

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

The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the national human rights institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

# Introduction

The Scottish Human Rights Commission (the Commission) welcomes the opportunity to provide a submission on the Scottish Government’s consultation on incorporating the United Nations Convention on the Rights of the Child (UNCRC/CRC) into domestic law in Scotland.

This consultation represents an important milestone in a long journey towards CRC incorporation and is thanks to the hard work and commitment of many children and young people and other actors in the Children’s Rights sector across Scotland.

The First Minister’s Advisory Group on Human Rights Leadership (FMAG), on which the Commission was represented, set out key elements of an outline Act of the Scottish Parliament to incorporate rights from other international treaties in their December 2018 report.[[1]](#footnote-1) Together and the Children and Young People’s Commissioner for Scotland (CYPCS) have also drafted a Children’s Rights (Scotland) Bill (CYPCS/Together proposal) to incorporate the CRC.[[2]](#footnote-2) The Commission has been informed by the thinking in these complementary proposals in our response and we have in some places made suggestions as to how the strengths of each could be drawn on to provide the best model for incorporation of the CRC.

# Summary of Key Points

Key points from our full consultation response are as follows:

* Children and young people in Scotland should have the highest standards of protection for their rights; the Commission is of the view that directly incorporating the CRC into Scots law, insofar as is within the legislative competence of the Scottish Parliament, is an important first step to achieving this.
* Direct incorporation of all of the protections contained within the CRC, insofar as is within the legislative competence of the Scottish Parliament, will provide the highest protection and the greatest legal certainty and clarity. By setting out Children and Young People’s rights in one place, the Scottish Government will send a strong message that children and young people in Scotland are rights holders and that public authorities have duties to respect, protect and fulfil their rights.
* In keeping with the ambition to ensure that children and young people have the highest standards of protection for their rights, direct CRC incorporation will provide a solid bedrock of protection which can be evolved under other legislative frameworks, allowing for further specificity and/or higher levels of protection for children and young people in future where required in a Scottish context.
* The Commission’s ambition is that everyone in Scotland, including children and young people, has the highest possible standard of rights protection. CRC incorporation is an important step on this journey; implementation of the FMAG’s recommendations to incorporate a range of rights in other international human rights treaties will allow us to further build towards this ambition.
* The Commission’s preferred model for incorporating the UNCRC into domestic law is a direct incorporation model. Any Bill to incorporate the CRC should have the following features:
	+ Provisions identifying the rights to be incorporated as Articles 1-42 of the CRC and the rights within Optional Protocol 1 on the involvement of children in armed conflict and Optional Protocol 2 on the sale of children, child prostitution and child pornography, insofar as these are within the legislative competence of the Scottish Parliament;
	+ Provisions specifying that the rights apply, at a minimum, to all children and young people in Scotland who are aged under 18;
	+ Provisions indicating that courts and tribunals must read and give effect to primary and subordinate legislation of the Scottish Parliament in a way which is compatible with the rights in the CRC;
	+ Provisions indicating that courts and tribunals must have regard for judgments from the European Court of Human Rights, General Comments of the UN Committee on the of the Rights of the Child and those of other UN Committees which are relevant to children and young people, and the Concluding Observations of the UN Committee on the Rights of the Child on the UK, as well other relevant comparative international jurisprudence;
	+ A duty on public authorities to comply with the CRC rights incorporated by the Act of the Scottish Parliament;
	+ A duty on public authorities to have due regard to the CRC rights incorporated by the Act of the Scottish Parliament in undertaking their functions; alongside a duty on Scottish Ministers to formulate a scheme such as that which has been developed in Wales to set out the mechanisms through which the due regard duty can be effectively achieved, such as CRWIA, a 3 yearly reporting cycle as is the case under the CYP14 Act and a duty to promote knowledge and understanding of the rights set out in the CRC.
	+ A provision enabling children and young people and others with sufficient interest to bring proceedings if and when a public authority has failed or will fail to comply with the duties imposed on it by the Act;
	+ A provision that the courts or tribunals may grant any relief or remedy within their power and which they deem just and appropriate, including damages;
	+ A strike down power of the courts, if deemed within competence, failing which a declaration of incompatibility provision where a court finds that a provision of legislation made by the Scottish Parliament is incompatible with incorporated CRC rights, and provisions that any finding of incompatibility must be addressed by the Scottish Parliament;
	+ Provisions which require adequate pre-legislative scrutiny to ensure that proposed Bills are compatible with incorporated CRC rights; and
	+ Acknowledgement of the devolved context and the legislative competence of the Scottish Parliament.

