Follow up comments to the EHRiC Committee on its Chamber debate on prejudice-based bullying and harassment on children and young people in schools

On Wednesday 15 November 2017, the Scottish Parliament will debate Motion S5M-08171 on the name of Christina McKelvie, (Hamilton, Larkhall and Stonehouse, Scottish National Party), On Behalf of Equalities and Human Rights Committee—

*That the Parliament notes the findings and recommendations in the Equalities and Human Rights Committee’s 5th Report, 2017, (Session 5), It is not Cool to be Cruel: Prejudice-based bullying and harassment of children and young people in schools (SP Paper 185) and the Education and Skills Committee’s 7th Report, 2017 (Sessions 5), Let’s Talk about Personal and Social Education (SP Paper 148).*

In advance of the debate, the EHRiC Committee sought comments via email and social media on the key issues people/groups would like to see raised during the debate.

The following sets out the responses received.

**Equalities and Human Rights Committee**  
14 November 2017

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<th>Name/Organisation</th>
<th>Question</th>
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<td>Children in Scotland</td>
<td>1. Scotland should make a concerted effort to <em>prevent</em> bullying as opposed to just tackling it. This begins by embedding a child rights approach across the board, throughout education, health and all our public services.</td>
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<td>2. To prevent bullying and harassment, schools need to promote an environment where young people feel empowered to discuss issues openly. The new anti bullying strategy and current school governance proposals present an opportunity to promote meaningful youth led work in this area.</td>
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<td>3. Support for the workforce is very important in preventing bullying and building confidence to robustly challenge it. Practitioners should have access to accessible, high quality, rights-based and ongoing training that has been shaped by the experiences and voices of children and young people.</td>
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<td>4. Bullying should not be considered as only an issue for the individuals involved. Instead it must focus on upholding child rights and building trust. We know that positive intergenerational relationships, built on a foundation of human rights, will also promote the prevention of bullying and harassment.</td>
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5. Children and young people with additional support needs require extra support to deal with bullying and harassment. Educators and children themselves have identified that children with ASNs often do not have the friendship base or resilience required to prevent, tackle and deal with issues of bullying and harassment.

Tweet from Children in Scotland: https://mobile.twitter.com/cisweb/status/930450351945388032

| Children’s Parliament | The Committee calls for “all schools to have an actively inclusive culture and ethos”. This is at the heart of the work and findings of the Children’s Parliament Investigates Bullying work which the Committee recognised as important. The problem is that saying a school should have an inclusive culture and ethos does not require them to do so, does not help them understand what this means. Surely all schools MUST be inclusive. Surely all schools MUST work with children, parents, school staff and partners to make it so. Children tell Children’s Parliament that adults should stop the focus on investigating, punishing and reacting when it’s too late – rather, they need to establish relationships based on human dignity, empathy, kindness and trust and where these are problematic they need to focus on fixing relationships. If they do not know how to do this, if monitoring/evaluation/inspection shows the school not able to create and sustain an inclusive environment then the school must allocate resources and pull in partners to help them make it happen. Otherwise it won’t. And so a question: **How does the Committee imagine a school should become actively inclusive in terms of culture and ethos?** |
| Church of Scotland | The key point that the Church of Scotland would raise in relation to prejudice based bullying is the need for high levels of religious and secular literacy within the education system so that ignorance ceases to be a cause of bullying. |
| Equality and Human Rights Commission | The Commission published the research report *Prejudice-Based bullying in Scottish Schools* in March 2015. Our recommendations included:

- Local Authorities should undertake regular reviews of anti-bullying policies and include evidence of reported incidents across the relevant protected characteristics as well as information gathered from pupils on their experiences of prejudice-based bullying and barriers to reporting. They should also analyse and follow up locally on the findings from surveys and data on recorded incidents to refine and improve their policies.

- Local Authorities and schools should ensure that protected characteristics are factored into the design of any future systems to support the recording of bullying and...
harassment.

- Teachers and schools should respond to and take action on all forms of prejudice-based bullying. These should be dealt with and recorded consistently, including information on the motivating prejudice.

