



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

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Yes

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

August 2019

Introduction

Children in Scotland is pleased to be able to respond to the Scottish Government's consultation on incorporation of the United Nations Convention on the Rights of the Child.

Giving all children in Scotland an equal chance to flourish is at the heart of everything we do.

By bringing together a network of people working with and for children, alongside children and young people themselves, we offer a broad, balanced and independent voice. We create solutions, provide support and develop positive change across all areas affecting children in Scotland.

We do this by listening, gathering evidence, and applying and sharing our learning, while always working to uphold children's rights. Our range of knowledge and expertise means we can provide trusted support on issues as diverse as the people we work with and the varied lives of children and families in Scotland.

Our work is firmly rooted in the United Nations Convention on the Rights of the Child.

Our Activity

Children in Scotland has delivered a number of engagement events which have informed our response to this consultation, including:

- a Voices Forum attended by 24 Children in Scotland members
- a session for the Cross-Party Group on Children and Young People with 52 attendees

- a Children's Rights Discussion Day with 20 children and young people aged between 8 and 21.

These events included contributions from Scottish Government representatives, legal professionals and children's rights experts.

Children in Scotland has been a member of Together's Incorporation Strategy Group for the past five months and as such has been involved in detailed discussion around incorporation of the UNCRC.

Children in Scotland recognises the technical nature of this consultation. Our response has been informed by the consultation responses submitted by Together and the Children and Young People's Commissioner Scotland as leading children's rights experts in Scotland.

Summary of key points from Children in Scotland's response:

- 1) **Children in Scotland recommends full and direct incorporation** of the UNCRC into domestic law. Incorporating the UNCRC as written is the best way to ensure children's rights are respected, protected, and realised. This method of incorporation is the best way to improve outcomes for children and young people in Scotland.
- 2) **The UNCRC is clear and comprehensive.** Full incorporation will mean domestic law will keep pace with international developments in human rights law. The rights enshrined in the UNCRC are universal, indivisible and interdependent. Developing a suite of Scottish children's rights could result in watered-down legislation and a lack of clarity for public authorities and the courts.
- 3) **Full and direct incorporation should not be delayed.** The Scottish Government must act swiftly to ensure the UNCRC can be incorporated within this session of the Scottish Parliament. A bill should be laid before the Scottish Parliament before the end of 2019 to ensure that Scottish Ministers can give it proper scrutiny.
- 4) **The UNCRC is the minimum standard of rights for children and young people,** and incorporation into Scots Law should be seen as a platform for further action to progress children's rights. The Scottish Government needs to go above and beyond the UNCRC to be recognised as a world leader in human rights.

- 5) **Children and young people's voices should be at the heart of activity to incorporate the UNCRC into domestic law.** Ongoing and meaningful engagement is integral to the protection and realisation of children's rights. Communication strategies and resources should be co-designed with children and young people to raise awareness of the UNCRC across Scottish society and promote its benefits.

- 6) **Adults, including professionals, parents and carers, should be supported to be informed advocates and champions of children's rights.** A coordinated suite of resources, information and events should be developed with input from stakeholders. These should be widely promoted to ensure that professionals, parents and carers have the information and support that they need to fulfil their roles in making incorporation of the UNCRC a success.

QUESTIONNAIRE

THEME 1: Legal mechanisms for incorporating the UNCRC into domestic law

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

Children in Scotland believes that a robust legislative framework is essential to ensure children and young people's rights are fully respected, protected and realised in Scotland. Children's rights must be legally binding in courts and tribunals across Scotland, and all public authorities should be legally obliged to act in a way which is compliant with the UNCRC and the Optional Protocols to which Scotland is a signatory.

There are a number of elements of the Human Rights Act framework that should be included in the model for incorporation of the UNCRC into domestic law.

Section 3 of the Human Rights Act requires that primary and secondary legislation must be read and given effect in a way which is compatible with the European Convention of Human Rights. A similar provision is necessary to ensure domestic legislation is compatible with UNCRC articles and Optional Protocols.

Like the requirement in Section 19 of the Human Rights Act, Children in Scotland believes that for every bill introduced to the Scottish Parliament, Scottish Ministers must include a statement of compatibility with the UNCRC and Optional Protocols. This move would ensure children's rights are at the forefront of policy development and legislative change in Scotland.

Section 6 of the Human Rights Act makes it unlawful for a public authority to act in a way which is incompatible with an ECHR right. A similar provision is essential to prevent acts that are incompatible with children's rights and ensure the UNCRC and Optional Protocols are embedded in policy and practice across Scotland. Importantly, this section of the Human Rights Act states that "an act" by a public authority can also include a failure to act. New legislation incorporating the UNCRC into domestic law should cover both public authority acts and omissions.

Similar to HRA, a court should be able to make a declaration of incompatibility if it determines that a new bill is incompatible with the UNCRC. It is right that proposed legislation can be held up to scrutiny by the courts.

If the courts make a declaration of incompatibility, a Scottish Minister should be able to make amendments to the legislation to remove the incompatibility. This is covered by section 10 of the HRA.

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

Children in Scotland believes that a Child Rights and Wellbeing Impact Assessment (CRWIA) should be completed and laid with any new bill presented to the Scottish Parliament. This is separate and in addition to the statement of compatibility that Scottish Ministers would be required to make when presenting a bill.

Mandatory CRWIAs would ensure that new bills are compatible with the UNCRC. They would also guarantee that the rights and wellbeing of children and young people are fully considered during the development and implementation of new legislation, and that any negative impacts are mitigated. This provision is covered in Section 27 of the draft Children's Rights (Scotland) Bill proposed by Together and the Children and Young People's Commissioner Scotland.

Children in Scotland also supports the 'due regard' duty included in the draft Children's Rights (Scotland) Bill (Sections 20 and 21). The 'due regard' duty ensures that public authorities must have due regard for the UNCRC and Optional Protocols, and take into account General Comments, Observations or findings from relevant CRWIAs when exercising any of their functions.

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

Yes. Children in Scotland believes that a duty to comply is essential in delivering better outcomes for children and young people.