# 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? Please explain your views.

The Scottish Human Rights Commission welcomes the opportunity to comment on the legal mechanisms for incorporating the UNCRC into domestic law. In our answer to this question, we will recommend that a Human Rights Act Framework (HRA) provides a sound foundation for CRC incorporation, whilst recognising the significant scope for developing it further to secure practical implementation. The First Minister’s Advisory Group on Human Rights Leadership (the FMAG) and the Together/Children and Young People’s Commissioner for Scotland draft Children’s Rights (Scotland Bill) (the CYPCS/Together proposal) each give consideration as to how to ensure any new legislative framework should take account of practical implementation. Consideration of both the HRA and these recommendations form the basis of the Commission’s response below, and if adopted, would provide a robust framework for the protection and promotion of children and young people’s rights in Scotland. Our answer to this question therefore goes beyond simply identifying elements of the HRA framework we would like to see and develops our overall thinking on the Bill to incorporate the CRC. Where elements of this answer are relevant to other questions, we have repeated these suggestions below, for ease of analysis.

**Rights holders**

Any Bill should set out that as per Article 1 of the UNCRC, the rights incorporated by the Bill apply, at a minimum, to all children and young people in Scotland aged under 18.[[3]](#footnote-3)

**Identification of rights to be incorporated from the CRC and Optional Protocols**.

As with section 1 of the Human Rights Act 1998, this should refer to the rights in the Convention and Optional Protocols in later schedules. The Commission is of the view that by directly incorporating all CRC rights as set out in Part I Convention Rights (Articles 1 - 41), Part II Article 42, Optional Protocol 1 on the involvement of children in armed conflict and Optional Protocol 2 on the sale of children, child prostitution and child pornography, the most comprehensive foundation of protection to children will provided. The Commission recognises however that the scope of some of these protections covers areas of mixed devolved/reserved power[[4]](#footnote-4) and others relate predominantly or solely to reserved issues.[[5]](#footnote-5) Careful consideration must be given to whether an overarching provision limiting the application of the legislation to devolved competence adequately deals with this issue. In any event the fullest protection of CRC rights should be provided for within devolved competence.

**Interpretative tools**

Section 2 of the Human Rights Act 1998 identifies what courts and tribunals must take into account when determining an issue in connection with an ECHR right. Any future Bill to incorporate the UNCRC should have a similar section providing that courts and tribunals must have due regard to:

* judgments, decisions, declarations or advisory opinions of the European Court of Human Rights, among other sources, recognising that Article 41 of the Convention provides that if there is a higher standard set within domestic law or international law, then this should prevail;
* UN Committee on the Rights of the Child General Comments 1-21, with a provision that if the UK Government ratifies the Convention on Migrant Workers, then the joint General Comments of the Committee on Migrant Workers and the Committee on the Rights of the Child would also be included in this list;
* General Comments from other UN Treaty Body committees which are relevant to children and young people;
* UN Committee on the Rights of the Child Concluding Observations on the UK and the Concluding Observations of other UN treaty Committees which are relevant to children and young people’s rights; and
* Comparative international jurisprudence, as relevant.

**Interpretative obligations**

As with section 3 (1) of the Human Rights Act, and as is recommended by the FMAG and the CYPCS/Together proposal, any Bill to incorporate the CRC should provide that courts and tribunals must read and give effect to primary and subordinate legislation of the Scottish Parliament in a way which is compatible with the rights given effect by the incorporation of the CRC.

**Public authority duties under the Act**

Section 6 of the Human Rights Act sets out that it is unlawful for a public authority to act in a way which is incompatible with ECHR Rights. Any Bill to incorporate the CRC into Scots law should contain a similar provision, framed as a duty to comply with CRC rights, as recommended by the FMAG. There should also be an explicit duty on public authorities to have due regard for the incorporated CRC rights while carrying out their functions, as set out in section 20 of the CYPCS/Together proposal. This is important as it puts in place both obligations of conduct or process as well as those of result or outcome, thereby strengthening the practical implementation of children’s rights.

**Devolved Competence**

Any Bill to incorporate the CRC should set out that it applies to devolved areas. This was recommended in the context of the FMAG proposals. Similarly, the Commission notes that section 2(a) and 2(b) of the CYPCS /Together proposal refer to the exercise of devolved functions and to devolved law.

