

Response to the Scottish Parliament's Equalities and Human Rights Committee's call for views on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill



Submission from the Scottish Youth Parliament, October 2020

Introduction

The Scottish Youth Parliament (SYP) welcomes the opportunity to respond to the Scottish Parliament's Equalities and Human Rights Committee's (hereafter referred to as 'the Committee') call for views on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) (hereafter referred to as 'the Bill'). We are delighted to see the introduction of this historic Bill and we see this as a key moment in history for Scotland's children and young people. It is something that MSYPs have called for over the past five years and we believe this is a vital step forward to making Scotland the best place in the world to grow up.

Summary of SYP's recommendations

- We believe both the proactive and reactive measures included within the Bill will make it significantly easier for children and young people to access their rights.
- We foresee potential barriers to equitable access to the rights set out in the Bill due to their intersectionality with other rights that are yet to be incorporated into Scots Law and the potential inequality in access to legal advice and counsel. We welcome the ongoing work of the National Taskforce for Human Rights Leadership to further improve rights in Scotland and echo Together's calls on the Scottish Government to 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.
- SYP welcomes the powers granted in the Bill to the Children and Young People's Commissioner Scotland.
- Whilst we welcome the Bill's provision to allow action to be taken against public authorities who do not act in ways that are compatible with the UNCRC, we believe that the inclusion of an additional 'due regard' duty would strengthen the Bill and further protect children's rights.
- We believe that the interpretation of the UNCRC requirements (section 4) should go further and include a duty on the courts to have due regard to General Comments, Concluding Observations, opinions made in relation to Optional Protocol 3, reports resulting from Days of General Discussion, comparative law and court rulings, and decisions made under other international treaty regimes.
- We believe the Bill would be further enhanced by including clarity on the "sufficient interest" approach on the face of the Bill.
- We believe the Bill would be strengthened by removing the scope given to Ministers to publish CRWIAs in a manner they see as appropriate and inserting a requirement to publish them in a child friendly format instead.
- SYP believes that it is reasonable and practical for the Bill to commence by the end of 2021 and that a commencement date should be included within the Bill itself.

- We welcome the provisions within the Bill to strike down legislation judged incompatible with the UNCRC as well the duty to provide a statement of compatibility with the UNCRC for any new legislation introduced.
- We welcome the inclusion of the Children’s Rights Scheme within the Bill and support the provisions for accessibility, participation and frequency of follow up reports. We call for the provisions listed in section 11(3), the duty to prepare the scheme, to be made a statutory requirement.
- We welcome the duty placed on “listed authorities” to report every three years on the steps taken to ensure compliance with the UNCRC requirements.

Our approach

This youth-led response has been reviewed, amended and approved by SYP’s Conveners Group (a group of ten democratically elected young people who lead on policy and campaigning at SYP) as well as by key members of the SYP Board of democratically elected young Trustees. Our membership represents young people aged 12-25, SYP’s response is not representative of children below the age of 12, or of adults over 26.

The content of this Bill is technical in nature. Our members have told us that what matters most to them is how rights are exercised in real life, i.e. the outcomes the model will deliver, rather than the technical nature of the model itself. Therefore, our response focusses on supporting and calling for the provisions which they think will provide the best outcomes for children and young people in Scotland. We have also taken account of advice from leading children’s rights experts and our partners at Together (Scotland’s Alliance for Children’s Rights) and the Children and Young People’s Commissioner Scotland (CYPCS).

The views detailed within this response were largely taken from the findings of our July 2019 UNCRC discussion day, which MSYPs attended after receiving capacity building training in this area.

We also carried out a number of telephone interviews with young people to get a deeper understand of how incorporation would impact their lives. These have also been incorporated into our answers.

To find out more information about our approach, please contact us or see [our response](#) to the Scottish Government’s initial consultation on this topic.

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1. Will the Bill make it easier for children and young people to access their rights?

Yes. We believe that both the proactive and reactive measures included within the Bill will make it significantly easier for children and young people to access their rights.

