

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

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

Policy Memorandum

Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill introduced in the Scottish Parliament on 1 September 2020.
2. The following other accompanying documents are published separately:
 - explanatory Notes (SP Bill 80–EN);
 - a Financial Memorandum (SP Bill 80–FM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP 80–LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Policy Objectives of the Bill

Overview

4. The Scottish Government is committed to fully realising the human rights of all people in Scotland. It is committed to building a Scotland where respect for human rights forms the bedrock of society and the institutions which govern and deliver public services for the people of Scotland. The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill represents a significant step on the road to fully realising that future for Scotland: a future based on tolerance, equality, shared values and respect for the worth and human dignity of all people.

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

5. The Scottish Government is committed to a revolution in children's rights. The dual impacts of the Covid-19 pandemic and the United Kingdom's withdrawal from the European Union underline the importance of human rights being built into the fabric of society. Nowhere is this more important than in relation to children and young people, whose futures depend on the action taken by all public authorities to implement their rights in practice.

6. The United Nations Convention on the Rights of the Child (UNCRC) is the global "gold standard" for children's rights. By incorporating the UNCRC, the Bill will deliver a fundamental shift in the way children's rights are respected, protected and fulfilled in Scotland, ensuring that children's rights are built into the fabric of decision-making in Scotland and that these rights can be enforced in the courts.

7. The approach which the Bill takes is 'maximalist'. It will ensure that children's rights are protected, respected and fulfilled in Scotland to the maximum extent of the Scottish Parliament's powers. The Bill will ensure that there is a proactive culture of everyday accountability for children's rights across public services in Scotland. It will ensure that public authorities should be required to take proactive steps to ensure compliance with children's rights in their decision-making and service delivery. This will mean that the structures within which decisions are made in Scotland must enable children and young people to be heard and take an active role in their own lives and communities.

8. The Bill will mean that children, young people and their families will experience public authorities consistently acting to uphold the rights of all children in Scotland. Public authorities, including the Scottish Ministers, will be legally obliged to respect children's rights and rights-holders will be able to challenge public authorities in the courts for breaches of their rights.

9. Children and young people face additional barriers to realising their rights and accessing justice. In recognition of this some specific measures are provided for which remove barriers and build in greater accountability and transparency in relation to the proactive realisation of children's rights in practice. These provisions include giving power to the Children and Young People's Commissioner in Scotland to raise claims in the public interest and provision requiring the Scottish Ministers to make a Children's Rights Scheme.

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

10. The Scottish Government wants a Scotland where policy, law and decision-making take account of children's rights and where all children have a voice and are empowered not just to know and understand their rights, but also to assert and defend those rights and the rights of others. Fully realising the fundamental human rights of children and young people is essential to building the more prosperous, equal future which the Scottish Government wants for Scotland. Only by respecting and fully realising the rights of all children and young people can all of Scotland flourish.

Children's Rights in the Context of Covid-19 – Recovery and Renewal

11. The Covid-19 pandemic has highlighted the essential role of human rights in ensuring the highest standards of health and wellbeing for all. On 8th April 2020, the UN Committee on the Rights of the Child (CRC discussed further below) warned of the "grave physical, emotional and psychological effect of the Covid-19 pandemic on children". Children's rights matter now more than ever. This is why the Scottish Government remains committed to delivery of the United Nations Convention of the Rights of the Child (Incorporation) (Scotland) Bill in this Parliament.

12. A children's rights approach has been embedded in the Scottish Government's response to Covid-19 and the approach to recovery and renewal, with Child Rights and Wellbeing Impact Assessments (CRWIAs) published for the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No. 2) Act. The CRC urges States to respect the rights of the child in taking measures to tackle the public health threat posed by the Covid-19 pandemic, particularly in 11 areas.¹ The Scottish Government actively considers the CRC's statement as part of the response to Covid-19 and has shared reports on the action being taken across Scottish Government portfolios within the 11 key areas outlined by the CRC with Together (Scottish Alliance for Children's Rights) on 5 and 19 May 2020².

1

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CRC/STA/9095&Lang=en

² 5 May report:

https://www.togetherscotland.org.uk/media/1514/scottishgovernment_childrens-rights_covid-19-response.pdf; 19 May report:

<https://www.togetherscotland.org.uk/media/1528/scottish-government-childrens-rights-covid-19-response.pdf>

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

A range of other measures have also been put in place to support children's health and wellbeing in the context of the Covid-19 crisis including, as announced in June 2020, £100m of new funding over the next two years to support children, particularly those from disadvantaged backgrounds, returning to school getting the support they need.

13. The pandemic has highlighted and exacerbated existing inequalities in our society with the effects of Covid-19 being felt across every aspect of children's lives, including having significant impacts on relationships with family and friends, housing, access to healthy and nutritious food, education, health and social care, and safety and security.

14. The Scottish Government is committed to ensuring that a rights-respecting approach is at the heart of Scotland's recovery from the pandemic. This will ensure that the services and support which are put in place build on previous successes but are renewed and improved to support better and more equal outcomes for the people of Scotland. Incorporation of the UNCRC will provide a strong platform from which to build stronger rights-based approaches and decision-making structures that will support children and young people recovering from the effects of the pandemic and which will better support children's health, wellbeing and participation into the future.

Background

The United Nations Convention on the Rights of the Child and Optional Protocols

15. The UNCRC was adopted by the General Assembly of the United Nations in 1989 and it was ratified by the UK Government in 1991. It is the most widely ratified human rights treaty in the world. The UNCRC was a landmark treaty, recognising the importance of childhood and the unique needs of children across the globe. It sets out the civil, political, economic, social and cultural rights that all children, everywhere, are entitled to and it remains, to this day, truly world leading. The rights in the UNCRC are guaranteed to every child, whatever their ethnicity, gender, religion, language, abilities or any other status.

16. The UNCRC is one of the core international human rights treaties. It is a holistic framework for the rights of all children and an agreed set of minimum child rights standards. Governments are expected to do all they

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

can to implement the UNCRC – to make sure all law, policy and decisions which impact children comply with their human rights. The UNCRC articles are interdependent – the mutually-reinforcing nature of children’s rights means that civil, political, economic, social and cultural rights all have equal status and are indivisible. For example, the right to relax and play (article 31) and the right to freedom of expression (article 13) have equal importance as do the right to be safe from violence (article 19) and the right to education (article 28).

17. The UNCRC consists of 54 articles. Articles 1 to 42 contain the substantive rights and obligations which States Parties must uphold and give effect to. These include the right to life, survival and development; the right to protection from violence, abuse or neglect; the right to an education that enables children to fulfil their potential; the right to be raised by, or have a relationship with, their parents and the right to express their opinions and be listened to. Articles 43 to 52 concern procedural arrangements for the signature, ratification and amendment of the UNCRC and the establishment of the CRC and the reporting process for States Parties.

18. There are four articles in the UNCRC which are known as the “General Principles”. These assist in interpreting all the other articles and play a fundamental role in realising all the rights in the UNCRC for all children. They are:

- non-discrimination (article 2)
- best interest of the child (article 3)
- right to life, survival and development (article 6)
- right to be heard (article 12).

19. The UK Government has also ratified the first optional protocol on the involvement of children in armed conflict and the second optional protocol on the sale of children, child prostitution and child pornography. A third optional protocol which allows complaints to be made to the CRC has not yet been ratified by the UK Government. While the UNCRC and the first and second optional protocols apply in the UK as a matter of international law, because they have not been incorporated into domestic law they cannot be enforced directly in the Scottish courts.

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

20. The Bill will mean that Scotland is the only part of the UK where the UNCRC requirements (as defined in section 1(2) of the Bill) are directly enforceable in the courts, representing a significant step forward for the protection of children's rights in Scotland.

The United Nations Committee on the Rights of the Child (CRC)

21. The CRC is the body of 18 independent experts that monitors implementation of the UNCRC by States Parties. It also monitors implementation of the first and second optional protocols to the UNCRC. "General Comments" are issued by the CRC based on the articles and provisions of the Convention with a view to promoting its further implementation and assisting States Parties in fulfilling their reporting obligations.

22. Under article 44 of the UNCRC, all States Parties are obliged to submit regular reports to the CRC on how the rights are being implemented. States must submit an initial report two years after acceding to the UNCRC and then periodic reports every five years. The CRC examines each report and addresses its concerns and recommendations to the State Party in the form of "Concluding Observations". These set out what that State Party needs to do to comply with, and better progress, the implementation of the UNCRC.

23. The Scottish Ministers work with the UK Government in reporting to the CRC on the measures they have adopted which give effect to the UNCRC requirements in relation to devolved matters in Scotland. The Scottish Government has also presented on these matters as part of the UK delegations, which is a key component of the UN treaty monitoring process.

24. Following the CRC's most recent examination of the UK in May 2016, the Scottish Ministers welcomed the CRC's Concluding Observations, which were published in final form in July 2016. The report, entitled "Progressing the Human Rights of Children in Scotland: A Report 2015-2018", and its associated Action Plan 2018-2021, set out progress made in

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

taking forward the CRC's Concluding Observations and planned activity until 2021.³ The next examination of the UK is due to take place in 2022.

The Approach to Implementing Children's Rights in Scotland to Date

25. Scotland has a strong track record on building respect, protection and fulfilment of children's rights into law, policy and practice. Children's rights are embedded in Scotland's National Performance Framework and in how public services are delivered, through specific pieces of legislation and policy such as the Children and Young People (Scotland) Act 2014 (CYP Act) and 'Getting it Right for Every Child', (the national approach in Scotland to improving outcomes and supporting the wellbeing of children and young people by offering the right help at the right time from the right people). The Scottish Government respects, protects and fulfils children's rights to help deliver the National Outcomes, in particular that children "grow up loved, safe and respected, so that they reach their full potential".

26. The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill builds upon a proud tradition of respecting children's rights in Scotland that predates even the adoption of the UNCRC by the UN General Assembly in 1989, such as the pioneering and unique children's hearings system, which became operational in 1971. Some specific pieces of legislation which give effect to the rights and obligations in UNCRC in Scotland include:

- The Children (Scotland) Act 1995, which provides a major part of the legal framework for child welfare and protection in Scotland, embedding the principles of articles 1, 3, 5, 9, 12, 18, and 20. Section 11 of that Act is an example of legislation which goes further than the UNCRC. It provides that when considering whether or not to make an order on matters such as child contact and residence and parental responsibilities and rights, the courts must regard the welfare of the child concerned as its "paramount" consideration. This compares to article 3 of the UNCRC (best interests of the child) which provides that

³ <https://www.gov.scot/publications/progressing-human-rights-children-scotland-report-2015-2018/>

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

the best interests of the child shall be “a” primary consideration when considering all actions concerning children.

