

Response to

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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This is a submission from Professor Kay Tisdall, Professor of Childhood Policy, as an individual academic and as part of the Childhood & Youth Studies Research Group. Having both academic and policy interests in Scottish policy and practice, she has been active in seeking to improve the recognition and implementation of children's human rights. This has involved research projects and analysis on such topics as children's participation in family law, early years and childcare, additional support needs, and children's services planning¹.

Kay Tisdall's contribution has included direct work with Government, MSPs and MPs and civil servants on such legislation as the Children (Scotland) Act 1995, the Standards in Scotland's Schools etc. Act 2000, and Education (Additional Support for Learning) (Scotland) Act 2004, as well as on-going support to the children's rights sector in Scotland. In 2017-18, she co-organised -- with Together (Scottish Alliance for Children's Rights) and the Centre for Child Wellbeing and Protection at University of Stirling -- a seminar series² asking how we could improve UNCRC incorporation following the Children and Young People (Scotland) Act 2014. The combination of working with children and young people, adult stakeholders and international experts resulted in a suite of briefings and podcasts on what needed to happen next and publication of an international special journal issue with *International Journal of Human Rights* (2019, Vol. 23(3)), to capture the key academic and stakeholder learning.

Q1 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.

Yes.

The Scottish Government has stated its commitment to incorporating the UNCRC into Scottish law, during this session of the Scottish Parliament. Full and direct incorporation of the UNCRC is required to fulfil this commitment. On this basis, three fundamental elements of the HRA framework should be followed for UNCRC incorporation:

- Legislation must be read and given effect in a way which is compatible with the UNCRC, as far as it is possible to do so.
- 'The duty to comply'. Under S.6 of the HRA, it is unlawful for a public authority to 'act in a way that is incompatible' with a Convention right.
- Provision for substantive and legal remedies should a right be violated. Remedies are an essential component of a human rights framework, and part of recognising children's rights to justice.

¹ [https://www.research.ed.ac.uk/portal/en/persons/kay-tisdall\(e33e5161-73ea-46b0-8c95-0f5bae1471bd\).html](https://www.research.ed.ac.uk/portal/en/persons/kay-tisdall(e33e5161-73ea-46b0-8c95-0f5bae1471bd).html)

² <https://www.togetherscotland.org.uk/resources-and-networks/uncrc-in-scotland-seminar-series/>

Q2 Are there any other aspects that should be included in the framework? Please explain your views.

Yes.

Along with the duty to comply, a pro-active duty on public authorities to promote rights-based policy and practice should be included in the legislation. Both duties are required to create a strong framework, that focuses on progressive realisation of children's human rights.

The Children's Rights (Scotland) Bill, supported by Together and the Children and Young People's Commissioner Scotland, details a 'due regard' duty on a public authority, when exercising any of its functions. Such a duty has proven helpful in Wales, as placed on Welsh Ministers, through the Rights of Children and Young People (Wales) Measure 2011 (Hoffman and O'Neill 2018; Hoffman 2019). The potential of a 'due regard' duty has been commended for UNCRC incorporation, by Day and colleagues (2018), although they note the need for 'clear guidance to clarify obligations, responsibilities and specific requirements in practice' (page 16). There will be increasing familiarity with this standard due to its inclusion in the public sector equalities duties under the Equality Act 2010 and associated judicial interpretation. Thus a 'due regard' duty would be suitable standard for a pro-active duty on public authorities.

References

Daly, A., McDermott Rees, Y. and Curtis, J. (2018) Enhancing the Status of UN Treaty Rights in Domestic Settings, <https://www.liverpool.ac.uk/media/livacuk/law/2-research/ilhru/EHRC,Enhancing,the,Status,of,UN,Treaty,Rights.pdf>

Hoffman, S. and O'Neill, S. (2018) The Impact of Legal Integration of the UN Convention on the Rights of the Child in Wales, https://www.equalityhumanrights.com/sites/default/files/the_impact_of_legal_integration_of_the_un_convention_on_the_rights_of_the_child_in_wales_eng.pdf

Hoffman, S. (2019). The UN convention on the rights of the child, decentralisation and legislative integration: a case study from Wales. *The International Journal of Human Rights*, 23(3): 374-391 <https://cronfa.swan.ac.uk/Record/cronfa40504> doi:10.1080/13642987.2018.1558978

Q3 Do you agree that the framework for incorporation should include a 'duty to comply' with the UNCRC rights? Please explain your views.