We do however foresee potential barriers to equitable access to the rights set out within Bill due to their intersectionality with other rights that are still to be incorporated into Scots Law. We also have concern around potential inequality in access to resource for legal advice and counsel (see our response to question 5).

Through provisions such as 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), the Bill will ensure the early protection of UNCRC rights in policy-making - preventing rights abuses (and the need to go to court) in the first place. All of these components were identified by MSYPs at our June 2019 Discussion Day as key elements of incorporating the UNCRC into Scots Law.¹

Furthermore, by ensuring children's rights are considered from the outset of decision-making, we believe that these provisions will help to build a positive culture of children's rights within decision and policymaking structures. This will also help to create a societal culture of compassion, tolerance, open-mindedness and equality where children are treated with respect and dignity. MSYPs have expressed that through incorporating the convention into Scots Law, young people will be empowered to both know about and claim their rights.

A former MSYP for LGBT Youth Scotland told us:

*"Incorporation will mean protections that need to be guaranteed and safety for children and young people. It is easier to look at a written document that says that these are the things I should have, rather than kind of guessing what you think you should have. This is empowering for me as a young person."*² (June 2019)
- Imogen Maskell, aged 17.

We also believe that these proactive provisions, and the maximalist model of incorporation, proposed within the Bill will help SYP succeed in achieving its mission to further Article 12 of the UNCRC - for young people to have the right to express their views freely and have their opinions listened to in all matters affecting them. Young people have actively called for incorporation and the need to be heard. In SYP's *Lead the Way* Manifesto (2016-2021), 76% of responses from young people agreed with UNCRC incorporation, and at SYP's 63rd National Sitting in June 2017, MSYPs voted to campaign for young people's rights following consultation with over 5,000 young people across Scotland. The ask for the UNCRC to be incorporated into Scots Law has been raised at both the [first](#) and [second](#) annual Cabinet Meeting with Children and Young People. In April this year, over half of the respondents to the *Lockdown Lowdown* survey had some concern

¹ The Scottish Youth Parliament (2019), [Response to the Scottish Government's Consultation on Children's Rights: Consultation on incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland](#). Hereafter referred to as SYP's UNCRC consultation response (2019)

² SYP's [UNCRC consultation response](#) (2019), p.28

around their ability to access their rights as a young person during the COVID-19 crisis³. This Bill reflects their calls and its introduction demonstrates the power of Article 12 in action.

We know from examples in other countries that these preventative measures can only do so much and breaches are still inevitable. Therefore, we are delighted to see the inclusion of a reactive provision that enables 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). MSYPs believed that the inclusion of this provision is essential to ensuring children's rights are binding rather than simply guiding.

We are also pleased to see that the Bill grants power to the Children and Young People's Commissioner Scotland to bring or intervene in proceedings (section 10). Again, MSYPs have told us how they feel it is essential for bodies such as this one to have such powers as many children will struggle to have the knowledge or confidence to bring about their own complaint⁴.

As one young person told us:

"It will ... specifically help those children who have [had their rights] abused to speak out, now that [their rights] are stated clearly in writing rather than ambiguously. I also hope it will help adult services and statutory bodies to start defending children and young people's rights before it gets really bad." - Charlie McKenzie, June 2019.

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

We welcome the Bill's provision to allow action to be taken against public authorities who do not act in ways that are compatible with the UNCRC, and feel this is an essential element to achieving incorporation.

The UN Committee on the Rights of the Child (UN Committee) is clear that:

*"incorporation should mean that the provisions of the Convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice".*⁵

MSYPs consulted in July 2019 felt that public authorities should action UNCRC rights. The majority of all six tables at our Discussion Day agreed that public authorities should protect UNCRC rights with an 'act compatibly' requirement. Along with many others in the children's rights sector, we agree that a Bill without the 'act compatibly' requirement would not be full incorporation. This 'gives stronger protection' and young people said this was an 'obvious' and an 'absolute' necessity.

