

**Children’s Rights: Consultation on incorporating the
United Nations Convention on the Rights of the Child
into our domestic law in Scotland
– Response from Amnesty International**



Introduction

1. Amnesty International is a global movement of more than 7 million people who campaign for a world where human rights are enjoyed by all. We reach almost every country in the world. Amnesty has had an office in Scotland for over 25 years and works regularly on a variety of human rights issues with the Scottish Government, Parliament and organisations and institutions across Scotland. Human rights are the fundamental entitlements and freedoms that we can, and should, expect in our lives. All governments have the obligation to respect, protect and fulfil human rights as the primary duty bearers. These rights are enshrined in the Universal Declaration of Human Rights, which was adopted by the United Nations General Assembly in 1948 and in other international law and standards.
2. Amnesty International Scotland welcomes the opportunity to respond to the Scottish Government’s Consultation on incorporation the United Nations Convention on the Rights of the Child into our domestic law in Scotland.
3. The UN Convention on the Rights of the Child (UNCRC) was adopted by the UN General Assembly on 20 November 1989 and entered into force on 2 September 1990, 20 November 2019 therefore marks the 30th anniversary of the UN General Assembly’s adoption of the Convention on the Rights of the Child. All but one of the UN member states has ratified the UNCRC. Amnesty International was represented at the drafting of the UNCRC by Professor Geraldine Van Bueren QC.
4. The UN has a number of other mechanisms for children including the Special Representative on Children in Armed Conflict (established by UNSC), the Special Representative on Violence against Children (established by UNGA), the Special Rapporteur on the sale of children, child prostitution and child pornography. We hope that incorporation of the UNCRC will be seen as part of a wider set of international protections for children provided by the UN and as a way of reinforcing the Government’s commitment to the realisation of children’s rights.
5. The government of the United Kingdom and Northern Ireland ratified the United Nations Convention on the Rights of the Child (UNCRC) on December 1991. The UK further ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict in 2003 and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography in 2009. The UK has yet to ratify the Optional Protocol to the Convention on the Rights of the Child on a communications procedure¹.

¹ List of current signatories and ratification of the 3rd Optional Protocol of the UNCRC on a communications procedure can be accessed here: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&clang=en

6. The 3rd Optional Protocol on a communications procedure (OPIC) allows children to file complaints against a State before the UN Committee on Rights of the Child alleging a violation of any of the provisions included in the CRC and its Optional Protocols and after having exhausted all domestic remedies. Amnesty International had originally advocated for a complaints procedure within the UNCRC itself and we continue to campaign for its ratification by all States. The purpose of OPIC is not only to provide children with the opportunity to access justice at the international level to address violations of their rights, but also to prompt the availability of remedies at the domestic level.
7. Although the Scottish Government cannot incorporate OPIC until it is ratified by the UK Government, we do urge that the Scottish Government advocate for ratification but also use the opportunity of UNCRC incorporation to domesticate the “spirit” of the Optional Protocol in ensuring access to justice and the availability of remedies to children in Scotland.

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

8. Amnesty International believes the Human Rights Act (HRA) is an excellent example of national human rights protection. It is designed to suit and support the UK’s democratic system, protecting universal rights while preserving Westminster parliamentary sovereignty. The HRA and European Convention on Human Rights (ECHR) are fundamental to the establishment of the Scottish Parliament.
9. Important principles within the HRA should be considered in any legislation that seeks to incorporate international law, including; making it unlawful for a public authority to act or fail to act, in a manner incompatible with the ECHR (Section 6); providing direct recourse to a court or tribunal in the event of such an act or omission (Section 7) and providing a wide range of judicial remedies at the discretion to the court (Section 8). Courts can also make a declaration of incompatibility (Section 4) which is one mechanism for ensuring legislation is rights-compatible, together with a specified remedy, which is a vital aspect of any incorporation model. Whether this mechanism or a specific “strike down” power is preferable is discussed below (paragraphs 43 and 44).
10. The Scotland Act 1998 explicitly commits the Scottish Parliament and Government to operate within the constraints of the HRA and ECHR, so that it is unlawful for the Scottish Parliament to pass a law or bill that is deemed incompatible with the rights laid out in the European Convention. Furthermore, any individual can bring a complaint of a human rights violation under the Convention to an ordinary Scottish court i.e. it includes a “duty to comply” in its model of incorporation.
11. Other examples within the UK of forms of incorporation of the UNCRC include in Wales with the Rights of Children and Young Persons (Wales) Measure 2011². This imposes a “duty to pay due regard” on Welsh Ministers to have due regard to the rights within the UNCRC when making decisions, policies and laws. The Children’s Rights Scheme 2014 sets out the arrangements for the Welsh Government to have due regard to the UNCRC when exercising functions. While there are many positives to this model of incorporation and the use of child

