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Consultation Response by the Law Society of Scotland

Children's Rights: Consultation on incorporating the United Nations Convention on the Rights of the Child into Domestic Law in Scotland

August 2019



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Child and Family Law and Constitutional Law sub-committees welcome the opportunity to consider and respond to the Scottish Government consultation: Children's Rights: Consultation on incorporating the United Nations Convention on the Rights of the Child into Domestic Law in Scotland. We have the following comments to put forward for consideration.

Theme 1: Legal Mechanisms for incorporating the UNCRC into domestic law

Question 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.

Yes, The Human Rights Act 1998, and its relationship with the Scotland Act 1998, is a useful model which sets out a helpful framework for implementation (subject to the comments later in this response) the elements which should be included are:

- A. implementation by an act of parliament,
- B. the framework should include: –
 - i. a requirement for legislation to be compatible with the UNCRC, similar to that contained in the Human Rights Act 1998 in relation to Acts passed by the UK Parliament and allowing courts to make a declaration of incompatibility
 - ii. obligations on public authorities relating to the UNCRC
 - iii. enforcement in the courts
 - iv. a requirement that legislation should be read and given effect in a way which is compatible with the UNCRC, similar to the requirement in section 3 of the HRA.

Reasons for adopting of these elements of the Human Rights Act 1998 are that the Act has been seen to be an effective mechanism for the promotion of human rights and their vindication, the courts have applied the Act successfully and that the act has not only brought rights home but made rights real.

One issue to note is that the Human Rights Act 1998 imposes a duty to comply. We refer to our response to question 3, below, in relation to whether there should be a duty to comply or a duty to have due regard to the UNCRC rights once incorporated.

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

We have no further comments on this point.

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

The duty to comply and the duty to have due regard are both well understood in the Scottish legal landscape.

A duty to comply is consistent with the approach taken in the Human Rights Act 1998 and in the Scotland Act 1998, whereas a duty to have due regard is consistent with the approach taken to equalities law. A duty to comply is a stronger requirement. Failure to comply could either lead to the public authority acting ultra vires as in the Scotland Act 1998 or to an award of damages as in the Human rights Act 1998. It would ensure that public authorities would be bound to respect the rights contained in the convention and ensure that the UNCRC is effectively embedded in the practice and policy of public authorities.

A duty to have due regard is a softer duty, which would allow public authorities, provided they had regard to the UNCRC rights, not to comply with them and to decide that they should be overridden by other considerations. It would allow greater scope for public authorities to adapt their approach and balance competing obligations.

There are differing views as to which duty would be most appropriate in relation to the incorporation of the UNCRC.

We note that there are an increasing number of duties imposed on public authorities, and that this is likely to continue to grow. Consideration should be given to how to ensure that public authorities have the necessary resources and capacity to meaningfully comply with the range of duties and are supported to manage situations where different duties may conflict. Failure to do so may result in a situation where the issues, including children’s rights, that are intended to be mainstreamed are lost in the wider context of compliance, only superficially addressed due to pressures of time and resource and desensitisation to the number of checks required.

Question 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?

The general comments and observations of the Committee on the Rights of the Child should not be given any juristic status in Scots law. The consultation paper makes it clear that there is no body of authoritative international jurisprudence to which a Scottish court could refer when the UNCRC requires consideration because there is no body analogous to the European commission of human rights

The general comments of the UN Committee on the Rights of the Child are not legally binding in international law nor are the Observations of the Committee in reports made under the UNCRC in response to reports made by states.

Such views may be informative, but they should not be made binding.

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

The Judicial Studies Institute for Scotland has a significant role to play in providing assistance to the courts in interpreting the UNCRC in Scots law.

If the UNCRC is implemented by statute it would be necessary for compliance audits to be carried out by public authorities and other bodies to ensure that the organisation complies with the UNCRC. A similar audit was conducted when the Human Rights Act 1998 was in the process of implementation.

However, the statutory obligation to respect judicial independence limits the capacity of the Scottish Government to issue statutory guidance on implementation of the UNCRC.