Yes.

As stated in response to Question 1, 'a duty to comply' would ensure that the UNCRC is fully and directly incorporated into Scottish law.

Q4 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 which are party to the UNCRC should be given in our domestic law?

The requirements should be that courts and public authorities may take into account the authoritative interpretations of the UNCRC and its jurisprudence: i.e., General Comments of the UN

Committed on the Rights of the Child, Concluding Observations of the UN Committee on the Rights of the Child, and jurisprudence arising from Optional Protocol No. 3.

Doing so would go a substantial way to addressing the concern, expressed in the consultation paper, of the lack of 'authoritative international jurisprudence' (page 17). For example, the General Comment 12 of the UN Committee on the Rights of the Child (2009) provides very detailed interpretation on the meaning of Article 12(1), as well as guidance on how to meet its requirements. This detail has provided a testing framework to consider the current provisions of S. 11 of the Children (Scotland) Act 1995 in family law, as we are currently undertaking in a joint research project funded by the Scottish Government (see references below).

Taking account of such public and official documents will ensure that Scottish domestic law is part of the latest developments in international law and practice. This is essential to ensure that the framework for children's human rights in Scotland stays at the forefront of the changing global world and new challenges.

References

Scottish Government. 'Children's Participation in Family Actions: Probing Compliance with Children's Human Rights' (2018-2019). Collaborative project between Dr Fiona Morrison (University of Stirling), Professor Kay Tisdall (University of Edinburgh) and Clan Childlaw.

Q5 To what extent do you think other possible aids would provide assistance to the courts in interpreting the UNCRC in domestic law?

Domestic courts in Scotland are increasingly familiar with interpreting laws in line with human rights principles. They have had to do so because of the HRA and related ECHR jurisprudence.

Domestic courts have already been engaging with key principles of the UNCRC, as they are presently included in domestic law. For example, children have individual participation rights in such legislation as the Children (Scotland) Act 1995 and the Children's Hearing (Scotland) Act 2011.

Comparative case law in other countries will be instructive. Courts in South Africa, for example, have been actively using the UNCRC in a range of cases, which are particularly informative in how they adjudicate on economic, social and cultural rights.

Q6 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 Scottish Government has made an intensive commitment to children and young people's participation, building on its Year of Young People and its 2018-2021 Action Plan, *Progressing the Human Rights of Children in Scotland*. Children and young people across Scotland have overwhelmingly called for children's rights to be incorporated now (e.g. Right Here, Right Now by the Scottish Youth Parliament; Children's Parliament 2019). If their participation is to be taken seriously, we must attend to their demand for action now on incorporation.

Going forward with the UNCRC is a first step towards a more comprehensive legal framework for human rights in Scotland. It is essential to remember that children are part of all the international human rights treaties, and will be part of the development of a Statutory Human Rights Framework. The First Minister's Advisory Group on Human Rights Leadership distinctly confirmed this staged process, stating in its final report that it encourages UNCRC incorporation now and that this process is 'complementary to and capable of being aligned with our overall recommendations' (2018, page 54).

References

Children's Parliament (2019) Children's Parliament meets the Scottish Cabinet: Key messages from Children's Parliament <https://www.childrensparliament.org.uk/wp-content/uploads/CabinetKeyMsgs2019-Childrens-Parliament.pdf>

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

Scottish Youth Parliament, Right Here, Right Now https://www.syp.org.uk/right_here_right_now

Q7 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 (Scottish Alliance for Children's Rights).