³ The Scottish Youth Parliament, Youthlink Scotland and Young Scot (2020), [Lockdown Lowdown– what young people are thinking about COVID-19: key findings and data analysis](#), p.15. Hereafter referred to as Lockdown lowdown

⁴ SYP's [UNCRC consultation response](#) (2019), p.40

⁵ 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](#), paragraphs 19-20

The ‘act compatibly’ duty will ensure that children are able to access remedy and redress where serious rights breaches occur - a right they are entitled to under article 39 of the UNCRC. We endorse the wider arguments put forward on this point in Together (Scotland’s Alliance for Children’s Rights) (hereafter referred to as Together)’s response to question 2 of the consultation. Furthermore, we believe that this duty will also help to create a culture of respecting children’s rights and protect against future breaches.

Charlie McKenzie, a member of SYP’s Bridge the Gap Transition Care Plan team and the Commissioner for Children and Young People’s Advisory Group, told us in 2019 how they felt that by having full incorporation, including an enforceable ‘act compatibly’ duty would have protected their right to education (article 28):

“This is something that I was denied at about age 15 when my mental health deteriorated and meant I couldn’t be in school. But rather than just taking me out of school, they cut me out of education completely. I still wanted to learn but just couldn’t do it in the school environment. This would have helped me receive the education I deserved.”

We also welcome the Bill’s provisions for awarding just remedy. MSYPs felt that decisions around awarding damages should be considered on a case-by-case basis as rights violations happen in different ways. We are pleased to see that Bill’s provisions reflect this.

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

Due Regard Duty

As noted above, we believe it is vital to have an ‘act compatibly’ duty to effectively incorporate the UNCRC into Scots Law. However, we believe that there would be further benefit to including a ‘due regard’ duty in addition to this. The majority of MSYPs at our discussion day called for both duties to be included in legislation.⁶

We have learned from Wales that a ‘due regard’ duty will mean that Government and public authorities will have to think about possible rights breaches in advance, and should try to reduce the chances of them occurring. If they do not think about children’s rights when making decisions, the decision can be reviewed by a judge. Then, if they do not take steps to prevent rights breaches and rights breaches do occur, the duty to ‘act compatibly’ will mean young people (and their representatives) can defend them in court, and the judge will have to take children’s rights seriously.

This is the Human Rights Act+, best suited to the nature of the rights in the UNCRC. One MSYP told us they believed that ‘the Government should take both duties seriously’. This model would ensure accountability, transparency and evidences public bodies’ thinking, explaining their decisions - something that MSYPs felt was important. This would be that the UNCRC is embedded ‘before and after, checking the whole way through’⁷.

To further illustrate how this would benefit young people, an MSYP told us that they themselves have had to fight to get the right equipment to deal with their Additional Support Needs in school. They believed that if public bodies had to show that they have considered their rights, it could have stopped this breach occurring in the first place. But, if it did still occur, then the legally binding duty to act compatibly would provide the

⁶ SYP’s [UNCRC consultation response](#) (2019), p17.

⁷ *ibid.*

added protection of action having to be taken to remedy this if and when it was challenged.

Interpretation of UNCRC requirements (section 4)

We note that the Bill states that courts “may” consider the preamble to the UNCRC, the full articles and the first and second Optional Protocols when interpreting the UNCRC requirements. Whilst these provisions are welcome, we believe they do not go far enough.

MSYPs have told us that they believe courts should use what the UN Committee on the Rights of the Child say when applying UNCRC rights. This extends beyond what is currently detailed within the Bills provision and include the Committee’s General Comments, Concluding Observations and reports resulting from Days of General Discussion.

This is what some of the MSYPs we spoke to at our July 2019 Discussion Day said:

“They know what they are talking about - they are the experts. They specialise in this area and outline realistic actions.”