- The Standards in Scotland’s Schools etc. Act 2000, which sets out the provision of school education specifically relating to children’s rights and the duty of the education authority, embedding the principles of article 29.
- The Commissioner for Children and Young People (Scotland) Act 2003, which embeds the principles of 3, 12 and 42. It creates the post of Commissioner for Children and Young People in Scotland with the general function of promoting and safeguarding the rights of children and young people.
- The Mental Health (Care and Treatment) (Scotland) Act 2003. Section 2 of the Act makes specific provision as regards securing the welfare of any child in respect of care or treatment given under the Act. This legislation is based on a set of principles which promote patient’s rights, which includes that any function should be carried out for the maximum benefit to the patient, with the minimum necessary restriction on the freedom of the patient and having regard to the wishes and feelings of the patient.
- The Education (Additional Support for Learning) (Scotland) Act 2004, which embeds the principles of articles 6, 23 and 29 in the education system. It provides the legal framework which underpins the system for identifying and addressing the additional support needs of children and young people who face a barrier to learning.
- The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, which provides for the protection given to children and young people from those who would wish to cause them sexual harm, or exploit them for sexual purposes, and embeds the principles of article 34. The Act also aims to improve the protection given to children from those convicted of sexual offences who still pose a risk of sexual harm.
- The Adoption and Children (Scotland) Act 2007, which modernised the system of adoption in Scotland to provide long-term security for children who cannot live with their families and embeds the principles of articles 3, 7, 8, 9, 12, and 21 into the adoption system.
- The Protection of Vulnerable Groups (Scotland) Act 2007, which embeds the principles of articles 3 and 34 by creating the legislative

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

framework for a strengthened, robust and streamlined vetting and barring scheme for those working with children and protected adults in Scotland.

- The Children’s Hearings (Scotland) Act 2011, which reformed the children’s hearings system and embeds the principles of articles 3, 4, 6, 8, 9, 12, 25 and 40 into the children’s hearing system.
- The Children (Scotland) Bill, which will enhance how the voice of the child is heard in family cases.
- The Children and Young People (Scotland) Act 2014. Section 1 of the CYP Act, which commenced in June 2015, places specific duties on the Scottish Ministers to keep under consideration whether there are any steps which they could take to give better or further effect to the UNCRC requirements. These include consideration and delivery of appropriate action, listening to the views of children and promoting public awareness and understanding of children’s rights, including amongst children. These duties also require Ministers to report every 3 years on relevant progress and their plans for the subsequent 3-year period. Since 1 April 2017, section 2 of the CYP Act has also placed a duty on a wide range of public authorities to report every 3 years on the steps they have taken to secure better or further effect of the UNCRC requirements within their areas of responsibility.

27. The rights and obligations contained in the UNCRC are also given effect through a range of policy and practice across Scotland including through ‘Getting it Right for Every Child’.

28. The Scottish Government has continued to make respect for children’s rights a priority. The Scottish Government’s ambition to eradicate child poverty in Scotland has been set in statute and the first child poverty delivery plan and first annual progress report were published in June 2019. Through the Attainment Scotland fund, £750 million is being invested during this parliamentary session to tackle the poverty related attainment gap, with a further commitment to continue funding at current levels beyond this parliamentary term and into 2021/22. Despite having to pause the statutory national roll-out of the near doubling of funded early learning and childcare (ELC) entitlement to 1140 hours in order to allow local authorities to respond to the Covid-19 emergency, the Scottish Government is focused on ensuring that as many children as possible can access expanded ELC. Many local authorities are still preparing to provide children and families with up to 1,140 hours this year, meaning that children and parents will

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

benefit from an increase in high quality, flexible early learning and childcare; and the Scottish Government is the first national government in the world to introduce access to free period products for up to 395,000 students attending schools, colleges and universities in Scotland.

29. These are transformational changes that are being delivered for children and young people and their families now and the Scottish Government is committed to doing more. Further implementation of changes to the age of criminal responsibility, raising it from 8 to 12 years, will take place in 2021. The Children (Equal Protection from Assault) (Scotland) Act 2019, which will come fully into force on 7 November 2020, will remove the defence of “reasonable chastisement” in relation to physical punishment of children. This legislation provides children with the same legal protection from assault as adults.

30. The Scottish Government’s vision is for a statutory human rights framework for Scotland that ensures that the rights of every member of Scottish society are respected, protected and fulfilled, and that everyone can live with fundamental human dignity. The National Taskforce for Human Rights Leadership will report its recommendations on establishing such a statutory framework for human rights that can bring internationally recognised human rights into domestic law and protect the human rights of every member of Scottish society. The Bill, which will ensure that children’s rights are fully embedded in domestic law, is a first step in achieving that larger ambition.

Alternative Approaches and The Role of Legislation

31. Whilst the UNCRC was ratified by the UK in 1991, international treaties such as the UNCRC do not automatically become part of domestic law on ratification. “Incorporation” of an international treaty is generally understood to mean that the substantive provisions can be relied upon and applied by the national courts and those provisions must, as a matter of domestic law, be applied by national authorities. Incorporating the UNCRC into domestic law in Scotland in this way requires domestic legislation. The overarching intention of the Bill in this respect is to embed the rights in the UNCRC into the law in Scotland. This will further ensure that children’s rights are woven into policy, law and practice in Scotland and enable children to rely on their rights in the domestic courts.

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

32. International experience suggests that a mixture of law, policy and practice is the best way to progress implementation of the UNCRC. Non-legislative measures that different countries have used include national strategies and action plans for children, children's rights training and the establishment of children's commissioners or ombudspersons. The Scottish Government will continue to pursue a range of measures to implement the UNCRC in addition to the Bill. The Scottish Government's priorities for embedding a children's rights approach in Scotland over the next three years are set out in "Progressing the Human Rights of Children in Scotland: 2018-2021 Action Plan", published in December 2018. The first annual update on progress made on taking forward the Action Plan was published in November 2019 and a further update will be provided later this year.

33. Evidence suggests that in a number of countries incorporation has had a positive impact in providing a platform for the development of other legal and non-legislative measures, underpinned by systematic children's rights training and a robust infrastructure designed to monitor, support and enforce implementation. As set out above, the Bill builds upon a strong foundation of existing policy, practice and legislation in Scotland which has sought to embed children's rights. As is evident from the consultation responses, there is wide recognition in Scotland, however, that incorporating the UNCRC directly will significantly advance the protection and realisation of children's rights. The Scottish Government considers that now is the right time to directly incorporate the UNCRC and make the rights and obligations contained within it enforceable in the Scottish courts.

Statutory Human Rights Framework for Scotland

34. The principal recommendation of the First Minister's Advisory Group on Human Rights Leadership, which reported on 10 December 2018⁴, was the creation of a new statutory human rights framework for Scotland. This would involve a new Act of the Scottish Parliament which incorporates into Scots law rights from UN and other human rights treaties. The Advisory Group proposed that such an Act of the Scottish Parliament should set out for the first time, and in one place, the rights that belong to everyone in Scotland. The group proposed that the Act could be legislated for at the commencement of the next term of the Parliament in 2021.

⁴ <https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

35. Rather than delivering a Bill to incorporate the UNCRC now, it would be possible to achieve incorporation of the UNCRC as part of such a comprehensive human rights framework. This would allow all rights to be brought together in one place, including those of children and young people under other human rights treaties.

36. It would not, however, be possible to pass this legislation before the next Scottish Parliament election in 2021. The Advisory Group explicitly recognised in its report that longer-term ambitions to incorporate all human rights treaties should not cause any delay to UNCRC incorporation. The Scottish Government has, therefore, confirmed its intention to push ahead with UNCRC incorporation now. The Scottish Government has been mindful that the approach taken in the Bill will, to some extent, set a precedent for the wider approach to the creation of a new statutory human rights framework for Scotland as recommended by the Advisory Group. The Scottish Government have kept the National Taskforce for Human Rights Leadership group advised on the policy development for the Bill and it is expected that the approach taken can dovetail with any wider approach recommended by the Taskforce in due course.

Options considered for the Bill

37. There is no single approach to the implementation of an international convention into domestic law. The CRC recognises that there are a variety of legal methods for implementation including by direct or indirect incorporation or through piecemeal legislation, and makes clear that it is for individual States to decide how best to make children's rights real in their particular country. Learning gained from experiences in other countries indicates incorporation is most effective when it is carried out in a way that best takes account of each individual country's legal system, policies and practices. In considering the approach which the Bill should take to incorporation of the UNCRC, the Scottish Government considered different approaches. These are discussed below.

Imposing Duties on Public Authorities

38. There are broadly two approaches which have been taken in the UK in relation to incorporation of human rights treaty obligations. The first is that used in section 6 of the HRA, where it is made unlawful for a public authority to "act in a way which is incompatible" with rights in the ECHR (as given effect in domestic law by the HRA). There is a similar requirement in

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

the Scotland Act 1998 (Scotland Act) that the Scottish Ministers may not act incompatibly with ECHR rights or EU law.

39. The second approach would involve placing a duty on an authority to pay “due regard” to human rights obligations when exercising their functions, and to reflect that consideration in their decisions. This type of duty obliges public authorities to show that they have considered people’s rights when they make relevant decisions. Other formulations of this type of duty are also seen in legislation, for example a duty “to have regard”, a duty “to consider” or a duty “to take into account” in relation to principles or aims.

40. The First Minister’s Advisory Group on Human Rights Leadership consider these two approaches in their recommendations. They illustrate the difference between the two approaches by explaining that a “duty to comply” (as in the HRA) is “a duty to provide an outcome which is consistent with the rights of the individual, and unlike an obligation to give due regard not simply a duty to provide a process which takes into account the rights of the individual.”

41. The Scottish Government considered whether the Bill should provide for a “duty to comply”, a due regard duty or a combination of both, such as through a sunrise clause where an initial duty to have “due regard” is later replaced by a “duty to comply”. Obligations to have “due regard” have important applications in many areas, but the Scottish Government does not consider that a standalone duty to have due regard to the UNCRC rights would be the most effective means of delivering improvement in outcomes for children. In relation to the consideration of a sunrise clause, given the progress which has already been made on children’s rights in Scotland and the provision which already exists in the CYP Act, the Scottish Government considers that the approach taken in the Bill, whereby one clear compatibility duty (see section 6 of the Bill) is provided for, is the approach that best delivers the protection for children’s rights which is sought.

Incorporating the UNCRC Directly into Domestic Law or Transposing the UNCRC for a Scottish Context

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

42. In the consultation for the Bill, the Scottish Government asked whether the Bill should take a direct approach to incorporation of the UNCRC or whether a transposition model should be adopted.

43. Direct incorporation is the shorthand for a method of incorporation that takes the content of an international convention and gives it effect in domestic law – for example by lifting the wording from the international convention and putting it into domestic law. Broadly, this is the approach taken by the HRA with regard to the ECHR. Section 1 of that Act defines “Convention rights” and the relevant articles are set out in schedule 1. The articles in the schedule reproduce the wording of the articles in the ECHR itself.

44. Direct incorporation in this way means that rights-holders can simply refer to the text of the international convention (as included in the Act) to identify the rights which form part of domestic law. Under this approach, the Bill would (so far as permissible under the Scotland Act) set out a framework of duties and requirements which would apply to the rights as set out in the UNCRC and optional protocols and would introduce remedies in the domestic courts for enforcement of those rights. In this context there is no difference in the wording between the “domestic version” of a right and the international version.