² Rights of Children and Young Persons (Wales) Measure 2011:
<http://www.legislation.gov.uk/mwa/2011/2/contents>

rights impact assessments (CRIA) are developing, it is a model limited by the legal competencies of the Welsh Assembly in contrast to the Scottish Parliament.

12. The First Minister's Advisory Group on Human Rights Leadership published a report on 10 December 2018, which recommended that the Scottish Parliament pass an Act to establish a new human rights framework to improve people's lives³. It is recommended that this Act restate those rights already provided under the HRA 1998 but also provide further rights drawn from UN human rights treaties ratified by the UK but not yet incorporated, including economic, social and cultural as well as environmental rights. The report goes on to recommend that there should be further rights specific to children, women, persons with disabilities, on race and rights for older persons and LGBTI communities.
13. In the research for this report and its recommendations, the FM Advisory Group grappled with the two duties that can be imposed by incorporation of any international treaty; the "due regard" duty and the "duty to comply". Their conclusion was that both duties have considerable merits and can be combined within a new human rights framework.
14. The "duty to pay due regard" to certain rights or duties is already familiar to public bodies in Scotland. It has been applied in the public sector equality duties under the Equality Act 2010. In Scotland, there is the additional duty under Section 1 of the Equality Act, where certain public authorities are required to pay due regard to how they can reduce inequalities of outcome caused by socio-economic disadvantage.
15. A "duty to comply" is already well established in Scotland under the Human Rights Act 1998 (see paragraph 9). The right to an effective remedy is not only required under the HRA but under international human rights law.
16. With these precedents already in Scots Law, it is clear that the incorporation of the UNCRC in domestic law can and should combine both the "duty to pay due regard" and the "duty to comply". Moreover, future anticipated legislation which will incorporate further international treaties into Scots Law, will seek to combine these two duties which necessitates a coherent and consistent approach to incorporation at this earlier stage.

The Options for Incorporation

17. General Comments and Observations made by the UN Committee on the Rights of the Child can already be taken into account by the Scottish courts and by public authorities when exercising their devolved functions. It is hoped that incorporation will further enable courts and public authorities to keep pace with developments in international law and practice.
18. As referenced in the Children and Young People's Commissioner Scotland's response to this consultation; the UNCRC has been cited in Scottish case law (*Sanderson v McManus 1997 SC (HL) 55*) and has already been used as an interpretive tool in UK courts (*ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4, [2011] 2 AC 166*)⁴. However, without incorporation into domestic law it is not enforceable and less likely to be referred

³ "Recommendations for a new human rights framework to improve people's lives" – Report to the First Minister: <https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>

⁴ CYPES Response: <https://www.cypes.org.uk/policy/incorporation-of-the-un-convention-on-the-rights-of-the-child-/uncrc-incorporation-response>

to. Therefore, reference to General Comments and Observations by the UN Committee on the Rights of the Child in a Bill incorporating the UNCRC would be consistent with current practice and enable courts to give them extra consideration than they currently do.

19. Alongside these, it is important to consider the emerging jurisprudence under UNCRC's Optional Protocol 3 (OPIC); on a communications procedure (see paragraphs 5-7 above). Given that this protocol has not been ratified by the UK, these decisions would not be binding, but would provide the judiciary with useful reference points and considerations. As referred to above, OPIC is designed not only to give rights holders access to an international mechanism but to prompt the availability of remedies at the domestic level. We hope that although it cannot be directly incorporated, its spirit can be.
20. The Scottish courts can and do draw on jurisprudence from any relevant jurisdiction including those that have incorporated the UNCRC such as Belgium, Norway and Spain⁵.

