominantly positive potential of the pieces of legislation considered in many CRWIAs may minimize the need for substantial or differentiated engagement. However, the failure of the Unsuitable Accommodation CRWIA to consider the negative impact on young people aged 16-17 who are excluded from the benefits of the amended order reinforces the disenfranchisement of that group in the mixed classifications of under-18s in Scotland.

It is not only different age groups that must be considered. Children who identify with other protected characteristics, such as being part of an ethnic minority, LGBTI or disabled, face multiple possibilities of marginalization or intersectional discrimination. The distinct vulnerabilities associated with different group identities often render them invisible due to imposed protections that take away individual autonomy. This is what necessitates framing different categories of rights as emancipation rights and navigating the realisation that variable

⁷⁷ Backbier, et al., *A Children's Rights Approach*, 9-10.

⁷⁸ de Beco, 'Human Rights Impact Assessments', 165.

emancipation rights require extensive culture change. CRWIAs on the Functions of Health Boards (Scotland) Amendment Order (2017)⁷⁹ and the Child Poverty (Scotland) Bill (2017) exemplify how historically marginalized children are deprived of the emancipatory promise that could be delivered through participation because the CRWIAs failed to engage with protected characteristics directly.⁸⁰ Mandatory consultation with children from diverse, intersectional backgrounds would embed a children's rights-based approach to developing new law and policy in Scotland and ensure non-discrimination as required by UNCRC Article 2.⁸¹

Make children's views visible

In addition to broad engagement with a variety of children from diverse backgrounds, CRWIAs should be published as early as possible in the development of new legislation and be used to make children's views visible throughout the decision-making processes.⁸² Where extensive child-participation practice is evidenced in CRWIAs, subsequent explanations about how decisions were made in light of children's involvement in the CRWIA process should be made public. The CRWIAs relating to the Human Tissue (Authorisation) Bill (2018),⁸³ the Management of Offenders (Scotland) Bill (2018),⁸⁴ the South of Scotland Enterprise Bill (2019)⁸⁵ and the Incorporation Bill (2020),⁸⁶ for example, were published alongside the introduction of the bills into Parliament. This practice provides a useful tool for decision-makers who are able to rely upon the children and young people's views consolidated in the CRWIA to

⁷⁹ Scottish Government, CRWIA: The Functions of Health Boards (Scotland) Amendment Order (2017), <https://www.gov.scot/binaries/content/documents/govscot/publications/publication/2017/10/child-rights-wellbeing-impact-assessment-crwia-functions-health-boards-scotland/documents/00525318-pdf/00525318-pdf/govscot%3Adocument>.

⁸⁰ Backbier, et al., *A Children's Rights Approach*, 10-12.

⁸¹ Chitashvili, et al., *Recommendations and Notes*, 23.

⁸² Chitashvili, et al., *Recommendations and Notes*, 6.

⁸³ Scottish Government, CRWIA: Human Tissue (Authorisation) Bill (2018), <https://www.gov.scot/publications/human-tissue-authorisation-scotland-bill-childrens-rights-wellbeing-impact-assessment/>.

⁸⁴ Scottish Government, CRWIA: Management of Offenders (Scotland) Bill (rehabilitation of offenders) (2018), <https://www.gov.scot/publications/management-offenders-scotland-bill-childrens-rightswellbeing-impact-assessment-rehabilitation/>.

⁸⁵ Scottish Government, CRWIA: South of Scotland Enterprise Bill (2019) <https://www.gov.scot/publications/south-scotland-enterprise-bill-child-rights-wellbeing-impactassessment/>.

⁸⁶ UNCRC Incorporation (Scotland) Bill (2020): CRWIA, 2 September 2020, <https://www.gov.scot/publications/united-nations-convention-rights-child-incorporation-scotland-bill-child-rights-wellbeing-impact-assessment-crwia/>.

determine whether the legislation should be amended.⁸⁷ Importantly, it also enables individuals consulted as part of the CRWIA to track how their participation is reflected in the decision-making process. This suggests that CRWIAs should also be published in a child-friendly form, which may require simplifying the terminology or shortening the text, depending on the target child audience.⁸⁸ Even the UNCRC requires a child-friendly form in order to reach all age groups, thus paying attention to accessibility for children is good practice.⁸⁹ Publishing the full range of impact assessment materials in an accessible, searchable format is recognised as best practice.⁹⁰ Ensuring participants are notified directly of the availability of CRWIA materials would further reinforce the importance of individual participation in these processes.

Summary

It is acknowledged that children and young people's participation relates to political culture,⁹¹ which is why the upsurge in support for children's rights in Scotland has presented an opportunity to legalise the range of rights in the UNCRC that collectively lead to the entrenchment of children's participation in both personal legal proceedings and democratic processes. When coupled with the broader work of the Scottish Human Rights Taskforce on participation, the consolidation of a rights-based approach to participation should increase the effectiveness of participation processes overall, including those designed specifically to facilitate the individual and collective participation of children in line with their evolving capacities.

The Incorporation Bill provides no further guidance on individual participation in legal proceedings or on strengthening the CRWIA process though it does require CRWIAs for all primary and secondary legislation (s14). The Incorporation Bill does, however, require that a statement of compatibility with the UNCRC accompany each new piece of proposed legislation (s18). Any diminution in a child's right to participate in decision-making processes that affect

⁸⁷ Backbier, et al., *A Children's Rights Approach*, 6-7.