Incorporation must make children’s rights binding and not simply ‘guiding’. Legislation should ensure that it is unlawful for public authorities to act in a way which is incompatible with the UNCRC or the Optional Protocols through acts or omissions.

We believe that including both a ‘duty to comply’ and a ‘due regard’ duty places a clear focus on improving outcomes for children rather than simply putting processes in place to ensure children’s rights are considered. Together¹ and the Children and Young People’s Commissioner Scotland² endorse the inclusion of both a ‘duty to comply’ and a ‘due regard’ duty. This provision is covered in the draft Children’s Rights (Scotland) Bill.

Interpretation of Rights

4. What status, if any, do you think General Comments by the UN Committee on the Rights of the Child and Observations of the Committee on reports made by States party to the UNCRC should be given in our domestic law?

Children in Scotland believes that General Comments and Observations made by the UN Committee on the Rights of the Child are very important and should be given consideration by both public authorities and the courts.

General Comments and Observations support states to interpret the Convention and to implement their obligations under the UNCRC. The UN Committee on the Rights of the Child considers monitoring reports from state parties and provides guidance about emerging issues that are relevant to the Convention. General Comments have been used effectively since 2001, providing clarity and consistency, and ensuring that the UNCRC is relevant in an ever-changing world.

In other European nations who have incorporated the UNCRC, UN Committee General Comments and Observations are seen by the courts as a valuable tool for interpreting the Convention. Similarly, Committee General Comments and Observations will support courts in Scotland to understand and apply UNCRC rights within the Scottish legislative context.

¹ Together’s UNCRC Consultation Response
(https://togetherscotland.org.uk/media/1342/uncrc_incorporation_response_final.pdf)

² Children and Young People’s Commissioner Scotland’s UNCRC Consultation Response
(<https://www.cypcs.org.uk/ufiles/UNCRC-Incorporation.pdf>)

General Comments and Observations provide respected guidance to duty bearers in relation to their responsibilities and we believe that public authorities should give them due regard. As highlighted in our response to question 2, we support the inclusion of a 'due regard' duty in the legislation to recognise the value of the UN Committee's General Comments and Observations.

General Comments and Observations also provide an important function in helping rights holders to understand and interpret their rights. Courts should be able to refer to these when complaints are raised about breaches of children and young people's rights.

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

Courts in Scotland are already used to drawing from the UNCRC when considering cases under the Human Rights Act and wider EU legislation.

A United Nations database³ provides access to jurisprudence from caselaw considered by United Nations Treaty Bodies including the Committee on the Rights of the Child, the Human Rights Committee and the Committee on the Rights of Persons with Disabilities. This resource allows access to a vast body of legal interpretation of international human rights law that has developed over a number of years.

In countries like Norway, Sweden and Iceland who have directly incorporated the UNCRC, there have not been significant issues with the courts interpreting UNCRC rights. The clarity provided by full and direct incorporation in Scotland would mean the courts could draw upon learning from other countries who have taken this approach to incorporation.

Statutory Human Rights Framework for Scotland

6. Do you agree that it is best to push forward now with incorporation of the UNCRC before the development of a Statutory Human Rights Framework for Scotland? Please explain your views.

Yes. The First Minister has committed to incorporating the UNCRC within this Parliamentary session. It is essential that this promise is upheld, not only to underline Scotland's commitment to children's rights but also to strengthen existing work to support and protect children and young people, and to improve the outcomes for some of the most vulnerable members of our society.

³ Office of the United Nations High Commissioner for Human Rights - Jurisprudence (<https://juris.ohchr.org/>)

Scotland's Year of Young People 2018 provided a unique platform for children and young people to have their views heard and acted upon. While we recognise the impressive scope of activity across Scotland, we know that many children and young people struggle to have their voices heard and their rights upheld. Children in Scotland believes that full and direct incorporation of the UNCRC now would capitalise on the momentum provided by YoYP activity and would ensure a fitting legacy for a year where children and young people clearly demonstrated their enthusiasm for shaping Scotland's future.

2019 marks the 30th anniversary of the UNCRC. Introducing a bill to parliament this year would serve as a timely demonstration of the Scottish Government's belief in the principles of the UNCRC. Introducing a bill to coincide with the anniversary would also maximise media interest and support public awareness-raising activity about the benefits of incorporation.

Introducing a bill to parliament this year would allow the Scottish Parliament sufficient time to give the bill the proper scrutiny it requires. The commitment to incorporate the UNCRC into law by the end of this parliamentary session gives a clear and immovable deadline to work to which will require swift and efficient action.

Scotland and the rest of the UK is facing a significant period of economic and political uncertainty brought about by the challenges of exiting the European Union. It is vitally important that the Scottish Government does all it can to secure children's rights as Brexit continues to dominate the political landscape. Children and young people in Scotland under the age of 18 had no opportunity to have their views considered in the 2016 referendum. We must ensure that their voices are heard, and their rights are prioritised, respected and upheld as our future relationship with the EU is decided.

The First Minister's Advisory Group on Human Rights Leadership has clearly stated that longer term ambitions to develop a Statutory Human Rights Framework should not hold up action to incorporate. The Advisory Group's December 2018 report⁴ states that "The Advisory Group encourages UNCRC incorporation by the government and parliament". It acknowledges that this is a separate process that "is complementary to and capable of being aligned with our overall recommendations". The report concludes that their recommendations should not cause any delay to UNCRC incorporation.

⁴ Recommendations for a new human rights framework to improve people's lives (<https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>)

Political momentum for incorporation of the UNCRC has continued to grow since the introduction of the Children and Young People (Scotland) Act 2014. It is vital that the First Minister stands by her commitment to incorporate the UNCRC within this session of parliament and that the Scottish Government listens to the voices of children and young people who, when consulted, overwhelmingly call for full and direct incorporation of the UNCRC.

7. We would welcome your views on the model presented by the advisory group convened by the Commissioner for Children and Young People in Scotland and Together (the Scottish Alliance for Children's Rights).

Children in Scotland believes the model presented by the Children and Young People's Commissioner Scotland and Together is a strong model for incorporation of the UNCRC.

