

INCORPORATION AND IMPLEMENTATION OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (UNCRC)

Programme Update No. 1 : 9 June 2022

Introduction

Welcome to the first of our regular updates on the incorporation and implementation of the UNCRC and the work of the Children's Rights Unit to support this.

The purpose of these updates will be to:

- keep public authorities informed of the progress of the UNCRC (Incorporation) (Scotland) Bill;
- explain how public authorities will be supported to deliver the duties under the Bill by the Scottish Government UNCRC Implementation Programme; and
- share practical examples on how public authorities are already implementing the UNCRC and/or preparing for the commencement of the duties in the Bill in their own organisations.

The intent behind the UNCRC (Incorporation) (Scotland) Bill is to deliver a proactive culture of everyday accountability for children's rights across public services in Scotland. When passed the Bill would require all Scotland's public authorities to take proactive steps to ensure the protection of children's rights in their service delivery and make it unlawful for public authorities to act incompatibly with the UNCRC requirements as set out in the Bill. Children, young people and their representatives would have a new ability to use the courts to enforce their rights.

The key audience for these programme updates will be those who bear duties under the Bill – those delivering or responsible for public services in Scotland. That includes all public services, not just those targeted on children and young people. The UNCRC Bill also extends the duties beyond 'core' public authorities, to any person exercising functions of a public nature. These are sometimes referred to as 'hybrid' public authorities. This could include private companies, charities or others. Under the Bill, functions of a public nature includes functions carried out under a contract or other arrangement with a public authority. You should therefore share these updates with any 'hybrid' public authority that is supporting you to deliver a public service.

Although the full realisation of children's rights requires proactivity on the part of all public services, the Scottish Government has developed a three-year UNCRC Implementation Programme running from April 2021 to March 2024. The UNCRC Implementation Programme is supported by a Strategic Implementation Board. Information on board membership and minutes from meetings can be found [here](#).

The [programme action plan](#) outlines what we will do to ensure that children's rights are respected, protected and fulfilled in Scotland by: providing Scottish Government leadership for children's rights; empowering children and young people to claim their rights; embedding children's rights in public services; and supporting an approach to children's rights resolution. These programme updates will highlight progress with these actions and resources and support that will be made available as a result.

As part of the programme, [introductory guidance](#) on embedding a children's rights-based approach in public services was published in November, and these programme updates will complement and build on this.

Deputy First Minister's Update on the UNCRC Bill

On the 24th May, the Deputy First Minister updated Parliament on where we are with our consideration of the Supreme Court's judgement on the UNCRC (Incorporation) (Scotland) Bill and plans to bring an amended Bill back to the Scottish Parliament via the 'Reconsideration Stage'. (A recording of the statement is available [here](#) and the official written report is available [here](#).) As this is an important milestone in our journey to incorporation of the UNCRC we have dedicated most of this first programme update to explaining what this means.

The Scottish Government remains committed to delivering UNCRC incorporation to the maximum extent possible. However, we must do that while also addressing the areas found by the UK Supreme Court to be outwith the competence of the Scottish Parliament and while avoiding further challenge. In his statement, the Deputy First Minister explained the proposed changes to bring the challenged provisions of the Bill within legislative competence, and outlined plans for targeted stakeholder engagement before the Bill is brought back to Parliament.

Compatibility duty (Section 6 of the Bill)

Section 6 of the Bill sets out the compatibility duty, which would make it unlawful for a public authority to act in a way that is incompatible with the UNCRC requirements (as defined by the Bill). The judgment of the Supreme Court was that the compatibility duty set out in this section was too broad, including for the reason that it would, on its face, have applied to public authorities acting in reserved areas.

Subject to stakeholder engagement, this section of the Bill will be amended to expressly limit the compatibility duty to devolved matters (i.e. devolved functions and public authorities that are not reserved by the Scotland Act). It is also necessary to add provision equivalent to section 6(2) of the Human Rights Act 1998. This is to ensure that a public authority is not subject to the compatibility duty if the provision of the applicable Act that confers its function cannot be read compatibly with the UNCRC requirements.

What would this mean for public authorities?

The UNCRC Bill would make it unlawful for public authorities to act incompatibly with the UNCRC requirements (as defined by the Bill). The proposed amendments to the Bill (currently being consulted on) would mean that the legal duty in section 6 would apply only to devolved public authorities and devolved functions. This, however, should not limit the commitment to respecting children's rights.

The Bill will not seek to place any new or additional legal duties on public authorities when delivering a service in a reserved area (in legal terms, when they are exercising a function that would not be within devolved competence in terms of section 54 of the Scotland Act 1998). In exercising their functions, public authorities in Scotland will nonetheless wish to bear in mind that the obligations created by the UNCRC, and by the First and Second Optional Protocols¹, are binding on the UK as a State Party as a matter of international law. Although this does not create enforceable legal obligations in domestic law, it is established good practice for all public authorities to ensure that their policies and actions properly respect, protect and fulfil the rights of children and young people.

¹ The First Optional Protocol is on the sale of children, child prostitution and sexual pornography and Second Optional Protocol is on the involvement of children in armed conflict.

In the event that you think the statutory context under which you deliver a service prevents you from taking a child's rights-based approach, advice should be sought from your legal team. You should not wait until the Bill is passed to highlight where you think you are prevented from delivering services that are compatible with the rights in the [UNCRC requirements as defined by the Bill](#).