International jurisprudence will be helpful to the courts in interpreting the UNCRC in domestic law. This can include, as mentioned in the consultation paper, other human rights jurisprudence, or decisions of domestic courts of countries who have incorporated the UNCRC. Decisions of the UN Committee on the Rights of the Child under the Third Optional Protocol would also be valuable aids to interpretation.

Question 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.

This is a matter of which is essentially a decision for the Scottish Government. However, we support continuing to progress with the incorporation of the UNCRC at this stage.

The government may wish to continue now with the incorporation of the UNCRC before the development of a statutory human rights framework for Scotland in order to comply with the commitment made in the Programme for Government 2018-19 to implement the convention within the current Parliamentary session. Delay would mean that implementation would have to take place after the next Scottish Parliamentary elections.

Question 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).

The model presented by the advisory group convened by the commissioner for children and young people and together is a very helpful and useful model.

In our view it does not take account of the existing law which implements provisions of the convention which nor adequately deal with issues connected with the distinctions between devolved competence and reserved matters.

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

The principles of making good law should be to make law which is clear, coherent, accessible and effective.

If the decision with made to proceed with a suite of Scottish children’s rights, then the issues whether UNCRC rights are self-executing is resolved. The legislation will be the source of law which the courts, rights holders and duty bearers will primarily interpret.

Such an approach could consolidate (with amendment where necessary) those rights which are already incorporated in Scots law and provide the possibility of building on UNCRC rights.

It would also ensure that the legislation would comply with the devolution settlement.

If a suite of rights is not adopted, it will be necessary for the courts to consider this issue on a case by case basis. The different nature of different articles of the UNCRC means that a general rule as to whether the rights are self-executing will not be possible.

Where a UNCRC Article contains elements which are both reserved and devolved care would be needed to ensure that the drafting achieves the policy intention. The result however should be a better statute which fits with the structure of Scots law and is clear, understandable and useable.

Question 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?

See our response to question 8.

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

The method of transposition through making specific changes to domestic legislation is the approach that Scotland has taken to incorporating rights from the UNCRC to date. We agree that it is now appropriate to move to a more global application of the UNCRC to ensure compliance across the full range of rights in all areas of a child's life, to the extent that it is competent for the Scottish Government and Parliament to do so.

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

We refer to our answer to question 10, above, and 12, below. We do not favour continuing with a transposition model at this stage. However, if this approach was taken, there is a growing number of democratic innovations being used by parliaments and governments to support more participative democracy.

The 'mini- publics' model is one such innovation and comes in different formats including citizen juries, consensus conferences, deliberative polls and citizen assemblies. They all have some common principles such as:

- a) using a random selection of participants to underpin the legitimacy of the process;
- b) facilitated discussions;
- c) experts providing evidence and advocacy of relevant information; and
- d) the outcome of participants' deliberations is reported.

The First Minister announced in April that the Scottish Government was to explore Citizen Assemblies. In June the Government announced

"The process of establishing the new Citizens' Assembly to explore some of the major challenges facing Scotland has begun.

A contractor is being sought to randomly select 120 members of the public to serve on the Assembly. The individuals will be broadly representative of Scotland's adult population in terms of age, gender, socio-economic class, ethnic group, geography and political attitudes.

The Assembly will consider three broad issues:

- what kind of country Scotland should be
- how can Scotland best overcome challenges, including those arising from Brexit
- what further work is required to enable people to make informed choices about the future of Scotland

In the UK Parliament in late June six select committees of the House of Commons (Business, Energy and Industrial Strategy; Environmental Audit; Housing, Communities and Local Government; Science and Technology; Transport; and Treasury) have announced plans to hold a Citizens' Assembly on combatting climate change and achieving the pathway to net zero carbon emissions.

These models could provide a way to ensure adequate participation in the approach to defining the rights to be enacted.