The model proposes direct incorporation of UNCRC (Articles 1-42) and Optional Protocols 1 and 2 without adjustment. We agree that full, direct incorporation is the best way to incorporate the Convention into domestic law. Children in Scotland believes that the UNCRC is clear and comprehensive and rewriting the articles as a suite of Scottish Children's Rights risks diluting its principles and undermining children's rights.

The draft bill includes a duty to 'act compatibly' which is similar to the Human Rights Act model. This ensures that the Scottish Ministers and public authorities must comply with the UNCRC and may be held accountable for acts or omissions that breach the Convention. Part 2 of the draft bill clearly sets out mechanisms for preventing acts that are incompatible with children's rights, complaints processes and remedies for unlawful acts.

The model presented by the advisory group draws upon strengths of other approaches to protecting and supporting children's rights through the inclusion of a Children's Rights Scheme and the 'due regard' duty. The Children's Rights Scheme has been largely successful in Wales in ensuring that the State actively thinks about how children and young people's human rights are realised and upheld.

As highlighted in our response to question 2, we support the mandatory requirement for a Child Rights and Wellbeing Impact Assessment to be completed to accompany any new legislation laid before the Scottish Parliament. We also support the requirement for a statement of compatibility with UNCRC for any new bills introduced by Ministers.

The draft Children's Rights (Scotland) Bill has been endorsed by a wide range of Scotland's legal experts. Throughout the consultation period, Children in Scotland has heard contrasting opinions about how full and direct incorporation impacts on the competencies of the Scottish Parliament. For

example, on 12th June 2019 the Cross-Party Group on Children and Young People heard contradictory opinions from Helen Fogarty (Scottish Government) and Dr Kasey McCall-Smith (Edinburgh Law School, University of Edinburgh) about whether full and direct incorporation is possible within the provisions set out in the Scotland Act 1998. It is our opinion that the draft bill clearly states the scope and extent of the legislation in sections 2, 4 and 32. It does not go beyond or seek to extend the devolved powers of the Scottish Parliament. Children in Scotland believes that the draft bill is future-proofed and provides flexibility in the event of further devolution of powers or Scottish Independence.

Children in Scotland recognises the challenges facing public authorities in Scotland. In the last 5 years, local government budgets in Scotland have reduced by 4%. This is compared to the Scottish budget which has seen a reduction in real terms of just 0.4%.⁵ The 'Local Government in Scotland: Financial Overview 2016/17' produced by public spending watchdog the Accounts Commission concluded that "Councils are showing signs of increasing stress. They are finding it increasingly difficult to identify and deliver savings".⁶ Local authorities provide many essential services for tackling inequality in our society and these services need to be fairly resourced to ensure local government can deliver its functions. For example, there is currently significant pressure on the provision of support in schools for children with additional support needs. To ensure effective implementation of the UNCRC and to guarantee that practice does not fall short of the legislation, Children in Scotland supports the inclusion of a 'sunrise clause'. Please see our responses to questions 14 and 15 for further details.

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

It is our understanding that this concern is not relevant to Scotland, which operates under a dualist legal system. Children in Scotland refers to the consultation responses submitted by Together⁷ and the Children and Young People's Commissioner Scotland⁸ which state that the act of incorporating the UNCRC into Scots law is the way in which we "execute" the rights and give them practical effect.

⁵ COSLA - Fair Funding for Essential Services 2019/20

(https://www.cosla.gov.uk/sites/default/files/documents/fairfundingforessentialservices2019-20v2_1.pdf)

⁶ Audit Scotland - Local Government in Scotland - Financial Overview 2016/17 (https://www.audit-scotland.gov.uk/uploads/docs/report/2017/nr_171128_local_government_finance.pdf)

⁷ Together's UNCRC Consultation Response (https://togetherscotland.org.uk/media/1342/uncrc_incorporation_response_final.pdf)

⁸ Children and Young People's Commissioner Scotland's UNCRC Consultation Response (<https://www.cypcs.org.uk/ufiles/UNCRC-Incorporation.pdf>)

9. How could clarity be provided to rights holders and duty bearers under a direct incorporation approach, given the interaction with the Scotland Act 1998?

The draft Children's Rights (Scotland) Bill proposed by Together and the Children and Young People's Commissioner Scotland clearly sets out the scope and extent of the proposed legislation in relation to devolved and reserved matters.

Duty bearers have been used to working under devolution for 20 years so have a strong understanding of their responsibilities in relation to devolved matters under the Scotland Act 1998. The Scottish Government's approach to implementing the UNCRC so far has been through making specific legislative changes to embed UNCRC principles into Scots Law and policy (for example, the Children and Young People (Scotland) Act 2014 and the Children's Hearings (Scotland) Act 2011). This approach means that Scottish public authorities will already be familiar with the UNCRC and their obligations under the Convention when fulfilling their functions. Children in Scotland advocates for additional guidance from the Scottish Government, as well as further awareness-raising activity and training to strengthen this understanding and provide clarity for duty bearers ahead of direct incorporation.

It is important that rights holders understand their rights in the context of Scottish devolution. The Scottish legislative landscape is relatively complex so clear and understandable information should be provided to rights holders to ensure clarity. A child-friendly website devoted to UNCRC in Scotland would help children and young people (and the adults who help to protect their rights) to understand and interpret the UNCRC articles within the Scottish legislative context. This website, along with any additional public awareness-raising resources, should be co-designed by children and young people.

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

Yes.

As mentioned in the consultation, this has so far been the method of implementing elements of the UNCRC into domestic law. This approach does not go far enough to ensure children's rights are championed in society and fully enshrined in public policy and practice.

As the First Minister's Advisory Group on Human Rights Leadership report highlights, a large part of ensuring children's rights are properly upheld is making sure that children, young people and the adults who support them fully understand their rights. Introducing specific changes to domestic

legislation fails to recognise a coherent body of rights that all children in Scotland have and should benefit from.

The UNCRC is well-established and widely recognised across the world and there is already significant awareness of the Convention across Scottish society. However, more needs to be done. Full and direct incorporation of the UNCRC would provide a stronger platform for promoting children's rights across Scotland, building on the foundations that are already in place.

