Overview

1. UNICEF UK advocates for the protection and promotion of children’s rights. UNICEF has a specific role under the United Nations Convention on the Rights of the Child (UNCRC) to give advice and assistance to States Parties in implementing children’s rights. This submission concentrates primarily on Parts 1 and 2 of the Bill (the rights measures and the Children’s Commissioner); however, we recognise that there are significant (and potentially negative) rights implications for children within other provisions in the Bill, particularly around new proposals for information sharing.

2. UNICEF UK welcomes the leadership shown by successive governments in Scotland in implementing the UNCRC, and commends the intention of the current government to make rights a reality for children. We welcome the focus the rights measures – when taken together – will give to children’s rights in Scotland, but are disappointed they do not amount to a stronger imperative on Ministers and public authorities to respect and protect children’s rights.

3. The measures to implement the UNCRC in the Bill fall significantly short of incorporation, neither enshrining the rights in the UNCRC into Scots law nor providing any new avenues of legal redress for children. UNICEF UK research (presented at an event in the Scottish Parliament earlier this year) shows that the strongest formulation of children’s rights and the most powerful force for implementation within a nation comes through the direct incorporation of the UNCRC into domestic law. This approach is the most effective and immediate way of achieving the sustained cultural change that will put “children and young people at the heart of planning and delivery of services and [ensure] their rights are respected across the public sector”\(^1\).\(^2\) As such, we would like to see a far more ambitious approach from Scottish Government in its legislative implementation of the UNCRC.

4. With this in mind, we urge the Committee to consider the following overarching issues in its examination and analysis of the Bill:

- Perhaps as a result of the amalgamation of two Bills into one, the Bill fails to create a consistent children’s rights framework for Scotland, within which both government decision-making and local service delivery will sit. This cultural and legal disconnect must be addressed through amendments to the Bill (with a particular focus on Parts 1 and 3, among others) but also through a review of existing legislation to ensure a joined-up approach to legislation, policy and services affecting children.

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\(^2\) Children and Young People (Scotland) Bill: *Policy Memorandum*, paragraph 2
• Stronger duties on those whose decisions and actions affect children – including both Ministers and public authorities – are necessary to give fuller effect to the UNCRC.

• Mechanisms to ensure transparency and achieve the systematic consideration of children’s rights (such as routine child rights impact assessment and an implementation scheme) are missing from the face of the Bill – their absence will compromise the effective implementation of the proposed duties.

• Scottish Government must set out its longer-term vision for children’s rights in Scotland and the steps it proposes to take to achieve this.

Incorporation of the UN Convention of the Rights of the Child

5. UNICEF UK’s experience and research shows legislative steps are essential to embed the UNCRC within legislation, policy, practice and attitudes towards children. The direct incorporation of the UNCRC into Scots law is UNICEF UK’s preferred model and would, with immediate effect, make the principles and provisions of the UNCRC a reality for children in Scotland. This would place duties on public authorities to respect and protect children’s rights, and allow children to challenge violations of their rights in the courts. In essence, it would serve to build a sustainable culture of children’s rights, and enable children to be secure in the enjoyment of their rights.

6. We recognise that it is the current government’s policy to take a step-by-step approach to implementing the UNCRC, and that Ministers ‘are not of the view that wholesale incorporation…represents the best way [forward]…’. Yet this approach has led to inconsistency in the way the UNCRC is implemented across Scotland, and the reality that many children remain unable to realise the full extent of their rights, or to seek appropriate help when those rights are violated. Direct incorporation of the UNCRC would enable gaps in the coverage of current legislation affecting children’s rights to be closed and would embed the overarching principles of the UNCRC (non-discrimination in the application of rights; the best interests of the child; the right to life, survival and development; and the right to express views and be heard) into Scots law for all children.

7. Our comparative research in 2012 found that incorporation is, in and of itself, significant in raising the status of children within society. Certain countries (including Norway, Belgium and Spain) have already incorporated the UNCRC, and there is strong evidence that this has given new life to and a positive outlook

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3 Transposing the UNCRC into Scots law in the same way that the European Convention on Human Rights was transposed into UK law through the Human Rights Act 1998. This is within the power of Scottish Government and Scottish Parliament, see Aidan O’Neill QC (2012), Legal opinion for UNICEF UK.

4 UN Committee on the Rights of the Child (2003), General Comment 5, paragraphs 19-20

5 Letter from the Minister of Community Safety and Legal Affairs to the Rt Hon Lord McNally (August 2012), setting out Scottish Government’s position on incorporation in response to recommendations arising from the Universal Periodic Review http://www.togetherscotland.org.uk/pdfs/Scottish%20Government%20UPR%20response%2029-08-2012.pdf

6 See consecutive reports from Together (the Scottish Alliance for Children’s Rights) on the State of Children’s Rights in Scotland
on the implementation of children’s rights. A renewed focus and commitment is also evident in Wales as a result of the Rights of Children and Young Persons Measure 2011 (which places a due regard duty on Welsh Ministers in the exercise of all their functions). Although the Measure falls short of incorporation, it clearly demonstrates the value of child rights legislation in achieving the systematic consideration of children’s rights.