Since 2015 we have called for the introduction of a mandatory requirement to record and monitor bullying incidents and to record any motivating prejudice as the fundamental basis of any strategy to tackle bullying.

Most recently we, jointly with the Children and Young People’s Commissioner Scotland, used the occasion of the publication of report of the Scottish Parliament’s Equality & Human Rights Committee “It is not Cool to be Cruel” to write seeking a meeting with the Deputy First Minister to discuss our concerns, and this meeting will now take place at the end of November. I attach a copy of our letter, for reference (annexe A).

In terms of one key point which we would raise in a debate, the Committee’s phrasing encapsulates this well, with a slight amendment:

- For the mandatory recording of bullying incidents from all schools, including information on the motivating prejudice, and the collection of robust data to measure the progress of the anti-bullying strategy, including through the school inspection system

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<th>Equality Network</th>
<th>The key point that the Equality Network would raise is the question of the recording and monitoring of bullying incidents - paragraphs 190 and 201, and recommendations 28 and 29, of the Committee's report.</th>
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<td>We welcome that John Swinney's response dated 30th August said in relation to recommendation 28 that the Scottish Government agreed with the recommendation &quot;to introduce a new requirement for local authorities to record specific information on bullying incidents&quot; including identifying and recording any underlying related prejudice.</td>
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<td>However, there have been some concerns raised with us recently that the Scottish Government may be moving away from support for making that recording a requirement. In our view, voluntary recording is unlikely to be effective - it needs to be a requirement.</td>
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<th>Girlguiding Scotland</th>
<th>1. The #MeToo campaign has highlighted just how widespread and entrenched sexual harassment and sexual violence is at every level of our society. But it's important not</th>
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just to call for accountability but explore how we can address this issue at the root cause.

Findings by both committees have highlighted the vital role early age on topics like equality, consent and healthy relationships could play to help all young people feel safe and happy in school and look forward to a future free from abuse and sexual violence.

What tangible actions will the Scottish Parliament call for to tackle the culture of misogyny that underlies sexist bullying and harassment in school and allows violence and abuse to affect so many women later in life?

2. As part of their campaign to end sexual harassment in schools, Girlguiding Scotland has been calling for high-quality sex and relationships education covering topics like harassment, consent and healthy relationships to be taught in every Scottish school. Recent research by Girlguiding found that nearly two in three girls age 13-21 have experienced some form of sexual harassment in school. Girlguiding Scotland believes this is a vital step not only to ensuring all girls can feel safe and happy at school but can also look forward to a future that’s free form sexual harassment and sexual violence.

Following the findings of It is not Cool to be Cruel report, what actions will the Scottish Parliament take to ensure all young people in Scotland have access to comprehensive, high quality person and social education covering essential topics including equality, consent, healthy relationships, and harassment?

3. Despite the seriousness of the sexual harassment in school, Girlguiding research found that nearly two thirds of girls age 11 to 16 (61%) say teachers or staff sometimes or always dismiss sexual harassment as just a bit of banter – ‘boys mucking around’. In our evidence to the Equalities and Human Rights Committee, we highlighted the need for better training to ensure that teachers and other school staff feel confident in recording and responding incidences of sexual harassment and sexist bullying both in the classroom and online.