45. A transposition model, on the other hand, could be achieved in Scotland by providing for a suite of Scottish children’s rights in a Bill with a corresponding framework of duties and requirements to those rights. Alternatively, specific changes could continue to be made through different pieces of domestic legislation.

46. Through the responses to the consultation, it is evident that there is wide support for directly and fully incorporating all the rights that are set out in the UNCRC. Children in Scotland have said that they want the same rights that children have all around the world. Although there was some limited support for the approach of having a suite of Scottish rights, the Government has heard that such an approach would carry a risk of diluting or changing rights, even if that were unintended. The Scottish Government, therefore, confirmed in November 2019 that the Bill would take a direct approach to the incorporation of the UNCRC.

Clarity and Enforceability of Rights

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

47. A benefit of the transposition model as discussed in the consultation was that it afforded the opportunity for rights which are set out in an international treaty and which are expressed in general terms and directed towards actions to be taken by the State, to be given clear effect and tailored to the actions of public authorities at domestic level.

48. The Scottish Government considers that there is a significant benefit in incorporating the UNCRC requirements directly, thereby ensuring that children in Scotland have the same rights as other children around the world. The Scottish Government does not consider that this prevents it from making further provision where appropriate; indeed the UNCRC envisages further legislative and other measures to ensure that rights are respected, protected and fulfilled fully in practice.

49. The Scottish Government has given careful consideration to how, in taking a direct approach to incorporation, the Bill can be as clear and accessible as possible. The starting point for the Scottish Government is recognition that the rights and obligations provided for in the UNCRC and the first and second optional protocols are already obligations which apply to the UK as a matter of international law.

50. Implementation of the UNCRC in different jurisdictions has led to a debate about whether some articles are not self-executing (that is, they cannot be enforced without further provision). The Scottish Government gave careful consideration to this question and the views expressed in the consultation and by the Working Group. It is clear that there is no international consensus on this matter: articles that have been found to be unenforceable in some jurisdictions have been found to be enforceable in others. In the context of this Bill, the question is essentially whether a right can be created that can be enforced by the Scottish courts.

51. The approach taken, that is, the inclusion of the articles of the UNCRC and the first and second optional protocols in the Bill with a corresponding duty on public authorities to act compatibly – is considered by the Scottish Government to create legally enforceable rights and obligations in relation to those articles. Whether those rights and obligations will give rise to claims before the courts will depend on the circumstances of the case. Interpretation of the incorporated rights and obligations will ultimately be a matter for the courts.

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

52. Unlike the situation when the HRA incorporated the ECHR, there is not a body of case law regarding the UNCRC from an international court equivalent to the European Court of Human Rights. The Scottish Government recognises that it will take time for the Scottish courts to develop their own case law in relation to the interpretation of the rights and obligations being incorporated by the Bill.

53. There are of course sources of interpretation that may be useful to the courts and public authorities when applying the UNCRC. These include General Comments and Concluding Observations of the CRC, any communications issued by the CRC under the third optional protocol communications procedure, and case law from other jurisdictions. This is in addition to the experience and practice that already exists within some public authorities and the courts in applying the UNCRC at present. The Scottish Government considered whether any special status should be given to these sources of interpretation. Whilst it is considered that these will be useful aids to public authorities and the courts it was considered that, as these sources are not intended to be binding sources of interpretation, no special status was necessary.

Going Further Than the Rights and Obligations Set Out In the UNCRC

54. The First Minister's Advisory Group on Human Rights Leadership recommendations also noted that, in some circumstances, it may be preferable to go above and beyond the rights set out in the UN treaties and provide additional protection that better serves the public interest. The Scottish Government has given careful consideration to this recommendation in taking the full and direct approach to incorporation provided for in the Bill within the powers of the Scottish Parliament.

55. In addition to incorporating the UNCRC requirements the Bill provides for measures of implementation which will ensure that children's rights are considered and fully implemented within the Scottish context and in practice in Scotland. These provisions, which include powers to raise proceedings by the Children and Young People's Commissioner Scotland (Commissioner), provision for Children's Rights and Wellbeing Impact Assessments (CRWIA) and for the Children's Rights Scheme are discussed further below.

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

56. Through the consultation there were some calls for the Scottish Government to go even further and to provide for new rights over and above those provided for in the UNCRC. At this stage the Scottish Government is mindful of the risks identified with a Scottish suite of rights approach and considers that a direct approach to incorporation is the one that will lead to the highest protection, respect and fulfilment of children's rights in practice. Incorporation of the UNCRC will provide a platform for further progress and advancement of children's rights in Scotland and the Scottish Government will continue to consider any proposals for further legislative provision in support of children and young people. The National Taskforce for Human Rights Leadership will also provide recommendations to the Scottish Government on the establishment of the statutory framework for human rights.

57. The direct approach to incorporation taken in the Bill does not mean that further provision to give effect to children's rights in Scotland is not possible or desirable. Indeed the Scottish Government considers that by incorporating the UNCRC and optional protocols in full and directly, as far as possible within the powers of the Scottish Parliament, Scottish Ministers will be under a continuing obligation to review legislation, policy and practice and to consider what further provision is necessary to ensure that children's rights are fully respected, protected and fulfilled in Scotland.

Scottish Constitutional Context

58. In developing the approach for the Bill, the Scottish Government has been mindful of the need for the Bill to take account of the Scottish context and, in particular, the constitutional constraints of devolution.

59. The approach taken is, therefore, based to a strong degree upon the frameworks provided for in the Scotland Act and the HRA, and the experience which has developed under previous legislation in Scotland, including the CYP Act.

60. In line with the "maximalist approach", the Bill provides for the maximum protection possible for children's rights within the devolution settlement. The Bill seeks to ensure that incorporation, and therefore enforceability of the rights and obligations incorporated by the Bill, is delivered up to the absolute limits of what is possible within the boundaries of the devolution settlement. The Bill will also make provision to allow incorporation of those provisions of the UNCRC currently beyond the

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

powers of the Scottish Parliament into domestic law should the powers of the Parliament change in the future.

The Benefits of The UNCRC Incorporation (Scotland) Bill

61. The Scottish Government believes now is the right time to incorporate the UNCRC into domestic law so that the rights of children and young people must always be built into policy, legislation and decision-making in practice, and that children can enforce their rights directly in the Scottish courts should the need arise.

62. The Bill will represent a significant step forward for the protection of children's rights in Scotland. It will mean that all legislation and decision-making must be compatible with the UNCRC requirements and where that is not the case children and young people and their representatives can use the courts to enforce their rights.

63. The Scottish Government is committed to ensuring that children's rights are respected, protected and fulfilled and that recourse to the courts should be a last resort. The Bill will ensure that all practical steps are taken to ensure that children and young people are heard and that their rights are built into day-to-day policy and decision-making across Scotland.

64. The provisions in relation to the Children's Rights Scheme and related reporting requirements will ensure that the Scottish Ministers are not only accountable for their actions in relation to the compatibility duty under the Bill, but that they are accountable for planning and reporting how they will fulfil the rights and obligations under the Bill in practice. The requirement for listed public authorities (being those bodies that currently have duties under section 2 of the CYP Act), who work most closely with children and young people, to continue to plan and report on how they give effect to children's rights remains an important mechanism in ensuring that children's rights are given effect fully in practice.

65. The Bill recognises the special role played by the Commissioner and their role as the guardian of children's rights in Scotland. It strengthens the Commissioner's existing functions, providing the power to raise litigation in the public interest, with a view to ensuring that incompatibilities can be identified and brought to court if necessary without the need for individual children and young people or their families to take on the full responsibility and strain of challenging breaches of their rights alone.

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

66. The Scottish Government recognises the central role that litigation can play in delivering a rights-based approach in practice. Experience under the HRA and the Scotland Act shows that litigation of human rights violations can lead to the identification of legislation and practice which is incompatible with rights, driving progress and change to the law, and leading to a rights-respecting approach. The Scottish Government fully expects that children and young people will use the power being given to them to enforce their rights and that this will have similarly positive consequences for the development of law, policy and practice in Scotland that cannot yet be foreseen.

67. The Bill will ensure that every child has the opportunity to challenge breaches of their rights, should they need to, throughout their childhood and that no claim can be time-barred during the period of their childhood. Similar to the HRA, the Bill will ensure that where a public authority has been found to have acted in a way that is incompatible with the UNCRC requirements, the courts can award the remedy which they consider will provide the child with appropriate redress, including awards of damages as just satisfaction.

68. The Scottish Government believes that the benefits of the Bill are best expressed by the children, young people and stakeholders who have called for its introduction. In the responses to the consultation some of them said:

Children's Parliament: "Children tell us that making the UNCRC and optional protocols law in Scotland will result in more people respecting children's rights and taking them seriously. To children, the idea of incorporation is naturally binding – there should be no question that the government and adults more generally should have to know, understand and fulfil children's human rights. Incorporating the UNCRC will have a direct impact on the outcomes that children experience in Scotland and children recognise that having their rights respected in law will make a huge difference in their lives."

An attendee at a Scottish Youth Parliament consultation event:

"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

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

what you think you should have. This is empowering for me as a young person.”

Children 1st: “30 years since the UNCRC was agreed by the UN, it is time that Scotland takes the next step in securing children’s rights. We applaud the bold and decisive step taken towards this by the First Minister, and believe it is crucial that we push forward now with incorporation of the UNCRC.”

Together: “Scotland has emerged with the potential to become an international leader in children’s rights.”

Consultation

Public Consultation

69. The Scottish Government recognises that, as the First Minister’s Advisory Group on Human Rights Leadership has said, consultation and engagement with children and young people and the full range of duty bearers and stakeholders is key to successful change in relation to rights awareness-raising and incorporation.

70. In developing the policy for the Bill, the Scottish Government has sought to consult as widely as possible including through a formal consultation, by establishing a working group, supporting the engagement by children and young people and by continued engagement with key stakeholders in the weeks and months towards the Bill’s introduction. The Scottish Government remains committed to further engagement throughout the Bill’s passage through the Parliament and beyond to ensure that an effective and inclusive implementation strategy is developed and implemented in support of the Bill.

71. The Scottish Government published a consultation document on 22 May 2019 which invited views on the best model of incorporating the UNCRC into Scots law.⁵ The consultation was undertaken from 22 May 2019 to 28 August 2019. 162 responses were received from individuals, public bodies, third sector, legal organisations, academia and others. Non-confidential consultation responses were published on 20 November 2019

⁵<https://www.gov.scot/publications/childrens-rights-consultation-incorporating-uncrc-rights-child-domestic-law-scotland/>

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

on the Scottish Government website.⁶ The Scottish Government commissioned an independent analysis of the consultation responses by ARAD Research and this was published, along with a community version of the consultation responses, on 20 November 2019.⁷

72. To complement the public consultation, a range of bilateral official and Ministerial meetings were held over the summer, meeting 47 organisations representing a number of different sectors. The Scottish Government recognises the right of children to be involved in decisions that affect them and to that end funded seven events which engaged over 180 children and young people to support their engagement in the consultation.

