

Policy and Sustainability Committee

10.00am, Tuesday, 1 October 2019

City of Edinburgh Council response to the Scottish Government's Consultation on Children's Rights

Executive/routine	Routine
Wards	All
Council Commitments	

1. Recommendations

- 1.1 To note the Council's response to the Scottish Government consultation on the Children's Rights: Consultation on incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland. This was approved by the Chief Executive in consultation with the Convener and Vice Convener under urgency provisions contained within Committee Terms of Reference and Delegated Functions.

Andrew Kerr

Chief Executive

Contact: Beth Hall, Strategy Manager (Policy Unit)

E-mail: beth.hall@edinburgh.gov.uk | Tel: 0131 469 3538

City of Edinburgh Council response to Scottish Government's Consultation on Children's Rights

2. Executive Summary

- 2.1 This report includes the Council's response to the Scottish Government's consultation on Children's Rights. The response was compiled based on feedback from service areas, discussion with the Social Work Scotland, and alignment with Council outcomes and priorities.
- 2.2 As the deadline for submission of the Council's response fell before this meeting, the Convener and Vice Convenor were consulted on the intended response, and it was approved by the Chief Executive using the urgency provisions within Committee Terms of Reference and Delegated Functions. The response was subsequently submitted to Scottish Government. The committee is asked to note this response which is attached in *Appendix 1*.

3. Background

- 3.1 The Government believes that incorporation of the UNCRC has the potential to transform the experience of children and young people in Scotland, and that it is important to develop a model of incorporation that will deliver the best outcomes for children, young people and families in Scotland.

4. Main report

- 4.1 The consultation response, provided in *Appendix 1*, states that the Council welcomes the opportunity to provide a view on the Scottish Government's proposal to incorporate the UNCRC into domestic law in Scotland. It is important to note that there are many points of principle which need to be given consideration before concluding there is a need to move to legislation, and which should determine the scope of any Bill should legislation be deemed necessary.
- 4.2 Firstly, there is a need to consider the extent to which Scotland is already implementing or going beyond UNCRC and what can be achieved within the existing legal framework. The current statutory framework in Scotland includes

many Acts which are congruent with the UNCRC, or in some cases go further than the UNCRC. An outline of relevant legislation is given at *Appendix 2*.

- 4.3 The process of developing and implementing legislation, and the reporting requirements associated with that, come with financial and opportunity costs. Within the current fiscal environment across the public sector, there is a need to consider whether this would be the best use of resources, or whether there may be more cost-effective ways to improve outcomes for children and young people.
- 4.4 As a minimum, Scottish Government must ensure any proposals are fully and accurately costed, including any additional costs to duty bearers arising from increased responsibilities, and that these costs are agreed with duty bearers and sufficient additional resource is made available in order to meet them.
- 4.4 If the Scottish Government decided to proceed with legislation, direct incorporation will present risks because UNCRC rights are framed in general terms and not tailored to domestic context, there may be varying and conflicting interpretation of those rights. Within this context, a tailored and evolving approach to transposition which is developed through comprehensive consultation and co-production may be the most effective option.

5. Next Steps

- 5.1 Monitoring the progress of the incorporation of UNCRC rights into Scottish Law and reporting back to Committee on any implications for the Council.

6. Financial impact

- 6.1 There are no financial impacts arising from this report at this time. It is not possible to assess financial impact in incorporating the UNCRC into Scottish Law and at this stage; until a position becomes clearer from the Scottish Government further information will need to be obtained to evaluate the likely costs of different options.

7. Stakeholder/Community Impact

- 7.1 The response to the consultation has been developed from engagement with Council service areas led by the Council's Strategy and Communications Division. The move to enhance Children's Rights should have a positive impact on equalities, at this stage there is limited information available to complete any further impact evaluation.

8. Background reading/external references

- 8.1 [Equality, Diversity, and Rights Framework 2017 - 2021](#)

9. Appendices

- 9.1. Appendix 1: Children's Rights Consultation - The City of Edinburgh Council Response
- 9.2. Appendix 2: Existing Legislation which embodies UNCRC in Scots law

Appendix 1

Children's Rights Consultation – The City of Edinburgh Council Response

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

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

Yes

Please explain your views:

The transposition option could be achieved by developing a defined suite of children's rights in Scotland and a Bill with a corresponding framework of duties. Specific changes could be made to domestic legislation to ensure overall compliance. The Scottish Courts should be able to determine when a provision in primary legislation is incompatible with UNCRC.

One approach would be to make it unlawful (as with HRA section 6) for a public authority to act in a way that is incompatible with UNCRC. An alternative approach would be to place duties on public authorities to have due regard to UNCRC rights. The first is much stronger, leading to a duty to provide an outcome compliant with UNCRC.

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

Yes

Please explain your views:

Dovetail with domestic context e.g. in relation to the Children's Hearings system.

- 3 Do you agree that the framework for incorporation should include a "duty to comply" with the UNCRC rights?