The Children's Rights (Scotland) Bill provides a framework with four elements that should be included in the forthcoming legislation:

1. Full and direct incorporation of the UNCRC, of all its substantive articles
2. 'A duty to comply' on a public authority
3. A proactive duty for a public authority to give due regard in exercising its functions
4. Child-appropriate accountability and mechanisms for redress

Further, the Bill includes details of how to promote children's rights implementation (i.e. statutory requirements for Children's Rights Impact Assessments). These mechanisms are vital to support the four elements above.

Q8 How should the issue of whether particular UNCRC rights are self-executing be dealt with?

No comment.

Q9 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 Bill to incorporate the UNCRC will need to make clear it can only deal with reserved issues. Public authorities can build on the proactive approach already promoted under S. 2 of the 2014 Act, which requires them to report on what steps have been taken to secure better or further effect within its areas of responsibility of the UNCRC

requirements. They have and can do so in light of the requirements of the Scotland Act 1998.

Q 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.

Scotland has taken the 'piecemeal' approach to date, in terms of making specific changes to domestic legislation to meet the requirements of the UNCRC. This has created a patchwork of rights, with notable holes even in one piece of legislation: for example, we identified over 100 gaps within the Children (Scotland) Bill as it progressed through Parliament in 1994 in relation to its key overarching principles on children's rights (Tisdall 1997). Few of these holes have been filled. This is a similar finding across numerous other areas of legislation, as demonstrated by reports by the Children's Commissioners to the UN Committee on the Rights of the Child and the Committee's Concluding Observations.

The importance for professionals of fully incorporating the UNCRC into domestic law is underlined by the emerging evidence from Stalford (2019), finding that domestic incorporation is essential for legal professionals to fully embrace the UNCRC in their work. Similarly, Kilkelly (2019) reports that incorporation in Norway into the domestic system helped 'to create ownership over those standards in the legislative framework among those who work with and for children' (page 327).

The piecemeal approach to date has not created the 'step change' required to meet the First Minister's commitment and the Government's aspirations as outlined in the consultation paper. Therefore direct and full incorporation of the UNCRC is supported.

References

Children's Commissioners UK (2015) Report of the UK Children's Commissioners
<https://www.cypcs.org.uk/ufiles/UKreport.pdf>

Kilkelly, U. (2019) The UN Convention on the Rights of the Child: incremental and transformative approaches to legal implementation, *The International Journal of Human Rights*, 23(3): 323-337.

Stalford, H. (2019) Strengthening children's rights in family law: Making the UNCRC work harder
<https://www.ed.ac.uk/education/rke/centres-groups/creid/news-events/latest-events/seminar-transforming-children-rights/abstract-stalford-liverpool>

Tisdall, E.K.M. (1997) Children (Scotland) Act 1995: developing policy and law for Scotland's children, Edinburgh: HMSO.

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

The transposition options listed on page 20 of the consultation paper are not desirable. Full and direct incorporation of the UNCRC is recommended.

There has been extensive involvement of children, young people, professionals and other

stakeholders on children's rights incorporation over many years in Scotland, as encapsulated by the joint seminar series organised by Together, University of Edinburgh and University of Stirling.

Rather than repeating such exercises, which have been very consistent in their findings, widespread public engagement should be dedicated to how best to *implement and realise* children's rights under the UNCRC. This goes alongside and beyond the legislation to incorporate it.

References

UNCRC in Scotland Seminar Series. <https://www.togetherscotland.org.uk/resources-and-networks/uncrc-in-scotland-seminar-series/>

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

The preferred model for incorporating the UNCRC into domestic law is full and direct incorporation.

This will set minimum standards for children's rights, which are internationally recognised. It is fully possible – and desirable – that Scottish law and practice can go further than these standards, as the UNCRC explicitly allows for this in Article 41.

As stated in response to Question 10, the piecemeal approach taken to date in Scotland has not resulted in wholesale recognition and realisation of children's rights, as has been amply underlined by research and consultation responses. Incorporation provides the opportunity for a 'step change', if accompanied by non-legal mechanisms to support it.

Q 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 your views.

Yes.

As stated in the consultation paper, Scotland can build on the requirements already placed on Scottish Ministers by S.1 of the Children and Young People (Scotland) Act 2014. A national plan for action for children and children's rights, which sets out strategic developments, practical arrangements and holds duty-bearers to account, is necessary to progress children's rights.

