



# United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill

## About Together (Scottish Alliance for Children's Rights)

Together (Scottish Alliance for Children's Rights) is an alliance that works to improve the awareness, understanding and implementation of the UN Convention on the Rights of the Child (UNCRC) and other international human rights treaties across Scotland. We have over 400 members ranging from large international and national non-governmental organisations (NGOs) through to small volunteer-led after school clubs and interested professionals. Our activities include collating an annual State of Children's Rights report to set out the progress made to implement the UNCRC in Scotland. The views expressed in this submission are based on wide consultation with our members but may not necessarily reflect the specific views of every one of our member organisations.

Together welcomes this historic Bill to incorporate the UN Convention on the Rights of the Child (UNCRC) into Scots law. After over 10 years of campaigning by children, young people and wider civil society, and years of calls from the UN Committee on the Rights of the Child (UN Committee),<sup>1 2 3</sup> the Bill's introduction marks a significant step towards ensuring all children's human rights are respected, protected and fulfilled across Scotland.

We are pleased that the Bill responds so positively to many of the calls made by Together's membership - highlighted in our [2019 response](#) and the [draft Children's Rights \(Scotland\) Bill](#).<sup>4</sup> The combination of proactive and reactive legal measures – when supported by effective implementation - have the potential to provide for a world-leading model of UNCRC incorporation.

In light of COVID-19, the importance of legal protections for children's human rights is more evident than ever. Once the Bill is enacted, it will provide a powerful tool to ensure that a children's rights-based approach is implemented and embedded in responses to the pandemic, recovery and all other decision making. As such, the need for incorporation has never been more pressing. We look forward to continued cross-party support to ensure the Bill passes through the Scottish Parliament by March 2021.

<sup>1</sup> UN Committee on the Rights of the Child (2002). [Concluding Observations: United Kingdom of Great Britain and Northern Ireland](#), paragraphs 8-9.

<sup>2</sup> UN Committee on the Rights of the Child (2008). [Concluding Observations: United Kingdom of Great Britain and Northern Ireland](#), paragraphs 10-11.

<sup>3</sup> UN Committee on the Rights of the Child (2016). [Concluding Observations: United Kingdom of Great Britain and Northern Ireland](#), paragraph 79(a).

<sup>4</sup> Prepared by the Independent Incorporation Advisory Group, co-convened by Together (Scottish Alliance for Children's Rights) and the Children and Young People's Commissioner Scotland.

## 1. Will the Bill make it easier for children to access their rights?

*Yes. The Bill will make it easier for children to access their rights through a range of proactive and reactive measures. Proactive measures include the Children's Rights Scheme, Child Rights and Wellbeing Impact Assessments (CRWIAs) and reporting duties on listed authorities which will promote positive culture change and encourage rights-based decision making. Reactive measures include the ability for children to challenge breaches of their rights in court and powers for the courts to assess whether legislation is compatible with the UNCRC.*

Yes, the Bill will make it easier for children to access their rights. We particularly welcome that the Bill will apply to all children under the age of 18 years old.<sup>5</sup> This is a significant step towards addressing the inconsistent definition of the age of the child in Scots law which can leave 16 and 17 year-olds without adequate protection of their UNCRC rights. We endorse the approach taken in the Bill to include both proactive and reactive measures and believe that these provide an innovative and effective mechanism to ensure the realisation of children's rights.

### Proactive: culture change and preventing future breaches

The Incorporation Bill takes proactive and preventative approach through the Children's Rights Scheme (sections 11-13), Child Rights and Wellbeing Impact Assessments (section 14) and reporting duties on listed authorities (sections 15-16). These measures will help to prevent breaches of rights arising by ensuring children's rights are considered from the outset of decision-making. In turn, this will help build a positive culture of children's rights.

Evidence from countries that have already incorporated shows that 'legal incorporation matters' and that children's access to their rights is improved.<sup>6</sup> Countries such as Belgium, Norway, Iceland, Sweden and Spain display positive culture change. They are more likely to perceive children as rights-holders and have a broader context of respect for children's rights.<sup>7</sup> In giving the UNCRC formal status in the domestic legal system, it becomes an 'influential touchstone' for all those whose decisions impact on children across legislation, policy and practice.<sup>8</sup> In this sense, incorporation safeguards children's access to their rights by preventing future breaches.

Evidence from Sweden shows the positive impact that incorporation has had on informing the country's response to COVID-19. This has included the use of national and local Child Rights Impact Assessments to inform decision making, taking children's views and experiences into account, increased prominence for children and children's rights across government and state agencies, and press conferences for children by the Prime Minister, department ministers and government agencies upholding children's right to information.<sup>9</sup>

### Reactive: challenging breaches

Proactive and preventative approaches help to minimise the likelihood of children's rights being breached, yet this risk cannot be completely removed. As such, we welcome the reactive provisions of the Bill that enable the courts to assess the compatibility of legislation with the UNCRC requirements (sections 18-21) and children or their representatives to challenge breaches of their rights (section 7).

Children have said that speaking out can be difficult - they may not always have the knowledge, skills or confidence to raise complaints, and that it is unfair to ask children (especially young or vulnerable children)

<sup>5</sup> Part 1, Schedule, [United Nations Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Bill](#).