A study by UNICEF UK and Queen's University Belfast in 2012⁹ examining the impact of incorporation in 12 countries found the main value of incorporation was thought to be "the strong message it conveyed about the status of children and children's rights, and the knock-on effects for implementation of children's rights principles into domestic law and policy". Full and direct incorporation provides a visible commitment to placing children's rights at the centre of our society, helping to underpin Scotland's commitment as a leading nation in the field of children's rights.

Children in Scotland recognises the need for continuous legislative review and reform as an important process alongside direct incorporation of the UNCRC. The First Minister has stated that the Convention is the 'gold standard' of children's rights however, we see full and direct incorporation as simply the basis for supporting, promoting and upholding children's rights. We welcome and encourage any domestic legislation that goes above and beyond the UNCRC in realising children's rights.

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

Children in Scotland does not support this model of incorporation. As previously highlighted, we feel that this model would risk diluting the principles of the UNCRC and undermining children's rights.

One of the significant challenges around the transposition model of developing a bespoke suite of Scottish children's rights is the limited time available if incorporation is to be achieved within this parliamentary session.

A suite of Scottish children's rights would take significant time to develop if conducted in line with the principles of participation and engagement reflected in the UNCRC. Article 12 provides for the right of children and young people to express their views on all matters concerning them and to have

⁹ The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries (https://downloads.unicef.org.uk/wp-content/uploads/2012/11/UNICEFUK_2012CRCImplementationreport-FINAL-PDF-version.pdf?_ga=2.130427849.734868076.1564586714-247095534.1556710143)

those views given due weight in accordance with their age and maturity. This right applies to all children without discrimination.

In order to create a suite of Scottish children's rights, a significant period of engagement activity would be required to ensure that a broad range of children and young people from across our society had the opportunity to participate. The children's sector could support participation and engagement work with different groups to ensure that vulnerable and seldom-heard voices are represented, however this would require substantial time and funding. It is our view that it would be impossible to undertake meaningful engagement work and pass a bill within the timeframe set out by the First Minister.

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

Children in Scotland's preferred model for incorporating the UNCRC into domestic law is full and direct incorporation. We have based this decision on advice from Together and the Children and Young People's Commissioner Scotland as well as evidence gathered from engagement events with professionals, families and children and young people.

The majority of professionals who participated in the UNCRC discussions at the Cross-Party Group on Children and Young People and our Voices Forum believed full and direct incorporation was the best method of incorporating the UNCRC into Scots Law. This was also the preferred choice of children and young people who took part in our recent Children's Rights Discussion Day.

We believe that full and direct incorporation will deliver real and transformational change to children's lives in Scotland. The UNCRC is clear, comprehensive and widely respected. It is the most widely and rapidly ratified human rights treaty in history. To date, 195 countries have ratified the Convention, which contains wide-ranging protections for children's cultural, economic, political, social and civil rights.

Direct incorporation provides clarity for rights holders and duty bearers and ensures that domestic legislation keeps pace with developments in international human rights law. As mentioned in our response to question 7, we support the draft Children's Rights (Scotland) Bill 2018 presented by Together and the Children and Young People's Commissioner Scotland. We believe that the additional preventative measures that the bill puts in place – a 'due regard' duty and the inclusion of a Children's Rights Scheme – will help to ensure implementation at national and regional level does not fall short of the legislation.

We believe the draft bill does not go beyond the competencies of the Scottish Parliament, but it does future-proof the legislation in the event of further devolution, Scottish Independence or the withdrawal of powers.

Children in Scotland believes that a suite of Scottish children's rights rooted in UNCRC is problematic as the decision-making process for agreeing what rights should be included would be long and complex. We fear this could result in a watered-down version of children's rights. There are also longer-term implications in terms of how this approach would develop and align with international human rights over time. Scotland could lose step with other countries as updates to the UNCRC through General Comments and Observations would not automatically be relevant. Full and direct incorporation would be a faster and more straightforward process – this is particularly important given the tight deadlines for passing a bill within this parliamentary session.

Over recent years, many children and young people have already clearly voiced their opinion about incorporation. Scottish Youth Parliament's 2016-21 youth manifesto, 'Lead the Way', found that 76% of young people believed that the UNCRC should be fully incorporated into Scots law.¹⁰ This overwhelming majority for full incorporation has been echoed in numerous consultation events with children and young people conducted by the Children's Parliament.¹¹

Recent engagement events commissioned by the Scottish Government and delivered by SYP, YouthLink Scotland and Children in Scotland all independently recommended full and direct incorporation of the UNCRC as children and young people's preferred method of incorporation. Children and young people who took part in our Children's Rights Discussion Day in July 2019 believed that full and direct incorporation would provide "consistency internationally" and felt it would be "measurable and comparable to other countries". There is a strong risk that incorporation by any means other than full and direct incorporation would be seen as substandard and in direct opposition to the views of children and young people.

The Scottish Government has previously stated that the UNCRC is internationally recognised as the 'gold standard'. Full and direct incorporation would reaffirm Scotland's ambition to be a leading figure in the field of children's rights and would provide a strong platform for children's rights awareness-raising activity across our society.

¹⁰ Scottish Youth Parliament (https://www.syp.org.uk/right_here_right_now)

¹¹ Children's Parliament – What kind of Scotland? Report (<https://www.childrensparliament.org.uk/wp-content/uploads/WhatKindofScotlandOnline2017.pdf>)

THEME 2: Embedding Children's Rights in public services

Children's Rights Scheme

13. Do you think that a requirement for the Scottish Government to produce a Children's Rights Scheme, similar to the Welsh example, should be included in this legislation? Please explain why.

Yes.

We believe that the requirement for a Children's Rights Scheme should be included in the legislation.

In Wales this has been successful in promoting a rights-based approach to the development of new legislation, ensuring transparency and supporting accountability. As proposed in the draft Children's Rights (Scotland) Bill, we believe Scottish Ministers should consult with children and young people (8-18 years) and the Children and Young People's Commissioner Scotland about the development of the Scheme. This will ensure that children and young people have a say in how the UNCRC is implemented.

A Children's Rights Scheme for Scotland will support embedding the UNCRC across public services. It should include plans and guidance around the use of Child Rights and Wellbeing Impact Assessments, regular reporting processes that strengthen and build upon the statutory duty on ministers and public authorities already required under the Children and Young People (Scotland) Act 2014, and include requirements on public authorities to set out what mechanisms have been put in place to support complaints from children and young people.

