



Rights of the Child UK

Working together to bring children's rights into UK law

**Rights of the Child UK
Coalition**

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Annual Conference 2017 – Post-conference briefing

This briefing supports the annual conference of the Rights of the Child UK (ROCK) Coalition which took place in Edinburgh on Friday 3rd November 2017. The conference brought together representatives from across England, Scotland, Wales and Northern Ireland to explore the use of law to progress the implementation of the UN Convention on the Rights of the Child (UNCRC). The event was organised by the ROCK Steering Group consisting of representatives from [Together \(Scottish Alliance for Children's Rights\)](#), [Child's Rights Alliance for England](#), [UNICEF UK](#), and the [Wales UNCRC Monitoring Group](#).

This year's annual conference explored developments that are currently taking place across the UK to embed the UNCRC into law and highlighted opportunities to further legal protections of children's UNCRC rights across the devolved nations and at a UK level. Professor Ursula Kilkelly outlined the developments, opportunities, and challenges in giving effect to the UNCRC and discussed both legal and non-legal measures that can be taken to embed children's rights. Government updates were given in person by Donald Henderson from Scottish Government, and with written statements given by the UK and Welsh Governments. Civil society updates for England, Wales and Scotland were provided by members of the ROCK Steering Group. Dr Kasey McCall-Smith explored some of the strengths and limitations of incorporation, drawing from different international examples. Dr Simon Hoffman followed, looking at what an 'ideal' model of incorporation could look like, drawing from experiences gained through the Human Rights Act 1998 and the Welsh Measure. Throughout the day, ROCK members and delegates discussed opportunities for implementing the UNCRC at both a devolved and UK level and what role ROCK can play in the future to support this.

Key messages

- UNCRC implementation can be furthered through a wide range of legal measures including using the Convention in courts and incorporating the UNCRC into domestic law. However, the use of non-legal measures, such as raising public awareness and understanding of children's rights, are also vital in building momentum and instigating a culture change that will lead to achieving legislative incorporation.
- Whilst progress has been made in UNCRC implementation across England, Wales and Scotland, full incorporation of the UNCRC has yet to be achieved in the UK.
- An ideal model of incorporation of the UNCRC into domestic law in the UK, Wales, or Scotland would not necessarily be direct incorporation but rather a mixed model of incorporation of the 'Human Rights Act' model and the 'Due Regard' model.
- Members of ROCK can play an important role in advocating for incorporation, including ensuring children and young people are heard in decisions regarding UNCRC implementation, enhancing partnership working between organisations, and encouraging academic research in the area of children's rights.

The UN Convention on the Rights of the Child in law internationally

The UNCRC is a widely ratified and binding international treaty which recognises children as rights holders and states as duty bearers. Implementation of the Convention is monitored by the UN Committee on the Rights of the Child (the UN Committee) who provide extensive guidance on how states can implement the treaty. In particular, the UN Committee highlights the effectiveness of incorporation, justiciability, and a focus on non-legal measures of implementation.¹

Professor Ursula Kilkelly outlined different methods of UNCRC implementation which further children's rights through legal measures. These include:

The UNCRC and Litigation

The UNCRC is being increasingly used in courts at both a domestic and regional level. Courts in South Africa² and the Supreme Court in the United States³ have made reference to the UNCRC and the Convention has also been used in regional human rights bodies such as the European Court of Human Rights.⁴ In the UK, the UNCRC has been used in multiple court cases including the 2015 Supreme Court case regarding the benefits cap,⁵ where it was ruled that the cap breached the UK's international children's rights obligations.⁶ Courts have also drawn on other documents produced by the UN Committee such as General Comments⁷ and Concluding Observations.⁸

Legal Implementation

Various approaches can be used to incorporate the UNCRC into domestic law, ranging from full incorporation to incorporating select principles, and research has shown that the value of incorporation in all cases is significant.⁹ Often incorporation is accompanied by increased efforts in awareness raising and education around children's rights, which improves understanding of a rights-based approach. Research has also shown that incorporation leads to a sense of ownership of rights amongst rights-holders which empowers children and young people to claim the rights laid out in the UNCRC¹⁰. Incorporation can also lead to positive engagement with the UN Committee by national governments and can act as a gateway to fuller engagement with the Convention, as opposed to with only the general principles.¹¹

Constitutional Protection

Many European Constitutions contain provisions or references to children's rights, such as the right to an education which is contained as a provision in the constitution of 43 Council of Europe Member States.¹² There is increasing reference to principles of the UNCRC and recognition of children as rights holders. For

¹ CRC/GC/2003/5: Para 20 and 24.

² Centre for Child Law v. the Governing Body of Hoerskool Fochville, (156/2015) [2015] ZASCA 155.

³ Roper v. Simmons, 543 U.S. 551 (2005)

⁴ Sahin v. Germany, (30943/96) [2003] ECHR 340

⁵ SG & Ors, R (on the application of) v SSWP [2015] UKSC 16.

⁶ Ibid. Lord Carnwath (para.126), Lady Hale (para.227) and Lord Kerr (para.269) agreed that the benefit cap was not consistent with UNCRC Art.3.

⁷ YG v. The State A263/2016 South Africa (2017).

⁸ Saviny v. Ukraine, 39948/06 Ukraine (2008).