Yes

Please explain why:

One approach would be to make it unlawful (as with HRA section 6) for a public authority to act in a way that is incompatible with UNCRC. An alternative approach would be to place duties on public authorities to have due regard to UNCRC rights. The first is much stronger, leading to a duty to provide an outcome compliant with UNCRC.

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

They may be illustrative of principles when there are conflicts and tensions between the needs and rights of rights holders and should assist in setting standards.

However, the legal and structural context is so varied that the relevance should probably be limited to illustration of matters of principle.

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

No response - this question could be more clearly expressed to help respondents provide relevant comment.

- 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?

Don't know

Please explain your views.:

It is extremely difficult to answer this in the abstract without an evaluation of the main pinch points within Scotland's current performance against UNCRC. For example, there should be an assessment of the progress through current and ongoing transposition of UNCRC in legislation and policy (e.g. such as GIRFEC).

There should also be an assessment of the risks and benefits in creating an urgency to rush through two waves of legislation.

A risk with direct incorporation is that, because UNCRC rights are framed in general terms and not tailored to domestic context, there may be a broad and conflicted spectrum of interpretation.

The consultation paper provides headings for the options, but there is a lack of contextual analysis that would assist with considering implementation options. Contextual analysis means representing other legal and policy changes in the pipeline in the next 5 years and the potential implications of legal reform that may be anticipated with Brexit.

- 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).

There is concern that the model implies that in the Scottish context imprecision about the interpretation of some rights could lead to a lot of conflicted processes and potentially some paradoxical outcomes. There needs to be further interrogation of the practical and probable outcomes if UNCRC is incorporated verbatim.

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

Legal evaluation should be pursued to understand the implications and how this would apply in the Scottish context.

- 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 response to Q1.

- 10** Do you think we are right to reject incorporating the UNCRC solely by making specific changes to domestic legislation?

Don't know

Please explain why:

There is insufficient analysis in the briefing to provide a balanced response.

The current approach, although piecemeal, does ensure a measured and thorough consideration of each change in relation to the rights of Scottish children. It does make sense to have a mechanism in the interim to ensure that no changes currently progressing are incompatible or potentially interpreted in a way that would be incompatible with UNCRC. One element of this mechanism already exists in terms of the Child Rights and Wellbeing Impact Assessment, guidance for which was due to be updated in March 2019.

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

“People” implies one size fits all and there is a need to consider the different approaches required for different constituencies. As indicated by the consultation paper this a complex question that would require a strategy with range of communication methods. This should also include some detailed public examination of the meaning, risks and advantages of this model from the perspective of rights holders and consider competing rights.

- 12** What is your preferred model for incorporating the UNCRC into domestic law?

Please explain why:

The preferred model for incorporating the UNCRC into domestic law would be a tailored and evolving but systematic approach to transposition, arising from comprehensive consultation and co-production with a defined suite of Rights for Scotland's children; anticipating in due course a Statutory Human Rights Framework for Scotland.

We also need to ensure through consideration of impact of each option upon children with protected characteristics especially children with a disability, children living in poverty, minority ethnic children; and those children with complex needs moving on in to adult life and services.

Theme 2: Embedding Children’s Rights in public services

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?

Yes

Please explain why:

There are positives as indicated in the briefing at p23. However, the Wales-only legislation that incorporated the UNCRC into Welsh domestic law was referred to as a devolved model on children’s rights in the UK. The Rights of Children and Young Persons (Wales) Measure 2011 (Welsh Measure) does not follow the model of incorporation recommended by the UN Committee, and does not ensure that children’s UNCRC rights can be enforced by the courts.

The Scottish context should be fully appreciated. Some aspects of UNCRC are reserved to the UK Parliament and in these areas, Scottish Parliament could only legislate if an order under section 30 of the Scotland Act 1998 was passed to devolve these areas. For example, in relation to nationality, asylum, immigration, international relations, misuse of drugs and some aspects of armed conflict.

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

No

Please explain why:

There should not be a “sunrise clause” within the legislation. Ministers should have discretion to bring the Bill in to force at the appropriate time. There is a danger that the sunrise could create a long-lasting negative impact if there is not further analysis of the risks as well as advantages of e.g. wholesale incorporation relative to measured but systematic transposition within a framework of children’s rights for Scottish children.

Further detailed information on the structural, practice, and resource gaps that would need to be addressed before a balanced comment can be made on the implications of a block sunrise clause. The debate about the Age of Criminal Responsibility (Scotland) Bill over 2-3 years illustrates the degree of care that needs to be taken in considering unintended consequences. In that much more limited example, the option of a sunrise clause was not followed.

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 why:

n/a

- 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

Please explain why:

A comprehensive strategy is needed that knits a potentially disintegrated range of positive changes, both recent and in progress, within a children's rights and human rights framework. The GIRFEC Practice model, underpinned by UNCRC has anticipated some of this intention.

Theme 3: Enabling compatibility and redress

- 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?

Yes

Please explain your views:

- 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?

Yes

Please explain your views:

- 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?

Don't know

Please explain your views:

The Council can neither agree or disagree with this statement. While this seems reasonable, there is insufficient information within the consultation paper to form a balanced view. Proportionality is key. There could possibly be a risk of fuelling a culture of combative 'no win no fee' litigation that will do little to protect rights and might conceivably have a negative impact on services and practice.