73. There was widespread support for the Scottish Government's commitment to incorporate the UNCRC; it was viewed as representing a step forward in Scottish leadership for children's rights. Only 4 out of 134 respondents expressed general opposition to the incorporation of the UNCRC and/or additional implementation of children's rights when asked for their preferred method of incorporation.

74. The majority of those who answered the question identified direct incorporation as their preferred model (82 out of 134 responses). This model was favoured by over three quarters of third sector organisations who answered the question. Around one fifth of respondents expressed uncertainty as to their preferred model and/or could see the benefits and challenges associated with the various options (25 out of 134 responses). A direct incorporation model was also supported by all but one of the organisations which included the views of children and young people in their response.

75. The majority of those respondents who answered the question were in favour of the incorporation framework containing a "duty to comply" (125 out of 132 responses). This was the same for organisations representing the views of children and young people (10 out of 13 responses).

76. A large majority of respondents who answered the question felt that the Scottish Government should push forward with incorporation prior to

⁶ https://consult.gov.scot/children-and-families/uncrc/consultation/published_select_respondent

⁷ <https://consult.gov.scot/children-and-families/uncrc/>

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

the development of a Statutory Human Rights Framework (113 out of 136 responses).

77. A large majority of respondents who answered the question about a Children's Rights Scheme favoured a requirement for the Scottish Government to include such a scheme in the Bill (116 out of 130 responses). This was the same for organisations which included the views of children and young people in their response (11 out of 13 responses).

78. A large majority of respondents who answered the question whether the Bill should include a requirement that any future legislation to be introduced in the Scottish Parliament should be accompanied by a statement of compatibility with children's rights agreed with that proposal (120 out 131 responses). A majority of organisations which included the views of children and young people in their response agreed also (9 out of 13 responses).

79. There was strong support for the Bill to contain a provision requiring an Act of the Scottish Parliament to be interpreted and applied so far as possible in a manner which is compatible with the rights provided for in the Bill (82 out of 105 responses). This was also supported by a majority of organisations which included the views of children and young people in their response (8 out of 13 respondents).

80. A large majority of respondents who answered the question agreed that rights-holders should be able to challenge acts of public authorities (131 out of 142 responses).

81. Around 3 in 10 respondents who provided written comments to the question suggested that provision should be made to enable third party representatives such as the Children and Young People's Commissioner for Scotland to bring cases or contribute to judicial proceedings relating to children's rights (30 out 101 responses).

82. Additional issues emerging from the consultation and engagement activity in this regard included:

- Many respondents highlighted the importance of providing further training for duty-bearers, courts, legal practitioners and other stakeholders in preparing for the implementation of the Bill. This issue

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

was raised in response to a number of questions in the consultation, for example by just under a third of those who provided written comments to the question regarding whether additional non-legislative activities were required to further implement children's rights in Scotland (41 out of 128 responses). This issue of further training was also raised by those organisations representing views of children and young people in their responses.

- Many respondents highlighted the need to minimise the barriers for children and young people in bringing proceedings to protect their rights.
- Around one in four respondents suggested that, to support addressing these difficulties, developing clear routes for challenging potential breaches of UNCRC rights (32 out of 126 respondents) was required. The right to challenge acts of public authorities was also supported by all but one organisation which included the views of children and young people in their responses, and they emphasised the importance of advocacy support and access to justice for children and young people to enable them to challenge a potential breach.

83. The Scottish Government has given careful consideration to the views expressed through the consultation in the development of the policy for the Bill. The Scottish Government is committed to a 'maximalist' approach and has sought to deliver on all of the major themes from the consultation in the provisions included in the Bill, including that the UNCRC should be incorporated fully and directly as far as is possible within legislative competence, placing a compatibility duty on public authorities, making provision for compatibility of legislation, ensuring that all children (being all persons under 18) are entitled to the rights, ensuring that rights are enforceable in the courts and that there are effective remedies, requiring that the Scottish Ministers publish a Children's Rights Scheme and that listed public authorities continue to be required to report. Further information about the policy for all of the provisions contained in the Bill is provided below.

Draft Bill by the Independent Advisory Group convened by Together and the Children & Young People's Commissioner Scotland

84. The consultation asked specifically about the draft Bill presented to the Scottish Government in 2018 by the Independent Advisory Group

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

convened by Together and the Children & Young People's Commissioner Scotland.⁸ The Scottish Government shares the ambition set out in this draft Bill which was also broadly supported by many respondents to the consultation. The draft Bill has been helpful in guiding the approach taken in this Bill.

85. There are some areas where the Scottish Government has taken a different approach. The Bill which is being introduced to the Parliament provides for one clear compatibility duty. The Scottish Government considers that one clear duty underpinned by a framework ensuring that the rights and obligations in the UNCRC can be enforced in the courts is the best way to deliver for children and young people and ensure that there is a coherent framework within which public authorities should deliver their services which supports respect, protection and fulfilment of children's rights in practice.

86. The Scottish Government gave careful consideration to the dual duties approach taken in the draft Bill (that is to provide for both a duty to not act incompatibly and a duty to have due regard). Many respondents to the consultation were attracted to this idea on the basis that it would provide both 'proactive' and 'reactive' protection for children's rights. The Scottish Government considers that a proactive approach is inherent in acting compatibly with human rights and was concerned that such an approach risked causing unnecessary duplication and confusion. As is the case under the HRA, the compatibility duty in the Bill is a continuing obligation.

87. The requirement in the Bill for the Scottish Ministers to publish a Children's Rights Scheme, and to report on the steps taken and which are planned to ensure that the Scottish Government is complying with the compatibility duty under the Bill, is considered to be a further way that proactive realisation of children's rights is delivered in practice. Whilst publishing Children's Rights Schemes will not be mandatory for all public authorities, it is intended that the example set by the Scottish Government in publishing its Scheme under the Bill could be followed in practice by other public authorities where this is appropriate. The reporting obligations which the Bill places on listed public authorities will further ensure that, in relation to those authorities whose services impact most directly on children

⁸ <https://www.togetherscotland.org.uk/media/1200/childrens-rights-scotland-bill-2019.pdf>

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

and young people, that plans and actions in respect of children's rights are more transparent and accessible.

88. The Scottish Government gave careful consideration to the proposal in the draft Bill to include an overarching objective to respect, protect and fulfil children's rights. Whilst the Scottish Government shares these objectives it is mindful of the need for the framework which the Bill puts in place to be clear and accessible to public authorities and children and young people in practice and not to put in place unnecessary procedural or administrative burdens. The Scottish Government considers that the best way to do this is through the compatibility duty and other requirements in the Bill which the Scottish Government believe will deliver on the objective that children rights are respected, protected and fulfilled in practice.

UNCRC Working Group

89. To complement the public consultation, the Scottish Government convened a short-life working group that was made up of stakeholders from public authorities, the third sector, the Scottish Youth Parliament, academia and the legal profession. The UNCRC Working Group was convened with an advisory remit to inform the development of a model for incorporation relevant to the Scottish context, and a Scottish Government Bill, which would be introduced in this parliament.

90. The Group met eight times from 25 June 2019 to 24 February 2020. The final report, which was published on 27 July 2020, minutes and summaries of the workshop discussions from the meetings of the Group are available on the Scottish Government website⁹.

91. The Group considered the policy, practice and legislative implications of UNCRC incorporation, using the Scottish Government's consultation document on "incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland" as the framework for discussions.¹⁰

⁹ <https://www.gov.scot/publications/incorporating-united-nations-convention-rights-child-domestic-law-scotland-working-group-summary-report/>

¹⁰ <https://www.gov.scot/publications/childrens-rights-consultation-incorporating-uncrc-rights-child-domestic-law-scotland/>

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

92. The meetings of the Working Group focused on specific themes in line with the consultation document:

Theme 1: Legal Mechanisms for Incorporating the UNCRC into Domestic Law;

Theme 2: Embedding Children's Rights in Public Services; and

Theme 3: Enabling Compatibility and Redress.

93. The Scottish Government followed the work of the Group carefully and its deliberations informed the development of the policy for the Bill. The final report of the Group includes majority views expressed by the Working Group which identify a number of areas for consideration by the Scottish Government. The Scottish Government is committed to implementing all of these actions either through the Bill itself, within the context of the implementation programme in support of the Bill, or through other policy and legislation. A summary of the majority views and the action which the Scottish Government is taking in response is provided below. All the views expressed by the Working Group will continue to be considered by the Scottish Government, including in the development of the implementation plan.

Theme 1 – Legal Mechanisms for Incorporating the UNCRC into Domestic Law

94. The majority views of the Working Group on this theme were:

- There should be a standalone Scottish Government Bill (the Scottish Bill) which should incorporate as much of the UNCRC as is possible within the legislative competence of the Scottish Parliament.
- The Scottish Bill should incorporate the UNCRC fully and directly into domestic legislation, with the caveat that provisions would relate only to the exercise of devolved functions.
- Accessible guidance and training should be provided for duty bearers to support preparation and planning for UNCRC incorporation.
- Any new legislation should be accompanied by an awareness-raising programme so that children are aware of the UNCRC and other rights protections; how to act to promote rights; and how they might challenge perceived breaches of their rights.

95. The approach which the Bill takes is 'maximalist' meaning that the Bill will fully and directly incorporate the UNCRC and first and second optional protocols as far as possible within the powers of the Scottish Parliament.

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

The Scottish Government is fully committed to ensuring that accessible guidance and training is developed as part of an implementation programme in support of the Bill for public authorities to support preparation and planning in advance of commencement of the Bill. This will be supported by a central implementation team within the Scottish Government who will be dedicated to coproducing and delivering effective guidance and training with public authorities and the third sector so that it best meets the needs of practitioners and the rights children and young people they serve.

96. The Scottish Government will build upon existing work in support of effective participation of children and young people. In addition, Scottish Government will continue to fund awareness-raising which builds children, young people and their families' awareness and understanding of the UNCRC and other rights protections. This will include raising awareness amongst children and young people of how to act to promote rights and how they might challenge breaches of their rights and act as human rights defenders. Building upon effective participation and awareness raising will support effective implementation of the Bill.

Theme 2 – Embedding Children’s Rights in Public Services

97. The majority views of the Working Group on this theme were:

- The development of a Scottish Children’s Rights Scheme could complement the existing children’s rights framework in Scotland and support the implementation of the proposed Scottish Bill to incorporate the UNCRC into Scots law.
- The use of CRWIAs should be continued within any future Scottish Children’s Rights Scheme.
- There should be a statutory requirement for CRWIAs to be undertaken on all new Scottish Government policies and legislation.
- A clear timeframe should be provided to duty-bearers to allow public authorities adequate time to ensure that services and policies are compliant with the UNCRC prior to commencement of provisions in the Scottish Bill.

98. The Scottish Government is delivering on the views expressed in the first three bullets directly through the Bill. The Scottish Government believes that the compatibility duty should take effect as soon as possible. A reasonable implementation period will, however, be required to ensure

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

that public authorities can ensure that all legislation, policy and practice is fully in alignment with the UNCRC requirements before the duty is commenced. Given the additional pressures faced by public authorities in the context of Covid-19, the Scottish Government considers that it is reasonable to afford public authorities the opportunity to engage with the Scottish Ministers further about what the appropriate length of implementation period that will be.