<sup>6</sup> Kilkelly, U. (2019). [The UN Convention on the Rights of the Child: Incremental and transformative approaches to legal implementation](#), The International Journal of Human Rights, p.17

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> Ombudsman for Children in Sweden (2020). [Additional submission to the UN Committee on the Rights of the Child from the Ombudsman for Children in Sweden focusing on Sweden's response to Covid-19](#).

to raise their own complaints in court.<sup>10</sup> Accordingly, we welcome the powers granted on the Children and Young People's Commissioner Scotland to bring or intervene in proceedings (section 10).

## 2. What do you think about the ability to take public authorities to court to enforce children's rights in Scotland?

*The ability to take public authorities to court to enforce children's rights is welcome as this forms an essential part of incorporation. It will help to ensure children have access to remedy and redress, as well as have broader impacts including preventing future breaches, supporting positive culture change and encouraging the establishment of child-friendly complaints mechanisms.*

We welcome the ability to take public authorities to court to enforce children's rights.

It is widely argued that the more the provisions of the UNCRC can be relied upon in courts and other decision-making processes, the greater the impact it will have.<sup>11</sup> Although the importance of access to justice applies equally to children and adults, children consistently face additional barriers in pursuing remedies for breaches of their rights. These include inadequate resources, and reliance on others to act on their behalf where capacity is in issue.<sup>12</sup> To overcome these barriers, children, or those advocating on behalf of children, must be able to use and trust the legal system to protect and enforce their UNCRC rights. The legal system must provide children the means to obtain a quick, effective and fair response to protect their rights and this must be available through a transparent, efficient, accountable and affordable process. As such, the ability to take public authorities to court under the Bill will have several positive effects in that it will:

- **Prevent future breaches** of children's human rights and **support positive culture change across public authorities** by helping to focus minds and ensure child rights-based decision making is used from the outset.
- **Encourage the establishment of child-friendly complaints mechanisms** so that children's concerns can be resolved in a way that ensures the full participation of the child and respect for the child's dignity and best interests.
- **Ensure that children have access to remedy and redress in the most serious cases.** Children must be able to access justice if their rights have been breached, in line with UNCRC Article 39.

It will also put into action the statement from the UN Committee on the Rights of the Child (UN Committee) that "for rights to have meaning effective remedies must be available to redress violations"<sup>13</sup> which has been echoed at the UN Human Rights Council<sup>14</sup> and in the Council of Europe Guidelines on Child Friendly Justice.<sup>15</sup>

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<sup>10</sup> Children's Parliament (2019). [All rights are important, so all rights should be law: A consultation on incorporating the UNCRC into domestic law in Scotland.](#)

<sup>11</sup> Liefwaard, T. and Doek, J. E. (2015). *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence.* Dordrecht: Springer Netherlands

<sup>12</sup> Hoffman, S. (2019). [The UN Convention on the Rights of the Child, decentralisation and legislative integration: A case study from Wales.](#) *The International Journal of Human Rights.*

<sup>13</sup> UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child,](#) paragraph 24

<sup>14</sup> UN Human Rights Council (2014). [Resolution on the Rights of the Child: Access to justice.](#)

<sup>15</sup> Council of Europe (2010). [Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice,](#) Guideline 34.

### 3. What more could the Bill do to make children's rights stronger in Scotland?

*The Bill provides an innovative model of UNCRC incorporation which provides a solid foundation for progressing children's rights. There are several areas that merit further consideration by the Committee, including some where provisions could be further strengthened. These include: interpretation, the definition of public authorities, standing, remedies, conditions for undertaking CRWIA, commencement date, child-friendly complaints, legal representation and independent advocacy.*

We are pleased that the Bill responds so positively to many of the calls made by Together's membership and highlighted in our [2019 response](#). As such, the Bill already provides an innovative, world-leading model of UNCRC incorporation which will provide a strong foundation for progressing children's rights in Scotland. However, in discussion with our members, we have identified several areas that merit further consideration by the Committee, including some where provisions could be further strengthened. Please note that those areas relating to the Children's Scheme are included in our answer to question six.

#### Interpretation of UNCRC requirements (section 4)

The Bill provides that the courts "may" consider certain material when interpreting the "UNCRC requirements". This includes the preamble to the UNCRC, the full articles and the first and second Optional Protocols. While this direction is welcome, it misses the rich and valuable guidance provided in other UN Committee documents such as General Comments, Concluding Observations, opinions made in relation to the third optional protocol and reports resulting from Days of General Discussion. These documents serve an important role in clarifying the content of UNCRC rights, outlining potential violations and offering advice on how best to comply with UNCRC obligations. General Comments have been recognised by the UK Supreme Court as providing "authoritative guidance"<sup>16</sup> and have already been used by the judiciary to inform wider ECHR cases.<sup>17</sup> Their value has been recognised in other countries that have incorporated the UNCRC. In Sweden, guidance for the judiciary has been prepared that draws from this wider jurisprudence alongside comparative caselaw in what has been described as a 'roadmap' for the judiciary as to how to interpret the UNCRC Articles.<sup>18</sup> In the 2019 Scottish Government consultation, an overwhelming number of respondents agreed that these documents provide valuable interpretive guidance and should be used as an aid to interpret and ensure effective implementation of the UNCRC.<sup>19</sup> As such, this wider guidance from UN Committees should be specifically included as interpretative guidance in section 4 of the Bill. This will encourage Scottish courts to keep pace with, or indeed lead, developments in international human rights law and practice whilst being able to apply learning in a way that fits the Scottish context.