What actions will the Scottish Parliament take to ensure all teachers understand the seriousness of this issue and feel empowered to tackle it effectively?
| HIV Scotland | This briefing (annexe B) contains recommendations from our recent report on the provision of relationship and sexual health education in Scotland, HIV and Education: Guarantying Lessons for All. Education is the fundamental tool in equipping young people with the information they need to reduce their risk of HIV infection, and a means of combating stigmatising attitudes towards people living with HIV that continue to prevail within society. |
| Name withheld | Should the tens of thousands of children attending schools in the Independent sector in Scotland enjoy equally robust standards of safeguarding and protection from bullying and other forms of abuse, and their parents and carers equally accessible channels for effective complaint and redress, as children and families at maintained schools? |
| Rape Crisis Scotland | We are keen to stress the need to ensure strong links between action on gender equality and sexual relationships as envisaged by the inquiry, and the Equally Safe strategy with its focus on tackling gender-based violence hand-in-hand with gender inequality. The recent consultation with children and young people for Equally Safe (which we were a partner to) produced some very strong recommendations by children and young people in relation to promoting gender equality and tackling gender based violence in schools, and we would encourage parliament and government to engage with these recommendations, and to facilitate children and young people’s ongoing involvement, and the involvement of organisations with gender and VAWG expertise (eg. ourselves, Zero Tolerance, Scottish Women’s Aid, Engender.) |
| Samena Dean | I have a concern that there might be a lack of understanding or action taken of racism/Islamophobia beyond direct cases of bullying. I understand the Committee has asked for clear guidelines on bullying and that an understanding between bullying and hate crime should be distinguished but I feel there needs to be an emphasis made on what action is required on single incidents of Islamophobia. The Committee has asked for clarification on prevent. I feel the government cannot fight the Islamophobia abuse Muslim children are facing when implementing a program that institutionalises Islamophobia and creates a climate of suspicion towards Muslims. How will staff be able to support children who facing Islamophobia when are at the same time being influenced by prevent. This seems like double standards towards the Muslim communities and already a failure of the Scottish government to provide a safe haven for Muslim school children. |
| Scottish Youth Parliament | Young people have the right to be safe, heard and healthy at school and free from discrimination. Prejudice-based bullying is a breach of young people’s rights. Through their new national campaign on young people’s rights called Right Here, Right Now; the Scottish Youth Parliament calls for a youth-led, rights-based approach to tackling bullying in school. For example, 76% of our membership think there should be increased LGBT+ education in all schools to reduce stigma and homophobic bullying.

Bullying must be tackled through education and training on rights and all types of prejudice-based bullying, ensuring young people and those responsible for upholding their rights are being aware of, and able to defend, their rights and those of others. |
|---|---|
| Together Scotland | The one key point that Together (Scottish Alliance for Children’s Rights) would like to see included in the debate would be around the incorporation of the UN Convention on the rights of the Child (UNCRC):

- International evidence shows that the act of incorporating the UNCRC in law plays a vital role in progressing a culture change in which children and young people are recognised as rights holders. As shown through the work of the Children’s Parliament, prevention of bullying is underpinned by a commitment to form relationships and a school ethos where bullying or other negative behaviours have little chance to grow. This is achieved through a rights-based culture which focusses on relationships based on human dignity, kindness, empathy and trust. As recognised by the Equalities and Human Rights Committee in recommendation #73, incorporation plays a key role in establishing this culture and should be progressed in Scotland as a matter of urgency.

- See Annexe C |
8th August 2017

John Swinney,
Cabinet Secretary for Education and Skill
T4.23
The Scottish Parliament
Edinburgh
EH99 1SP

Dear Cabinet Secretary

RE- PREJUDICE BASED BULLYING IN SCOTTISH SCHOOLS.
We are writing to urge you to implement the recommendations of the recent report of the Scottish Parliament’s Equality & Human Rights Committee (EHRiC), entitled “It is not Cool to be Cruel: Prejudice-based bullying and harassment of children and young people in schools”.
We agree with the Committee’s recommendations 28 and 29.

RECOMMENDATION 28: We ask the Scottish Government to make it a requirement for every education authority in Scotland to collect and monitor school bullying incidents and to record specifically incidents of prejudice-based bullying. We ask the Scottish Government to ensure consistency by prescribing the type of data recorded. If necessary, such a requirement could be placed on a statutory footing. We also believe data collected should be shared with other agencies involved in reducing prejudice-based bullying. [Paragraph 190]

RECOMMENDATION 29: We ask the Scottish Government to build the requirement for recording and monitoring of school bullying into the inspection framework to ensure compliance, and also to ensure teachers are competent not only in delivering health and wellbeing, but also inclusion, diversity and human rights (Paragraph 201)