We agree that the scheme should be reviewed and, if appropriate, re-made every three years. Again, this should be in consultation with children and young people. This provision is included in the draft Children's Rights (Scotland) Bill.

Preparation for public authorities

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

While we do not want to see incorporation of the Convention delayed, we believe there may be a practical rationale for including a 'sunrise clause' within the legislation.

A 'sunrise clause' would allow public authorities sufficient time to review their policies and practices to ensure that they are compatible with the new legislation.

Key pieces of Scottish legislation including the Children (Scotland) Act 1995, the Children and Young People's (Scotland) Act 2014 and the Education (Additional Support for Learning) (Scotland) Act 2004 have already embedded articles of the UNCRC into Scots law. Public authorities are familiar with their legal duties in relation to the UNCRC under domestic legislation.

In addition to this, the Getting It Right for Every Child approach has been central to Scottish Government policies since 2006 and is based on values and principles which support children's and parents' rights. This approach has been widely implemented across public bodies and services with varying levels of success. GIRFEC principles are strongly informed by the UNCRC, so public authorities should already be adopting the key principles of the Convention in their delivery of services and in their support provisions.

While recognising this, it is important to acknowledge that public authorities will require time to assess the impact of new legislation, identify gaps in their provision of services, develop and implement new processes (for example, CRWIAs) and develop and deliver awareness-raising activities among staff.

Economic and political uncertainties linked to Brexit will mean that public bodies are dealing with significant challenges over the next few years. This means incorporating the UNCRC is as important as ever. However, it is important to recognise the impact of these pressures on public bodies in the short- and medium-term. During consultation events, our members raised important concerns about the implementation of new legislation and the resources at a regional level to deliver the transformational change required.

A 'sunrise clause' may help to ensure that legislation, policy and practice are closely aligned, and that incorporation of the UNCRC is effective in delivering improved outcomes for children and young people.

15. If your answer to the question above is yes, how long do you think public bodies should be given to make preparations before the new legislation comes into full effect? Please explain your views.

If a 'sunrise clause' is included in the legislation, Children in Scotland recommends a relatively short timescale to ensure that public bodies remain focused on delivering necessary changes and that they prioritise related activity.

Additional non-legislative activities to progress implementation of the UNCRC

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

Yes.

Children in Scotland welcomes the non-legislative activities identified in 'Progressing the Human Rights of Children in Scotland: An Action Plan 2018-2021'. The activities include awareness raising, supporting public authorities to use Child Rights and Wellbeing Impact Assessments (CRWIAs) and developing a more strategic approach to children and young people's participation.

Children in Scotland believes the following measures will assist in embedding children's rights in Scotland.

Children's Rights Training

We believe the Scottish Government should invest in the development of a new interactive online training module that goes above and beyond the government's existing 'Introduction to the UNCRC' ten-minute training tool. This module should be developed with the Children and Young People's Commissioner Scotland and co-designed with children and young people.

The training module should:

- Underline the status of children as holders of human rights
- Increase knowledge and understanding of the Convention
- Explain how the UNCRC fits within the Scottish legislative context
- Emphasise the importance of listening to children's voices and supporting participatory approaches

Online training should be mandatory for all Scottish Government staff to ensure that children's rights are fully embedded across government, and that there is clear understanding of how their work can impact on the outcomes for children and young people.

More in-depth, specialist training should be provided to Scottish Government staff working on policy and legislative reform.

Supporting Dissemination of Children's Rights Training

Children in Scotland would like to see training on children's rights elevated to a similar level as child protection training. In many organisations working with children and young people, child protection training is mandatory for all staff. A new Scottish Government online training module (as proposed above) could be adopted by organisations working with children and young people

(including third sector, ELC settings and schools) to widen awareness and increase employees' understanding of children's rights.

Child Rights Accreditation Programme

The Scottish Government should consider the development of a children's rights accreditation programme. This could build on UNICEF's Rights Respecting Schools model and the LGBT Youth Scotland's LGBT Charter Mark. This would raise the profile of children's rights and encourage organisations to develop a holistic approach to supporting and protecting children's rights by ensuring their policies and practices fully align with the UNCRC.

National Strategies and Action Plans

As proposed in the draft Bill, Child Rights and Wellbeing Impact Assessments should be mandatory for the development of new Scottish Government legislation. CRWIAs must also be central to the development of national policies, strategies and action plans that impact children and young people (for example, the National Culture Strategy and the National Youth Work Strategy).

Children's Rights and the Curriculum for Excellence

We believe that human rights education should begin at an early age and is a lifelong process. Further embedding children's rights into the Curriculum for Excellence and teachers' practice was identified as a key action during our consultation activities with Children in Scotland members and at our Children's Rights Discussion Day with children and young people. The Children and Young People (Scotland) Act 2014 imposes a statutory obligation on every local authority to embed the UNCRC into learning however, as highlighted in the *Promote. Protect. Defend.* report¹² and identified through our own participation and engagement work with children and young people over many years, rights awareness amongst school-aged children is often patchy and inconsistent.

At our Children's Rights Discussion Day, young people stated that there was "massive disparity" in terms of children and young people's knowledge and awareness of their rights.

It is clear there is a strong need for increased efforts to promote children's rights throughout formal education, building on existing examples of good practice. Children in Scotland believes awareness-raising activities in education should begin in early learning and childcare settings and continue throughout primary and secondary school education. There are significant challenges to ensure children's rights are championed across all areas of our society – we believe the education system provides a strong platform from which to reach children, young people and families from a wide variety of backgrounds.

¹² Promote. Protect. Defend. Report (<https://www.cypcs.org.uk/ufiles/PromoteProtectDefend.pdf>)

Information about children's rights and the UNCRC should form a significant part of the college and university courses for professionals working with children and families.

Developing Awareness of Children's Rights in the Early Years

Children in Scotland believes that more needs to be done to raise awareness of the status of children aged 0-5 as rights holders. As highlighted in our response to the Progressing the Human Rights of Children in Scotland Action Plan consultation, a key part of this is awareness raising activity that should be focused the role of parents and carers in upholding children's rights during these crucial early stages of life.