***We encourage the Committee to consider broadening section 4 to provide that the courts may also consider General Comments, Concluding Observations, opinions under the third optional protocol and reports resulting from Days of General Discussion as well as comparative law and future advances.***

#### Definition of public authorities (section 6)

The Bill provides that "it is unlawful for a public authority to act in a way which is incompatible with the UNCRC requirements". This includes private actors whose "functions are of a public nature" unless the nature of the particular act is private, echoing a similar provision in the [Human Rights Act 1998](#). The UN Committee recognises the role that private actors play in the delivery of children's services, including

<sup>16</sup> See *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, see [105-106]; *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, see [41]).

<sup>17</sup> See Justice McCloskey's assessment of UNCRC General Comment No.14 and how it interplays with the ECHR and domestic primary legislation in *MK, IK and HK v Secretary of State for the Home Department* (UK Upper Tribunal, Immigration and Asylum Chamber).

<sup>18</sup> Apolitical (2018). [How Sweden is rewriting national law to put children's rights front and centre.](#)

<sup>19</sup> Scottish Government (2019). [Consultation on incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland. Analysis Report](#), p20.

education, transport, health and alternative care.<sup>20</sup> It emphasises that States are not exempted from their UNCRC obligations when they outsource or privatise services that impact on the fulfilment of children’s rights. As such, we welcome the policy intention of the Bill that private actors can fall within its scope. However, we have some concerns as to the practical application of this section which have been echoed by the Scottish Human Rights Commission (SHRC). Scottish Government’s intention is that related case law under the Human Rights Act (HRA) may inform decisions on the meaning of “public authority” under the UNCRC Incorporation Bill. This has caused some concern to our members who, particularly following the *Serco* judgement,<sup>21</sup> are concerned that private bodies may escape liability. SHRC notes this is an area of great uncertainty requiring further clarification and calls for the UNCRC Incorporation Bill to be viewed as an opportunity to provide clarity, guidance and guard against unintended accountability gaps. Our members call for clear reassurance that organisations such as private housing providers, childcare, private foster care and public schools will be included within the scope of this duty.

***We encourage the Committee to comprehensively consider the definition of public authority included in section 6 to ensure that the policy intention of the Bill is met.***

As recognised in the Policy Memorandum, the Scottish Parliament is currently excluded from the definition of public authority. This can be seen to be at odds with Parliament’s role as a human rights guarantor. The Policy Memorandum accepts it is “desirable” for the Scottish Parliament to be included under the duty but that “further consideration requires to be given by the Parliament itself to how the requirements of the Bill should be applied to its functions”.<sup>22</sup>

***We encourage the Committee to consider amending section 6 to include the Scottish Parliament and persons carrying out Scottish Parliament functions within the definition of public authority.***

#### Clarity on ‘standing’ (section 7)

To be effective, the Bill must ensure clarity on who can bring a case to court alleging a breach of UNCRC rights (‘standing’).

We welcome that the Bill does not include a ‘victim test’ - in contrast to the Human Rights Act.<sup>23</sup> This echoes the approach advocated in the [draft Children’s Rights \(Scotland\) Bill](#).<sup>24</sup> The victim test is restrictive, in that it requires a specific ‘victim’ to bring a case. This is particularly inappropriate for cases involving children, given that capacity and/or vulnerability can be at play. The victim test can also act as a barrier to public interest litigation which is not linked to a specific child.<sup>25</sup> In its December 2018 report, the First Minister’s Advisory Group on Human Rights Leadership recommended that “appropriate bodies” should be able to bring proceedings “regardless of the fact the body is not the victim of the alleged rights infringement”.<sup>26</sup> By not including a victim test, the current Bill should help overcome barriers faced by Together’s members in raising children’s rights issues in the courts. This includes the issues faced by the Humanist Society Scotland (HSS) when bringing a judicial review on religious observance in schools – the review was not permitted to proceed on European Convention on Human Rights grounds because HSS was not considered a ‘victim’ (the review instead proceeded on other grounds). By removing these barriers, the current Bill will allow preventative steps to be taken to protect children’s rights before the damage of an unlawful act – or many unlawful acts - is done.

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<sup>20</sup> UN Committee on the Rights of the Child (2013). [General Comment No.16: on State obligations regarding the impact of the business sector on children’s rights](#). Para: 33.

<sup>21</sup> *Ali (Iraq) v Serco Ltd [2019] CSIH 54*

<sup>22</sup> Scottish Government (2020). [Policy Memorandum](#), para. 125.

<sup>23</sup> Section 7(1). [Human Rights Act 1998](#).

<sup>24</sup> Prepared by the Independent Incorporation Advisory Group, co-convened by Together (Scottish Alliance for Children’s Rights) and the Children and Young People’s Commissioner Scotland.

<sup>25</sup> Jack, D. and McCorkindale, C. [Standing in Scots Public Law Litigation](#), pp.6-7

<sup>26</sup> First Minister’s Advisory Group on Human Rights Leadership (2018). [Recommendations for a new human rights framework to improve people’s lives](#). p.62.

Despite not including a victim test, the rules on standing are not entirely clear from the face of the Bill. We appreciate the Policy Memorandum notes “the ordinary rules about who can bring cases in court would apply to claims brought under the Bill”<sup>27</sup> and understand Scottish Government intends to apply the test of “sufficient interest”. Our members call for clarity that the removal of the ‘victim test’ would enable NGOs, parents and carers and youth workers to bring cases on behalf of individual and groups of children if they were deemed to have “sufficient interest”.