Evidence submitted to the Committee highlighted the variations in practice across Scottish Education Authorities. Research by Tavish Scott MSP, published in 2016, showed significant differences in monitoring of racist bullying. Some authorities reported only one or two incidents a year, whilst others are identifying significantly more. Worryingly some of the worst performing authorities were those with highest numbers of ethnic minority pupils. EHRC research in 2016 showed that one in four children were aware of fellow pupils experiencing prejudice-based bullying.
As you will be aware, from the report and from previous correspondence from the EHRC, schools in Scotland currently operate only under non-statutory guidance from the Scottish Government on how to address and eliminate prejudice-based bullying. We believe that the current guidance based system is no longer fit for purpose.

Prejudice-based bullying in schools affects children’s attendance, attainment and well-being. By failing to address prejudice-based bullying some pupils may learn that such behavior is acceptable as it does not attract any sanction, a lesson which will not equip them for the realities of Scotland today. We agree with the Committee that until prejudice-based bullying is placed on a statutory footing. Education Authorities will not have the evidence they need to enable them to identify and support both the victims and the perpetrators. We believe that Education Scotland should be able to inspect a school’s approach to eliminating prejudice based bullying. This would allow them to document and share best practice, and identify improvements.

As you will be aware both the Equality and Human Rights Commission and the Children and Young People’s Commissioner Scotland strongly believe incorporation of the United Nations Convention on the Rights of the Child into Scots law would help to promote an overarching children’s framework that would help to influence all areas of policy and practice. It would illustrate the importance the Scottish Government places on children’s rights and demonstrate a clear commitment to ensuring that Scotland is the best place for children to grow up.

We would welcome the opportunity to meet with you to discuss how we can ensure that children in Scottish schools can study without the fear of prejudice-based bullying.

Yours sincerely

Lesley Sawers
EHRC Scotland Commissioner

Bruce Adamson
Children and Young People’s Commissioner Scotland
HIV Scotland briefing – Debate on Prejudice-based Bullying and Harassment of Children and Young People in Schools and Review of Personal and Social Education

About HIV Scotland

HIV Scotland is the national HIV policy organisation for Scotland. We exist on behalf of all those living with and at risk of HIV to ensure that Scotland has responsive policies, quality services and a supportive environment that enable people living with or at risk of HIV in Scotland to live healthy and fulfilling lives.

Statistics about HIV in Scotland

- There are 5134 people diagnosed as living with HIV in Scotland¹
- Health Protection Scotland estimate that an additional 790 people may be infected but are not diagnosed.
- There were 317 new cases of HIV were reported in 2016². This represents the first significant (approximately 20%) drop in new cases for over a decade. Research is required to determine why this has happened, it should be noted that is coincides with a rise in PrEP being privately purchased.
- Over the last 15 years (2002 – 2016), a total of 527 reports of HIV infection among 15-24 year olds in Scotland have been recorded.³

HIV and Education

Education is the fundamental tool in equipping young people with the information they need to reduce their risk of HIV infection, and a means of combatting the stigmatising attitudes towards people living with HIV that continue to prevail within society.

HIV Scotland are calling for a 21st understanding of HIV, with resources providing information on the latest HIV prevention and treatment strategies, such references to the availability of PrEP.

It is vital that young people have consistent access to sexual health information and HIV Scotland submitted evidence to the Education and Skills Committee’s inquiry into Personal and Social Education (PSE) earlier this year.

² Ibid
³ Ibid
The Sexual Health and Blood Borne Virus Framework 2015 – 2020 identifies the teaching of Relationships, Sexual Health and Parenthood (RSHP) education – which can be taught within PSE lessons – as a key component in HIV prevention. Whilst recognising equality and diversity legal obligations, it states, “RSHP education should continue to be provided to all young people in all schools and wherever learning takes place.”

How young people learn about HIV and wider sexual health issues is crucial to ensuring they have the knowledge and information to make informed choices about their sexual activity and the relationships they form. The UN Committee on the Rights of the Child expressed concern at inconsistent access to sexual health education in the UK and recommended the subject become “mandatory” for all schools⁴. The UN Special Rapporteur on the Right to Education has made clear that the right to education includes the right to sexual education⁵.