The Welsh Children's Rights Scheme has proven to be largely successful in meeting these requirements, and subsequently been evaluated and improved. Hoffman and O'Neill (2018) particularly note the value of the mandatory Children's Rights Impact Assessments and training across Government.

Such a national plan for action, developed with children, young people and other stakeholders, has the potential to support substantially the Government's aspirations to realise children's rights in Scotland. Learning from Wales, careful attention should be paid to what should be contained within primary legislation to make this a progressive Scottish policy (e.g. making Children's Rights Impact Assessments mandatory at a national level; key rights to community participation, including children and young people, as being developed through the Scottish Government's Strategic Participation

Group).

References

Hoffman, S. and O'Neill, S. (2018) The Impact of Legal Integration of the UN Convention on the Rights of the Child in Wales,

https://www.equalityhumanrights.com/sites/default/files/the_impact_of_legal_integration_of_the_un_convention_on_the_rights_of_the_child_in_wales_eng.pdf

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

Yes.

A sunrise clause combines greater certainty for rights holders that the full legislation will come into force at a set time, with a recognition that public authorities will need to ensure that their policies and practices are aligned with the Act.

Public authorities should be well underway with ensuring such alignment, given the requirements under Part 1 of the Children and Young People (Scotland) Act 2014. The duty to comply will enhance attention to such evaluation and progress, which can be done during the time of the sunrise clause.

Q 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?

No comment.

Q 16 Do you think additional non-legislative activities, not included in the Scottish Government's Action Plan, are required to further implement children's rights in Scotland?

Yes.

International evidence shows that legal incorporation of the UNCRC must be accompanied by other mechanisms to maximise its implementation (Lundy et al. 2012).

To maximise on the potential of incorporation, certain themes already contained within the Scottish Action Plan require enhancement such as:

- Children and young people's participation rights have gained increased attention in Scotland over recent decades; investment and support is required to ensure that their participation in collective decision-making is meaningful, effective and sustainable.
- Increased availability of advocacy services. Children and young people repeatedly state that they require trusted support in order to put forward their views and exercise their rights.
- Improved advice, complaints and redress mechanisms that are child-friendly and child-accessible.
- Awareness-raising programmes, for professionals and more generally for the public. Business,

for example, has a considerable impact on children's rights yet their horizontal obligations are often inadequately recognised.

- Systematic training for those working in the public sector. Children's human rights should be as part of any public sector training as are equalities duties. This requires intensive training for those who work with children – but also with those who work with any member of the public who could include children.

Monitoring and accountability are central to a human rights approach, as ensuring a vital circle between rights holders and duty bearers (Collins 2019). For example, Scotland currently has extensive statistics and other data on children and children's services: to what extent do they cover the requirements of the UNCRC and what are the gaps? With the incorporation of the UNCRC, a review of existing monitoring and accountability systems would be required, to ensure they are firmly based on a children's rights approach.

References

Collins, T. (2019) The general measures of implementation: opportunities for progress with children's rights, *The International Journal of Human Rights*, 23(3): 338-356

Lundy, L., Kilkelly, U., Byrne, B. and Kang, J. (2012)
The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries
<https://www.qub.ac.uk/research-centres/CentreforChildrensRights/filestore/Filetoupload%2C485596%2Cen.pdf>

Young People's Response to the Consultation on Incorporating the UN Convention on the Rights of the Child (UNCRC) into Scots law, facilitated by YouthLink Scotland (2019)
<https://www.youthlinkscotland.org/media/3802/young-peoples-response-to-consultation-on-uncrc-incorporation-facilitated.pdf>

Q 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.

Legislation introduced into the Scottish Parliament should be accompanied by a statement of compatibility with children's rights.

Further, the statement should be accompanied by a Children's Rights Impact Assessment. The CRIA will support Parliament to ensure that all legislation is compatible with the UNCRC.

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

Yes.