***We recommend that Committee seeks clarity on the provisions relating to “standing” to ensure the Bill achieves its policy objective of removing barriers to children’s access to justice.***

#### Time limits

We welcome that children are excluded from the requirement that cases must be raised within one year of an alleged violation, instead providing that the one year “clock” only starts to run when they turn 18. We further welcome that the Bill allows cases to be brought after more than a year has passed where considered “equitable”. Together, these provisions should help to address barriers in access to information, advice and support which may have prevented younger children from raising proceedings within a year. However, we have concerns that the provisions as drafted may not realise this policy intention in practice. We particularly seek assurance that the one-year time limit does not prevent children benefitting from more generous time limits provided in other legislation.

***We recommend that Committee seeks clarity on the provisions relating to time limits to ensure the Bill achieves its policy objective of ensuring no time limit on proceedings begins until the child reaches 18 years old.***

#### Remedies (section 8)

The Bill provides that where a public authority has acted unlawfully, the court “may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate”. The Bill notes that the remedy may include an award of damages where necessary to provide “just satisfaction”.

While these provisions are positive, we would welcome more detail on how “just and appropriate” will be determined, either on the face of the Bill or through supporting guidance. Further, we would welcome the consideration of wider remedies by EHRiC, in line with principles 19-23 of the UN Basic Principles and Guidelines on the Right to a Remedy, such as:<sup>28</sup>

- **Restitution:** as required to restore the situation before the breach occurred - for example restoration of liberty, return to place of residence, restoration of family life or other measures as appropriate.
- **Rehabilitation:** including medical and psychological care, as well as legal and social services.
- **Satisfaction:** may include public disclosure of an accurate account of the violation, public apology, investigation or other measures as appropriate.
- **Guarantee of non-repetition:** including measures to protect human rights defenders, providing human rights education as a priority to all sectors of society, promoting mechanisms for preventing and resolving conflicts, reviewing and reforming laws which have contributed to the violation or other measures as appropriate.

As the UN Committee has noted, remedies other than compensation may be required such as measures to promote physical and psychological recovery, rehabilitation and integration. The Council of Europe

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<sup>27</sup> Scottish Government (2020). [Policy Memorandum](#), para. 132.

<sup>28</sup> United Nations General Assembly (2005). Resolution 60/147. [Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#).

Guidelines on Child Friendly Justice also highlight the importance of appropriate social and therapeutic programmes which should be available, accessible and provided free of charge.<sup>29</sup>

***We encourage the Committee to explore how “just and appropriate” remedies could be determined and consider if amendments are needed to ensure children are able to access an effective remedy.***

#### Child rights and wellbeing impact assessment (CRWIA) (section 14)

We welcome the duty on Scottish Government to prepare child rights and wellbeing impact assessments for new Bills, certain statutory instruments and “decisions of a strategic nature”. Such assessments should explicitly set out how the measure furthers UNCRC compliance and mitigates against any predicted negative effects on children’s human rights.

Section 14 of the Bill only provides for a statutory CRWIA duty on Ministers rather than on wider public authorities. To ensure the UNCRC is respected in legislation, policy development and delivery, the UN Committee is explicit that there must be a clear process of impact assessment built into government at all levels, and as early as possible in the policy making process.<sup>30</sup> The UN Committee has said “States parties should conduct child rights impact assessments [...] at the national and subnational levels” to assess the impact of proposed laws, policies on programmes on children - particularly those in vulnerable situations”.<sup>31</sup> Research for the Council of Europe identifies CRIA as a key tool to support a child rights approach.<sup>32</sup> More recent academic research into CRIA notes that “while political commitment may be a key step towards securing a children’s rights approach, [...] statutory underpinning for CRIA may be required if it is to be embedded as part of policy processes”.<sup>33</sup> This echoes the view of many Together members who called for a mandatory CRWIA duty on all public authorities in the 2019 Scottish Government consultation.<sup>34</sup>

In our [2019 response](#), we called for a duty on Scottish Ministers and wider public authorities to have “due regard” to the UNCRC when exercising their functions to complement a “compatibility duty”. Such a duty provides a mechanism that ensures children’s rights are at the forefront of all decisions made by public authorities, and seen first and foremost as a framework for effective policy and decision-making rather than primarily the basis for a legal claim. We note Scottish Government’s reasoning for not including a due regard duty but believe the policy intention behind our previous call remains important and could be met through mandatory duties for CRWIA on both Ministers and public authorities.

Section 14(3) provides that Scottish Government “must” prepare a CRWIA for new Bills, certain statutory instruments and “decisions of a strategic nature relating to the rights and wellbeing of children as they consider appropriate”. Scottish Ministers are to determine what constitutes a “strategic decision” when preparing the Children’s Rights Scheme. As such, the CRWIA duty is weakened by two levels of discretion and could be strengthened by the removal of “consider appropriate”. Our members have noted that section 14(5) which requires Scottish Ministers to publish a CRWIA “in such a manner as the Scottish Ministers consider appropriate” would be strengthened by limiting the wide discretion given to Ministers, and instead requiring the publication of the CRWIA and child friendly summary within three months of its commencement.

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<sup>29</sup> Council of Europe (2010). [Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice](#), Guideline 80

<sup>30</sup> UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#).