⁸⁸ This often means engaging experts to develop communications that can be understood by children at different ages and stages with the benefit that it reinforces the value children and young people's participation. See, for example, CYPCS, Children's version: Independent Children's Rights Impact Assessment on the Response to COVID-19 in Scotland (July 2020), <https://cypcs.org.uk/resources/independent-childrens-rights-impact-assessment-on-the-response-to-covid-19-in-scotland/>. There is also a distinct, 'young people's version' of the same CRIA.

⁸⁹ UNCRC, Child-friendly format, <https://www.unicef.org/sop/convention-rights-child-child-friendly-version>.

⁹⁰ James Harrison and Mary-Ann Stephenson, *Human Rights Impact Assessment: Review of Practice and Guidance for Future Assessments* (Edinburgh: Scottish Human Rights Commission, 2010), 57.

⁹¹ Tisdall et al., 'Reflecting on Children', 351.

their lives would not be compatible with the Convention. Evidence given at Stage One of the parliamentary process suggests that the compatibility statement should be reasoned with reference to the related CRWIA, which would strengthen the existing use of CRWIAs.⁹² The potential for the court to issue a declarator of incompatibility (s21) or a strike-down declarator (s20) demands that all laws undergo a more concentrated examination of UNCRC compliance. If the CRWIAs on the Incorporation Bill and the Children (Scotland) Bill (2019) are indicative of new practice that can be sustained, then CRWIAs will serve to emancipate children by allowing them to engage their participation rights in conjunction with a number of other rights outlined in the UNCRC.

The Emancipatory Challenge of Children's Rights

The examples of barriers to children's participation rights demonstrate what Brems frames as 'the emancipatory challenge of children's rights', which is 'making people see not only children's inherent vulnerability, but also their inherent capacity for autonomy, and the gradual development of that capacity.'⁹³ Children's capacity for autonomy in forming personal views has historically been marginalized in both personal and collective decision-making processes. For both dimensions of children's participation to be meaningful they must be viewed as stakeholders just as adults are.⁹⁴ Viewing children as stakeholders, as potential agents of change, does not mean that their voices are given greater weight than others in the same way that different groups of stakeholders do not exist in a concrete, pre-assigned hierarchy. Governance is and will always be a decision-making process. The law offers a structure for determining how and when priorities are ordered in decision-making processes. The unparalleled opportunity offered by incorporation of the UNCRC in Scotland lies in its unprecedented recognition of children as individuals with enforceable rights.

The unanimous adoption of the Incorporation Bill signifies the beginning of a new era in the realisation of children's rights in Scotland, but this is only the first step. This article considered why the CYP Act 2014 failed to secure meaningful participation rights for children and

⁹² Aileen McHarg, Evidence to the Equalities and Human Rights Committee, Transcript, 9.30-9.45

⁹³ Brems, 'Lessons for Children's Rights', 97.

⁹⁴ E. Kay M. Tisdall, 'is the Honeymoon Over? Children and Young People's Participation in Public Decision-Making', *International Journal of Children's Rights* 16 (2008): 419.

highlighted the opportunities offered by the Incorporation Bill to address the limitations of the CYP Act. The analysis then considered how children's participation rights have been marginalised or suppressed in Scotland. It used individual participation examples to demonstrate that Scots law and practice should reconcile participation and practicability and ensure meaningful participation for all children in decision-making that affects their personal lives. Concomitantly, when carrying out CRWIA as a means of securing children's collective participation rights, Scottish government should: ensure that assessors understand the UNCRC; engage with children in line with their age and stage; ensure non-discrimination; and make children's views visible. These conclusions are supported by the article's initial construction of participation rights as emancipation rights for it is through emancipation that all individuals are able to exercise their human rights, which includes ensuring children's rights to participate in decision-making processes in relation to their personal lives as well as the lives of children as a dynamic group and potential influencers of democracy.

Incorporation of the UNCRC in Scotland is important not only because it will legally entrench children's rights on an unprecedented scale but also because the process itself is a driver of change. In Scotland, that process began over a decade ago and while it seems a long duration in the context of making children's rights real, it is a process that is worth doing right. Advocacy and education surrounding the incorporation of international human rights is required to ensure rights-holders and duty-bearers drive culture change at every level of society and government.⁹⁵ Only then will children's rights definitively lead to their emancipation but children's rights to participate in decision-making processes that affect their lives is a necessary starting point. UNCRC Article 12 demands that we 'dismantl[e] the legal, political, economic, social and *cultural* barriers that currently impede children's opportunity to be heard and their access to participation in all matters affecting them'⁹⁶ before we can entrench a culture of respect for children's views. Experiences in family law proceedings in Scotland and in the CRWIA process demonstrate that there is still progress to be made. Enhanced participation processes for children will not automatically ensure that a children's rights-based approach is taken in every decision in Scotland once the Incorporation Bill becomes law. The legalisation of the UNCRC will only be

⁹⁵ Laura Lundy et al., *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries* (Belfast: Queen's University Belfast and UNICEF UK, 2012).

⁹⁶ UNCRC art 12, as discussed by Brems, 'Lessons for Children's Rights', 102.

the first step toward a brighter, more engaged future for the children of Scotland.