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

Please explain why:

In general, as a matter of principle this is consistent, and if there are specific elements of subordinate legislation that can be challenged on UNCRC grounds then there should be a mechanism for review. However, there could be a difficulty if some provision in secondary legislation is key within specific processes to the delivery of safety and best interests of a child or children involved. This is one of the reasons why careful tailoring of transposition makes sense alongside a defined Suite of Children's Rights, central in due course within a Scottish Statutory Framework for Human Rights.

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?

Yes

Please explain your views:

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?

Yes

Please explain your views:

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

Don't know

Please explain your views:

The recommendation that the ordinary test of standing in Scots Law which applies to challenges on judicial review (the test of sufficient interest), is reasonable, but this is again a technical question upon which some further argument working of the risks is necessary. Legal interrogation of this aspect should be considered in due course.

Appendix 2

Existing Legislation which embodies UNCRC in Scots law

Scotland has many binding legal strands, congruent with UNCRC. These include:

- **Children (Scotland) Act 1995** embeds Articles 1, 3, 5, 9, 12, 18, and 20. Section 11 is an example of goes further than the UNCRC. (When considering whether or not to make an order on matters such as child contact and residence and parental responsibilities and rights, the court “shall regard the welfare of the child concerned as its paramount consideration”. This compares to Article 3 of the UNCRC (best interests of the child) which provides that “the best interests of the child shall be a primary consideration” when considering all actions concerning children.
- **Standards in Scotland’s Schools etc. Act 2000**, sets out the provision of school education specifically relating to children's rights and the duty of the education authority and embeds Article 29.
- **Commissioner for Children and Young People (Scotland) Act 2003** embeds Articles 3, 12 and 42. It creates the post of Commissioner for Children and Young People in Scotland with the general function of promoting and safeguarding the rights of children and young people.
- **Criminal Justice (Scotland) Act 2003**. Section 51 of this Act embeds Articles 3, 19 and 37 by protecting children from physical punishment and making it illegal to punish children by shaking, hitting on the head or using an implement. (Note intentions of Equal Protection (Scotland) Bill at stage 1 and the Domestic Abuse (Scotland) Act in force from 1/4/19
- **Mental Health (Care and Treatment) (Scotland) Act 2003**. Section 2 of the Act makes specific provisions as regards securing the welfare of any child in respect of care or treatment given under the Act. This legislation is based on a set of rights and principles which promotes patient’s rights which includes that any function should be carried out for the maximum benefit of the patient, with the minimum necessary restriction on the freedom of the patient and having regard to the views of the patient.
- **Education (Additional Support for Learning) (Scotland) Act 2004** embeds Articles 6, 23 and 29 in the education system. It provides the legal framework which underpins the system for identifying and addressing the additional support needs of children and young people who face a barrier to learning.
- **Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005** provides for the protection given to children and young people from those who would wish to cause them sexual harm, or exploit them for sexual purposes and embeds Article 34. The Act also aims to improve the protection given to children from those convicted of sexual offences who still pose a risk of sexual harm.
- **Adoption of Children (Scotland) Act 2007** modernised the system of adoption in Scotland to provide long-term security for children who could not live with their families

and embeds Articles 3, 7, 8, 9,12, and 21 into the adoption system. A variety of family law reforms in tune with children's rights are currently under consideration.

- **Protection of Vulnerable Groups (Scotland) Act 2007** embeds Articles 3 and 34 by creating the legislative framework for a strengthened, robust and streamlined vetting and barring scheme for those working with children and protected adults in Scotland. There is legislation afoot to reform the scheme in tune with children's rights and human rights.
- **Children's Hearings (Scotland) Act 2011** reformed the children's hearings system and the Act embeds Articles 3, 4, 6, 8, 9, 12, 25 and 40 into the children's hearing system. (Many decisions are taken by Hearings, not courts. A Hearing in principle embodies many UNCRC rights.)
- **The Scotland Act 1998** requires that all Scottish Parliament legislation and all Scottish Government decisions and actions must be compatible with the rights set out in the Human Rights Act 1998 (HRA) and derived from the European Convention on Human Rights (ECHR). The HRA also makes it unlawful for public authorities in Scotland to act incompatibly with the ECHR. Section 3 of the HRA requires that legislation must be read and given effect to in a way that is compatible with ECHR. Courts can determine that a provision in primary legislation is incompatible with ECHR. Ministers have legal powers to take action to rectify legislation. A comparable framework could be adopted for UNCRC. The HRA imposes Human Rights duties on public authorities; and makes provision for breaches and remedies in domestic courts.
- **The Scottish Ministerial Code** recognises the responsibility of Scottish Ministers "to comply with the law, including international law and treaty obligations. (First Minister established an Advisory Group on Human Rights Leadership to work independently of the government to develop recommendations on how Scotland can continue to lead by example on human rights, including economic, social, cultural and environmental rights. The Group presented its report and recommendations to the First Minister on Human Rights Day, 10 December 2018.