Statutory Human Rights Framework for Scotland

21. Amnesty considers the model developed by the Commissioner for Children and Young People in Scotland and Together (the Scottish Alliance for Children's Rights) as being in line with international best practice on UNCRC incorporation.
22. We do not believe that there is any benefit from delaying the incorporation of the UNCRC and instead a huge risk to the loss of momentum and buy-in from public bodies, civil society and most importantly, children and young people. Multiple Scottish Government Departments, local authorities and relevant public bodies are already aware of and using the UNCRC to inform policy and practice. The campaign for incorporation by the children's sector in Scotland and by children and young activists has been running for over 10 years. We do not believe there is any basis for delay.
23. It is however, vitally important for the anticipated future incorporation of other international human rights treaties that incorporation of the UNCRC be seen as a pre-cursor to further incorporation. This is not a standalone project, indeed the rights of children and young people can be further enhanced by other treaties, and so consideration should be given to consistency and compatibility with future developments in human rights legislation.
24. The United Kingdom is a dualist state which maintains the sovereignty of the UK Parliament. Although the UK Government can negotiate and ratify international treaties without direct Parliamentary involvement, those treaties cannot change domestic UK law (i.e be self-executing)⁶. Treaties are seen as automatically creating rights and duties only for the Government under international law. For a treaty provision to become part of domestic law,

⁵ For further information on international examples of UNCRC incorporation, see: *The UNCRC: a study of legal implementation in 12 countries*: Queen's University Belfast, UNICEF UK: <https://www.unicef.org.uk/publications/child-rights-convention-2012-report/>
Incorporation of the United Nations Convention on the Rights of the Child in Law: A comparative Review, International Journal of Children's Rights (link to PDF): https://pure.gub.ac.uk/portal/files/18188714/Incorporation_of_the_United_Nations_Convention_on_the_Rights_of_the_Child_in_Law.pdf

⁶ UK Parliament's role in ratifying treaties, House of Commons Library: <https://www.parliament.uk/briefing-papers/sn05855.pdf>

the relevant legislature must explicitly incorporate it as it is anticipated that the Scottish Parliament will do with a UNCRC incorporation bill.

25. Self-executing rights are only an issue for legal systems in which international treaties can become part of domestic law automatically, which is not the case in any UK jurisdiction.
26. Incorporating an international treaty into domestic law can be done in a number of ways, but few would achieve the First Minister's vision of "meeting the UN's gold standard on children's rights." To meet this aspiration, the Scottish Government must commit to the full and direct incorporation of the UNCRC. Partial or cherry-picking rights or sections from treaties risks a diminution or dilution of rights.
27. Direct incorporation will not clash with the Scotland Act 1998 with adequately worded legislation. Duty bearers already have to interpret their responsibilities under a raft of different laws and legal authority including legislation from the Scottish Parliament, UK Parliament and EU, case law and statutory guidance. Guidance, statutory guidance and policy frameworks can and are used to navigate and explain a crowded legal field. Direct incorporation of the UNCRC into Scots Law could make this easier by pushing a culture change as well as legal change amongst local authorities, public bodies and the courts.
28. A duty to pay due regard to the rights in the UNCRC should, over time, lead to changes in decision-making, budgeting, developments in policy and practice, complaints procedures, monitoring, reporting and much more. For example, where local authorities are dealing with children under immigration control (a reserved issue), they still have duties and responsibilities in the delivery of those children's right to education, healthcare, housing etc. COSLA, the representative body for local authorities in Scotland, regularly issues guidance as part of its Strategic Migration Partnership which address exactly these intersections such as updates on new immigration laws⁷, convening the No Recourse to Public Funds (NRPF) Network⁸ and further guidance on establishing migrants' access to local authority services⁹. There is no reason why this would not continue to be the case post-incorporation.
29. Incorporation of any international human rights treaty sets a framework within which future legislation is made. It should ensure that all future legislation is at the highest human rights standards, it enables mechanisms for keeping step with advances in international standards and it empowers rights holders. Therefore, minor changes or tweaks to domestic legislation will continue to fall short of the vision of gold standard human rights legislation in Scotland without this framework and the capacity building and culture change that underpins it.