**Proceedings**

Section 7 of the HRA sets out that a person may bring proceedings against a public authority in an appropriate court or tribunal if that authority has acted, or proposes to act, in a way which is made unlawful by section 6 of the HRA. Any incorporation of the CRC should provide a similar power and enable a complainant to rely on the rights set out within the CRC and Optional Protocols, as specified in the relevant schedule(s).

**Standing**

Any Bill to incorporate the CRC should set out who has standing to bring proceedings, which should include individuals whose rights under the Act are said to have been infringed. As both the FMAG and CYPCS/Together proposal acknowledge, this should include persons or organisations with “sufficient interest” in the subject matter of the proceedings, which must be drawn broadly enough to include non-governmental organisations or charities.

**Remedies**

As with section 8 of the HRA, any Bill to incorporate the CRC should provide that courts or tribunals are able to grant effective remedies which are within their power, and which they consider just and appropriate. Both the FMAG and the CYPCS/Together proposal concur that these should include damages where a court decides that these will provide just satisfaction to the person affected.

The FMAG recommends either a strike down or declaration of incompatibility model, depending on whether the former is deemed within the legislative competence of the Parliament. The CYPCS/Together proposal recommends a strike down model.

Under Schedule 4 of the Scotland Act 1998, the Scottish Parliament is not able to amend the provisions of the Scotland Act 1998 which set out its own legislative competence. Therefore, it is not clear that limiting the Scottish Parliament from being able to legislate incompatibly with CRC rights, and thereby creating a strike down power for the courts, is an available option. Whilst the consultation takes the view that it would not be open to the Parliament to create new limitations on its own legislative competence, the Commission is of the view that the merits and risks of various options warrant further exploration. The Commission considers that a power of strike down provides the strongest legal remedy. However, if a mechanism to provide this within devolved competence cannot be established, the Commission endorses the adoption of a declaration of incompatibility model for CRC similar to that set out in section 4 of the Human Rights Act 1998. This would enable any provision of an ASP which is found to be incompatible with the incorporated CRC rights to be referred back to the Parliament, which would then have to ensure that the legislation could be amended to bring it into line with the judgment of the court.

**Legislative Scrutiny**

As is the case with the Scotland Act 1998 with regard to ECHR rights, any Act which incorporates the CRC should, at a minimum, contain a provision which would require any person introducing a Bill in the Scottish Parliament to declare that it is compatible with the incorporated CRC rights. In order to provide the evidence informing this statement, persons introducing a Bill to the Scottish Parliament should complete and publish a Child Rights Impact Assessment and Children’s Rights Memorandum akin to that produced by the UK government to the Joint Committee on Human Rights at Westminster. Furthermore, enhanced pre-legislative scrutiny for CRC compliance could be provided through the Parliamentary Committees supported by appropriate legal expertise and resources. This is line with both the recommendations of FMAG and also the Equalities and Human Rights Committees Inquiry Report ‘Getting Rights Right’ (2018).[[6]](#footnote-6)

**Schedules**

These should set out the rights to be incorporated. The Commission advocates that, Part I Convention Rights (Articles 1-41), Part II Article 42, Optional Protocol 1 on the involvement of children in armed conflict and Optional Protocol 2 on the sale of children, child prostitution and child pornography should be directly incorporated, insofar as these are within the legislative competence of the Scottish Parliament.

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

The Human Rights Act Framework, FMAG and the CYPCS/Together proposal have much in common. Comparative analysis of the detailed provisions within them highlights small differences, which if effectively synthesized, have the ability to offer the most robust and enduring framework for the respect, protection and fulfilment of children’s rights. All of these are discussed in our response to Q1 above, but we have reiterated them here:

**Rights holders**

* Any future bill should proactively identify rights holders as, at a minimum, all children and young people under the age of 18, as is set out in the Convention.

**Duties**

* The Commission is of the view that the ‘double duty’ set out within the CYPCS/Together proposal provides the highest standard available, since it ensures the outcome that rights are respected while at the same time requiring that knowledge and understanding of children’s rights are embedded in policy making processes. Given that public authorities have had duties placed upon them under the Children and Young People (Scotland) Act 2014, which include reporting duties in 2020, the Commission considers that there is no requirement for postponing the compliance duty.

