

Draft Children's Rights (Scotland) Bill

NOTE

Context

1. The Children and Young People's Commissioner for Scotland and Together (Scottish Alliance for Children's Rights) have convened an Advisory Group to advise on incorporation of the UN Convention on the Rights of the Child (UNCRC) in Scotland. To assist the Advisory Group to visualise how the objectives of incorporation might be interpreted in a legislative proposal, Dr Simon Hoffman (Observatory on Human Rights of Children) has prepared a draft bill, to be used as a reference document. This draws on approaches to human rights integration in Wales, in the UK and internationally.
2. The Bill has been drafted to give effect to the following objectives:
 - The desire to incorporate the UNCRC in Scotland.
 - The aim of ensuring a proactive culture of children's rights across government at all levels in Scotland.
 - The aim of providing redress where children's rights are breached.
 - The need to ensure that government at all levels is able to act in the best interests of all children in Scotland.
3. The drafting approach is underpinned by recognition that in order to effectively incorporate the UNCRC in Scotland legislation needs to:
 - a. Regulate policy and legislative decision-making at an early stage in development (a proactive approach);
 - b. Provide an effective mechanism for redress where children's rights are breached (a reactive approach).

With this above in mind the Bill has been drafted in three parts.

NB the numbering used below DOES NOT refer to sections in the draft Bill.

Part One – The Convention, Relevant Authorities and the Overarching Objective

4. Specifies which articles of the UNCRC (1-42) and its First and Second Optional Protocols are incorporated: these are drawn by way of a schedule making them part of Scots law. Clarifies that incorporation is for the purposes of the Act (i.e. in application to devolved competences, as is further specified in part 2 and 3).
5. Defines relevant authorities subject to the Act: the Scottish Parliament, Scottish Ministers and Scottish public authorities. Applying the Act only to these authorities when they are exercising devolved powers, or acting in devolved areas.

6. Provides for overarching objectives: requiring relevant authorities to seek to ensure that they respect, protect and fulfil rights.

Part Two – Securing Compatibility and Promoting the Rights of Children in Scotland

7. Makes acts or omissions by a relevant authority which are incompatible with the Convention and the Optional Protocols (as drawn down) potentially unlawful, including legislation introduced by the Scottish Parliament.
8. Authorises a court to determine whether an unlawful act is committed. Sets out factors to be taken into account by a court to decide if an act or omission is an unlawful act. Enables the court take into account the views of individual children affected by a claimed unlawful act and provides for a proportionality assessment of whether an act of omission is an unlawful act.
9. Sets out ancillary requirements concerning confirmation of compatibility by Ministers.
10. Provides for enforcement and redress, including through the award of damages. Empowers courts to restrict damages in some cases. Empowers a Higher Court to declare legislation passed by the Scottish Parliament incompatible with the UNCRC and unlawful. Provides that unlawful legislation shall cease to have effect. Empowers a Higher Court to make directions as to the consequences of a declaration that legislation is incompatible and therefore unlawful, including deferring the consequences of such a declaration to allow the incompatibility to be remedied.
11. Clarifies the scope and extent to the Act as confined to the regulation of devolved competences, and/or the exercise of powers in devolved areas.

Part Three – Promoting the Rights of Children in Scotland

12. Introduces a duty on relevant authorities to have due regard to the UNCRC and Optional Protocols (as drawn down). Elaborates the due regard duty to ensure attention to the overarching objective and requiring relevant authorities to take account of explicatory output from the UN Committee on the Rights of the Child.
13. Requires Scottish Ministers to make a Children’s Rights Scheme setting out mechanisms to give effect to the due regard duty and the overarching objective. Making a Child Rights Impact Assessment a mandatory requirement.
14. Requires the Scottish Ministers to publish compliance reports (which may be published as part of any report the Scottish Ministers are required to publish under Part 1 of the Children and Young People (Scotland) Act 2014) on how they have met the due regard duty and the overarching objective.
15. Sets out ancillary requirements concerning consultation and publication of the above.