<sup>31</sup> UN Committee on the Rights of the Child (2016). [General Comment No.19: Public budgeting and children’s rights](#). Para: 47.

<sup>32</sup> S. Hoffman, *Championing Children’s Rights in Times of Austerity: Local and Regional Authorities’ Responsibilities* (Strasbourg: Council of Europe, Congress of Local and Regional Authorities, 2015).

<sup>33</sup> S. Hoffman (2020), [Ex ante children’s rights impact assessment of economic policy](#). *International Journal of Human Rights*.

<sup>34</sup> Scottish Government (2019). *Children’s Rights: Consultation on incorporating the UN Convention on the Rights of the Child into our domestic law in Scotland*.

***We encourage the Committee to consider extending the duty to conduct CRWIA to include those public bodies listed in Section 16(1). Furthermore, the Bill could be strengthened by requiring publication of CRWIA and a child friendly summary within three months of its commencement.***

#### Commencement date (section 40)

The commencement date does not appear on the face of the Bill, instead leaving this to Scottish Government's discretion. Meanwhile, the Financial Memorandum provides for a three-year implementation period, with the understanding that commencement will occur at some point during that period. While we understand Scottish Government's position that responding to COVID-19 has placed additional pressures on public bodies, the crisis also highlights the importance of legal protections for children's human rights. COVID-19 continues to compound existing rights issues of child poverty, inequality, digital exclusion, mental health and negative public attitudes. These are immediate and pressing concerns, requiring the strong framework that incorporation provides sooner rather than later. Incorporation will guide a rights-based approach to Scotland's response, recovery and future crises preventing violations from occurring.

Public authorities have had many years to prepare for commencement. The UK ratified the UNCRC almost 30 years ago in 1991. This placed binding obligations on the Scottish Government and, as a result, the UNCRC has already been embedded into legislation, policy and practice for many years – albeit on a piecemeal basis. The Children and Young People (Scotland) Act 2014 further raised awareness and understanding of the UNCRC obligations among public authorities by placing reporting duties on Ministers and public bodies to set out what steps are being taken to further children's rights. As such, public authorities should be ready by 2021 to apply the more comprehensive duties that are set out in the current Bill. Furthermore, the UNCRC is the floor and not the ceiling – it sets minimum standards beyond which governments should strive. Accordingly, the UNCRC allows for the progressive realisation of rights over time provided that the minimum core obligations are satisfied.<sup>35</sup>

***We encourage the Committee to consider an amendment that adds a commencement date to the face of the Bill that is no later than six months after it receives Royal Assent.***

#### Child-friendly complaints

The Bill does not currently provide for child-friendly complaints mechanisms. Barriers in access to justice and long drawn-out processes can seriously compromise a child's ability to assert their rights.<sup>36</sup> The UN Committee emphasises the importance of independent complaints procedures and child friendly information, as well as access to independent advocacy and to the courts with necessary legal and other assistance.<sup>37</sup> This is echoed in the Council of Europe Guidelines on Child Friendly Justice which require the promotion and monitoring of child friendly complaints mechanisms, including child-friendly information, making sure children know how and who to complain to about their treatment, and regularly reviewing and improving systems. These calls are endorsed by Together members, who repeatedly set out the need for child-friendly complaints mechanisms at all levels of government<sup>38</sup> to ensure public authorities are held to account for their decisions at the earliest possible stage and that the courts remain the measure of last resort.

These calls could be met by including an additional requirement in the Children's Scheme for Scottish Ministers to set out a process for child-friendly complaints. This should be accompanied by supporting guidance for public authorities that is clear on the strong need for accessible mechanisms and processes for

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<sup>35</sup> Article 4, UNCRC. See also [CRC/GC/2003/5](#): Paras: 7-8.

<sup>36</sup> UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraph 24

<sup>37</sup> *Ibid.*

<sup>38</sup> The Health and Social Care Alliance Scotland (the ALLIANCE) and Together (Scottish Alliance for Children's Rights) (2019). [Incorporation of Children's Rights Consultation Event 11 July 2019, Children in Scotland, Edinburgh](#)

both informal and formal complaints. The guidance should encourage public authorities to include information on the availability and access to such mechanisms as part of their reporting duties under sections 15-16.

***We encourage the Committee to consider an amendment that adds an additional requirement on Scottish Ministers to set out a process for child friendly complaints within the Children’s Scheme.***

#### Legal representation

The Council of Europe Guidelines on Child Friendly Justice emphasise “any obstacles to access to court, such as the cost of the proceedings or the lack of legal counsel, should be removed”. The Guidelines set out children’s right to legal representation and free legal aid under the same or more permissive conditions as adults,<sup>39</sup> and that such lawyers should be knowledgeable about children’s rights, receive ongoing training and be able to communicate effectively with children.<sup>40</sup>

Scottish Government should set out a clear process for children who want to access legal assistance and include this as a priority in the first Children’s Rights Scheme. This process will require a review of legal aid and resourcing to ensure all children have access to confidential and independent legal assistance, and include funding for specialist services for vulnerable children, including migrant and care experienced children.