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

We have concerns around the proposal for a suite of Scottish children's rights. Although we acknowledge the desire to ensure that legislation works in a Scottish context, we believe that there are risks to redefining the established rights of the UNCRC and would encourage the Scottish Government to maintain the wording of the UNCRC when incorporating the rights into Scottish law.

Developing a suite of rights carries the risk of selectivity or unintentional exclusion of rights, allowing for certain rights to be lost in the incorporation process if they are not felt to suit the Scottish context at this point in time or being deemed to be excluded if they are not expressly included. Scotland is obliged to respect all of the rights of the UNCRC and should ensure that they are all incorporated as a result of this process. A further risk is that in reformulating or restating the rights of the UNCRC, the meaning of the rights is altered, and we end up with a suite of rights that does not, in fact, reflect and incorporate the UNCRC. Maintaining the language of the UNCRC also ensures that we have a broader range of resources to use in interpreting those rights, as it will be consistent with international jurisprudence, research and writings, and the work of the UN Committee on the Rights of the Child. Finally, we have concerns that developing a suite of Scottish children's rights could result in unintentionally creating a more rigid document that represents a fixed understanding of children's rights at a particular point in time, rather than being treated as a living document able to adapt as society changes in the same way as the UNCRC and other international human rights treaties.

However, if a suite of rights is adopted, we take the view that this should be reformulated as the Rights of Children in Scotland — that avoids any imputation that there is some kind of nationality qualification to be a rights holder.

Theme 2: Embedding children’s rights in public services

Question 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.

No. We refer to our response to question 12.

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

As the consultation paper states, a ‘sunrise clause’ creates a two-stage process for the Act to come into effect. Stage one is the transition period to enable public authorities to prepare and ensure their practices and policies comply with the Act. At the end of the transitional period the duty to comply or to have due regard would apply without the need for any commencement order.

A sunrise clause would have the advantage of ensuring continued focus and momentum on incorporation of the UNCRC, in particular in the context of a very crowded policy and legislative environment. Public authorities would need sufficient resources to meet the requirements of the sunrise clause.

Question 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.

The exact timescales for implementation are for the Scottish Government to decide in consultation with the public authorities who will be required to prepare for any changes. However, the purpose of a sunrise clause is to ensure prompt implementation of legislation agreed by the Scottish Parliament to be a priority for implementation, and the timescales allowed should reflect that priority status.

Question 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.

The consultation paper notes that the Scottish Government will be “considering access, including digital technology, to support wider engagement”. We suggest that stronger emphasis should be given to the means of communication and access, in particular through the use of technology and social media.

Theme 3: Embedding compatibility and redress

Question 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, in order that children’s rights are fully respected the existing statute book and future legislation must be compatible with those rights.

The declaration of compatibility currently issued by the Presiding Officer, the introducing member or Minister is an important consideration in ensuring that our law complies with ECHR. We would expect that such a declaration in the context of UNCRC would have a similar effect.

Question 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, where there is a right there should be a remedy. If such rights are not capable of enforcement then the rights are at risk of being rendered ineffective.

Question 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. Enabling awards of financial compensation is a part of ensuring recognition of the enforceability of the UNCRC rights.

Question 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. Although the UNCRC lacks the guidance of a supra-national court as is available for the ECHR, the Scottish domestic courts are capable of addressing the challenges of this approach, and the model of section 3 of the HRA could be adapted for the UNCRC.

Question 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, the similar provision in the Human Rights Act 1998 is a useful way to ensure that our law is compatible with ECHR. The courts should be permitted to read down legislation to ensure compatibility. We note that, however incorporated, the UNCRC will be subservient to the HRA as the Scottish Parliament is not able to legislate in conflict with the HRA.

Question 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 mechanism would allow for the courts to highlight to the Parliament that there is an issue that needs to be remedied. It would also allow for preventative action to be taken to ensure that children's rights are not violated.

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

The Children and Young People's Commissioner for Scotland should be able to bring actions in relation to the UNCRC. This could follow the model provided by the Equalities and Human Rights Commission and the Scottish Human Rights Commission.



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