**Pre-legislative scrutiny**

* As with the Scotland Act 1998, any Act to incorporate the CRC should include a provision that any person introducing a Bill to the Scottish Parliament must declare that it is compatible with the rights set out within the CRC and Optional Protocols. This should be accompanied by a Children’s Rights Impact Assessment and a Children’s Rights Memorandum to evidence the thinking behind such a declaration.
1. Do you agree that the framework for incorporation should include a “duty to comply” with the UNCRC rights? Please explain your views.

Yes.

For the reasons set out in the report by the FMAG[[7]](#footnote-7), the Commission believes that the duty to comply should be included. A duty to comply has an emphasis on outcome rather than process. It will result in the realisation of rights, rather than just the consideration of rights, and is a much stronger duty. It sets out the responsibilities of public authorities clearly and provides legal certainty

## Interpretation of Rights

1. 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?

UN Treaty Body Committee General Comments ‘are the authoritative view of the Committee which oversees a particular human rights treaty as to the substance of the rights.’**[[8]](#footnote-8)** They provide an authoritative explanation of the normative content of the rights set out in the UN Conventions, including:

* the general and specific obligations on States and public authorities;
* immediate and progressive obligations on States and public authorities; and
* examples of what would constitute a violation of any given right and the limited circumstances in which these could justified.

They will be invaluable to public authorities as they look to interpret international rights within a Scottish context for the purposes of law and policy making, as well as to courts and tribunals in making judgments on the actions or omissions of public authorities.

Concluding observations are ‘a UN Committee’s assessment of a State’s compliance with a particular treaty and recommendations for better observance**.’[[9]](#footnote-9)** It will be vital that Parliament, Government, public authorities and courts and tribunals are able to respond to the recommendations of the UN Committee and its assessment of what more Scotland needs to do to realise children and young people’s rights. Any Bill to incorporate the CRC should therefore ensure that courts and tribunals have regard to both General Comments and Concluding Observations of the Committee as interpretative tools.

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

The courts may be assisted by referring to jurisprudence from other countries which have incorporated the CRC into their domestic law.[[10]](#footnote-10) However, it should be acknowledged that General Comments of the Committee on the Rights of the Child and their concluding observations will provide a comprehensive framework for courts when interpreting the rights in the CRC.

## Statutory Human Rights Framework for Scotland

1. 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. Scottish public authorities already have a strong understanding of their obligations under the CRC because this forms the basis for all of the Scottish Government’s policy making with regard to children and young people. In addition, public authorities are already obliged to undertake reporting on the steps they have taken to secure better or further effect of the CRC requirements within their areas of responsibility under section 2 of the Children and Young People’s Act 2014. A final and more comprehensive step to secure the fullest protection of children’s rights within the constraints of the Scotland Act 1998, is to:

a) make the CRC justiciable so that children and young people can get redress for breaches of their rights;

b) create duties to make acts or omissions of public authorities which are incompatible with the CRC rights unlawful; and

c) create duties on public authorities to comply with and to have regard for the CRC rights and Optional Protocols in the exercise of any of their functions. This should have the effect of improving policy making and outcomes in relation to children and young people.

1. 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 Scottish Human Rights Commission welcomes the helpful and comprehensive model presented by the advisory group convened by the Commissioner for Children and Young People in Scotland and Together. We have a number of specific comments on the CYPCS/Together proposal which are as follows:

1. The Commission agrees that direct incorporation, insofar as is within the legislative competence of the Scottish Parliament, is an appropriate mechanism to incorporate the CRC as an internationally recognised baseline of protection for children’s rights.

2. The Commission agrees with the adoption of section 7-10 which follow the Human Rights Act 1998 model within the devolved context.

3. As it stands under the Scottish Human Rights Act 2006 section 6 (1), the Scottish Human Rights Commission does not have power to bring proceedings under judicial review. The Commission is of the view that the inclusion of the Commission within this Bill would have to be reflected in the Scottish Commission for Human Rights Act 2006 which sets out the Commission’s general mandate and specific legal powers. Any extension to our powers should be undertaken within a broader context and must consider our infrastructure, funding, staffing and any future legislative change such as further incorporation of international treaty rights.

