



SCRA Consultation Response FULL VERSION

SCRA Consultation Response -

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

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.

SCRA supports a legislative approach which gives effect to international rights within the specific Scottish context. We also agree that this approach can lead to some rights being given greater weight in Scotland – and that we can go further than the UNCRC.

We support the duties placed on Scottish Ministers and public authorities (in the Children and Young People (Scotland) Act 2014, for example) and think that these duties lead into an implementation and evaluation framework which means that children's rights are recognised and real, and that work around children's rights is always on the agenda.

Incorporation through a mixture of law, policy and practice is absolutely required – but this does not have the same impact or give the same message to Scottish society as a 'big bang' approach and incorporation within a single piece of legislation. The mixed law / policy / practice approach could also mean that change happens as and when something else is being considered and is not in relation specifically to the rights of children – so children's rights are perhaps not the focus of change, and change in relation to children's rights might take a very long time. SCRA thinks that incorporation and a robust infrastructure to deliver and evaluate service provision are essential.

SCRA's preferred option is the creation of a suite of Scottish Children's Rights modelled on the UNCRC which sits within the overarching legislative framework of the Human Rights Act 1998 (HRA 1998) and the Charter of Fundamental Rights of the European Union. We see the suite of Scottish Children's Rights as the articles of the UNCRC, 'branded' for Scotland's children.

The Government of the United Kingdom has already said that the Charter of Fundamental Rights will not apply after the United Kingdom leaves the European Union, on 31st October 2019. The impact of leaving the European Union on rights will depend on the laws passed to manage the withdrawal. If the United Kingdom leaves with no agreed deal then the impact on rights could be significant, in particular the impact on children's rights, which are not covered by the Human Rights Act, but by the Charter of Fundamental Rights¹.

In the absence of a section 30 order under the Scotland Act 1998 to further devolve areas reserved for Westminster to Holyrood we think this is the best possible approach. In this approach we would need to ensure that none of the Scottish rights diminish children's rights from the UNCRC.

¹ Information taken from the Equality and Human Rights Commission, <https://www.equalityhumanrights.com/en/our-human-rights-work/what-does-brexit-mean-equality-and-human-rights-uk>.





2. Are there any other aspects that should be included in the framework?

Please explain your views.

SCRA thinks that an audit of children’s rights in Scottish systems, based on the proposed Bill of Scottish Children’s Rights will be required – so that areas where further significant work is required will be identified, prioritised and progressed.

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

Please explain your views.

Yes – SCRA agrees that a ‘duty to comply’ with UNCRC rights should be in place for public authorities in Scotland, but we should also go further. SCRA thinks that a duty to comply with UNCRC rights is not a strong enough position on its own, and that it should also be unlawful for a public body to act in a way incompatible with Scottish Children’s Rights (with a clear set of exception clauses for specific circumstances, for example where application of the rights would cause risk or harm to a child).

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

We are not sure that the general comments or state reports should have a legal status in Scots law other than the purpose for which they are written – to advise on developments and to indicate the position / expectation / standards of the international community. If we have a Bill of Scottish Children’s Rights, which mirrors the framework of UNCRC and the HRA 1998, we will be able to use the general comments and state reports to develop our domestic case law and further embed the children’s rights we have given effect to.

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

We think guidance should be developed in relation to the way in which the Scottish Judiciary should / could use European jurisprudence, the general comments and the resolution of complaints to the UN Committee on the Rights of the Child - brought under the communications procedure in the 3rd optional protocol. This could be a framework to signpost what might be helpful or it could be guidelines to be followed when making decisions in such cases.

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.

SCRA does not want to see the momentum around children’s rights diminish – but we are keen that this fundamental change to Scottish society and our social systems is robust and fully developed within the





entirety of 'rights' in Scotland. We cannot envisage an approach which considers the compliance of the whole statute book and we prefer the development of a Bill of Scottish Children's Rights.

We think that this Bill of Rights could be developed within the wider plan for a Statutory Human Rights Framework for Scotland – but it does not need to wait for the overarching framework. We agree with a participative approach to this and think that there is a growing movement of young people who would want to be actively involved in this work (across Champions Boards and other groups of young people, within Scottish schools and through a focus group approach, for example).