***We encourage the Committee to consider if the Bill can be strengthened to ensure children’s access to legal representation.***

#### Independent advocacy and advice

The UN Committee is clear about the barriers children face in seeking justice and redress if their rights are breached. The UN Committee recommends that a clear channel of redress for breaches of children’s rights should include provision of advocacy and child-friendly information as well as access to independent complaint procedures and the courts.<sup>41</sup> This is supported by the Council of Europe Guidelines on Child Friendly Justice which emphasise the importance of information and advice which should be “provided to children in a manner adapted to their age and maturity”.<sup>42</sup>

Barriers in access to justice and long drawn-out processes can seriously compromise a child’s ability to develop to their full potential.<sup>43</sup> Children and young people have frequently discussed the importance of receiving help, support and advocacy to enable them to assert their rights. They have particularly mentioned the importance of youth workers, mental health workers, teachers, social workers, counsellors and independent advocates, and have said that in their perfect world there would be ‘lots of’ them.<sup>44</sup> They have also spoken about the importance of knowing about the different support mechanisms available.

***We encourage the Committee to consider amending sections 11(3) and 13(3) on the Children’s Rights Scheme so that Ministers are required to set out and report annually on what they are doing to ensure advocacy services for children and young people that are available, accessible, acceptable and of high quality.***

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<sup>39</sup>Council of Europe (2010). [Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice](#), Guidelines 37-38.

<sup>40</sup> Council of Europe (2010). [Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice](#), Guidelines 39-43.

<sup>41</sup> UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraph 24

<sup>42</sup> Council of Europe (2010). [Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice](#), Guideline 2

<sup>43</sup> UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraph 24

<sup>44</sup> YouthLink Scotland (2019). [Young People’s Response to the Consultation on Incorporating the UN Convention on the Rights of the Child \(UNCRC\) into Scots Law](#)

#### **4. If you work for an organisation or public authority, what resources do you need to help children and young people access their rights? Will you require additional resources or training to implement the Bill, for example to make or respond to challenges in court?**

Detailed information on implementing the UNCRC is available in a forthcoming Together report *Making children's rights real: turning a vision into reality for every child in Scotland*.

Together has produced a routemap for effective implementation of the UNCRC in Scotland following incorporation. The report includes an overview of the training, support and culture change that will be required across public authorities to “make rights real” for children. This includes training on how to engage and speak with children and young people.

The forthcoming report highlights the importance of harnessing existing knowledge, expertise, frameworks and resources, adapting these where necessary to ensure that children's rights are mainstreamed through public authorities at all levels. It also highlights the importance of supportive structures within organisations, and a guiding coalition to drive forward change.

We note that as Sweden approached incorporation, the Swedish Government designed a national programme to support local and regional communities, and national agencies to support implementation of the new law.<sup>45</sup> We believe that existing Scottish Government guidance for the 2014 Act and for implementation of GIRFEC could be developed and enhanced to support implementation in this way.<sup>46</sup>

#### **5. Are there any relevant equalities and human rights issues related to this Bill, or potential barriers to rights, that you think we should look at?**

It is important that the Bill recognises the intersectionality between children's rights, women's rights, the rights of disabled people, ethnic minorities and other protected groups. COVID-19 has exacerbated existing inequalities and highlighted the importance of wider human rights protections for children, young people and their families. It has worsened the real economic inequality faced by women, who remain the primary caregivers of children and are more likely to be at risk of increased job insecurity and poverty. BAME children, young people and their families are facing greater risks of poverty and food insecurity. Disabled children are also facing greater risks of poverty as well as barriers in accessing education and healthcare services. COVID-19 clearly demonstrates the need for progress on incorporating wider human rights protections into Scots law.

As such, UNCRC incorporation will be further strengthened by the work of the National Taskforce for Human Rights Leadership and the subsequent incorporation of the UN Convention on the Rights of Persons with Disabilities (for disabled children), the Convention on the Elimination of All Forms of Discrimination against Women (for girls and young women), and the Convention on the Elimination of Racial Discrimination (for ethnic minority children). Incorporation of these broader international human rights treaties needs to be progressed as a matter of urgency. Guidance around UNCRC implementation will need to reiterate these connections and explicitly consider the interrelation between the range of international human rights obligations in place for children.

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<sup>45</sup> Apolitical (2018). [How Sweden is rewriting national law to put children's rights front and centre](#).

<sup>46</sup> Scottish Government (2016). [Guidance on Part 1, Section 2 \(Duties of Public Authorities in relation to the UNCRC\) of the Children and Young People \(Scotland\) Act 2014](#).

## 6. What are your views on the provisions in the Bill that allow the courts to strike down legislation judged to be incompatible with the UNCRC?

*Together welcomes the power for courts to strike down legislation which is incompatible with the UNCRC.*

The UN Committee is clear that incorporation requires the UNCRC to prevail over conflicting domestic legislation or practice.<sup>47</sup> Accordingly, we welcome the power for courts to strike down legislation judged to be incompatible with the UNCRC (section 20). This will ensure that the rights enshrined in the UNCRC are given the same status as that given to ECHR rights through the Scotland Act 1998.<sup>48</sup>

We note that the strike down power is limited in that it applies only to conflicting legislation which *predates* the entry into force of the Incorporation Bill. While we would welcome a strike down power being available for all legislation, we recognise that this would be outwith the competence of the Scottish Parliament. We welcome the Bill's alternative that courts may make an incompatibility declarator for legislation which *postdates* the entry into force of the Incorporation Bill.

Together welcomes the duty on Ministers to prepare a report within six months of a strike down or incompatibility declarator being issued setting out the steps that Ministers intend to take – although we note this is just a duty to report and not a “duty to do” (i.e. take action). We welcome the duty to lay this report before the Scottish Parliament to enable further scrutiny.

