

## Implementing & monitoring the UN Convention on the Rights of the Child (UNCRC) Post-Seminar Briefing 1: The UNCRC in Law

This briefing supports a series of four seminars funded by the [Scottish Universities Insight Institute](#) which seek to improve - and address gaps - in the implementation and monitoring of the UNCRC in Scotland. Seminars examine the UNCRC from the perspectives of law, practice, policy and identify next steps for implementation. They are held in partnership between [Together \(Scottish Alliance for Children's Rights\)](#), the [Centre for Research on Families and Relationships](#) at the University of Edinburgh, and the [Centre for Child Wellbeing and Protection](#) at the University of Stirling.

This first seminar explored the strengths - and limitations - of using law to progress UNCRC implementation. Speakers examined important trends in the incorporation of children's rights principles into domestic law throughout Europe, Wales and Scotland, and explored the challenges children face in enforcing their UNCRC rights. Discussions among delegates started with 'if' the UNCRC should be incorporated into Scots law before moving to explore 'how' this could happen. Threading through all discussions was the question - how can law be used to best effect to make a tangible difference to children's rights?

### Key messages

- International experience shows that the process of incorporation in itself is important: it raises awareness of the UNCRC and generates respect for children as rights-holders. The greater awareness of rights, the higher the likelihood of securing respect for them.
- When rights are enforceable in law, there is opportunity for legal challenge and public scrutiny. Incorporation ensures that the principles of the UNCRC are taken into account during the development of policy and legislation, rather than in court after a breach has occurred.
- Experience with the ECHR through the Human Rights Act 1998 and the Welsh Measure 2011 shows that reviewing legislation can produce tangible results in terms of improving human rights protections in law and practice.
- As rights-holders, children should be able to enforce their rights in court. Children would only need to use courts as a last resort if the government failed to give its UNCRC obligations appropriate effect.
- Incorporation cannot be expected immediately to prevent – or provide remedy - to every violation of UNCRC rights. Many other factors influence whether a country has a strong child-rights focused culture, including levels of awareness and training, and coordination within government. Even if the UNCRC were to be incorporated into Scots law, there would be gaps in protection in relation to issues reserved to UK Government.
- Incorporation would offer the opportunity to draw from the learning of the past 25 years of implementation and guidance from the UN Committee. It would be a missed opportunity to directly incorporate the substantive articles of the UNCRC and its Optional Protocols without considering where improvements could be made in relation to the Scottish context.
- To progress incorporation, child rights advocates need to work with children and young people to convince decision-makers and influencers of the value of taking a children's rights approach. This needs to include members of the Scottish Parliament, local government, the judiciary, health and education services, parents and academics. This will be explored at the forthcoming SUII seminars.

## What does the UNCRC say about incorporation?

Article 4 of the UNCRC requires governments to take 'all appropriate legislative, administrative, and other measures' to implement the UNCRC. The UN Committee on the Rights of the Child (the UN Committee) has emphasised the importance of legal measures, such as UNCRC incorporation into domestic law and the justiciability of children's UNCRC rights. The Committee has also recognised the importance of non-legal measures of implementation, including child rights action plans, participation strategies and child rights impact assessments.

## What does international experience tell us?

Both legal and non-legal measures of implementation are crucial in building momentum for a culture change in which children are recognised as rights-holders. Professor Kilkelly highlighted two studies that demonstrate this in practice:

- [UNICEF's study of implementation in 12 countries](#) shows that whilst few of the 12 countries studied had fully incorporated the UNCRC into domestic law, it had a significant effect where it had happened. The very process of incorporation raises awareness of children's rights across government and civil society. In countries where there has been incorporation (Belgium, Norway, Spain), children are more likely to be perceived as rights holders, creating a culture of respect for children's rights and demonstrating positive benefits beyond the legislative procedure itself.
- [Research for the Council of Europe](#) shows that the level of incorporation into European constitutions is now very high, with increasing reference to UNCRC principles and child rights provisions. In Ireland, there has been a gradual transition from paternalism to rights-based approaches. This has been achieved through constitutional change and subsequent law and policy reform, enabled by domestic inquiries, sustained advocacy and international pressure.