⁷ Immigration Acts 2014 and 2016 – Implementation update, COSLA:

<http://www.migrationscotland.org.uk/uploads/documents/18-01-10%20Immigration%20Acts%20-%20Implementation%20Update.pdf>

⁸ Supporting Vulnerable Migrants with No Recourse to Public Funds, COSLA:

<http://www.migrationscotland.org.uk/uploads/18-09-21%20CWB%20Item%202.5%20Supporting%20Vulnerable%20Migrants%20with%20No%20Recourse%20to%20Public%20Funds.pdf>

⁹ Establishing Migrants' Access to Benefits and Local Authority Services in Scotland, COSLA:

http://www.migrationscotland.org.uk/uploads/files/documents/final_guidance_document_-_layout.pdf

30. Participation is a human right; everyone has the right to participate in the decisions and processes that impact upon them. Human rights legislation, policy and practice can realise this right and it is through the incorporation of the UNCRC that the participation of children and young people can be guaranteed and linked to international best practice. This means that all future legislation that impacts on children and young people, should consider the time necessary for genuine and meaningful participation. However, participatory processes cannot seek to fundamentally change, abrogate, or diverge from the international rights framework as this will risk dilution and diminution of rights particularly of the most marginalised. The participation of children and young people should be in the implementation stage of rights legislation, to ensure it fits with domestic and local contexts.
31. The UNCRC should be directly and fully incorporated into Scots Law. The legislation must make direct reference and connection to the UN Convention on the Rights of the Child and its Optional Protocols, in order to directly connect this legislation to the UN treaty monitoring processes, to the Committee on the Rights of the Child and its General Comments and Observations, and other UN mechanisms for children's rights such as the Special Representative on Children in Armed Conflict, the Special Representative on Violence against Children, the Special Rapporteur on the sale of children, child prostitution and child pornography. This legislation should include a duty on Ministers and public authorities to pay "due regard" to the Convention rights; bringing the Bill in line with the Equality Act 2010; and a "duty to comply"; bringing it in line with the Human Rights Act 1998; the only other piece of incorporated human rights law in Scotland.

THEME 2: Embedding children's rights in public services

32. It is for the Scottish Government, in collaboration with relevant stakeholders, to decide how best to ensure Ministers and public bodies pay due regard to the UNCRC. We would refer to other organisations that work directly with public bodies and/or directly deliver public services or work with rights-holders, to set out how best this can be achieved in Scotland.

THEME 3: Enabling compatibility and redress

33. In order to demonstrate and evidence that Ministers and the Scottish Parliament are paying due regard to the UNCRC in all future legislation, legislation should be accompanied by a statement of compatibility with children's rights. It should also be considered how this statement will be adapted if or when further international treaties are incorporated into Scots Law to ensure that all legislation is compatible with the widest range of human rights.
34. The Scotland Act 1998 that established the Scottish Parliament, gave it the power to legislate on certain matters. Section 28(1) of the 1998 Act provides that "subject to section 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament". The limit on that power to legislate, set out in section 29, is the limit of the Parliament's legislative competence.
35. The Parliament's legislative competence is defined according to five criteria (set out in section 29(2) of the Scotland Act 1998). One criteria is that the Parliament cannot modify certain enactments set out in Schedule 4 to the Scotland Act 1998 (which include the Human Rights Act 1998 and certain provisions of the Acts of Union and the European Communities

Act 1972); its legislation must be compatible with the European Convention on Human Rights and with European Union law.

36. There is debate as to whether the Scottish Parliament can place similar restrictions on itself in regards compatibility with further international treaties already signed and ratified by the UK Government. Legislation that provides these restrictions may be constitutional in nature but can be repealed or amended by future Parliaments. We acknowledge that there is legal debate about this degree of legislative competence as highlighted by the First Minister's Advisory Group (discussed further below). However, in order for there to be access to effective remedy, there must be a mechanism by which legislation is deemed compatible or incompatible with the UNCRC.
37. Legislative competence and compatibility are themselves open to legislative scrutiny and this should continue to be the case. As stated in the Scottish Parliament's guidance on Public Bills: "While many of the limits on legislative competence are clear-cut, others may be subject to differences of interpretation. Whether the provisions of a Bill are within the legislative competence of the Parliament may be a matter of debate throughout the process of considering the Bill – both in regard to general debate on the Bill as a whole (or specific provisions in it) and in the context of particular amendments. The precise boundaries of the Parliament's powers to legislate can ultimately be decided only by the courts."¹⁰