## 7. What are your views on the Child Rights Scheme and the requirement on public authorities to report?

*Together welcomes the Children's Rights Scheme and public authority reporting duties. Both are ways in which children's rights can be embedded into decision making. Following discussion with our members, we have some suggestions to further strengthen these measures.*

### Children's Rights Scheme

We welcome the Bill's inclusion of a Children's Rights Scheme as a “further way that proactive realisation of children's rights [will be] delivered in practice”.<sup>49</sup> Scottish Ministers are under a duty to prepare the scheme, report annually on the actions taken and planned to progress children's rights and lay this before the Scottish Parliament. It echoes a similar model in Wales that has been largely effective in promoting rights-based policymaking within national government and has provided children, young people, the Children's Commissioner and wider civil society with the opportunity to influence government action to promote children's human rights.

To be effective, a Children's Rights Scheme needs to enshrine systematic, robust and consistent consideration of children's rights in all decisions made by public authorities. We note that the duty to prepare the Scheme under section 11(3) does not set requirements for its contents – instead providing that the Scheme “may” include arrangements to ensure children's participation in decision-making, awareness raising, rights based budgeting and the preparation of CRWIA.

***We encourage the Committee to consider an amendment that replaces “may” with “shall” in section 11(3) to ensure consistent consideration of children's rights.***

We welcome the mandatory duty to have regard to UN Committee documents when making, amending or remaking the scheme (section 12(2)), yet consider this could be further strengthened by including UN Committee decisions under the third optional protocol. We further welcome the duty to consult with

<sup>47</sup> UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraph 20.

<sup>48</sup> Section 29, [Scotland Act 1998](#).

<sup>49</sup> Scottish Government (2020). [Policy Memorandum](#), para. 87.

children and young people, the Children and Young People's Commission Scotland and other stakeholders (section 12(3)). Children and young people must be properly involved in the development and review of the Scheme. The UN Committee is clear that this requires "[t]ranslations [of reports], including child-friendly versions, [which] are essential for engaging children and minority groups in the process".<sup>50</sup> This has also been raised by children and young people.<sup>51</sup> As such, we welcome that the Bill includes a duty to accompany annual reports on the Scheme with a child-friendly version.

Together welcomes the remaining reporting and review provisions, including that the overarching duty to report annually is supported by duties to take account of any new General Comments and Concluding Observations, and to consult with children and young people, the Children and Young People's Commissioner Scotland and other stakeholders before publication. Again, we believe the provisions on review and reporting could be further strengthened by including a duty to have regard to decisions made by the UN Committee under the third optional protocol.

***We encourage the Committee to consider amendments that would enable Ministers to take account of decisions under the third optional protocol when making, amending and reporting on the Children's Scheme (section 12(2)).***

#### Public body reporting

Regular reporting and public scrutiny play an essential role in embedding children's rights in decision making.<sup>52</sup> Accordingly, Together welcomes the duty on "listed authorities" to report every three years on the steps taken to ensure compliance with the UNCRC requirements. This builds upon and adds value to existing reporting obligations on public authorities listed in the Children and Young People (Scotland) Act 2014. In the absence of a due regard duty to ensure a proactive approach to children's rights, the public body reporting duty will play an even more crucial role.

Our members note that the list of authorities required to report could be widened to ensure a comprehensive approach to children's rights across all sectors. In particular, members have noted that the Scottish Courts and Tribunal Service should be added. We note that certain bodies are not listed as they are classed as "agencies of the Scottish Government" and accordingly fall within the scope of Scottish Ministers' reporting duty – this includes Transport Scotland. This delineation should be made explicit in the supporting guidance.

Our members are also clear that children and young people should be consulted in the preparation of public body reports and that a child friendly version should accompany reports. This would echo similar duties in relation to the Children's Rights Scheme.

***We encourage the Committee to consider an amendment that would require public authorities to consult with children in the preparation their children's rights reports and to publish a child-friendly version (section 15).***

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<sup>50</sup> UN Committee on the Rights of the Child (2003). [General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child](#), paragraph 49.

<sup>51</sup> YouthLink Scotland (2019). [Young People's Response to the Consultation on Incorporating the UN Convention on the Rights of the Child \(UNCRC\) into Scots Law](#).

<sup>52</sup> McCall-Smith, K. (2019). [To incorporate the UNCRC or not – is this really the question?](#). The International Journal of Human Rights.

## 8. Is there anything else you want to tell us about the Bill?

*The Bill responds positively to many of the calls made by Together members in 2019, providing a strong model of incorporation. Incorporation is an important first step in making rights real for all children and young people living in Scotland. Translating rights into lived reality requires effective implementation. We believe the current Bill has the potential to be world-leading if implemented well.*

### Provisions of the Bill

#### *UNCRC requirements (Part 1 and Schedule)*

Together welcomes that the Bill takes a “maximalist” approach to inclusion of UNCRC rights within the limits set by Scottish Parliament competence. The “UNCRC requirements” include UNCRC Articles 1-42, and articles from the first and second optional protocols subject to some redaction to ensure the Bill is within competence.<sup>53</sup> It appears this redaction has been as minimal as possible and we welcome the “future proofing” of the Bill in that it allows for the addition of new articles to the “UNCRC requirements” but does not permit the removal of existing articles. This will ensure the boundaries of the Bill can “flex” should additional powers be devolved to Scotland or should the UK ratify the third optional protocol. Given Scottish Government’s approach to drafting these sections of the Bill and the schedule, we believe it has looked at this matter in good faith and is going as far as it believes it can go within the limits of legislative competence.