“If the Committee is changing, it’s important to be kept up-to-date.”⁸

MSYPs also felt that courts should have a duty to take into account CRC Communications under OP3 (some participants thought that Parliament should vote on these). For example, the Communication No. CRC/C/79/D/11/2017 (18th February 2019) could help public bodies interpret Articles 3 and 12, as the Committee found Spain to be in contravention of these due as it failed to develop and apply a UNCRC compliant age-determination process young asylum-seekers. This could be useful in Scotland as there is a disparity across the UK in how age assessments are carried out, and they are often carried out by social workers in Scotland’s local authorities.

When asked what other aids they thought should provide assistance to the courts in interpreting the UNCRC, MSYPs highlighted:

- Court decisions from other countries who have incorporated the UNCRC into domestic law.
- Decisions made under other international treaty regimes such as the ECHR, and principles of these such as the ‘margin of appreciation’ - discretion to the will of Scotland.

Finally, MSYP’s told us that court should also use what the UN’s Human Rights Council say when applying UNCRC rights.

In their own words, they said the following about using the Council’s knowledge:

“Because they are experts, they know what they are talking about, and an objective stance is needed.”

“It’s important to keep issues up to date.”

“This will complement views from the UN Committee.”⁹

⁸ SYP’s [UNCRC consultation response](#) (2019), p15

⁹ *ibid.*

Therefore, we believe that the interpretation of the UNCRC requirements (section 4) should go further and include a duty on the courts to have due regard to General Comments, Concluding Observations, opinions made in relation to Optional Protocol 3, reports resulting from Days of General Discussion, comparative law and court rulings, and decisions made under other international treaty regimes. We believe this combination of provisions would best place Scottish courts to make fully informed rulings which keep pace with international developments and best practice.

Clarity on ‘standing’ (section 7)

We are pleased that the Bill does not include a ‘victim test’ but instead “the ordinary rules about who can bring cases in court would apply to claims brought under the Bill”¹⁰.

MSYPs have told us they would like to see a wide variety of individuals and bodies granted the ability to bring forward proceedings.¹¹ We therefore support this approach and believe that it will help to ensure that vulnerable children and young people can be represented in cases.

We also note that the Scottish Government intends to apply the test of “sufficient interest”. We echo Together’s view that the legislation could be further enhanced by including some clarity on the “sufficient interest” approach on the face of the Bill.

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

We hold concern around the provision detailed in section 14(5), which requires Scottish Ministers to publish a CRWIA “in such a manner as the Scottish Ministers consider appropriate”. MSYPs have specifically told us that CRWIAs should be made accessible to children and young people to enhance accountability and equality. We believe this is a straight-forward but essential element to making children’s rights a reality in Scotland.

Therefore, we believe that the Bill would be strengthened by removing the scope given to Ministers and inserting a requirement to publish CRWIAs in a child friendly format instead. Having the original CRWIA in a child-friendly format would ensure that it is accessible to all from the outset. However, if this call is not possible, we endorse Together’s calls for a provision for a child-friendly summary to be published within three months of the original publication.

Commencement date (section 40)

We note that the Bill does not specify a specific commencement date but the Financial Memorandum allows for a three-year implementation period, with the understanding that commencement will occur during this timeframe.

MSYPs believe that this legislation should come into effect as soon as possible.¹² SYP has called for the UNCRC to be incorporated by 2021 and we would like to see the Bill’s commencement date realised by the end of that year.

¹⁰ Scottish Government (2020). [Policy Memorandum](#), para. 132.

¹¹ SYP’s [UNCRC consultation response](#) (2019), p40.

¹² SYP’s [UNCRC consultation response](#) (2019), p.34.

As an organisation, we are very much aware of the strain that the COVID-19 crisis has placed on both the Scottish Government and public authorities, and appreciate that much has changed in our society since the initial 2019 consultation. However, the pandemic has also highlighted and exacerbated many existing children's rights issues, as well as creating new challenges. MSYPs have raised many rights concerns during this period as seen in the policy calls passed at our most recent National Sitting (July 2020). For example, the following policy, proposed by SYP's Justice and Equalities and Human Rights Committees, highlights a risk to the rights of young offenders:

'The Scottish Youth Parliament is concerned about the wellbeing of young offenders imprisoned during COVID-19, and therefore calls on Scottish Government and Scottish Prison System to ensure offenders can sufficiently social distance and have equal access to healthcare.' - Joint Committee Motion by the Justice and Equalities and Human Rights Committees, passed on 10th July 2020 with 97% support.