Remedies and Redress

38. As described above, legislation should be accompanied by a statement of compatibility when introduced to the Scottish Parliament, but this compatibility must be open to challenge within the Parliament and by the courts. This is one of the essential features that gives effect to the rights within the UNCRC. Rights holders must have access to justice and effective remedy and ultimately, that must be enabled by the courts and tribunals.
39. Some essential features were highlighted in the First Minister's Advisory Group report which recommended incorporation of further international human rights treaties into Scots Law¹¹. As described above, we believe that legislation incorporating the UNCRC should as far as possible anticipate incorporation of further treaties to ensure consistency and compatibility.
40. As well as proposed further incorporation, this legislation should be compatible and consistent with the current incorporation of the ECHR which enables rights holders to challenge acts of public authorities on the ground that they are incompatible with the Human Rights Act. Consistency can further be maintained by ensuring financial compensation broadly follows the just satisfaction damages under the HRA. This will bring clarity to claimants and courts.
41. We agree that UNCRC rights should take precedence over provisions in secondary legislation as is the case under the HRA for the ECHR and there are legal arguments that this can be achieved under the legislative competence of the Scottish Parliament. We are aware that a

¹⁰ Guidance on Public Bills, Session 5 Edition. Part 1, Point 1.11:

<https://www.parliament.scot/parliamentarybusiness/Bills/25656.aspx>

¹¹ Pg. 34, "Recommendations for a new human rights framework to improve people's lives" Ibid.

range of legal opinions are being sought on this point of law and it will be open to debate and scrutiny within the Scottish Parliament as the Bill progresses.

42. It is vitally important that human rights underpin all relevant legislation of the Scottish Parliament and it is clear that the Parliament itself and its Members, understand and embrace their role as a guarantor of human rights¹². To fully realise this role, the Parliament must enable the courts to fully enact access to justice and effective remedy. This could potentially include a “strike down” power or similar, as provided under the Scotland Act 1998 to enable the court to rule that legislation is not law because it is not compatible with the human rights set out in the ECHR and UNCRC. As acknowledged in the First Minister’s Advisory Group report: “Further consideration would need to be given to whether such a provision is within the legislative competence of the Scottish Parliament. Such a provision may be deemed to be a modification of the Scotland Act 1998 and therefore beyond the legislative competence of the Scottish Parliament.”
43. To address this point of whether a “strike down” power is within the competency of the Scottish Parliament, as described in paragraph 36, we acknowledge that there is current legal debate on this point. Firstly, any Act of the Scottish Parliament can be repealed by future Parliaments which would make this power constitutional in nature but not in law. Secondly, the Parliament itself will debate whether to put this restriction on itself and the legislative competency of this provision, during the progress of this legislation where the technicalities and alternatives can be explored. Thirdly, although the Scottish Parliament cannot change its legal competency, the UK Parliament can. It is possible that future amendments of the Scotland Act could bring the rights within the UNCRC (and potentially other international treaties) in line with the ECHR, and this request can be made.
44. Finally, the ultimate goal of incorporating the UNCRC is to ensure that any *“child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity”*¹³. To achieve this aspiration, we need to make fundamental and necessary changes in our society not simply tinker at the edges. Children, young people and their parents and carers, must be enabled to grow and flourish but must also be empowered to claim their rights and challenge injustices when they occur. Incorporating the UNCRC needs to do more than signify an aspiration, it needs to put in place the legal framework needed to change our society. If the Scottish Government, Scottish Parliament and people of Scotland are truly committed to the rights of children and young people, then we must ensure that the impacts of the UNCRC are felt, not just when this proposed legislation is passed, but across all future legislation, policy and practice.
45. Thank you for this opportunity to respond and Amnesty International would be happy to provide any further information on request.

¹² “Getting Rights Right: Human Rights and the Scottish Parliament”, report of the Scottish Parliament’s Equalities and Human Rights Committee:
<https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2018/11/26/Getting-Rights-Right--Human-Rights-and-the-Scottish-Parliament-3>

¹³ Convention of the Rights of the Child, Preamble:
<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:

<https://beta.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- Individual
- Organisation

Full name or organisation's name

Amnesty International UK – Scotland Office

Phone number

0131 357 8580

Address

66 Hanover Street, Edinburgh

Postcode

EH2 1ED

Email

scotland@amnesty.org.uk

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
- Publish response only (without name)
- Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No