Power of the Courts (Sections 19,20 & 21 of the Bill)

Collectively these sections set out the courts' interpretative and remedial powers in respect of legislation that it would be within the competence of the Scottish Parliament to make. Section 19 contains a duty on the courts to interpret and give effect to certain types of legislation in a way that is compatible with the UNCRC requirements, so far as it is possible to do so. The Supreme Court's judgment was that the Bill gave Scottish courts the power to interpret UK Acts in ways the UK Parliament did not necessarily intend, which would impermissibly affect the powers of the UK Parliament to make laws for Scotland. Section 20, as passed, would have given the courts power to strike down certain legislation that is incompatible with UNCRC requirements and section 21 would have enabled the courts to declare certain legislation to be incompatible with the UNCRC requirements.

The Supreme Court's judgment was that each of these provisions went beyond the powers of the Scottish Parliament insofar as they applied to Acts of the UK Parliament.

The Deputy First Minister has now proposed that, subject to stakeholder engagement, these sections of the Bill will be amended to make it clear that court powers will only apply to legislation comprising (or made under) an Act of the Scottish Parliament.

The removal of UK Acts from the scope of sections 19-21 will mean that enactments such as the Education (Scotland) Act 1980 and the Children (Scotland) Act 1995 will be excluded from the provisions summarised above, even though they principally concern matters on which the Scottish Parliament could (and frequently does) legislate. However, Scottish Parliament already has the power to amend or repeal devolved legislation, including where that takes the form of a UK Act. In addition, the Scottish Ministers will have the power, under section 32 of the UNCRC Bill, to make remedial regulations – including in respect of UK Acts – where there are compelling reasons to do so. This means that, while removing UK Acts from the scope of sections 19-21 would mean that the Scottish *courts* would lack interpretative and remedial powers as regards UK Acts, remedial action could still be undertaken by the Scottish Parliament or Scottish Ministers in appropriate cases.

What will this mean for public authorities?

Sections 19-21 would no longer apply to UK Acts and so the courts' powers will be more limited than in the Bill as originally passed. However, the section 19 interpretative obligation would continue to require Acts of the Scottish Parliament (and legislation made under them) to be read and given effect in a way which is compatible with the UNCRC requirements, so far as possible (much like section 3 of the Human Rights Act 1998 does with respect to the Convention Rights). The courts would still be required to make judgments about cases they consider, including cases brought against those delivering public services. The courts would also still be able to issue remedies, under sections 20 and 21, in respect of incompatible Acts of the Scottish Parliament (or legislation made under them).

The advice provided above in relation to the section 6 compatibility duty will help with ascertaining the impact of sections 19-21 on your service delivery.

Reconsideration Process

To make the required amendments to the Bill, it is the Deputy First Minister's intention to return a revised UNCRC Bill to Parliament as soon as practicable via the 'Reconsideration Stage'. Reconsideration Stage has never been done before by the Scottish Parliament, and the process to be followed will need to be worked through in consultation with the Parliamentary authorities. However, we hope that the Reconsideration Stage will take place after the Parliament's summer recess and before the end of the calendar year.

Targeted stakeholder engagement

We are currently undertaking a short period of targeted stakeholder engagement. The purpose of this engagement is to ensure that our key stakeholders understand the changes that are being proposed and why, and to help the Scottish Government understand any concerns that need to be aired prior to, and perhaps during, Reconsideration Stage. Because of the very narrow nature of the 'fix' that we're proposing to make to the Bill, as well as Ministers' and Parliament's desire to move as quickly as possible to return the amended Bill to Parliament, this is not a full scale consultation. Those who have been closely involved in lobbying for and developing the Bill have been invited to respond.

Ongoing work to support implementation of children's rights

Work to support implementation of the UNCRC continues at pace. Public services play a vital role in delivering for children, young people and their communities and the Scottish Government is committed to working in collaboration with partners in the public service to support them to deliver the duties under the Bill.

Future editions of this programme update will provide more detail on work underway or planned to support public authorities to fulfil their duties relating to children's rights, and to take a child's rights based approach. Updates will be provided on, for example:

- the development of statutory guidance for part 2 and section 15 of the Bill (part 2 being the "Duties on public authorities" and section 15 being the "Reporting duty of listed authorities");
- the development of a Skills and Knowledge Framework to provide duty bearers with a single point of access to a range of resources and training in relation to children's rights, and support for identifying and undertaking the learning that is most relevant to their role and service;
- the national programme of improvement being developed in coordination with the Improvement Service, which will provide additional training opportunities, leadership and peer support for those involved in putting a child rights based approach into practice;
- the launch of an Innovation Fund to stimulate innovative approaches to putting children's rights into practice;
- supporting the development by the Scottish Public Services Ombudsman of child friendly complaints processes to ensure children and young people are able to access their rights; and
- resources to help embed meaningful participation with children and young people in decision making processes.

Suggestions for future content

Future programme updates will issue as and when we have useful content to share but will be no less frequent than once every three months. If you have any suggestions about what you would like to see covered in future programme updates or would like to use these to showcase work underway

to implement UNCRC in your organisation please email UNCRCIncorporation@gov.scot.
Children's Rights Unit, Scottish Government