4. The Commission notes that the First Ministers’ Advisory Group on Human Rights Leadership did not come to a view on whether the Scottish Parliament was able to legislate to provide a court with strike down powers. Under Schedule 4 of the Scotland Act 1998, the Scottish Parliament is not able to amend the provisions of the Scotland Act 1998 which set out its own legislative competence. Therefore, it is not clear that limiting the Scottish Parliament from being able to legislate incompatibly with CRC rights, and thereby creating a strike down power for the courts, is an available option. Whilst the consultation takes the clear view that it would not be open to the Parliament to create new limitations on its own legislative competence, the Commission is of the view that the merits and risks of various options warrant further exploration. The Commission considers that a power of strike down provides the strongest legal remedy. However, if a mechanism to provide this within devolved competence cannot be established, the Commission endorses the adoption of a declaration of incompatibility model for CRC similar to that set out in section 4 of the Human Rights Act 1998. This would enable any provision of an ASP which is found to be incompatible with the CRC to be referred back to the Parliament, which would then have to ensure that the legislation could be amended to bring it into line with the judgment of the court.

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

It is not clear that the issue of self-executing rights is relevant to the incorporation of international treaties into Scots law. In a dualist system such as Scotland, incorporating the right has the effect of ‘executing’ the right.

1. 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 Scotland Act 1998 sets out in Schedule 5, section 7 (2) (a) that the Scottish Parliament has legislative competence in the area of ‘observing and implementing international obligations.’ The recent UK Supreme Court judgment on the Continuity Bill confirmed that ‘observing and implementing international obligations’ is within the Scottish Parliament’s legislative competence.[[11]](#footnote-11) There is nothing to prevent the Scottish Parliament from making provisions for public authorities in Scotland to comply with the CRC, where these fall within the legislative competence of the Parliament, nor is there anything to prevent Scottish Ministers from developing guidance, where this is in relation to a function exercisable within devolved competence. Public authorities already have a strong understanding of devolved functions; moreover, they operate under policies which have been based on the CRC. Clarity could be provided through a potential Children’s Rights Scheme setting out how public authorities can implement a ‘due regard’ duty.

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

The Scottish Human Rights Commission agrees that specific changes to domestic legislation would not be the most appropriate way to incorporate the UNCRC. This is because the changes made to domestic legislation are unlikely to meet the standards of the UNCRC in all areas and a backstop of protection is not provided to challenge this. Moreover, such an approach can be patchy and misses out on the potential for culture change which full incorporation can precipitate.

Direct incorporation within the constraints of the Scottish Parliament’s legislative competence has the benefit of setting out all the rights in one place, without children and young people and the people who work alongside them having to hunt through the statute book or question whether domestic rights accord with internationally agreed standards. In addition, the direct incorporation of the CRC sends out a strong message about children and young people as rights holders, which would not be the case with multiple small changes to domestic legislation.

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

The Commission is of the view that what is termed as a “transposition model” here is not necessary in a context in which a broad range of duty bearers and rights-holders already have a strong understanding of the CRC provisions. A transposition model is not preferable to relying on the existing wording of the CRC, where this is within the legislative competence of the Scottish Parliament. Furthermore, Article 41 of the CRC sets out that:

“Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.”

In this way, CRC Articles can be read as a foundation for Children’s rights which can be given further substance through other domestic and indeed international laws.

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

Any Bill to incorporate the CRC should have the following features:

* Provisions identifying the rights to be incorporated as Articles 1-42 of the CRC and the rights within Optional Protocol 1 on the involvement of children in armed conflict and Optional Protocol 2 on the sale of children, child prostitution and child pornography, insofar as these are within the legislative competence of the Scottish Parliament;
* Provisions specifying that the rights apply, at a minimum, to all children and young people in Scotland who are aged under 18;
* Provisions indicating that courts and tribunals must read and give effect to primary and subordinate legislation of the Scottish Parliament in a way which is compatible with the rights in the CRC;
* Provisions indicating that courts and tribunals must have regard for judgments from the European Court of Human Rights, General Comments of the UN Committee on the of the Rights of the Child and those of other UN Committees which are relevant to children and young people, and the Concluding Observations of the UN Committee on the Rights of the Child on the UK, as well as other relevant comparative international jurisprudence;
* A duty on public authorities to comply with the CRC rights incorporated by the Act of the Scottish Parliament;
* A duty on public authorities to have due regard to the CRC rights incorporated by the Act of the Scottish Parliament in undertaking their functions; alongside a duty on Scottish Ministers to formulate a scheme such as that which has been developed in Wales to set out the mechanisms through which the due regard duty can be effectively achieved, such as CRWIA, a 3 yearly reporting cycle as is the case under the CYP14 Act and a duty to promote knowledge and understanding of the rights set out in the CRC;
* A provision enabling children and young people and others with sufficient interest to bring proceedings if and when a public authority has failed or will fail to comply with the duties imposed on it by the Act;
* A provision that the courts or tribunals may grant any relief or remedy within their power and which they deem just and appropriate, including damages;
* A strike down power of the courts, if deemed within competence, failing which a declaration of incompatibility provision where a court finds that a provision of legislation made by the Scottish Parliament is incompatible with incorporated CRC rights, and provisions that any finding of incompatibility must be addressed by the Scottish Parliament;
* Provisions which require adequate pre-legislative scrutiny to ensure that proposed Bills are compatible with the incorporated CRC rights; and
* Acknowledgement of the devolved context and the legislative competence of the Scottish Parliament;

