



FACULTY OF ADVOCATES

Response from the Faculty of Advocates

to

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

Introduction

The Faculty of Advocates welcomes the opportunity to comment on the Scottish Government consultation on incorporating the United Nations Convention on the Rights of the Child (“UNCRC”) into the domestic law of Scotland.

General Comments

We are aware that incorporation raises potentially contentious questions of policy which are for the Scottish Government and the Scottish Parliament, and not for the Faculty to offer any view. The Faculty proposes therefore only to offer advice and opinions on issues of law.

Incorporation of the UNCRC into domestic law is not straightforward. The Convention contains an internationally agreed set of disparate aspirations, rather than a legislative framework. As a result it is neither internally consistent, nor is it entirely consistent with other rights instruments. For example article 3 requires courts of law, administrative authorities and legislative bodies to treat the child’s best interests as a primary consideration,

but article 21 concerning adoption has the best interests of the child as the paramount consideration. The notion of adoption, however, may be of itself inconsistent with the child's article 8 right to identity and may conflict with article 9 rights to contact.¹ There is also potential for conflict with rights under the European Convention on Human Rights ("ECHR"), such as the article 8 rights of parents to private and family life. The child's right to privacy under article 16 of UNCRC is differently framed to the similar right in article 8 of ECHR. Incorporation therefore involves nuanced issues which may be difficult for public bodies to apply and courts to balance.

The steps being proposed would take the UNCRC beyond its current status as an international commitment, recognised in Scotland, and generally used as an aid to interpretation.² Incorporation of UNCRC is capable of ensuring that children have effective rights in matters of public provision, such as the right to an adequate standard of living under article 27³ and rights in terms of health care (article 24), social security (article 26) and education (articles 28 and 29). As such, incorporation should result in a more effective framework for children's rights than is currently the case.

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.

Answer:

The HRA has been part of our domestic law for some 20 years now. The framework has been tried and tested. Those working with the HRA, for example employers, solicitors and the Courts, broadly know how the model works. As such, it would be beneficial for the framework of the HRA to be followed in the model for incorporation of the UNCRC into domestic law.

¹ This was pointed out by *Sloan* in 'Conflicting Rights: English Adoption Law and the Implementation of the UN Convention on the Rights of the Child' *Child and Family Law Quarterly*, Vol. 25, No. 1, pp. 40-60, 2013.

² As in *R (DA and others) v Secretary of State for Work and Pensions* [2019] UKSC 21 at [71]ff.

³ See *R (JS) v Work and Pensions Secretary (SC(E))* [2015] 1 WLR 1449.

However, difficulties may arise if there were to be a conflict between the HRA, ECHR and the UNCRC. In our view, the HRA and ECHR would need to prevail. The HRA and ECHR protect the fundamental rights and freedoms which are central to democracy. The Scottish Parliament could not, in any event, pass legislation that conflicted with ECHR.⁴ This is recognised in the model for incorporation proposed by the Children’s Commissioner and ‘Together’.

Question 2

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

Answer:

We have no further aspects to propose.

Question 3

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

Answer:

This is a matter for the Scottish Government and the Scottish Parliament to weigh.

A duty to have due regard will not necessarily result in compliance with children’s rights. There is, of course, a substantial body of case law in relation to the ‘due regard’ duty⁵. It allows authorities to balance compliance with other considerations, including other duties. ‘Due regard’ could therefore be viewed as a “soft” approach which does not provide for rights to be easily enforced. On the other hand, it may be considered more consistent with a Convention that is aspirational in its design.

⁴ Scotland Act 1998, s 29(2).

⁵ Eg *R. (on the application of Domb) v Hammersmith and Fulham LBC* [2009] EWCA Civ 941; *R. (on the application of Meany) v Harlow DC* [2009] EWHC 559 (Admin); *R. (on the application of Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141.

An alternative, and even softer approach, would be to “have regard to the principles set out in the UNCRC”. This would avoid difficulties with any inconsistencies within the UNCRC. This general approach was taken in the Victims and Witnesses (Scotland) Act 2014, which sets out in section 1A(d) “*when dealing with victims who are children, the best interests of the child should be considered, taking into account the child's age, maturity, views, needs and concerns...* ”.

The ‘duty to comply’ approach would be more robust than any kind of regard-based approach. It is more likely to result in enforceable rights, but that in turn will give rise to greater complexity where there are conflicting rights both within UNCRC and with respect to other rights and duties.

Either approach is likely to result in litigation. The former will, however, engage the courts in decisions regularly undertaken in judicial review proceedings. The latter will involve decisions as to whether rights are self-executing and is more likely to draw the courts into areas of policy that may be in direct conflict with democratically elected bodies, such as local authorities, or the national legislature.