The ability for rights holders to hold duty bearers to account is an essential part of the human rights framework. This can be done in a variety of ways, such as parliamentary reporting, as well as the ability for individuals or groups to seek redress.

Children have the right to justice if their rights have been breached. However, we know from research and consultations that children can have great difficulties accessing justice, because of lack of information about their rights, lack of advocacy and representation, and systems that are inaccessible and are not child-friendly (see references below). Incorporation of the Bill must be accompanied by mechanisms for accountability and remedy, with supporting services.

Is it notable that children's access to legal aid in most civil cases has been restricted since 2011, in Scotland, because of the requirement for the resources of parents (or others liable for support) to be taken into account when assessing the child's financial eligibility for legal aid. This is required unless it is unjust or inequitable to do so. Working with Clan Childlaw, we understand that this results in many children being unable to access confidential and independent legal advice and representation. These regulations need to be amended, to ensure child can obtain legal advice and representation when they need it.

To note in response to this question, that the Bill provides an opportunity to consider how to ensure child-friendly accountability. Extensive work on this has been undertaken on child-friendly justice by the Council of Europe and the Fundamental Rights Agency of the European Union. Further, consideration of human rights' accountability at international development levels has identified several types, including judicial, administrative, political and social accountability (Malena et al. 2004). If accountability is a key asset of the human rights framework, deeply considering how to ensure accountability mechanisms are accessible and effective for children is necessary.

References

Council of Europe (with reference to Fundamental Rights Agency of the European Union)
<https://www.coe.int/en/web/children/child-friendly-justice>

Malena C. with R. Forster and J. Singh (2004) *Social Accountability* Social Development Papers
<http://documents.worldbank.org/curated/en/2004/12/5529556/social-accountability-introduction-concept-emerging-practice>.

Power up/ Power down <https://www.cypcs.org.uk/policy/past-work/power-uppower-down/>

Young People's Response to the Consultation on Incorporating the UN Convention on the Rights of the Child (UNCRC) into Scots law, facilitated by YouthLink Scotland (2019)
<https://www.youthlinkscotland.org/media/3802/young-peoples-response-to-consultation-on-uncrc-incorporation-facilitated.pdf>

Q 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.

As stated in the consultation response from the Children and Young People's Commissioner Scotland, the principle under the HRA is that the victim should, as far as possible, be placed in the same position as if the violation has not occurred. This principle should be followed for the incorporation Bill.

Q 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.

Full and direct incorporation of the UNCRC requires that all legislation must be compatible with the UNCRC. This is the case under the HRA for ECHR rights and it should be followed for the UNCRC.

Q 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.

This approach has proven successful in regards to the Human Rights Act, in progressing human rights jurisprudence and implementation. It should be followed for incorporation of the UNCRC.

Q 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.

This approach has been tried and tested through the Scotland Act 1998. Overall, it has helped create a human rights culture in Scotland. To note that the court, under this regime, can give the Scottish Parliament time to make the changes required so that incompatible legislation is made compliant.

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

No.

A child who has legal capacity to instruct a solicitor, groups of children and those with 'sufficient interest' should be able to bring proceedings. It is essential that the Bill not rely solely on a victim to bring a case, given the barriers to children's access justice, the potential burden on the victim of bringing such a case, and the timeframe for justice systems. Collective action could be an effective way of challenging systemic breaches and reduce burdens on any one child. Automatic standing should be given to the Children and Young People's Commissioner for Scotland, the Scottish Human Rights Commissioner and the Equalities and Human Rights Commission.

Further, public interest litigation allows a case in the public interest, without specifying individual victims. This combination of standing should provide a strong platform for justice.

However, there are current barriers to public interest litigation in Scotland, as outlined in the discussion paper *Overcoming Barriers to Public Interest Litigation in Scotland*. These include poor access to information about court cases, short time-limits for taking cases and costs/ financial risk.

Reference

Overcoming Barriers to Public Interest Litigation in Scotland (2018)

<https://www.clanchildlaw.org/Handlers/Download.ashx?IDMF=59a1b325-c50b-4250-a0ca-d2bf7bb14061>