Professor Kilkelly concluded that international experience shows that legislative incorporation – beginning with the UNCRC principles – can be gradually transformative in terms of building a culture that respects, protects and fulfils children's human rights.

## What does the Welsh experience tell us?

Wales-only legislation has incorporated the UNCRC into Welsh domestic law, and is often held up as a devolved model on children's rights in the UK. However, the [Rights of Children and Young Persons \(Wales\) Measure 2011](#) (Welsh Measure) does not follow the model of incorporation recommended by the UN Committee, and does not ensure that children's UNCRC rights can be enforced by the courts. Despite this, Dr Hoffman was clear that the Welsh Measure still makes a significant contribution towards giving real effect to the UNCRC.

Specifically, the Welsh Measure requires Welsh Ministers to have 'due regard' to the UNCRC when exercising any of their functions. This legal mechanism is designed to promote deliberative, proactive processes to achieve implementation the UNCRC rather than providing redress for UNCRC violations if they occur. The Measure includes requirements for Welsh Ministers to set out how they will achieve due regard in a [Children's Scheme](#). Stakeholder engagement helped shape the Scheme, which requires a Child Rights Impact Assessment for legislation and policy proposals, training for every civil servant and internal coordination of children's rights within the Welsh Government.

The combination of legal and non-legal measures of implementation has shaped the content of legislation and policy in Wales to better reflect the UNCRC. However, Dr Hoffman noted a number of limitations. Without the enforcement of children's UNCRC rights in courts, Welsh Ministers have not yet delivered on

the long-standing promise to remove the defence of ‘reasonable chastisement’ in Wales. Furthermore, the duty did not prevent the decision to remove funding from the active Children and Young People’s Assembly for Wales (Funky Dragon) in 2014. Even after incorporation, the Welsh experience shows that a significant amount of work is still needed to embed children’s rights into policy and practice.

Dr Hoffman noted that the Measure is contributing to an improvement in Welsh institutional culture. For example, the Welsh Government has committed to consult with children and young people on the implications of Brexit for child rights. Further, there is growing evidence that the Measure has been important symbolically, providing inspiration for other institutions in the public sector to put children’s rights at the heart of their services planning and activities.

## Where are we in Scotland?

Children and Young People (Scotland) Act 2014

Despite widespread support for incorporation from a range of NGOs, public bodies, and children and young people themselves, the Scottish Government decided not to incorporate the UNCRC into law through the [Children and Young People \(Scotland\) Act 2014](#). Indeed, [proposals made in 2011 to introduce a ‘due regard’ duty similar to the Welsh Measure](#) were subsequently withdrawn by Scottish Government. The Scottish Parliament’s Education Committee concluded that [‘the benefits arising from incorporation of the UNCRC could be realised from improvements in policy and practice’](#).

Instead, the 2014 Act introduces duties on Ministers to keep the UNCRC ‘under consideration’, to raise ‘awareness and understanding’ of its principles and provisions, ‘take account’ of views of children and submit a report to the Scottish Parliament every three years on the changes that have been made to UNCRC implementation over the period. It also contains a duty on public bodies to report on UNCRC implementation (‘reporting’ rather than specifically ‘doing’ UNCRC implementation). There has been a mixed response to the 2014 Act to date – some see it as a step forward in how children’s rights are recognised and others believe that it lacks the legal weight needed to ensure that children’s rights are taken seriously.

UNCRC rights in Scots law

Without the incorporation of the UNCRC into Scots law, gaps remain in the protection of children’s rights. If a provision of UK or Scots law is clear, the fact that it is inconsistent with the UNCRC does not stop the provision from being valid<sup>1</sup>. However, UK courts have said that international human rights treaties should be used to help interpret the European Convention on Human Rights (ECHR)<sup>2</sup> and that if legislation is ambiguous, it should be interpreted in a way that complies with the UNCRC<sup>3</sup>.