For further discussion on these features, please also see our response to Q1.

# THEME 2: Embedding Children’s Rights in public services

## Children’s Rights Scheme

1. 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 why.

[x]  Yes [ ]  No

The Commission agrees that the Scottish Government should produce a Children’s Rights Scheme, similar to the Welsh example. This will ensure that the Scottish Ministers set out the mechanisms through which they will implement a new due regard duty. Many of these will be similar to those already set out in Part 1 of the current Children and Young People’s (Scotland) Act 2014, such as the requirement to provide 3 yearly reporting to the Scottish Parliament on actions of the Scottish Ministers to further the requirements of the CRC as well as the development of Child Rights and Wellbeing Impact Assessments. It should be acknowledged that although the existing duties under the CYP Act 2014 are similar to what could be set out in such a scheme, Scottish Ministers are currently under a duty to ‘keep under consideration whether there are any steps they could take to which would or might secure better or further effect in Scotland of the UNCRC requirements.’ This is significantly less robust than a duty to have due regard to the CRC and therefore, restating and further developing the mechanisms by which a due regard duty could be achieved is a valuable process.

Research by Simon Hoffman and Sean O’Neill on the efficacy of the Measure of Implementation in Wales found that “we have no reservations in concluding that the Measure has achieved its objective of embedding the Convention in policy-making in Wales. The due regard duty has established a new framework for policy development, which in turn has resulted in greater attention to, and visibility for, children’s rights.”[[12]](#footnote-12)

## Preparation for public authorities

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

[ ]  Yes [x]  No

As the consultation document acknowledges, the rights set out within the CRC have formed the basis for Scottish Government policy for some time. Public authorities are already under a duty to report under section 2 of the Children and Young People’s (Scotland) Act 2014 and have already developed a good understanding of the CRC. In the Commission’s view, there is no need for a sunrise clause and a full compliance duty can commence with immediate effect.

1. 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.

Not applicable

## Additional non-legislative activities to progress implementation of the UNCRC

1. 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 [ ]  No

# THEME 3: Enabling compatibility and redress

## Certification of Scottish Parliament Bills

1. 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.

[x]  Yes [ ]  No

A requirement to provide a statement of compatibility with children’s rights under the CRC will go some way to ensuring that whoever introduces a Bill to the Scottish Parliament will need to undertake an assessment and analysis of the effect of the Bill on children’s rights. Such pre-legislative scrutiny could take the form of Child Rights Impact Assessments and a Children’s Rights Memorandum.

Furthermore, enhanced pre-legislative scrutiny for CRC compliance could be provided through the Parliamentary Committees supported by appropriate legal expertise and resources.

This should contribute both to improving outcomes for children and young people and ensuring that the Scottish Parliament is fulfilling its role as a guarantor of human rights.

## Remedies and Redress

1. 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.

[x]  Yes [ ]  No

Accountability is the cornerstone of human rights law. The Committee on the Rights of the Child indicates in its General Comment No 5 that ‘incorporation should mean that the provisions of the Convention can be directly invoked before the courts.’[[13]](#footnote-13)

Without a provision to make the rights set out within the CRC and the Optional Protocols justiciable, there are:

* no opportunities for redress for a person who is affected by the actions or omissions of a public authority with respect to their rights;
* no effective teeth to ensure compliance and enforcement of rights within the CRC.

Failure to provide an effective remedy is contrary to the Convention itself and would call into question the Government’s commitment to incorporate the CRC. As the Committee on the Rights of the Child notes ‘for rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties. Children’s special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance. Where rights are found to have been breached, there should be appropriate reparation, including compensation.’[[14]](#footnote-14)

1. 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.