Children's rights awareness raising for parents should begin in the ante-natal period. In Sweden, the Baby Box has been used to help parents understand children's rights and their role as rights defenders. The Scottish Government could consider using Scotland's Baby Box in a similar fashion as well as promoting children's rights through the Parent Club website.

As highlighted above, we would like to see a stronger emphasis on children's rights from the earliest stages of education. We would like positive examples of rights-based approaches in early years education to be celebrated and shared widely. This would support other practitioners and help in spreading key messages about children's rights to parents and carers. Amnesty International has produced a resource to support teachers to introduce human rights to children aged between 3 and 5.¹³

Supporting Parents, Carers and Families to Understand Children's Rights

The UNCRC recognises that parents and carers are often the most important defenders of their children's rights. Awareness raising activities should highlight the important role families have to play in ensuring children's rights are upheld and dispel any notion of a conflict between children's rights and parental rights and responsibilities.

We know from experience of the implementation of GIRFEC that a misconception can arise that children's rights are at odds or sometimes in conflict with parental rights. The UNCRC clearly states that children's rights are best met within the context of a family. It is vitally important therefore that parents, carers and wider family members understand how children's rights support families in general. Clear and accessible information is required to ensure parents, carers and wider family members understand children's rights and their duties to protect them.

Awareness raising activities should echo the key messages covered in Together's briefing paper 'Parenting and the United Nations Convention on

¹³ Amnesty International – First Steps Resource Pack
(<https://www.amnesty.org.uk/resources/first-steps-resource-pack>)

the Rights of the Child'.¹⁴ This briefing emphasises the role of the UNCRC in supporting parents and families and recognises the central role they play in ensuring that children grow up healthy, happy and safe.

Public Awareness & Children's Right Awareness Resources

Article 42 puts a requirement on state parties to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

A website dedicated to the UNCRC in Scotland with clear, accessible, child-friendly information is essential to ensure that children and young people (and individuals who support them to uphold their rights) have access to all the information and support they need. This central resource should include guidance about how to make a complaint so that children and families know what to do if they feel their rights have been breached.

At our Children's Rights Discussion Day, young people identified social media campaigns as an effective way to raise awareness and engage with young people about their rights.

Other non-digital approaches to awareness raising should be implemented to ensure that messages about children's rights reach all children and young people. This could include making printed resources available at libraries, health centres, schools and Citizens Advice centres.

Rights awareness resources should be co-designed and developed with children, young people and families to ensure people are learning about their rights in a way that suits them best.

We look forward to working with Young Scot on the Rights Awareness and Participation Co-design Project. This project will engage children and young people in co-designing resources to raise awareness and understanding of children's rights across all sectors of society in Scotland and support the involvement of children and young people in developing a strategic approach to participation.

Media Campaign

The media will have an important role in developing and shaping public opinion on incorporation of the UNCRC. The Scottish Government should invest in a public media campaign to raise awareness of the Convention across Scotland. Clear, consistent messaging is required to explain what children's rights are, to emphasise the status of the child as a holder of human rights, and to underline how the Convention fits with the values of Scottish society.

¹⁴ Together Briefing - Parenting and the UNCRC

(https://www.togetherscotland.org.uk/pdfs/UNCRC_parenting_23-04-2018_FINAL.pdf)

Embedding Children's Rights across the Private Sector

Cascading knowledge and raising awareness of children's rights outside the public and voluntary sectors is essential to ensure private businesses and corporations develop socially responsible policies and programmes for workers, their children and communities.

Children's Rights Approaches to Children's Services Planning

Children in Scotland recognises that children and young people are key users of public services, although they are not often asked to contribute to the planning, design, development, delivery and evaluation of services.

Under Article 12 of the UNCRC, every child has the right to be heard in matters affecting them and to participate in the life of their family, community and society.

The National Third Sector GIRFEC (NTSG) Project was established in early 2013 and has been delivered by Children in Scotland since April 2018. The project was set up to support the third sector to be a strong partner in Children's Services Planning. As identified in NTSG's response to the recent Scottish Government consultation on children's services planning statutory guidance, we believe refreshed guidance is required to strengthen the voices of children, young people and families and ensure their views are at the centre of the planning process in local authorities and health boards. This process must be inclusive to ensure that vulnerable children such as those with disabilities and additional support needs receive appropriate support to meaningfully engage in co-design processes.

Meaningful Participation

Meaningful participation should be embedded throughout the development of a Scottish Children's Rights Scheme and any additional activities to support the full incorporation and implementation of the UNCRC.

We welcome the Scottish Government's commitment to develop a strategic approach to children and young people's participation through the Strategic Participation Framework. Children in Scotland will contribute to all four strands of the Framework. So far we have actively supported the work of the Research strand through both the main group and the sub group. We have been pleased to contribute to the research group, in particular identifying examples of good practice in engaging children and young people. However, Children in Scotland has concerns about the scope and ambition of the Framework if it is to achieve its overall objective.

Our main concern is that the development of a web page is not enough to support a strategic approach to participation. We would refer the Scottish Government back to the recommendations contained within our report 'The Impact of Children and Young People's Participation on Policymaking' as a

starting point for actions that would truly embed a strategic approach to participation.¹⁵ The recommendations make clear that if the Scottish Government aims to embed a strategic approach to participation then they must commit sufficient time and financial resources to engaging with children and young people.

To support children and young people to actively engage with policy and decision-making processes and to support co-design processes, accessible and age-appropriate resources for children, young people and families are essential.

Children in Scotland has produced a number of resources that can actively support the meaningful participation of children and young people. Our principles and guidelines for participation and engagement provide key information for practitioners and policymakers in the planning, delivery and follow up of any project.¹⁶ Disseminating this example of good practice would be a helpful action in supporting more meaningful engagement of children and young people.