#### *Duties on public authorities (Part 2)*

Together welcomes that the compatibility duty applies to both acts and omissions (failures to act). This ensures that the Bill addresses the requirements to both “protect” and “respect” human rights as required by international law. States also have a duty to “fulfil” human rights by taking positive actions to facilitate access to them – this is addressed by provisions relating to the Children’s Rights Scheme and Child Rights and Wellbeing Impact Assessments.

Together welcomes the ability of children or their representatives to bring legal proceedings for a breach of UNCRC requirements and to rely on the UNCRC in other proceedings (section 7(1)). This is an essential part of incorporation, facilitating access to a remedy in the case of breaches, but also encouraging culture change and preventing future violations by focusing minds and ensuring children’s rights are considered from the outset of decision-making. We further welcome the power for the Children and Young People’s Commissioner Scotland to bring or intervene in proceedings and for intimation of declarators, recognising that it may not always be in a child’s best interests to bring proceedings in their own name.

#### *Legislation and the UNCRC requirements (Part 4)*

Together welcomes the requirement for a statement of compatibility to accompany Bills when introduced to the Scottish Parliament (section 18). The statement will play an important role in ensuring that any new legislation is scrutinised from a child rights perspective and ensure it is compatible with the UNCRC before it is passed.

We further welcome the duty to interpret legislation in a manner compatible with the UNCRC requirements insofar as possible (section 19). This will give effect to the requirement that the UNCRC prevails over conflicting national legislation.

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<sup>53</sup> Scottish Government (2020). [Fact Sheet: United National Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Bill.](#)

## Implementation following incorporation

Children have emphasised that changing the law by itself is unlikely to secure the broad and lasting change they need.<sup>54</sup> The UNCRC says states should take “all appropriate legislative, administrative and other measures” to implement children’s rights, and [General Comment 5](#) provides guidance on the steps that should be taken. These steps are outlined within the Scottish context in our forthcoming report *Making children’s rights real: turning a vision into reality for every child in Scotland*. An overview of these is given below.

Once the Incorporation Bill is passed, there should be:

1. **A comprehensive and ongoing review of existing legislation** to identify areas where Scots law falls below the minimum standards set out in the UNCRC, allowing these to be addressed. Such reviews have already been undertaken by countries which have already incorporated and Scotland should draw from their experience, and findings of the 2017-18 UNCRC Audit.<sup>55</sup> <sup>56</sup> Our members have highlighted several issues to be addressed including inconsistencies in the definition of who is a “child” (some legislation defines a child as under 16, at odds with the UNCRC’s definition that a child is anyone under 18),<sup>57</sup> <sup>58</sup> and the minimum age of criminal responsibility (UN Committee guidance states that the minimum internationally acceptable level is 14 years old, accordingly Scottish legislation raising the age from 8 to 12 still falls short).<sup>59</sup>
2. **Development of a continuous process of impact assessment.** This should be supported by training and capacity building to ensure officials have the necessary knowledge, skills and understanding required to complete CRWIA. Our members have also called for the creation of a centralised CRWIA database to ensure transparency and allow for effective scrutiny.
3. **Data collection, analysis and the development of child rights indicators.** Data collection and analysis are essential for effective implementation, allowing the identification of gaps, disparities and/or discrimination in the realisation of children’s rights. This programme should include the development of a robust set of child rights-based indicators against which progress in implementing the UNCRC can be assessed. This could be achieved by adapting the GIRFEC outcomes and wellbeing indicators to ensure they are UNCRC-focused.
4. **Child rights-based budgeting** to ensure that decisions are made with the best interests of children as a primary consideration, and ensure they are protected from the adverse effects of economic policies or financial downturns.
5. **Effective mechanisms to ensure children and young people’s participation in decision-making.** These must ensure that all children are enabled and empowered to take part – including young children and those who are hard to reach or seldom heard.

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<sup>54</sup> Children’s Parliament (2019). [‘All rights are important, so all rights should be law’. A consultation on incorporating the UNCRC into domestic law in Scotland.](#)

<sup>55</sup> Apolitical (2018). [How Sweden is rewriting national law to put children’s rights front and centre.](#)

<sup>56</sup> Ministry of Health and Social Affairs, Government Offices of Sweden (2018). [Convention on the Rights of the Child will become Swedish law](#)

<sup>57</sup> Section 93(2)(b)(i), [Children \(Scotland\) Act 1995.](#)

<sup>58</sup> Section 199(1), [Children’s Hearings \(Scotland\) Act 2011.](#)

<sup>59</sup> [CRC/C/GC/24.](#)

6. **Effective mechanisms to ensure children have access to advocacy, remedy and redress** and barriers to access are removed.
7. **Coordinated and mainstreamed efforts to increase awareness and understanding of the UNCRC** among children and young people, all those working with or for children and young people, parents, carers and the wider public.
8. **Professional training and development actions** to ensure that all those involved in the implementation process and at all levels understand children’s rights and how to embed them in decision-making. Experience from Sweden highlights the importance of all officials being competent in children’s rights – rather than relying on individual “experts” within each department.<sup>60</sup>

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<sup>60</sup> Apolitical (2018). [How Sweden is rewriting national law to put children’s rights front and centre.](#)