Research by the Terrence Higgins Trust revealed half of respondents rated the sexual health education they received in school as either ‘poor’ or ‘terrible’⁶. The Scottish Youth Parliament found that 79% of young people believe all pupils should have access to up-to-date and effective PSHE⁷.

Education is a crucial tool to tackle stigmatising attitudes and misconceptions towards HIV. The National AIDS Trust found less than half of the British public understand how HIV is and isn’t transmitted⁸, with the Stigma Index 2015 revealing 29% of participants in Scotland worry about sexual rejection⁹.

The non-compulsory status of RSHP lessons presents a challenge to ensure that the Scottish Government’s vision of all young people having access to this important subject is guaranteed.

**Recommendations:**

In September 2017 HIV Scotland published research into the provision of relationships and sexual health education in Scotland. Our report HIV and Education: Guaranteeing Lessons For All recommended:

- The national review of PSE should identify a best practice model for schools and local authorities to share RSHP resources and training opportunities.
- Updated RSHP guidance should be produced in collaboration with key stakeholders in education and ensure a stronger focus on HIV.
- RSHP lessons must be inclusive for all young people and include information on LGBT relationships.

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⁴ UN Committee on the Rights of the Child, *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland*, 2016
⁵ Report of the United Nations Special Rapporteur on the right to education, submitted to the General Assembly in 2010
⁸ Ipsos Mori and National AIDS Trust, *HIV: Public Knowledge and Attitudes in 2014*
- Sexual health professionals and third sector providers should have a visible presence within schools.
- Legislation should be introduced to the Scottish Parliament for RSHP lessons to become a compulsory component of the curriculum, in order to guarantee access for every young person in Scotland

You can read our full report here: http://www.hivscotland.com/our-work/education/

Contact: Nathan Sparling, Head of Policy and Campaigning, HIV Scotland
Email: nathan.sparling@hivscotland.com Phone number: 0131 603 8772
Implementing & monitoring the UN Convention on the Rights of the Child (UNCRC)
Post-Seminar Briefing 1: The UNCRC in Law

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

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

Key messages

- International experience shows that the process of incorporation in itself is important: it raises awareness of the UNCRC and generates respect for children as rights-holders. The greater awareness of rights, the higher the likelihood of securing respect for them.

- When rights are enforceable in law, there is opportunity for legal challenge and public scrutiny. Incorporation ensures that the principles of the UNCRC are taken into account during the development of policy and legislation, rather than in court after a breach has occurred.

- Experience with the ECHR through the Human Rights Act 1998 and the Welsh Measure 2011 shows that reviewing legislation can produce tangible results in terms of improving human rights protections in law and practice.

- As rights-holders, children should be able to enforce their rights in court. Children would only need to use courts as a last resort if the government failed to give its UNCRC obligations appropriate effect.

- Incorporation cannot be expected immediately to prevent – or provide remedy - to every violation of UNCRC rights. Many other factors influence whether a country has a strong child-rights focused culture, including levels of awareness and training, and coordination within government. Even if the UNCRC were to be incorporated into Scots law, there would be gaps in protection in relation to issues reserved to UK Government.

- Incorporation would offer the opportunity to draw from the learning of the past 25 years of implementation and guidance from the UN Committee. It would be a missed opportunity to directly incorporate the substantive articles of the UNCRC and its Optional Protocols without considering where improvements could be made in relation to the Scottish context.

- To progress incorporation, child rights advocates need to work with children and young people to convince decision-makers and influencers of the value of taking a children’s rights approach. This needs to include members of the Scottish Parliament, local government, the judiciary, health and education services, parents and academics. This will be explored at the forthcoming SUII seminars.
What does the UNCRC say about incorporation?
Article 4 of the UNCRC requires governments to take ‘all appropriate legislative, administrative, and other measures’ to implement the UNCRC. The UN Committee on the Rights of the Child (the UN Committee) has emphasised the importance of legal measures, such as UNCRC incorporation into domestic law and the justiciability of children’s UNCRC rights. The Committee has also recognised the importance of non-legal measures of implementation, including child rights action plans, participation strategies and child rights impact assessments.