Theme 3 – Enabling Compatibility and Redress

99. The majority views of the Working Group on this theme were:

- The Scottish Bill should include a scheme which provides for an effective remedy for any infringement of individual rights.
- Children and young people should be effectively supported throughout the process of legal redress. This could include access to advocacy and mediation.

100. The Scottish Government is delivering on the first bullet directly by providing for a strong framework of legally binding duties which can be enforced by the courts. This includes the central compatibility duty. Some provision in support of the second bullet is provided directly through the Bill such as the provisions in section 7 relating to time limits and the provisions in section 10 strengthening the functions of the Children’s Commissioner and enabling the Commissioner to raise proceedings in the public interest. The Scottish Government is undertaking a range of other policy initiatives aimed at supporting children and young people’s access to justice and in relation to wider support children and young people need, such as advocacy support. The Scottish Government introduced a national children’s hearings advocacy scheme, backed by £1.5 million, this to further reinforce children’s rights and make sure the wishes and interests of each child is at the very heart of every hearing. A number of respondents to the Scottish Government’s consultation on Legal Aid reform indicated support for the removal of parental means from financial eligibility assessments for child applicants, and for moving to an automatic entitlement for children and the care-experienced. This will be explored as proposals for a Legal Aid Reform Bill are developed during the first session of the next Parliament, as will more targeted approaches to funding legal assistance required by children, where appropriate.

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

Further Engagement Since the Formal Consultation

101. Since the consultation closed the Scottish Government has had further discussions with a range of organisations including the Convention of Scottish Local Authorities (COSLA) and local authorities, child protection committees, justice and courts partners, social work bodies, and children's rights stakeholders to explore the implications of the Bill. Broadly these organisations have been supportive of the proposals for the Bill. Themes which have arisen out of these discussions were similar to those raised in the consultation itself such as the importance of accessible guidance for duty-bearers to support preparation and planning, as well as training for staff in public authorities. In relation to preparation time, some public authorities considered six months to one year will allow sufficient time to ensure their policies and practices are aligned with the UNCRC requirements. However, others saw this as a two- or three-year programme of work, noting the ongoing impact of Covid-19 and the UK's exit from the European Union on resources.

102. This engagement with public authorities has also highlighted that participation of children and young people is an area of particular challenge as it was considered that it can be difficult to build and/or access a network of youth voices. Some noted the need for intra-SG coordination given the cross-cutting nature of children's rights; others highlighted the need for support/reporting mechanisms linking Scottish Government, local government and community planning partnerships to drive accountability and assurance. Further, organisations felt that awareness-raising activities should be undertaken to ensure a good level of knowledge and understanding amongst both right-holders and duty-bearers.

103. Engagement with public authorities has been more complex in the context of the Covid-19 pandemic and the Scottish Government is committed to further detailed engagement with public authorities in the coming months in support of the Bill's progress through the Parliament. The Scottish Government will also continue this dialogue with public authorities in the development and delivery of an implementation plan in support of the Bill. The Scottish Government recognises that participation and engagement by children and young people is essential to the realisation of all rights in the UNCRC and that there will be a need to continue to build capability and capacity across the public sector within the context of an implementation plan and beyond.

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

Policy Objectives of The Bill

A 'Maximalist' Approach

104. The Scottish Government's ultimate ambition is for all children's rights to be fully respected, protected and fulfilled in Scotland. This would mean ensuring that all public authorities in Scotland must act compatibly with all the rights and obligations set out in the UNCRC and optional protocols and that legislation should be compatible. However, the extent of the rights and obligations that can be incorporated via the Bill is limited by the current powers of the Scottish Parliament, and the Bill has, therefore, been drafted in line with those restrictions.

105. The approach which the Bill takes is 'maximalist', meaning that the rights and obligations in the UNCRC and optional protocols are being incorporated to the maximum extent possible within the powers of the Scottish Parliament. In line with the CRC's stated preference the Bill takes a full and direct approach to incorporation of the UNCRC and the first optional protocol (on the involvement of children in armed conflict) and the second optional protocol (on the sale of children, child prostitution and child pornography) as far as is possible within legislative competence, meaning that all of the rights and obligations which are within legislative competence will be incorporated by the Bill.

106. It is intended that the Bill will result in the highest protection for children's rights possible within the boundaries of the devolved settlement as provided for in the Scotland Act. The Bill will ensure that, as far as possible within legislative competence, all legislation and practice aligns with children's rights and that where breaches of rights occur, these do not endure and are remedied.

107. The Scottish Government's preferred policy approach would be to require all legislation, past and future, to be compatible with the incorporated UNCRC rights and obligations, with the courts having the power to 'strike down' incompatible provisions, including primary legislation. A provision requiring future Acts of the Scottish Parliament to be compatible with UNCRC would effectively change the power of the Parliament and is, therefore, beyond its current powers. Accordingly, the Bill provides for two different remedies in respect of legislation which is found to be incompatible. In relation to legislation which pre-dates the Bill, the Bill enables the courts to declare that the incompatible provision ceases to be law from the date of the court's declaratory (a 'strike down

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

declarator’). Where the incompatibility is identified in legislation which post-dates the Bill, the Bill enables the courts to declare that the provision is incompatible with the UNCRC (an ‘incompatibility declarator’).

108. The primary benefit of this approach will be that breaches of children’s rights in legislation which pre-dates the Bill cannot endure. In relation to legislation which post-dates the Bill, incompatibility declarators will bring transparency to breaches of children’s rights. Whilst it is not possible to require that future legislation must be compatible, any incompatibilities which are the subject of an incompatibility declarator made by the courts would be expected to be remedied. In conjunction with further measures provided for in the Bill (such as, the provisions requiring CRWIA 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) the Scottish Government believes that the Bill puts in place a very strong framework which will ensure compatibility of primary legislation with children’s rights in practice.

109. The Scottish Government’s intention is to give children’s rights the highest status within Scotland’s constitutional framework. It is not possible to incorporate those elements of the UNCRC and the first and second optional protocols which relate to reserved matters. It has also not been possible to incorporate the third optional protocol on a communications procedure because it has not been ratified by the United Kingdom Government. The third optional protocol allows children to submit directly to the CRC a complaint claiming that their rights have been violated. The CRC must then consider the complaint and submit views to the State Party. The State Party must give those views due consideration and submit a written response to the CRC on any action taken and envisaged in light of the views and recommendations of the CRC. The CRC is able to receive complaints from children, groups of children or their representatives, against any State that has ratified the third protocol. The CRC is also able to launch investigations into grave or systematic violations of children’s rights and States are able to bring complaints against each other. It is not possible for this procedure to be used unless the State Party has ratified this optional protocol.

110. The Scottish Government believes that all of the rights in the UNCRC and the optional protocols should be enforceable across the UK. The

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

Scottish Government also believes that the UK Government should ratify the third optional protocol so that children and young people in Scotland and elsewhere can submit complaints to the CRC. The Bill contains a power which would allow Ministers to take account of the third optional protocol if this is ratified by the UK Government in the future. The Bill also contains a power which relates to those provisions of the UNCRC and optional protocols 1 and 2 which are not included in the schedule. That power allows the Scottish Ministers to add those provisions to schedule 1 “as they consider appropriate”. This would be used, for example, if the powers of the Scottish Parliament changed in the future.

111. The Scottish Government also recognises the fundamental importance and indivisibility of the rights contained in UNCRC. Scotland’s children should be able to access all of the rights set out in the UNCRC equally. The Scottish Government continues to pursue an order under section 30 of the Scotland Act to transfer competence to the Scottish Parliament to incorporate the UNCRC and the first and second optional protocols in full. The Bill is not, however, dependent on this.

112. All of the rights and obligations in the UNCRC and the first and second optional protocols will continue to apply in relation to children and young people in Scotland as a matter of international law. The Bill does not mean that public authorities in Scotland can take no action to support children and young people whose unincorporated rights are breached in Scotland where they have power to do so. Indeed, the Scottish Government believes that incorporation of the UNCRC requirements will act as a catalyst for all public authorities across Scotland to develop innovative ways to respect, protect and fulfil children’s rights to the maximum extent of their powers. The Scottish Government will continue to stand up for all the rights of all children and young people in Scotland and hopes that the example being set by the Bill will encourage the UK Government to take the steps necessary to fully incorporate children’s rights across the United Kingdom.

A Strong Legislative Framework

113. The Bill will deliver a strong legislative framework of duties and requirements incorporating the UNCRC and the first and second optional protocols into Scots law. Given the close connection with the substantive rights in the European Convention on Human Rights (ECHR), the HRA and

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

the Scotland Act have been a useful starting point for the consideration of the duties and requirements to be provided for in the Bill.

114. The Scotland Act and the HRA have been interpreted and applied for many years and are well understood by the courts and public authorities. Unlike the position for the ECHR when the Scotland Act and the HRA came into force, there is no body of case law on the UNCRC from an international court equivalent to the European Court of Human Rights. This may cause some uncertainty until judgments start to emerge from the Scottish courts.

115. The central compatibility duty on public authorities in the Bill follows a model similar to the HRA. The duty in the HRA is well understood and the approach taken is modelled on this so as to provide as stable a framework as possible.

116. The policy intention is for the duty to have a similar effect to the HRA by making it unlawful for public authorities to act incompatibly with those rights and obligations in the UNCRC and the first and second optional protocols that the Bill incorporates. The Bill provides for similar remedies to those available under the HRA and Scotland Act, which have been effective in protecting rights and providing just satisfaction to rights-holders. The Bill also builds upon the framework introduced in the CYP Act and on experience from elsewhere, such as Wales, and provides for the publication by the Scottish Ministers of a Children's Rights Scheme which will underpin the compatibility duty in the Bill and ensure proactivity and transparency in the realisation of children's rights by the Scottish Government. The Bill places additional duties on the Scottish Ministers and listed public authorities (being the same authorities to which the duty in section 2 of the CYP Act applies) to report on the steps they are taking to ensure compliance with the compatibility duty and further children's rights in Scotland.

117. In some respects the Bill departs from the frameworks under the HRA and Scotland Act. These points of departure are because of restrictions in the powers of the Parliament or to deliver on a specific policy intention, such as to provide for the highest protection possible for children's rights and to ensure, where possible, that breaches cannot endure.

118. The Bill recognises the indivisibility of the rights and obligations of the UNCRC and optional protocols and the integrity of the text itself as far as

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

possible within the powers of the Parliament. Whilst it has been necessary to “carve out” those elements of the UNCRC and the first and second optional protocols which relate to reserved matters, other measures in the Bill recognise the need for the interpretation of the incorporated rights and obligations to be informed by principles of public international law. This would include the full context of the original text of UNCRC and the first and second optional protocols. The duty under article 42 of the UNCRC to promote accessibility to and understanding of all the rights and obligations will be incorporated via the Bill.