Incorporation would ensure that imprisoned young offenders could access their right to be treated with respect and care (article 37 -inhumane treatment and detention) and their right to the best possible health (article 24 - health and health services) throughout this pandemic.

Furthermore, over half of the respondents to the *Lockdown Lowdown* survey in April 2020 had some concern over their ability to access their rights as a young person, within the context COVID-19.¹³ The Bills commencement must be a priority as it will provide much needed protection to children as we navigate our way through the pandemic and resulting recovery period.

We also anticipate many public authorities will already be prepared for the commencement of this Bill. Since the UK ratified the Convention in 1991, the UNCRC has been embedded into policy, legislation and practice in various ways. The Children and Young People (Scotland) Act 2014 has already placed specific duties on these bodies which has prepared them to take on the provisions set out within this Bill. With these factors in mind, we believe that it is reasonable and practical to call for a 2021 commencement date.

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

We note that rights are an intersectional issue and, whilst the Bill provides legal protection for the rights all children are entitled to, the inequalities facing a wide range of groups may create barriers to certain children accessing these rights in practice. Access to women's rights, the rights of disabled people, ethnic minorities and other protected groups are intrinsic to children gaining equal access to the rights granted UNCRC.

Under COVID-19 we have seen inequalities rise in many of these areas. For example, MSYPs have raised concerns around cases of discrimination in health care against those with pre-existing health conditions or disability and have called for equal access to health care for all during the pandemic.¹⁴ MSYPs responded to the Committee's COVID-19 inquiry to highlight this and several other intersectional rights concerns facing young people.¹⁵

¹³ Lockdown Lowdown, p.15.

¹⁴ See the relevant Committee Motion by SYP's Equalities and Human Rights Committee [here](#).

¹⁵ The Scottish Youth Parliament's Equalities and Human Rights Committee (2020), [The impact of COVID-19 pandemic on Equalities and Human Rights - SYP's EQU Committee Response to the EHRiC COVID-19 Inquiry](#).

We know these concerns are echoed by partners across the children’s rights sector, as demonstrated in Together’s own response to this call for views, and that the pandemic highlights a need for binding rights in areas beyond the UNCRC to be progressed. We therefore welcome the ongoing work of the National Taskforce for Human Rights Leadership in this area.¹⁶

We also believe that financial inequalities may create further barriers to children and young people accessing the binding rights this Bill grants them. With child poverty rates rising in Scotland, we could see situations where access to seeking advice and legal counsel on rights breaches depends on a child’s socio-economic standing.

Therefore, we echo Together’s calls on the Scottish Government to 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.

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?

We welcome the provisions in the Bill to strike down legislation judged incompatible with the UNCRC.

In July 2019, MSYPs told us that this legislation should ensure that no new law, policy or practice can be made which violates UNCRC rights¹⁷. They also believed that any current laws that already do so should be changed to ensure UNCRC rights are protected.

Whilst it has been established that the Scottish Parliament does not have the power to require that future legislation must be compatible, we believe that the other measures provided within the Bill (i.e. the provisions requiring CRWIAs and statements of compatibility in relation to future government legislation, the requirement on the Scottish Ministers to report following a strike down declarator or incompatibility declarator made by the courts and the remedial power) provide a robust defence against future incompatible legislation.

We are pleased to see that, under the Bill, any current incompatible legislation will cease to be law if and when a court declares it so. As one MSYP told us, “there is no point in incorporating if we don’t have this” functionality¹⁸.