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

- **UNICEF’s study of implementation in 12 countries** shows that whilst few of the 12 countries studied had fully incorporated the UNCRC into domestic law, it had a significant effect where it had happened. The very process of incorporation raises awareness of children’s rights across government and civil society. In countries where there has been incorporation (Belgium, Norway, Spain), children are more likely to be perceived as rights holders, creating a culture of respect for children’s rights and demonstrating positive benefits beyond the legislative procedure itself.

- **Research for the Council of Europe** shows that the level of incorporation into European constitutions is now very high, with increasing reference to UNCRC principles and child rights provisions. In Ireland, there has been a gradual transition from paternalism to rights-based approaches. This has been achieved through constitutional change and subsequent law and policy reform, enabled by domestic inquiries, sustained advocacy and international pressure.

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

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

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

The combination of legal and non-legal measures of implementation has shaped the content of legislation and policy in Wales to better reflect the UNCRC. However, Dr Hoffman noted a number of limitations. Without the enforcement of children’s UNCRC rights in courts, Welsh Ministers have not yet delivered on
the long-standing promise to remove the defence of ‘reasonable chastisement’ in Wales. Furthermore, the
duty did not prevent the decision to remove funding from the active Children and Young People’s Assembly
for Wales (Funky Dragon) in 2014. Even after incorporation, the Welsh experience shows that a significant
amount of work is still needed to embed children’s rights into policy and practice.

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

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

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

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

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

1 See Salomon v Commissioners of Customs and Excise [1967] 2QB 116
2 See Christian Institute v Lord Advocate [2015] UKSC 0216
4 See the Children (Scotland Act) 1995 and Children’s Hearings (Scotland) Act 2011
5 See the Children (Scotland Act) 1995
Other principles of the UNCRC have been established in Scottish courts through the use of the ECHR. In summer 2016, the Supreme Court used Article 8 ECHR to determine a judgment on children’s rights to privacy (Article 16 UNCRC) and establish the balance between this and the need to share information. In the absence of UNCRC incorporation, cases on juvenile justice (Article 40 UNCRC) have relied on ECHR Articles 6, 8 and 14. There is active debate among legal and policy experts that the defence of ‘justifiable assault’ available to parents who hit their children (which is clearly a violation of UNCRC Article 19) could be challenged in courts under ECHR Articles 3 and 8.

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

**What is next on Scotland’s journey towards incorporation?**

The discussion around the incorporation of international treaties into domestic law in Scotland continues to simmer. The First Minister has said that she’s open to ‘exploring implementing and incorporating [...] some of the key international human rights treaties’. The 2016 SNP Manifesto pledged to establish social and economic rights and further embed the European Convention on Human Rights. Given the international experience of the culture change that incorporation can bring, the seminar concluded with most delegates agreeing that the 2014 Act is only a starting point. The implementation of the 2014 Act provides an opportunity to explore how non-legislative measures such as child rights and wellbeing impact assessments, a national plan of action, data collection, participation of children in decision-making and complaints mechanisms for children can help to progress UNCRC implementation. However, incorporation is still needed to achieve the Scottish Government’s aspiration of making ‘Scotland the best place to grow up’ and of ensuring children’s rights are ‘respected across the public sector’.

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For more information contact Together (Scottish Alliance for Children’s Rights)

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Website: www.togetherscotland.org.uk  Twitter: @together_sacr

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6 Children’s Hearings (Scotland) Act 2011 Act, s.27.
7 Standards in Scotland’s Schools etc. Act 2000, s.2(2).
8 Christian Institute & Ors v Lord Advocate (Scotland) [2016] UKSC 51.
9 AB v HMA UKSC 2016/0083
10 Criminal Justice (Scotland) Act 2003, s.51.
11 Changes made by Advice & Assistance (Scotland) Amendment Regulations 2010, Civil Legal Aid (Scotland) Amendment Regulations 2010.