Specific Provisions

119. The provisions of the Bill deliver the following specific policy intention:

120. **Place a duty on public authorities (section 6)** – The rights and obligations in the UNCRC and optional protocols fall on ‘States Parties’. The CRC envisages that, as with other human rights obligations, different State actors will have a role in fulfilling the UNCRC. The Bill will, therefore, make it unlawful for “public authorities” to act in a way that is incompatible with the incorporated UNCRC requirements. The purpose of this duty is to protect children’s rights and to further the fulfilment of children’s rights in Scotland. It is intended that this should operate in a similar way to the HRA which makes it unlawful for public authorities to act in a way that is incompatible with rights under the ECHR.

121. Taking the same approach in this regard as in the HRA is based on two fundamental considerations. Firstly, the HRA approach is recognised in the UK as a means of applying human rights duties. Secondly, it is intended that children in Scotland should, as far as is possible within the power of the Scottish Parliament, have the same protection for their UNCRC rights as for their rights under the ECHR.

122. The meaning of “public authority” (i.e. the bodies to which the compatibility duty applies) has been drawn intentionally wide so as to ensure that the duty applies to all public authorities in respect of which it is within the power of the Scottish Parliament to apply the duty. The Bill makes it clear that this includes the Scottish Ministers and Scottish courts and tribunals.

123. As under the HRA, the definition of “public authority” will not only include so-called “core” public authorities such as local authorities and

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

health boards, but also other bodies, such as private bodies, when they are exercising functions of a public nature. The definition of “public authority” in the HRA has been applied by public bodies and the courts for over 20 years and case law has developed which the Scottish Government considers provides a helpful and stable basis on which to base the definition in the Bill.

124. In terms of the functions to which the compatibility duty will apply, the Scottish Government’s policy is that the duty should apply to the fullest extent possible within the Parliament’s powers. In relation to both which bodies are covered (discussed above) and how those bodies exercise their functions, the duty will apply only to the extent permissible within the limits of the Scottish Parliament’s legislative competence. This will encompass the devolved functions of public authorities. So far as reserved functions are concerned, the Scottish Government recognises that there will be circumstances in which the application of the compatibility duty would be beyond the legislative competence of the Scottish Parliament because it would breach the restrictions in schedule 4 of the Scotland Act (for example, by modifying the “law on reserved matters”). However, this will not necessarily be the case in respect of the application of all UNCRC requirements in respect of all exercises of reserved functions. The question will therefore fall to be analysed on a case-by-case basis.

125. The Scottish Government recognises the important role of the Scottish Parliament in promoting and upholding human rights. The Scottish Government believes that human rights can only be fully realised in Scotland if all institutions of state take action to respect, protect and fulfil the rights that belong to every member of Scottish society. The Scottish Government therefore believes that it would be desirable for the duty to act compatibly with the UNCRC requirements to apply also to the Scottish Parliament across all of its functions, as far as is possible within legislative competence. However, the Scottish Government recognises that further consideration requires to be given by the Parliament itself to how the requirements of the Bill should be applied to its functions. As such, at this stage the Parliament is specifically excluded from the definition of “public authority” and therefore the compatibility duty. The duty under the Bill would capture the Scottish Parliamentary Corporate Body so far as it has functions which are of a public nature. The Scottish Government looks forward to working with the Parliament as the Bill progresses in relation to how the Bill may apply to the functions exercised by the Parliament.

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

126. Incorporate in full and directly as far as is possible within legislative competence (section 1 and 2 and the schedule) – As discussed above, the Bill takes a “maximalist” approach to incorporation. The rights and obligations which are being incorporated are set out in the schedule of the Bill. More information about the specific articles which are being incorporated and those words or parts of articles which cannot be incorporated due to the fact that they relate to reserved matters is provided below.

127. Ensure the rights and obligations apply to public authorities (section 2) – Many of the UNCRC provisions are drafted so as to place obligations on ‘States Parties’. Depending on the structures in place within particular States, the obligations under the UNCRC are given effect to in practice not only by central government but by a range of local government and public sector bodies. In Scotland, the State Party to the UNCRC remains the UK. On a practical level, effect is given to the UNCRC requirements across the whole system of government and public administration in Scotland, by the actions of many different public authorities and some private bodies undertaking functions of a public nature. Section 2 of the Bill ensures that the UNCRC requirements “step down” to all public authorities, including Scottish Ministers.

128. This type of provision was not required in the HRA because the substantive rights to which the HRA gives effect do not use the “States Party” formulation of words. The equivalent reference in the ECHR, which is to the “High Contracting Parties”, is contained in a provision of the ECHR the text of which does not form part of the HRA.

129. The combined effect of this section and the compatibility duty in section 6 is intended to have a similar effect to the HRA, that public authorities must, in everything that they do, act compatibly with the UNCRC.

130. Apply to all persons under 18 (article 1 within the schedule) – article 1 of the UNCRC provides that:

“For the purposes of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.”

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

131. The Scottish Government believes that all children should benefit from the rights and obligations in the UNCRC up to the age of 18. As such, the Bill provides that, for the purposes of the incorporated rights and obligations, a child is a person under 18. This is in line with the recommendations of the CRC.

132. Give rights holders the ability to challenge breaches of their rights by public authorities in the courts (section 7) – The Bill will make a breach of the duty in section 6 by public authorities justiciable in the courts. As is the case under the HRA, a claim may be raised in legal proceedings brought against the public authority in question or may be relied on in any legal proceedings. It is intended that the ordinary rules about who can bring cases in court would apply to claims brought under the Bill.

133. Require claims to be brought within a specified time limit (section 7) – The Scottish Government considers that appropriately framed time limits provide legal certainty for rights-holders and duty-holders.

134. The Scottish Government considered the time limits in the HRA and Scotland Act. The time limits in these Acts have provided a balance of certainty and flexibility for public authorities and rights-holders. Broadly, the time limit which applies under the HRA and the Scotland Act is 1 year, other than in judicial review proceedings, where a 3-month time limit applies. These time limits are subject to the discretion of the courts to dis-apply the time limit where this is considered equitable in the circumstances.

135. The Scottish Government is of the view that these time limits are overly restrictive in the context of children's rights. It is widely recognised that children and young people face additional barriers in realising their rights and seeking access to justice. By nature of their age and vulnerability, having the understanding, capacity and means to raise legal proceedings is likely to be more difficult for children and young people. This is particularly so for children with additional needs or those experiencing violence, abuse and trauma.

136. A discretionary provision such the one in the HRA and the Scotland Act places the burden on the claimant to justify a longer period for bringing the claim. The Scottish Government does not believe that it is appropriate for a child to be required to demonstrate that by virtue of being a child they

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

face additional barriers to raising legal proceedings. As such, it is not considered that a discretionary provision sufficiently recognises the unique needs of children and the additional barriers that they face in realising their rights, nor the significant imbalance of power between children on the one hand and public authorities on the other.

137. The approach which the Bill takes on time limits is therefore modelled on the HRA and the Scotland Act but with one important difference. The Bill provides that the calculation of the time limit under the Bill (and the equivalent rule for judicial review claims) excludes any period in which the claimant was a child (for these purposes, when an individual is under 18). Once those time limits become applicable, the Bill will continue to provide for the court's discretion to dis-apply a time limit where it considers it equitable to do so in the circumstances, as under the HRA and Scotland Act.

138. Enable the courts to make strike down or incompatibility declarators in respect of incompatible legislation (sections 20 and 21)

– The Scottish Government's preferred policy approach would be to require all legislation, past and future, to be compatible with the incorporated UNCRC rights and obligations, with the courts having the power to "strike down" incompatible provisions. Provision requiring future legislation to be compatible with UNCRC would effectively change the power of the Parliament and is, therefore, beyond its current powers.

139. In line with the 'maximalist' approach, it is the Scottish Government's intention that a court should be able to make a strike down declarator where this is possible within legislative competence. This will mean that the Bill will treat legislation that pre-dates and post-dates commencement of the Bill differently. The Bill will enable the courts to:

(1) make a strike down declarator where the incompatible provision is in legislation which pre-dates the UNCRC Act. A strike down declarator is a declarator stating that the provision ceases to be law to the extent of the incompatibility, and

(2) make an incompatibility declarator where the provision is in legislation which post-dates the UNCRC Act. An incompatibility declarator is a declarator which states the incompatibility but does not affect the validity, continuing operation or enforcement of the provision which has been declared incompatible.

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

140. The primary benefit of this approach will be that, as far as is possible within the powers of the Scottish Parliament, breaches of children’s rights in historic legislation cannot endure. In relation to future legislation, incompatibility declarators will bring transparency to breaches of children’s rights. Whilst it will not be possible to require that future legislation must be compatible, any incompatibility declarator made by the courts would be expected to be taken seriously in practice. In conjunction with further measures provided for, such as the provisions requiring CRWIA 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, the Scottish Government believes the Bill puts in place a very strong framework which will ensure compatibility of all legislation with children’s rights in practice.

141. **Enable the courts to award damages (section 8)** – The Scottish Government recognises that it is important that damages are available for breaches of human rights and that these may be appropriate in the circumstances to ensure children and young people have access to effective remedies under the Bill. This is in line with the views of the CRC. The Scottish Government believes that the principle of “just satisfaction”, which applies in relation to the ECHR, is a helpful framework which can be utilised by the courts when considering what remedies should be awarded in respect of breaches of children’s rights. This section of the Bill will require courts, when considering whether to award damages or the amount of damages, to consider whether awarding damages and the amount of damages is necessary to provide just satisfaction.

142. **Require Ministers to report following an incompatibility declarator or strike down declarator (section 23)** – the Scottish Government believes that there should be accountability and transparency in relation to actions taken as a consequence of strike down declarators and incompatibility declarators made by the courts. The Bill will require Scottish Ministers to report following a strike down declarator or incompatibility declarator. Where an incompatibility declarator or strike down declarator is issued by a court, the Bill will require Ministers to state what action they intend taking in response. This statement should be made within a period of 6 months from the court’s decision. The benefit of this provision is that it will aid scrutiny and transparency for rights holders in

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

respect of the actions to be taken by Scottish Ministers following a finding of incompatibility.

143. Require the courts to notify the Lord Advocate and the Children’s Commissioner (section 22) – Where a court is considering making a strike down declarator or incompatibility declarator in relation to legislation, the Scottish Government considers it is proper for notification to be given to the Lord Advocate so that relevant representations in relation to the legislation can be made to the courts. The Bill, therefore, requires that the Lord Advocate be notified when a court is considering whether to make a strike down declarator or an incompatibility declarator in relation to legislation in a similar way as under the Scotland Act. The Scottish Government recognises the significant imbalance of power between children and young people on the one hand and Ministers on the other. As such, the Scottish Government considers that notification should also be given in these circumstances to the Commissioner so that the Commissioner also has the opportunity to make representations to the court.

144. Enable the courts to consider the preambles and excluded provisions of the UNCRC as sources of interpretation (section 4) – The Scottish Government recognises the indivisibility and interdependence of the rights and obligations in the UNCRC. The limitations of legislative competence, however, mean that the Bill requires to take the highly unusual step of “carving out” rights and obligations from the UNCRC and first and second optional protocols. Given this, the Scottish Government considers that it is imperative to make clear on the face of the Bill that the rights and obligations being incorporated remain within their context in the whole UNCRC and optional protocols as a matter of international law and that, therefore, the excluded provisions of the UNCRC and optional protocols may still be considered when interpreting the rights and obligations incorporated by the Bill. The Scottish Government recognises the interpretive value and significance of the preambles and consider that it is helpful to specifically reflect the importance of interpreting the incorporated rights and obligations within the context of the preambles on the face of the Bill.