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

Answer:

In our view, there should be a duty to consider the General Comments by the UN Committee and Observations of the Committee on reports made by States which are already party to the UNCRC. These reports cannot, however, be treated as determinative. The UN Committee is not a democratically elected body. Application of the UNCRC should be a matter for domestic agencies and decisions by Scottish courts, in the Scottish context. The courts should be trusted to give whatever weight they see fit to such General Comments, in the domestic context and in the particular circumstances of the case before them.

Question 5

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

Answer:

Regard should be had to international jurisprudence. This already occurs in relation to other international instruments such as the Hague Convention on the Civil Aspects of International Child Abduction 1980, where the decisions of courts in other states are referred to.⁶ There would appear to be no reason why consideration of international jurisprudence could not also offer assistance for the purposes of interpreting the UNCRC.

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.

Answer:

We see no reason to delay any proposed legislation relating to UNCRC. ECHR is already incorporated, both by the Human Rights Act 1998 and by the limitations on devolved powers in the Scotland Act 1998. There is thus already a framework for human rights in Scotland. There would be benefits to advancing with the UNCRC as it is a well-recognised and respected instrument, aspects of which have already been incorporated on a piecemeal basis. There may be benefits to making this Convention a trailblazer for any future wider framework.

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).

Answer:

Having considered the draft model, we can see some attractions to the way it is drafted, particularly in section 7. However, there may require to be some redrafting of the model. For example, in section 14(f) a test of proportionality will generally be part of the consideration of unlawfulness, rather than a factor which may excuse an unlawful act or

⁶ *Eg C v N* [2018] CSIH 34.

omission. The current drafting of this section arguably places these considerations in the wrong order.

Additionally, the purpose and aims of “A Children’s Rights Scheme” are not clear from sections 22-27 of the model. If acts or omissions that are incompatible with UNCRC are unlawful then it is difficult to see the purpose of the Scheme, save as an internal mechanism by which the Scottish Ministers check that they are fulfilling their obligations.

If a Scheme as drafted, or similar to, the above were to be brought into force as part of the incorporation of UNCRC into domestic law then sections 1-4 of the Children and Young People (Scotland) Act 2014 would presumably be repealed.

Question 8

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

Answer:

The issue of whether particular UNCRC rights are self-executing is difficult to envisage in the abstract. As such, we would suggest that determination of this issue should be by the Courts on a case by case basis.

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?

Answer:

It is in the nature of the UNCRC that there will be uncertainty. It will not be possible at the outset to offer clear guidance and clarity to rights holders and duty bearers. If the court is to interpret UNCRC, then previously published guidance will not be binding. Attempts to provide guidance at the outset risk causing unnecessary complications and misinterpretation of rights. In any event, as with other similar international instruments, the UNCRC falls to be treated as a living instrument, applicable in the context of international considerations prevailing at the particular time.

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.

Answer:

Incorporation of the UNCRC into domestic law piecemeal by specific changes may provide certainty to rights holders and duty bearers. However, a piecemeal approach will not give effect to the UNCRC as a whole. General incorporation will give better effect to the UNCRC and will allow development of the law in keeping with changes in society domestically and internationally.

Question 11

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

Answer:

Transposition by a suite of children's rights may have the best of intentions, but would be different from incorporation as it would result in a set of rights based on a domestic interpretation of UNCRC that may, or may not, be consistent with the real thing. It would be less securely related to the international context and interpretation, and may not have the flexibility of a 'living instrument'.

It is unclear how a participative process could be effective in relation to the incorporation of the UNCRC into our domestic law. The rights contained within the UNCRC are not subjective. They exist objectively apart from any domestic consensus. Further waiting to secure the agreement of a range of persons will delay incorporation. The transposition model is an unattractive basis for incorporation of UNCRC into Scots law. A participative approach is unnecessary. This consultation can provide assurances to the public. The provision of information to the public is what is required, not participation.

Question 12

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

Answer:

The present position is that Scotland has regard to obligations relating to UNCRC on a piecemeal basis. UNCRC is an aid to interpretation.⁷ Transposition is unattractive for the reasons outlined above. If the Scottish Ministers propose to give effect to children's rights in terms of UNCRC, and to make these an overarching consideration, then this will require to be by direct reference to the UNCRC as a whole. It is a decision for Ministers and for the Scottish Parliament whether incorporation takes the form of a "due regard" duty or a duty to comply. In either case the outcome may be to impose significant new duties on public authorities and the potential for litigation. Litigation may, however, serve the objective of clarifying the position and ensuring that rights are real, in the sense of effective and enforceable.