8. There are of course a range of steps the Scottish Government can take in light of its strong commitment to enshrining the UNCRC in statute that fall short of direct incorporation. Children’s rights duties on Ministers and public authorities are important; considering also how to give legal force to the four general principles of the UNCRC (see paragraph 6 above) would be another important step. One example of how this could be achieved would be the extension of the best interests paramountcy principle in the Children (Scotland) Act 1995 to all children; another could be an administrative approach that gives additional weight to the best interests of the child (Article 3, UNCRC) in the consideration of whether it is appropriate for Ministers to take steps that could give better or further effect to the UNCRC in Scotland.

9. For more information on the benefits and effects of incorporation, we refer the Committee both to the submission from Together and to our aforementioned research on the legal implementation of the UNCRC.

Part 1 – the Rights of Children

10. Political and administrative duties can play a fundamental role in securing respect and protection for children’s rights, and in changing attitudes towards children within society. To do this however, such duties must be strong, transparent, and supported by robust accountability measures including, but not limited to, child rights impact assessment. The Bill provides for a duty on Ministers to keep under consideration the ways in which they might achieve better or further implementation of children’s rights. While a statutory provision on children’s rights and the additional emphasis it places on existing duties on Ministers under international law and the Scotland Act 1998 is welcome, we are very concerned that the proposed duty may do no more than enshrine the status quo in statute if its meaning and intent are not further clarified. This is a particular concern with regard to the test of appropriateness through which Ministers will decide whether or not to take steps to further the UNCRC requirements. UNICEF UK has sought legal advice from a prominent QC on the application and limitations of the rights duties in the Bill; we would be happy to elaborate on these areas in more detail during our oral evidence session with the Committee.

11. An important deficiency of the consideration duty as drafted is that Ministers are under no obligation to demonstrate how they have fulfilled their duty to consider the UNCRC, nor to outline any steps they have identified but decided not to take, nor provide reasons for not taking such steps. They must only report on the steps they have taken to secure better or further effect of the UNCRC requirements. This lack of transparency and accountability will make it extremely difficult to hold

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Ministers to account either politically or legally, thus fundamentally undermining the effectiveness of the duty. It is also clear that a consideration duty will not, in itself, entitle an individual to challenge acts or decisions of Scottish Government or public authorities on the ground that those acts or decisions are not compatible with the UNCRC. There are stronger duties – such as requiring Ministers to act compatibly with children’s rights – that would be more effective in protecting children, promoting cultural change, and achieving Scottish Government’s specific policy goals.

12. Child rights impact assessment (CRIA) is an important mechanism for ensuring consistent and systematic scrutiny of government decision-making against the UNCRC. As well as being essential to enable Ministers and officials to keep the UNCRC genuinely under consideration in relevant matters, a CRIA will ensure Ministers can be held accountable for the actions they choose – or choose not – to take to further the requirements of the UNCRC. CRIA mechanisms are in place in countries such as Wales, Sweden and Belgium, and have also been used to a more limited degree elsewhere (such as Australia, Canada, Ireland and New Zealand). CRIA – broadly, initial screening based on an understanding of the UNCRC rights and the obligations of duty bearers; more detailed analysis of the impact of proposed action on those rights; the use of data (including children’s views) to inform that analysis; the development of alternative solutions to better implement the UNCRC requirements; and appropriate follow-up – has found to be effective in the development of rights-respecting legislation and policy. The added value that a CRIA can bring to existing impact assessment requirements is clear through the Welsh experience (see, for example, the development of the Human Transplantation Bill). Above and beyond the need for CRIA to be included on the face of the Bill to ensure consistency, transparency and accountability, we remain concerned that a full CRIA has not, to date, been undertaken on the Bill, particularly given the implications of many of its provisions for the rights of children in Scotland.

13. The Bill must provide for an implementation scheme to be developed in order to support, develop and roll out the various rights measures within the Bill. This will support Scottish Government to meet its aspirations for children through the legislation. Under the Rights of Children and Young Persons (Wales) Measure, Welsh Ministers must set out the arrangements they have put in place to deliver the child rights duty they are under, and consult on the scheme with children, the Children’s Commissioner and other relevant stakeholders. Moreover, the scheme must be approved by a resolution of the Welsh Assembly. This approach has been effective in driving progress and in supporting officials and practitioners to develop a child rights approach to their work, and has meant that, even with a change in government, the commitment and impetus to the implementation of the Measure and to children’s rights more generally has continued. It seems to us

9 Welsh Government (2013), Children’s Rights Scheme: Report on the compliance with the duty under Section 1 of the Rights of Children and Young Persons (Wales) Measure 2011
that such an approach is essential to the effective discharge of a Ministerial duty on children’s rights.