We often hear from children and young people that they experience consultation fatigue. Repeated consultation with children and young people can lead them to feel disempowered and can discourage them from engaging in future opportunities to share their views and experiences. We would encourage the Scottish Government to consider how it can make better use of evidence of what children and young people have already said about the issues that affect them to inform policymaking. Evidence of what works for children and young people can be found in our new Children and Young People's Evidence Bank.¹⁷ We acknowledge that many organisations recognise the importance of championing the voices of children and young people and have embedded children's views in their work. The Evidence Bank is a website that highlights the direct views and experiences of children and young people contained in a range of public reports. It can be used as an important resource to complement direct engagement work surrounding policy development.

Children in Scotland encourages positive initiatives like First Minister's Question Time Next Generation and the Annual Cabinet Meeting with Children and Young People. These high-profile initiatives have supported children and young people to have their voices heard and raised the profile of young people's involvement with political decision-making. However, we were disappointed by the recent decision to exclude children under the age of 16 from the Citizens' Assembly of Scotland. This feels like a backwards step in

¹⁵ The impact of children and young people's participation on policy making

(<https://www.gov.scot/publications/impact-children-young-peoples-participation-policy-making/>)

¹⁶ Children in Scotland - Participation and Engagement of Children and Young People - Principles and Guidelines (<https://childreninscotland.org.uk/wp-content/uploads/2017/11/Principles-and-Guidelines-FINAL.pdf>)

¹⁷ Children & Young People's Evidence Bank (<https://evidencebank.org.uk>)

relation to UNCRC incorporation and wider plans for developing a more strategic approach to children and young people's participation.

We also encourage all engagement work with children and young people to learn from the many examples of good practice from projects carried out by Children in Scotland and our partners across the children's sector¹⁸. Learning from these projects can be used to support the development of inclusive methodologies that are known to work or to explore ways to approach a particular topic.

Children in Scotland looks forward to continuing to work with the Scottish Government and other colleagues in the children's sector to support meaningful participation with children and young people.

Children's Rights Public Budgeting

The United Nations Human Rights Council, the European Commission and the Committee on the Rights of the Child have all put a strong emphasis on child rights budgeting, recommending that state parties develop child budgets as a key aspect of implementation of the UNCRC.

The UN Committee recommends open, inclusive, accountable and non-discriminatory budgeting and spending at both national and regional levels. UN General Comment No.19 recognises that prioritising children's rights in budgets "contributes not only to realizing those rights, but also to long-lasting positive impacts on future economic growth, sustainable and inclusive development, and social cohesion".¹⁹ In addition, States are encouraged to ensure children regularly participate in budget decisions, allowing them a voice in the issues that affect them.

Scotland has seen a significant increase in participatory budgeting initiatives in the past few years including some good examples of young people getting involved in budgeting projects in Edinburgh, North Ayrshire, Glasgow and Dumfries and Galloway as part of the Year of Young People 2018.²⁰ The Scottish Government should work to ensure that all levels of government adopt children's rights approaches to budgeting to ensure children and young people's rights are protected at all times, particularly during periods of economic instability.

¹⁸ Children in Scotland - Projects (<https://childreninScotland.org.uk/projects-search/>)

¹⁹ UN Committee on the Rights of the Child - General comment No. 19 (2016) on public budgeting for the realization of children's rights
(<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhslkirKQZLK2M58RF%2F5F0vHXnExBBGbm8arvsXxpbQfFay5IM9wjdpzdQWNBmhrXy5GddCXwk43lfcBNBFLtyueX%2B6YpzPiHmwp3k68ATyNi>)

²⁰ PB Scotland (<https://pbScotland.scot/search?q=young%20people>)

Advocacy and Other Support Services

There is a need for high-quality, universal advocacy services to ensure that children and young people in Scotland have their voices heard. All children have the right to have their views considered in decisions that affect them. Listening to the views of children is of key importance to ensuring that any decisions made are in the best interests of the child.

We are aware that there are a number of areas across Scotland where children and young people do not have access to advocacy services and we strongly recommend that to support the incorporation of the UNCRC advocacy access needs to be assessed and resourced accordingly.

Advocacy services have been used successfully in the Children's Hearings System for many years, providing children and young people with the confidence, knowledge and the support that they need to fully engage with the decision-making process. Children in Scotland has directly experienced the positive impact of quality advocacy services through delivery of the 'My Rights, My Say' service for children aged 12 – 15 who require support with their learning.

The 'My Rights, My Say' service exists to ensure that children with additional support needs aged 12-15 are able to exercise their rights as set out within the Education Act (Scotland) 2004 (as amended). The services offered recognise that children and professionals may need a range of support in order to make children's rights a reality and the same will be true of full incorporation of the UNCRC. Children have the right to request an advocate to help them share their views about their support at school. However, some children will not have the confidence or ability to take this initiative. The Children's Views service is then available for professionals to request independent support to seek a child's views to uphold their right to be involved in decisions about their life. Finally, for children who need to seek redress by taking a claim to the ASN Tribunal, free, independent legal representation is available for children to use. These services are delivered in partnership, alongside advice and information provided by Enquire. Children in Scotland believes that a similar model of integrated support services to enable children to access their rights and seek redress if needed would be beneficial in ensuring that the UNCRC is successfully embedded across Scotland.

The UN Committee recognises the barriers to justice many children and young people face if their rights have not been upheld. If a child feels that their rights have been breached, it is vital the necessary support mechanisms are in place to ensure they can raise complaints and seek remedy. It is essential that children and young people receive appropriate support early on to ensure their physical, cognitive or emotional development is not negatively impacted. Particular consideration should be given to how best to support vulnerable groups – including children with additional support needs

and refugee children – who face additional barriers to accessing services and having their rights upheld. As highlighted below in our response to question 18, we fully support the important role independent mediation can play in resolving disputes at an early stage. The Scottish Government must ensure sufficient resources are made available so that children, young people and families can access advocacy and mediation services when they need to.

In addition to advocacy and mediation, the Children and Young People's Commissioner Scotland should be able to provide support to individual children and young people who bring formal complaints.

THEME 3: Enabling compatibility and redress

Certification of Scottish Parliament Bills

17. Do you agree that any legislation to be introduced in the Parliament should be accompanied by a statement of compatibility with children's rights? Please explain your views.

Yes. As highlighted in our response to question 1, we believe there should be a statutory obligation for any legislation introduced to the parliament to be accompanied by a statement of compatibility with children's rights. This would ensure that children's rights are fully considered during the development of a bill before it is laid before the Parliament for consideration.