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.

Answer:

We are not convinced that a Scheme is necessary, if UNCRC is incorporated.

Question 14

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

Answer:

We would propose that the legislation follows the usual course of being brought into force by statutory instrument at a point where duty bearers have been able to prepare. That will give time for further consultation on what is necessary to ensure proper implementation of the UNCRC into domestic law. Allowing sufficient time prior to implementation would also provide time for any necessary secondary legislation to be drafted and brought into force.

Question 15

⁷ See *eg S v S* 2002 SC 246.

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.

Answer:

Although we do not consider a “sunrise clause” to be appropriate, we would suggest that further consultation will be required on the time needed for preparations. We recognise that certain public bodies may require more time than others.

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.

Answer:

This question raises policy issues which we consider are beyond the scope of our response.

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.

Answer:

Yes. Legislation needs to be compatible with children’s rights given the treaty obligations associated with UNCRC. As such it would make good sense for a statement to accompany any new legislation introduced in Parliament.

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.

Answer:

Yes. If UNCRC rights are to be effective, then it must be possible to challenge public authorities on the ground of acts or omissions that are not compatible with the Convention. As stated on p 29 of the Consultation document, vindication of rights is a basic feature of a constitutional democracy, in addition to helping to guarantee compliance and providing a

forum for interpretation. Some children will have capacity⁸ to make a challenge for themselves. Others may require to act through their legal representative.⁹ It must however be possible for a general issue about compliance to be raised. The Commissioner for Children and Young People in Scotland would be the logical guardian of children's rights. He or she would be well placed to identify any violations and take appropriate action to protect the rights of children and to make a challenge on behalf of a child who asserts that their rights have been breached. The Faculty offers support for the provision of standing for (*inter alia*) the Commissioner for Children and Young People as provided in section 12(b) of the proposed Children's Rights (Scotland) Bill.

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.

Answer:

Yes. The approach to awards of financial compensation for just satisfaction damages under the HRA is tried and tested. Decisions made in relation to just satisfaction damages under the HRA should be considered and used as guidance for awards of financial compensation made for breaches of rights in terms of the UNCRC. It may however take time to develop a body of case law on this. Unlike ECHR, there is no supra-national court such as the European Court of Human Rights to establish a standard.

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?

Answer:

Yes, we agree. It is a logical corollary of enacting supervening legislation of this kind that secondary legislation can be challenged. There is already a precedent for a self-limiting provision relating to secondary legislation (but not primary legislation) in the Human Rights Act 1998.

⁸ Age of Legal Capacity (Scotland) Act 1991, s 2(4A) and (4B).

⁹ Usually a parent, see Children (Scotland) Act 1995, s1(1)(d) and 2(1)(d).

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.

Answer:

Yes. A requirement for 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, is essential for effective incorporation of the UNCRC into domestic law. This should include the power to “read down” legislation, if necessary to render it compliant.¹⁰

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.

Answer:

Yes. On the model of the Human Rights Act 1998, there should be provision for a declaration of incompatibility, so that the Scottish Parliament can remedy any provision in primary legislation that is found to be in violation of UNCRC.

Question 23

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

Answer:

No. The decision of the Supreme Court in *Axa General Insurance Limited and Others v The Lord Advocate* [2011] UKSC 46 which removed the restrictive legal test of ‘title and interest’ and replaced the test with one of ‘standing’ should be applied. Lord Hope stated that:

"...the time has come to recognise that the private law rule that title and interest has to be shown has no place in applications to the court's supervisory jurisdiction that lie in the field of public law" (per Lord Hope para 62).

¹⁰ As in *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

A personal interest need not be shown if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public they seek to represent.

As indicated above the Faculty suggests that for the purposes of effective incorporation of the UNCRC into our domestic law, there should be provision for the Commissioner for Children and Young People to bring challenges before the courts similar to the way in which the Equalities and Human Rights Commission can. In child cases it is not desirable to wait for a child victim before a challenge can be brought by, or on behalf of, that child. There should be provisions to allow the Commissioner to bring challenges in advance of any harmful effect of legislation,¹¹ similar to the attempted challenge brought in Northern Ireland in relation to the smacking of children. We note that provision is made for the Commissioner to take such actions in section 12(b) of the Bill.

¹¹ Cf the position of the Commissioner in NI, who failed on lack of standing in a challenge to legislation relating to physical punishment of children, see *Re Northern Ireland Commissioner for Children and Young People's Application for Judicial Review* [2007] NIQB 115, [2009] NICA 10.