7. What are your views on the Children’s Rights Scheme and the requirement on public authorities to report?

Children’s Rights Scheme

MSYPs felt it was important that the Bill included a provision for a Children’s Rights Scheme, as detailed in the Independent Incorporation Advisory Group’s draft Children’s

¹⁶ As part of the development of our 2021-26 manifesto, SYP is currently consulting young people on whether they think the UN Convention on the Rights of Persons with Disabilities should be incorporated into Scots Law. This topic has been included in our consultation, as young people have told us they wish to see this change occur. We will be able to update the Committee with the results of our final manifesto once it is published later this Autumn.

¹⁷ SYP’s [UNCRC consultation response](#) (2019), p.14.

¹⁸ Ibid.

Rights (Scotland) Bill¹⁹. They said that the scheme will “get children engaged in rights” and “will bring about accountability²⁰”, so we are pleased to see its inclusion.

However, we are concerned to see that the duty to prepare the scheme (section 11(3)) does not include a mandatory provision to ensure children’s participation in decision-making, awareness raising, rights-based budgeting and the preparation of CRWIA.

In particular, MSYPs have highlighted to us the importance of having young people involved in its development and, in line with Article 12, we believe that the right of children to participate in this process should be enshrined in law. We are pleased to see the duty to consult with children and young people, the Children and Young People’s Commission Scotland and other stakeholders in subsequent reports (section 12(3)) but believe this duty should apply to the development of the initial scheme as well.

Furthermore, we also believe that by making the further provisions listed in section 11(3), such as CRWIAs, a statutory duty we will see a more consistent consideration of children’s rights. Therefore, we suggest that the “may” in section 11(3) is replaced with “shall”.

MSYPs have also told us the importance of making the scheme’s publications child-friendly and accessible²¹. Therefore, we welcome the Bills provision to accompany annual reports on the Scheme with a child-friendly version.

We welcome the mandatory duty to have regard to UN Committee documents. The majority of young people at our July 2019 discussion day felt that the UN Committee’s views are important and should be used, with some also feeling that they are very important and must be used. They provide respected guidance which will help duty-bearers and rights-holders to better understand UNCRC rights.

MSYPs told us that:

“We like the idea of international scrutiny and a higher body should be reviewing how we are doing.”

“They are rights experts and international communication is important. We are sure what they’re saying will fit in Scotland.”²²

Whilst MSYPs were content with the three-year reporting cycle presented in the Independent UNCRC Incorporation Advisory Group’s draft Bill²³, they did express a need for mid-term reports to be produced in addition to this. Therefore, we are delighted to see that the scheme will be presented to Parliament on an annual basis, as we believe this will enable greater accountability and progress on furthering rights.

Public Authority Reporting Duty

¹⁹ Together (Scottish Alliance for Children’s Rights) & CYPCS’s UNCRC Incorporation Advisory Group (2019), [Children’s Rights \(Scotland\) Bill](#), pp.10-11

²⁰ SYP’s [UNCRC consultation response](#) (2019), p.16.

²¹ SYP’s [UNCRC consultation response](#) (2019), p.16.

²² SYP’s [UNCRC consultation response](#) (2019), p.20.

²³ Together & CYPCS’s UNCRC Incorporation Advisory Group (2019), [Children’s Rights \(Scotland\) Bill](#), section 24 (p.10)

Whilst we have not had the opportunity to consult MSYPs on the specifics of the duty the Bill places on public authorities to report on their implementation of the UNCRC (e.g. the list of bodies covered and the frequency of reports), we know that MSYPs generally believe that it is important for public authorities to provide reports.

Such reports enable public scrutiny. As one MSYP told us, “just thinking is not enough, it is[...]difficult to hold them to account if they are only thinking.”²⁴ Therefore, we welcome the duty on “listed authorities” to report every three years on the steps taken to ensure compliance with the UNCRC requirements.

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

Statement of compatibility

SYP welcomes the provisions provided under section 18 of the Bill, which places a duty to provide a statement of compatibility with the UNCRC for any new legislation introduced. MSYP’s at our UNCRC Discussion Day agreed that the Bill should include such measures²⁵.

²⁴ SYP’s [UNCRC consultation response](#) (2019), p18.

²⁵ SYP’s [UNCRC consultation response](#) (2019), p12.