Children in Scotland supports the requirement for a Child Rights and Wellbeing Impact Assessment to be completed for any new bill presented to Parliament in addition to the statement of compatibility. These measures will ensure that children's rights are at the heart of legislative reform and they will support the Parliament to scrutinise proposed legislation from a child rights perspective.

Remedies and Redress

18. Do you agree that the Bill should contain a regime which allows rights holders to challenge acts of public authorities on the ground that they are incompatible with the rights provided for in the Bill? Please explain your views.

Yes. An important part of enforcement is the opportunity for rights holders to challenge public authorities if they believe their acts are incompatible with their rights. This is why we support a 'due regard' duty in the legislation and the requirement to act compatibly with the UNCRC.

It is essential that duty bearers can be held accountable for acts or omissions that breach or infringe children's rights. When disputes arise, a primary focus should be on de-escalation and encouraging the relevant parties to engage in dialogue and to work together to resolve issues.

Children in Scotland has significant experience of encouraging dialogue and supporting young people to have their voices heard and their rights upheld through;

- 'My Rights, My Say' – a service which supports children aged 12 to 15 to share their views and exercise their rights when decisions are being made about their additional support for learning
- Enquire – the Scottish advice service for additional support for learning that provides information for young people, parents and carers and professionals in relation to additional support for learning legislation and guidance
- Resolve: ASL – the additional support for learning independent mediation service supporting parents and carers and local authority education practitioners to resolve disputes.

We welcome the consultation's recognition that improving outcomes for children and young people in Scotland will only happen by "our public bodies working with and listening to children and young people and finding innovative and engaging ways to respect their rights".

Public authorities should set out clear mechanisms for complaints and make these accessible to children, young people and families to minimise the trauma of the complaints process. Where possible, processes should focus on repairing and re-establishing relationships to ensure the best possible outcome for the child.

19. Do you agree that the approach to awards of financial compensation should broadly follow the approach taken to just satisfaction damages under the HRA? Please explain your views.

Yes. We agree that a similar approach to financial compensation would be appropriate. The provision of financial compensation in order to provide "just satisfaction" for the breach of rights is a tried and tested method that reflects the individual circumstances of the rights holder and can take into account both financial and non-financial loss.

Judges should be provided with suitable guidance about appropriate levels of reward in different circumstances.

20. Do you agree that the UNCRC rights should take precedence over provisions in secondary legislation as is the case under the HRA for ECHR rights? Are there any potential difficulties with this that you can see?

Yes.

We believe that UNCRC rights should take precedence over secondary legislation unless a higher standard exists in domestic law. This is in line with Article 41 of the Convention.

The consultation raises concerns about the absence of authoritative case law however, we believe that sufficient guidance is available to mitigate any uncertainty. This guidance includes a range of material available from the UN Committee including General Comments and Observations. We do not anticipate significant difficulties in the courts interpreting UNCRC rights because full and direct incorporation provides clarity as well as allowing the courts to consider emerging jurisprudence from other countries around Optional Protocol 3.

21. Do you agree that the Bill should contain strong provisions requiring an ASP to be interpreted and applied so far as possible in a manner which is compatible with the rights provided for in the Bill? Please explain your views.

Yes. We believe the Bill should contain strong provisions requiring an Act of the Scottish Parliament to be interpreted and applied so far as possible in a way that is compatible with the UNCRC rights. This provision currently exists in the Human Rights Act (1998) and in the Scotland Act (1998) in relation to the European Convention on Human Rights.

If a piece of legislation or provision at first appears incompatible with the UNCRC, then courts should try to read it in a way that does comply. This minimises the risk of incompatibility and ensures that courts interpret legislation in a way that supports children and young people's rights.

22. Should the Bill contain a regime which would enable rulings to be obtained from the courts on the question of whether a provision in an ASP is incompatible with the rights secured in the Bill? Please explain your views.

Yes. Courts should have the power to rule that an Act of the Scottish Parliament is incompatible with the UNCRC and to declare the legislation unlawful.

This 'strike down power' is included in the draft Children's Rights (Scotland) Bill presented by Together and the Children and Young People's Commissioner

Scotland. This is similar to the approach set out in Section 29 of the Scotland Act 1998 once legislation has been found to be incompatible with ECHR.

If an Act of the Scottish Parliament is found to be incompatible with the UNCRC, courts should have opportunity to allow the Scottish Parliament to make changes to the legislation to make it compliant with the UNCRC.

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

No.

As previously highlighted, Children in Scotland recommends a preventative approach to upholding children's rights by introducing protective measures and processes to ensure children's rights are central to the development of new legislation and in the planning and delivering of services.

As per our response to question 18, Children in Scotland believes that guidance information linked to the incorporation should highlight and support de-escalation of disputes at the lowest appropriate level. Children and young people should be supported to have their views heard through advocacy services, and we strongly support the use of mediation services to bring people together to resolve disagreements before legal proceedings are considered.

Children in Scotland believes that a person who claims to be affected (directly or indirectly) by an unlawful act, should be able to bring proceedings before a court or tribunal. The age of full legal capacity in Scotland is 16 years old however, children under this age can instruct a solicitor and bring a case under their own name if they have 'a general understanding of what it means to do so'. This aligns with the principles of Article 12 of the Convention.

We do not believe any special test should be required to bring a case under the bill. We agree that the ordinary 'sufficient interest in the issues raised' test is a suitable test – as covered in section 12 of the draft Children's Rights (Scotland) Bill.

We recognise that children and young people face significant barriers in bringing complaints when their rights have been infringed. We also acknowledge that additional challenges exist for some of the most vulnerable children and young people in our society (for example, young people with additional support needs). If complaints proceedings escalate to the courts, children, young people and their families must be appropriately supported to access legal representation. The Children and Young People's

Commissioner Scotland may also be able to support an individual child who brings proceedings to court.

In addition to individual complaints, the Children and Young People's Commissioner Scotland, the Scottish Human Rights Commission and the Equality and Human Rights Commission in Scotland should be able to bring cases to court under their own name if a widescale breach is identified and if it is deemed within the public interest.