14. UNICEF UK’s research has shown that achieving the right balance of legal and non-legal measures when implementing children’s rights is crucial. We strongly support the new duty on Ministers to promote awareness and – importantly – understanding of the UN CRC. We would like further clarification from Ministers on how this duty will be delivered (and resourced), with particular attention to addressing the recommendation made by the UN Committee on the Rights of the Child in 2008 that “systematic training” be given to “all professional groups working with or for children, in particular law enforcement officials, immigration officials, media, teachers, health personnel, social workers and personnel of childcare institutions”, as well as to government officials. Significant thought will also need to be given to how knowledge and understanding of children’s rights will be institutionalised across government and the public sector, ideally within a broader implementation scheme (see paragraph 13). UNICEF UK’s research and experience in developing rights-respecting programmes at a local level, evidence from the Welsh experience, and learning from the roll-out of GIRFEC to date all underline the importance of training and capacity-building on the application of children’s rights in order to improve outcomes for children.

15. UNICEF UK welcomes, in principle, the duty on Scottish Ministers to report on the steps they have taken to secure better or further effect of the UNCRC and to raise awareness of children’s rights. However, as dealt with in paragraph 11, this duty must include a duty to report on action they have identified but decided not to take. The three-year reporting cycle adds a valuable domestic dimension to the international child rights reporting process (which takes place every five years). An interim report at the end of the first year following the duties coming into force may be a useful mechanism to ensure momentum is retained at a time of significant political and economic change.

16. UNICEF UK welcomes the greater focus the duty on public authorities to report steps they have taken to implement children’s rights will put on the UNCRC at a local level. However, this reporting duty is not accompanied by any obligation on public authorities to act to better implement the UNCRC, important because it is often at a local level that children will experience rights violations. This omission will have a serious impact on the extent to which a rights culture can truly be developed in Scotland – without a children’s rights duty on public authorities to reflect any duty on Ministers, the legal machinery for promoting and securing children’s rights is weaker than it otherwise could be. We would like to see public authorities placed under a duty to implement the UNCRC to ensure that children’s rights can genuinely become the framework for services and decisions that affect children and young people in Scotland. Such duties would also provide consistency across public functions both geographically but also no matter

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10 UN Committee on the Rights of the Child (2008), Concluding observations: United Kingdom of Great Britain and Northern Ireland, paragraph 21
11 UNICEF UK’s programmes in Scotland comprise the Baby Friendly Initiative, Rights Respecting Schools, and Child Rights Partners (the latter currently in development)
whether those functions are delivered by local authorities, the private sector or the voluntary sector.\textsuperscript{12}

Part 2 – Scotland’s Commissioner for Children and Young People

17. UNICEF UK welcomes the proposed extension of the powers of the Commissioner for Children and Young People to include handling individual complaints from children. This is an important function of a children’s ombudsman and one which provides a valuable mechanism of last resort for children who have not been able to seek justice for a particular rights violation. UNICEF’s recent global study on the role and impact of children’s commissioners found that a strong mandate to respond to individual complaints was “essential”, and that the complaints mechanism “operates as a remedy for specific cases of rights violations affecting an individual child…and also serves to reveal broader, systemic problems in the realisation of child rights”. A strong, independent national champion such as this is a fundamental cornerstone of efforts to improve outcomes for children.\textsuperscript{13} It is important that adequate and secure resources are guaranteed for the delivery of both the new and existing functions of the Commissioner.

18. It is important that the Commissioner’s new powers to investigate individual cases are seen as complementary to existing complaints procedures and advocacy services that children may use. Scottish Government must continue to place emphasis on the development and improvement of other child-friendly advocacy and complaints procedures at the local and national level.

Part 3 – Children’s Services Planning

19. One of the notable challenges in the Children and Young People Bill has been to join up the GIRFEC approach to children’s services with the broader children’s rights framework Scottish Government aspires to. This Bill offers the rare opportunity to embed children’s rights across the design and delivery of law, policy and services impacting on children and young people. To do this effectively, a child rights framework needs to be introduced within children’s services planning, through which public bodies can safeguard, support and promote the rights and well-being of children in their area. There are many opportunities to do this within the existing clauses in the Bill, not least of which is looking creatively at how comparable duties on well-being, planning and reporting may be broadened in scope to include explicit duties on child rights implementation. This would also aid in reducing the reporting burden on local authorities by (rightly) bringing together their responsibilities for children’s rights with those for child well-being.

UNICEF UK
26 July 2013

\textsuperscript{12} UN Committee on the Rights of the Child (2005), \textit{General Comment 5}, paragraphs 40-44 – State Parties have a responsibility for ensuring the compliance of non-State actors with the UNCRC; the reporting duty on public authorities in clause 2 as it currently stands does not cover those delivering public functions such as private or voluntary sector providers. http://www2.ohchr.org/english/bodies/UNCRC/docs/GC5_en.doc