A number of the general principles of the UNCRC are included in Scots law, albeit on a piecemeal basis. The best interests of the child is particularly prominent through provisions that treat welfare as the ‘paramount’ consideration<sup>4</sup>. This is a stronger wording than Article 3, in which the best interests of the child is a ‘primary’ consideration. In terms of children’s participation (Article 12 UNCRC), legislation places an obligation on those fulfilling a parental responsibility, and on courts, to give children the opportunity to express their view, and to have regard to their view as far as practicable, taking into account the child’s age and maturity<sup>5</sup>. A similar obligation is placed on Children’s Hearings<sup>6</sup> and education authorities<sup>7</sup>.

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1 See *Salomon v Commissioners of Customs and Excise* [1967] 2QB 116

2 See *Christian Institute v Lord Advocate* [2015] UKSC 0216

3 *White v, White*, [2001] S.L.T. 485. Lord Hope at para.494.

4 See the *Children (Scotland Act) 1995* and *Children’s Hearings (Scotland) Act 2011*

5 See the *Children (Scotland Act) 1995*

Other principles of the UNCRC have been established in Scottish courts through the use of the ECHR. In summer 2016, the Supreme Court used Article 8 ECHR to determine a judgment on children's rights to privacy (Article 16 UNCRC) and establish the balance between this and the need to share information<sup>8</sup>. In the absence of UNCRC incorporation, cases on juvenile justice (Article 40 UNCRC) have relied on ECHR Articles 6, 8 and 14<sup>9</sup>. There is active debate among legal and policy experts that the defence of *'justifiable assault'*<sup>10</sup> available to parents who hit their children (which is clearly a violation of UNCRC Article 19) could be challenged in courts under ECHR Articles 3 and 8.

Presentations made throughout the morning of the seminar were clear that the piecemeal inclusion of the UNCRC into domestic law in Scotland results in inconsistencies legal protections. Alison Reid of Clan Childlaw stated that there is *'no point in having rights without being able to enforce them'*, drawing delegates' attention to the UN Committee's statement that *'for rights to have meaning, effective remedies must be available to redress violations.'* There are many barriers that prevent children enforcing their rights in court. A key barrier is the low level of awareness of the UNCRC. Children cannot enforce their rights unless they know they have them. Another barrier is access to legal aid. Although children have the right to instruct a solicitor, changes to legal aid introduced in 2011<sup>11</sup> mean that parents' income needs to be considered when a child applies for legal aid. This creates clear conflicts where a child may wish to ensure their views are taken into account in disputes between - or with - parents, and results in a lack of confidential and independent advice for many children and young people.

### **What is next on Scotland's journey towards incorporation?**

The discussion around the incorporation of international treaties into domestic law in Scotland continues to simmer. The First Minister has said that she's open to *'exploring implementing and incorporating [...] some of the key international human rights treaties'*. The [2016 SNP Manifesto](#) pledged to establish social and economic rights and further embed the European Convention on Human Rights.

Given the international experience of the culture change that incorporation can bring, the seminar concluded with most delegates agreeing that the 2014 Act is only a starting point. The implementation of the 2014 Act provides an opportunity to explore how non-legislative measures such as child rights and wellbeing impact assessments, a national plan of action, data collection, participation of children in decision-making and complaints mechanisms for children can help to progress UNCRC implementation. However, incorporation is still needed to achieve the Scottish Government's aspiration of making *'Scotland the best place to grow up'* and of ensuring children's rights are *'respected across the public sector'*.

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6 Children's Hearings (Scotland) Act 2011 Act, s.27.

7 Standards in Scotland's Schools etc. Act 2000, s.2(2).

8 Christian Institute & Ors v Lord Advocate (Scotland) [2016] UKSC 51.

9 AB v HMA UKSC 2016/0083

10 Criminal Justice (Scotland) Act 2003, s.51.

11 Changes made by Advice & Assistance (Scotland) Amendment Regulations 2010, Civil Legal Aid (Scotland) Amendment Regulations 2010.