145. Enable a reference to a higher court (Part 5) – The Scottish Government recognises that it will take time for case law in relation to the interpretation of the rights and obligations being incorporated to develop.

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

There will likely continue to be novel issues in relation to the interpretation of the rights and obligations on which obtaining a decision of a higher court would be helpful. The Scottish Government considers it is appropriate, therefore, for lower courts to be able to refer a question relating to the incorporated rights and obligations to the Inner House of the Court of Session in a similar way to the way devolution issues can be referred under the Scotland Act.

146. Require that legislation should be read in a compatible way if possible (section 19) – The Scottish Government considers that legislation should be given effect to in a way that is compatible with children’s rights in every case where this is possible. Legislation should only be found to be incompatible where this is not possible. This section of the Bill, therefore, requires legislation to be read and given effect in a way that is compatible with the incorporated UNCRC requirements, so far as it is possible to do so. This is similar to the interpretation regime in section 3 of the HRA.

147. Require scrutiny of future Government legislation and strategic decisions made by Ministers (section 14 and 18) – The Scottish Government considers that effective scrutiny of legislation is essential to protecting, respecting and fulfilling children’s rights in practice. The Bill will require scrutiny of the compatibility of Scottish Government primary and secondary legislation by requiring Ministers to undertake a CRWIA and to make a statement of compatibility.

148. Requiring an assessment of children’s rights at the formative stage of legislation is a means of ensuring that a child’s best interests are treated as a primary consideration, as required by article 3 of the UNCRC. The Bill will place a legal duty on the Scottish Ministers to prepare a CRWIA in relation to any Bill they intend to introduce in the Scottish Parliament and in relation to most types of Scottish statutory instrument made by the Scottish Ministers.

149. Similar to the requirements for statements of legislative competence under the Scotland Act and statements of compatibility under the HRA, the Bill will require a statement of compatibility in relation to Scottish Government Bills and most types of Scottish statutory instrument. The statement will require the member of the Scottish Government in charge of the Bill, or the Scottish Ministers (as the case may be), to state the extent

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

to which they consider the relevant provisions to be compatible with the UNCRC requirements.

150. Statements of legislative competence under the Scotland Act and statements of compatibility under the HRA are only required in relation to primary legislation. To ensure the fullest incorporation of UNCRC rights and obligations, the Scottish Government considers that it is appropriate for statements of compatibility to be required in relation to secondary legislation made by Ministers also.

151. Taken together the Scottish Government considers that the CRWIA and statements of compatibility will ensure and make transparent that children's rights have been considered and complied with in relation to all relevant legislation.

152. The Bill provides for one exception to the requirements to undertake a CRWIA and provide a statement of compatibility in relation to secondary legislation. This is to commencement regulations or orders. This is because a CRWIA and statement of compatibility would have been provided in relation to the parent Act being commenced and they do not contain further substantive provision.

153. The Bill does not make similar provision for non-government Bills. The Scottish Government considers it is appropriate for parliament itself to consider whether these requirements should apply to members bills and other non-Government Bills.

154. The Bill also places the requirement to undertake CRWIA on the Scottish Ministers in relation to decisions of a strategic nature. This is to ensure transparency and accountability in relation to how the Scottish Ministers consider and make provision for children's rights in their strategic decision-making in practice. Detail on the strategic decisions for which Ministers will undertake CRWIA will be included in the Children's Rights Scheme.

155. The Scottish Government believes that undertaking rigorous impact assessments at all levels of government and public administration will be an important part of how public authorities demonstrate their compliance with the compatibility duty in section 6 and demonstrate how they respect, protect and fulfil children's rights in practice. The Scottish Government is

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

mindful that it is the quality not quantity of CRWIA undertaken which is important. The Scottish Government considers there is a careful balance to be struck between mandatory provision for CRWIA and ensuring that these are undertaken effectively in practice. The Scottish Government believes the Bill strikes the right balance by placing mandatory duties on the Scottish Ministers and allowing for more flexibility for public authorities, ensuring that capability and capacity can be built within public authorities rather than adding potentially overly administrative requirements on all public authorities.

156. Allow for remedial regulations in relation to incompatibilities (Part 6) – It is important that the Scottish Government can act swiftly to remedy incompatible legislation so that breaches or potential breaches to children’s rights can be remedied or prevented from occurring. The Bill, therefore, provides for powers to make remedial regulations which can be used to amend legislation which is or may be incompatible with the incorporated UNCRC requirements. This is similar to powers in Part 6 of the Convention Rights (Compliance) (Scotland) Act 2001, which contains remedial powers for remedying ECHR incompatibilities. This will allow Scottish Ministers to act proactively to remedy provisions which are considered to be incompatible, including following a declarator by the courts.

157. Enable the Children’s Commissioner to bring a claim in the public interest (section 10) – The Scottish Ministers recognise the important role that the Commissioner for Children and Young People plays in ensuring the highest standards for children’s rights in Scotland. The Scottish Government recognises the additional barriers faced by children and young people and the responsibility it holds to ensure justice is accessible for children and young people. Further, the Scottish Government recognises the importance of ensuring that incompatible legislation in Scotland is identified and remedied as soon as possible.

158. As such, the Bill makes provision supplementing the current powers of the Commissioner and enabling the Commissioner to raise proceedings under the Bill. Whilst children and young people or their representatives will be able to raise claims under the Bill, this power recognises that for many children and young people taking action through the courts is challenging and may not be their preferred option. This is a new form of public interest litigation and will give the Commissioner similar powers in respect of the

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

UNCRC as the Equality and Human Rights Commission has under the Equality Act 2006 in respect of the ECHR. In recognition of the strategic nature of the Commissioner's role, the Bill provides that awards of damages should not be possible where the Commissioner undertakes litigation in accordance with this power.

159. Require that Ministers publish a Children's Rights Scheme (sections 11 to 13) – The Bill will require Scottish Ministers to publish a Children's Rights Scheme setting out what arrangements Ministers have made or propose to make to fulfil the compatibility duty. The Scottish Government considers that this requirement builds upon the steps taken in the CYP Act to ensure that there are clear planning and reporting duties on Ministers and will ensure that children's rights are considered proactively and fully implemented in practice. The Children's Rights Scheme will also aid transparency and scrutiny of how the Scottish Ministers fulfil their obligations under the Bill. The Bill builds on the model of the Welsh Children's Scheme provided for in the Rights of Children and Young Persons (Wales) Measure 2011 and includes reporting requirements.

160. The Bill provides that a Children's Rights Scheme published by the Scottish Ministers may include arrangements by the Scottish Ministers to:

- ensure that children are able to participate in the making of decisions that affect them,
- raise awareness of and promote the rights of children,
- consider the rights of children in the Scottish Government's budget process,
- ensure that their actions contribute to any national outcome for children determined by them under Part 1 of the Community Empowerment (Scotland) Act 2015,
- prepare CRWIAs.

161. The Bill will require that the Children's Rights Scheme is laid before by the Scottish Parliament. The Bill will require consultation in relation to making the Children's Rights Scheme and requires that an updated scheme is published and laid annually. In practice this will be published alongside the Scottish Government's report on the previous year and plans for the year ahead which are also required under the Bill. The provisions in relation to the Children's Rights Scheme will ensure that Scottish Ministers are not only accountable for their actions in relation to the compatibility

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

duty, but that they are accountable for planning and reporting how they will fulfil the rights and obligations under the Bill in practice.

162. The Scottish Government gave careful consideration to whether a requirement to publish a Children's Rights Scheme should be placed on other public authorities. The Scottish Government considers that such a step could potentially be overly burdensome for some public authorities and that, instead, the publication of Children's Rights Schemes will be encouraged, as is appropriate, as a matter of good practice.

163. Building upon the current reporting requirements in section 2 of the CYP Act, it is intended that listed public authorities should continue to be required to report every 3 years. The reporting requirement in the Bill replaces the reporting requirement in the 2014 Act so that listed public authorities must report on the steps taken to fulfil the compatibility duty under the Bill.

164. **Repeal Part 1 of the Children and Young People (Scotland) Act 2014 (section 17)** – The Bill repeals part 1 of the CYP Act and replaces the duties with one clear set of duties as described above.

165. **Other provisions** – the Bill also makes provision for the following matters:

- No modification of the Human Rights Act (section 36) – The Bill makes it clear that nothing in the Bill modifies the HRA.
- Judicial acts (section 9) – The Bill makes provision to protect judicial immunity in a similar way to the HRA.
- Reservations and declarations (section 1) – The Bill provides that the incorporated rights and obligations are subject to any declarations and reservations made by the UK which remain in force.

166. **Commencement (section 40)** – The Scottish Government has given careful consideration to whether the Bill should include a type of sunrise clause meaning that the date for the commencement of the substantive duty in the Bill should be provided for directly in the Bill. This would have the benefit of providing certainty as to when the compatibility duty will take effect. The risk with this approach is that it limits flexibility in relation to the implementation period available for public authorities. The Scottish Government believes that the compatibility duty should take effect as soon

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

as possible. A reasonable implementation period will, however, be required to ensure that public authorities can ensure that all policy and practice is fully in alignment with the UNCRC requirements before the duty is commenced.

Guidance

167. The Bill does not make provision for statutory guidance. This is the same as the HRA. The Scottish Government does not consider that it would be appropriate to seek to provide statutory guidance on the interpretation of the rights and obligations being incorporated as this is properly a matter for the courts.

168. The Scottish Government will support implementation of the Bill with a package of measures including non-statutory guidance and tool-kits to help public services prepare for commencement of the duties set out in the Bill. The Scottish Government is fully committed to ensuring that accessible guidance and training is developed as part of an implementation programme in support of the Bill for public authorities to support preparation and planning in advance of commencement. These products will be co-designed by a central implementation team, public bodies and third sector partners so that they best meet the needs of practitioners and the rights of children and young people they serve. The Scottish Government will continue to make CRWIA materials public (and will be obliged to do so under section 14(5)) so partners in the public sector and the third sector can assess policy and practice impacts on children's rights and wellbeing.

Which of the UNCRC Requirements Are Being Incorporated?

169. The Bill will incorporate the following articles of the UNCRC and first and second optional protocols as far as is possible within legislative competence:

- Articles 1 to 42 of the UNCRC
- Articles 1 – 11 of the first optional protocol
- Articles 1 – 7 of second optional protocol.

170. The Bill cannot incorporate rights and obligations within the articles of the UNCRC and first and second optional protocols where their inclusion would take the Bill outside the legislative competence of the Parliament. For this reason there are some words or parts of articles which the Bill does

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

not incorporate because they relate to reserved matters. The following tables show the articles affected and the reservations which apply. A version of the UNCRC and optional protocols showing all words that have been “carved out” has been published separately by the Scottish Government.