There would need to be a clearly articulated plan to tie the Bill of Children's Rights and the Statutory Framework of Human Rights together throughout all the work. It will be important for the intentions in relation to children's rights to be visible across Scotland, together with the Scottish Government's plans to achieve this vision.

We would be disappointed if work to progress this is impacted by the electoral timetable and the timing of Scottish elections.

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).

SCRA supports this approach from the Commissioner and Together, although we are not entirely sure how the Child Rights Scheme would / could operate and think that a focus on identifying and prioritising required change in our existing systems is more likely to have a meaningful impact in relation to promoting children's rights in the short to medium term.

The advantage of this approach, as we indicated earlier, is that it gives a clear and unequivocal message about the belief and vision of Scotland, however, it does not make clear what practical changes need to occur in order for the vision to be realised.

This approach also asserts the central importance of Child Rights and Welfare Impact Assessments (CRWIA). These are not embedded across the work of Scottish authorities yet and we think that more time needs to be given for these to become routine, accepted practice. As and when the CRWIA do become routine and accepted practice, improvements (particularly across policy and procedures) will add to the momentum behind the push to fully realise UNCRC rights.

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

Scots law has not developed an approach to 'self-executing' and other rights and we are not convinced that we will need to – if the Bill of Scottish Children's Rights and accompanying documentation are robust, clear and kept under review. In many respects we are already in a good place in Scotland – and we have enshrined children's rights in recent (and not so recent) legislation.





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?

It would be helpful if a document could be drafted and agreed that recognises and explains the limits on Scotland's legislative authority in this area as a result of the Scotland Act 1998. SCRA recognises that our suggestion – a Bill of Rights which mirrors the UNCRC in full – is complex as a result of reserved and devolved power sharing. We have considered this in depth – and think that the principled approach to a Bill of Rights for Scotland's children which mirrors UNCRC articles is the right one – even if the full Bill cannot be delivered without further discussion and legislation in relation to powers.

We support a staged approach to audit followed by implementation and would support a phased approach to implementation, if that meant some rights could be enshrined in Scots statute earlier than others.

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. SCRA's view is that this would be too complicated, would take far too long and would not embed the changes in the Scottish psyche or in the day to day work of systems for children and young people.

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

We think a plan of action needs to be developed, with a specific timetable. SCRA does not think this work should be rushed through, it needs to be right, comprehensive and future proof.

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

We would like to see the UNCRC mirrored in full within a Bill of Scottish Children's Rights which fits within a Statutory Framework of Human Rights in Scotland and within the relevant international law. We think that the approach suggested by the Commissioner and the Together Alliance could be adjusted in order to do this.

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.

We already commented that we were unsure how the Children's Rights Scheme referenced in the Bill proposed by the Commissioner and Together would work. We think the development of a scheme for Scotland would be helpful and would be one of the key ways to embed consideration of children's rights across the board.





14. Do you think there should be a “sunrise clause” within legislation?

Please explain your views.

Yes. These changes are vast, systemic, cultural and attitudinal, and may take a generation to be fully realised. We should not try to do this overnight and we should be strategic and systematic in our approach to the work. SCRA thinks that agreed definite milestones should be identified in a series of ‘sunrise’ clauses, and that the purpose of any such clause would be to eliminate drift and ensure progress towards clearly stated legislative objectives.

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.

SCRA is not prepared to estimate a time for this work – and would prefer to plan required change as a result of the audit approach we have already outlined.

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. Non legislative approaches will be crucial and all those referenced in the consultation document are supported.

Grass roots work directed and driven by Scotland’s children and young people will make this real and will embed the shift into the next generation of policy and decision makers in our country.

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. SCRA supports this approach and the focus it puts on assessing the compatibility of new legislative proposals.

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 process for challenge should be clear and robust.

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. Using this existing framework makes sense.





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. SCRA would also say that there needs to be a process to amend secondary legislation (where amendment is required) that is swift and clear. Alongside this there should be an accepted approach to what should be done during a period of remedy. Many systems rely on secondary legislation and will need to continue to operate effectively (the system of secure accommodation authorisation across Scotland for example).

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.

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.

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

No. In the absence of a national audit approach, it may be that incompatibility could be assessed in the same way that a Bill is assessed for compliance.

SCRA Practice & Policy Team, August 2019.