[x]  Yes [ ]  No

Section 8 of the Human Rights Act enables courts to award damages, if this is within their power and if they are satisfied that this is necessary to afford just satisfaction the person concerned. The Commission is of the view that it would be appropriate to follow this model when incorporating the CRC. The Committee on the Rights of the Child notes that ‘where rights are found to have been breached, there should be appropriate reparation, including compensation.’[[15]](#footnote-15)

1. 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?

[x]  Yes [ ]  No

The Commission agrees that UNCRC rights should take precedence over provisions in secondary legislation as is the case under the HRA under ECHR rights.

1. 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.

[x]  Yes [ ]  No

This is a key feature of the Human Rights Act 1998 and forms part of the recommendations by FMAG. We agree that any Bill to incorporate CRC should include provisions requiring an ASP to be interpreted and applied as far as possible in a manner which is compatible with the rights set out in the CRC.

1. 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.

[x]  Yes [ ]  No

It will be critical for the Bill to include a provision that would enable the courts to make a ruling as to whether a provision in an ASP is (in)compatible with the rights set out in the CRC. The aim of this is to ensure that within a devolved context, the highest possible level of protection is available for the rights of children and young people. While it is not clear if this could include some kind of ‘strike down’ power, by following a declaration of incompatibility model, the Scottish Parliament would be able to reconsider and amend any legislation found to be incompatible with the incorporated CRC rights.

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

[ ]  Yes [x]  No

Following the recommendations of the FMAG, the Commission takes the view that anyone whose rights under that Act are said to have been infringed and anyone with “sufficient interest in the subject matter of the proceedings” should be able to bring proceedings.

Ends

Scottish Human Rights Commission

1. First Minister’s Advisory Group on Human Rights Leadership, December 2018, ‘Recommendations for a new human rights framework to improve people’s lives’ available at <https://humanrightsleadership.scot/> [↑](#footnote-ref-1)
2. Together (Scottish Alliance for Children’s Rights) and Children and Young Person’s Commissioner for Scotland, 20th November 2018, Children’s Rights (Scotland) Bill, available at <https://www.cypcs.org.uk/downloads/Incorporation_/Childrens_Rights_Scotland_Bill_2019.pdf> [↑](#footnote-ref-2)
3. Consideration could also be given as to whether it is possible to extend protections to young people aged 18-26 who fall under Section 29 of the Children (Scotland) Act 1995, i.e. those care experienced young people who are eligible for aftercare, especially with respect to Articles 4, 12 and 27. [↑](#footnote-ref-3)
4. E,g Article 33 of CRC [↑](#footnote-ref-4)
5. E.g Articles 7, 8, 10, 11, 22 of CRC [↑](#footnote-ref-5)
6. Scottish Parliament Equalities and Human Rights Committee, November 2018, Getting Rights Right, available at <https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2018/11/26/Getting-Rights-Right--Human-Rights-and-the-Scottish-Parliament-3> [↑](#footnote-ref-6)
7. Supra 1, p 28-29 [↑](#footnote-ref-7)
8. Scottish Human Rights Commission, 2018, ‘Social Security (Scotland) Bill Stage 2 Briefing

Amendments – The Right to Social Security’ available at <http://www.scottishhumanrights.com/news/commission-calls-for-due-regard-duty-to-advance-right-to-social-security/> [↑](#footnote-ref-8)
9. Ibid [↑](#footnote-ref-9)
10. For examples from several different countries, see Lundy et al, November 2012, ‘The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries’ UNICEF, available at [https://www.qub.ac.uk/research-centres/CentreforChildrensRights/filestore/Filetoupload,485596,en.pdf](https://www.qub.ac.uk/research-centres/CentreforChildrensRights/filestore/Filetoupload%2C485596%2Cen.pdf) [↑](#footnote-ref-10)
11. The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland (Scotland) [2018] UKSC 64, paragraph 30 [↑](#footnote-ref-11)
12. Hoffman S and O’Neill, S, August 2018, ‘The impact of Legal Integration of the UN Convention on the Rights of the Child in Wales’, Manchester: Equality and Human Rights Commission [↑](#footnote-ref-12)
13. The Committee on the Rights of the Child, 2003, ‘GENERAL COMMENT No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6) CRC/GC/2003/5

27 November 2003 [↑](#footnote-ref-13)
14. Supra 13 [↑](#footnote-ref-14)
15. Ibid [↑](#footnote-ref-15)