United Nations Convention on the Rights of the Child

Article	Fully/Partially relates to a reserved matter	Discussion
2	Partially relates to a reserved matter	Elements of article 2 relate to the reserved matter of equal opportunities under section L2 of Part 2 of schedule 5 of the Scotland Act.
7(1) and (2)	Partially relates to a reserved matter	Elements of both article 7(1) and 7(2) relate to the reserved matter of immigration and nationality in section B6 of Part 2 of schedule 5 of the Scotland Act.
8(1)	Partially relates to a reserved matter	Elements of article 8(1) relate to the reserved matter of immigration and nationality in section B6 of Part 2 of schedule 5 of the Scotland Act.
9(4)	Partially relates to a reserved matter	Elements of article 9(4) relate to the reserved matter of immigration and nationality in section B6 of Part 2 of schedule 5 of the Scotland Act.
10(1)	Fully relates to a reserved matter	Article 10(1) relates to the reserved matter of immigration and nationality in section B6 of Part 2 of schedule 5 of the Scotland Act.
10(2)	Partially relates to a reserved matter	Elements of article 10(2) relate to the reserved matter of immigration and nationality in section B6 of Part 2 of schedule 5 of the Scotland Act.
11(2)	Fully relates to a reserved matter	Article 11(2) relates to the reserved matter of international relations in paragraph 7(1) of Part 1 of schedule 5 of the Scotland Act.
21(e)	Partially relates to a reserved matter	Elements of article 21(e) relate to the reserved matter of international relations in paragraph 7(1) of Part 1 of schedule 5 of the Scotland Act.

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

26(1)	Partially relates to a reserved matter	Elements of article 26(1) relate to the reserved matter of national insurance under section F1 of Part 2 of schedule 5 of the Scotland Act.
27(4)	Partially relates to a reserved matter	Elements of article 27(4) relate to the reserved matter of international relations in paragraph 7(1) of Part 1 of schedule 5 of the Scotland Act.
34	Partially relates to a reserved matter	Elements of article 34 relate to the reserved matter of international relations in paragraph 7(1) of Part 1 of schedule 5 of the Scotland Act.
35	Partially relates to a reserved matter	Elements of article 35 relate to the reserved matter of international relations in paragraph 7(1) of Part 1 of schedule 5 of the Scotland Act.
38(3)	Fully relates to a reserved matter	Article 38(3) relates to the armed forces which is reserved under paragraph 9 of Part 1 of schedule 5 of the Scotland Act.

The First Optional Protocol on the Involvement of Children in Armed Conflict

Article	Fully/Partially relates to reserved matter	Discussion
1	Fully relates to a reserved matter	Article 1 relates to the armed forces, which is reserved under paragraph 9 of Part 1 of schedule 5 of the Scotland Act.
2	Fully relates to a reserved matter	Article 2 relates to the armed forces which is reserved under paragraph 9 of Part 1 of schedule 5 of the Scotland Act.
3	Fully relates to a reserved matter	Article 3 relates to the armed forces which is reserved under paragraph 9 of Part 1 of schedule 5 of the Scotland Act.

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 1 September 2020

The Second Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography

Article	Fully/Partially relates to a reserved matter	Discussion
5	Fully relates to a reserved matter	Article 5 relates to the reserved matter of extradition under section B11 of Part 2 of schedule 5 of the Scotland Act.
6(1)	Partially relates to a reserved matter	Elements of article 6(1) relate to the international relations and extradition reservations in, respectively, paragraph 7(1) of Part 1 and section B11 of Part 2 of schedule 5 of the Scotland Act.
10(1), (2) and (3)	Fully relates to a reserved matter	Article 10(1)-(3) relate to the international relations reservation under paragraph 7(1) of schedule 5 of the Scotland Act.

Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development Etc.

Equal Opportunities and Human Rights

171. The National Performance Framework includes a National Outcome for human rights: “we respect, protect and fulfil human rights and live free from discrimination”. Incorporation of the UNCRC is one part of the Scottish Government’s wider strategy to fully embed equalities and human rights in practice in Scotland. The UNCRC contains the fundamental human rights that all children across the world have and applies without discrimination. Children’s rights are human rights.

172. Incorporation through the Bill will represent a significant step in realisation of children’s rights in practice for all children. International experience shows that incorporation of human rights treaties is particularly important in the realisation of rights for those from underrepresented groups including those experiencing discrimination such as on the basis of sex, race, religion or other characteristics. This is expected to be particularly so in relation to incorporation of UNCRC, given that children facing discrimination or who have additional needs often face a double barrier in relation to the realisation of their rights, that discrimination or

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need, coupled with the fact that, as children, their voice can be unheard, or more easily dismissed.

173. Incorporation of the four articles known as the “General Principles” (non-discrimination (article 2), best interest of the child (article 3), right to life survival and development (article 6) and right to be heard (article 12) alongside the other substantive rights as they relate to issues such as education, health, family relations and justice will mean that the rights and needs of all children are brought to the fore and that the requirement for children to be heard and take part in decisions which affect them is built into decision-making structures across public authorities. The Bill will foster a culture of respect for children’s rights across public authorities which in turn puts the needs of all children at the centre of decision-making and practice.

ECHR Rights

174. The UNCRC includes rights that are the same as or similar to the ECHR.

- ECHR article 2 and UNCRC article 6 concern the right to life
- ECHR article 3 and UNCRC article 37(a) concern the prohibition of torture and degrading treatment
- ECHR article 5 and UNCRC article 37(b), (c) and (d) concern the right to liberty and security
- ECHR article 6 and UNCRC article 40(i)-(v) concern the right to a fair trial
- ECHR article 7 and UNCRC article 40(3)(b) concern the prohibition of punishment without law
- ECHR article 8 and UNCRC article 16 concern the right to respect for private and family life
- ECHR article 9 and UNCRC article 14 concern the freedom of thought, conscience and religion
- ECHR article 10 and UNCRC article 13 concern freedom of expression
- ECHR article 11 and UNCRC article 15 concern the freedom of assembly and association
- ECHR article 14 and UNCRC article 2 concern the prohibition of discrimination

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175. The Scottish Government considers that the rights and obligations within the UNCRC are in alignment and supportive of rights under the ECHR. This is evident in the approach taken by the European Court of Human Rights to considering children's rights. The Scottish Government considers that incorporation of the UNCRC will, therefore, support better realisation of the rights of children under the ECHR.

176. The Scottish Government has taken an equalities and human-rights-based approach to the development of the Bill. Ensuring that children and young people are heard and have the opportunity to take part in decisions that affect them is a core requirement of article 12 of the UNCRC. Through the consultation, the interests of many different children and young people and families were heard from across a range of different sectors, including youth justice, health, social work and education. The Scottish Government funded seven events specifically to ensure that the voices of a range of different children and young people were listened to. These were delivered by partners experienced in working with children and young people, including the Children's Parliament, Young Scot, Children 1st, Youthlink, Scottish Youth Parliament, Children in Scotland and the Scottish Commission for Learning Disability.

177. Over 180 children and young people engaged in these events. The views of children and young people expressed through these events and in consultation responses were subject to specific analysis in section 5 the consultation report 11. The approach taken in the Bill is a direct response to what children told the Scottish Government they wanted.

178. A draft Equalities Impact Assessment (EQIA) and a draft Child Rights and Wellbeing Impact Assessment (CRWIA) has been published to accompany the Bill. Introduction of the Bill is not the end of the Impact Assessment process and both the EQIA and CRWIA will be updated to reflect any additional impacts identified, as a result of further engagement with children, young people and stakeholders and any amendments made during the passage of the Bill.

Island Communities

179. The Bill will apply to all communities in Scotland equally including island communities; as such, a full Island Impact Assessment has not been

¹¹ <https://www.gov.scot/publications/uncrc-consultation-analysis-report/pages/5/>

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necessary. The Scottish Government has undertaken a screening exercise and will continue to engage with island communities to identify whether there may be any specific issues in relation to implementation of the Bill which may affect them differently.

Local Government

180. It is intended that the Bill will have the effect of building children's rights considerations into day-to-day decision-making and policy formulation across the public sector in Scotland. This is achieved in the Bill by requiring public authorities to act in a way that is not incompatible with the incorporated UNCRC rights and obligations (section 6). The Bill applies this compatibility duty to all public authorities to the maximum extent of the powers of the Scottish Parliament.

181. The policy intention is that the Bill should be transformative in terms of building children's rights into policies and decision-making. Until now, legislation has placed a series of specific duties on public authorities to take action to implement parts of the UNCRC. As discussed above, the Bill builds upon a lot of progress in Scotland on implementing children's rights. Under the Bill public authorities will for the first time be under a statutory duty to act in a way that is not incompatible with the UNCRC requirements.

182. In line with the "maximalist" approach, it is the Scottish Government's intention that the Bill should have as wide a reach as possible. It is intended that children's rights should be woven into the fabric of public life. This will mean that it will be the responsibility of public authorities to ensure that respect for children's rights is built in to all practice and decision-making of a public nature.

183. The Scottish Government considered whether the Bill should list the public authorities to which the compatibility duty should apply. This is the approach taken in the CYP Act. The Scottish Government does not consider that this would lead to full realisation of children's rights in Scotland. Effective implementation of children's rights in practice requires every part of the State and others exercising public functions to put children at the centre and to take proactive steps in the fulfilment of children's rights.

184. Respect for children's rights should not only be the domain of those parts of the Scottish public sector which deal particularly with children. The Bill recognises that respect for children's rights is something for the entire

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public sector, not simply for those organisations with “children-only” functions. Children’s rights are human rights and for human rights to be fully realised in practice, action on the part of the entire public sector is required. This is the approach taken under the HRA in relation to the ECHR and the effect of the Bill in relation to the UNCRC is intended to be the same.

185. The Bill will require public bodies to ensure that policy and practice is fully in alignment with the UNCRC requirements or else they will risk being challenged in court. The Scottish Government is committed to working in partnership with public authorities in the design and delivery of an implementation plan in support of the Bill. This will include coproducing relevant guidance, training and awareness-raising in advance of the Bill’s commencement. This will build upon the strong track record in delivering for children and young people through “Getting it Right for Every Child” and the progress which has been made since the CYP Act. The Scottish Government will also continue to review legislation and to make any further provision which may be necessary to fully realise children’s rights in practice.

Sustainable Development

186. In July 2015 Scotland became one of the first countries in the world to adopt the UN Global Goals for Sustainable Development. These Goals are reflected in Scotland’s National Performance Framework. The National Performance Framework is the framework through which the Goals are localised and implemented in Scotland. The National Performance Framework has a focus on tackling inequalities so that no one in Scotland is left behind as work is taken forward to achieve the Goals.

187. Fully realising and implementing all fundamental human rights is at the heart of the UN Sustainable Development Goals. The United Nations Convention on the Rights of the Child (Implementation) (Scotland) Bill contributes directly to the delivery of these in practice in Scotland and the pledge made by the First Minister in 2015 that Scotland would lead the way to deliver a more equal, more just world.

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Policy Memorandum

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