⁹ UNICEF (2012). The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries, pg 108. <https://www.qub.ac.uk/research-centres/CentreforChildrensRights/filestore/Filetoupload%2C485596%2Cen.pdf> [Date accessed: 1.12.17].

¹⁰ Ibid, p.108.

¹¹ Ibid.

¹² Venice Commission (2014). Report on the Protection of Children's Rights: international Standards and Domestic Constitutions. [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)005-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)005-e) [Date accessed: 1.12.17].

example, in Ireland, a referendum in 2012 resulted in the incorporation of Article 12 of the UNCRC into the constitution, leading to a gradual change from paternalism to a right-based approach.¹³

Professor Kilkelly used the above examples to emphasise that a strong case remains for legal advocacy around the UNCRC. In addition, non-legal measures are vital in building momentum and instigating a culture change that will lead to achieving legislative incorporation. This includes engaging with the media and raising public awareness and understanding of children's rights. A move towards incorporation requires co-ordinated support and sustained effort by civil society, national human rights institutions, academics, and politicians.

What are the UK and devolved governments doing to further children's rights?

The UK Government has created a UNCRC Action Group which is co-chaired by the Department for Education and CRAE. Members include Action for Children, Children England, The Children's Society, and UNICEF. A [Written Ministerial Statement](#) published in October 2016 as a response to the UNCRC Concluding Observations also sets out a framework of actions which will embed children's rights, including developing a training package on the UNCRC for civil servants in Whitehall and promoting the use of Children's Rights Impact Assessments when developing policy.

The Welsh Government is taking steps to progress the rights of children and young people in several policy areas, including transitions for care leavers, adverse childhood experiences, participation, mental health and the education system, and through an Additional Learning Needs Bill. The Government's new strategy, [Prosperity for All](#), identifies five priority areas which all have a significant impact on children and young people, including the early years and mental health. There is a high level of awareness of children's rights across Welsh Government as Ministers are under a duty to pay due regard to the UNCRC when developing policies, programmes, and legislation¹⁴.

The Scottish Government made several commitments to children's rights in the 2017-18 [Programme for Government](#). These commitments include raising the minimum age of criminal responsibility from 8 to 12 in line with the international minimum standard and supporting legislative proposals to remove the defence of 'justifiable assault' and ensure children have equal protection from violence. The Government will also commence a three-year programme to raise awareness of children's rights and will undertake an audit on the most effective way to further embed the principles of the UNCRC into policy and legislation. 2018 will be the "Year of Young People" in Scotland, which will provide an opportunity to celebrate the personalities, talents and achievements of Scotland's young people through a series of events, activities and ideas.

Civil society perspective

At Westminster, legislative progress to further children's rights has not progressed at a similar level to that of Wales and Scotland. At a UK governmental level, calls from civil society to introduce a child rights duty on public authorities have been resisted and progress at a local level remains limited. Some progress is being made in terms of non-legal implementation of child rights. For example, a Child Rights Impact Assessment tool is currently being developed alongside a civil service learning training module. Both will be launched to coincide with International Children's Day on 20th November 2018. Alongside this, it is also positive that a civil service child rights team has remained in place. Several threats to child rights protections remain at a

¹³ Ibid, page 21.

¹⁴ Rights of Children and Young Persons (Wales) Measure 2011. <http://www.legislation.gov.uk/mwa/2011/2/contents>.

UK level including the impact of the [EU \(Withdrawal Bill\)](#) and the replacement of the Human Rights Act 1998 with a 'British Bill of Rights'.¹⁵

In Scotland, the [Children and Young People \(Scotland\) Act 2014](#) places a duty on Scottish Ministers to 'keep under consideration' steps to further children's rights. It also places duties on Ministers to raise awareness of children rights and on both Ministers and public bodies to report on how they are furthering the UNCRC. The Act stops considerably short of full incorporation, which is still being called for by civil society organisations¹⁶ and children and young people across Scotland.¹⁷ Steps are being taken by Scottish Government to involve children and young people in decision making. The first annual meeting between children and young people and the Scottish Cabinet was held in 2016 and the Year of Young People in 2018 will see further opportunities for children and young people to influence decisions that affect them.

The Welsh Government has taken several steps to further children's rights. In particular, in 2011 the [Rights of Children and Young Persons \(Wales\) Measure 2011](#) places a duty on Ministers to pay due regard to the UNCRC when exercising their functions, including making decisions on policy, legislation, and programmes. Similar duties on persons exercising functions in relation to children under the [Social Services and Well-being \(Wales\) Act 2014](#) have also been put in place. Positive steps have been taken towards lowering the voting age in Wales to 16, and Ministers will soon be consulting with a view to removing the defence of reasonable punishment in Welsh law. The National Assembly for Wales have committed to establish a Youth Parliament with elections expected in late 2018, thus implementing a key Concluding Observation from the UN Committee. High levels of child poverty and significant pressure on public funds owing to austerity pose significant challenges to the children's rights agenda in Wales.

Does a perfect model of incorporation exist?

Dr McCall-Smith provided an overview of UNCRC implementation across several countries, drawing upon the findings of the [UNICEF study on incorporation](#). She spoke of the importance of law in protecting children's rights. Law is needed to make children's rights "real" and provide a common language to use when speaking about rights.

The way in which the UNCRC is incorporated into domestic law can vary from country to country depending on factors such as the country's legal system and public opinion on children's rights.

For example, when certain states sign up to an international treaty, such as the UNCRC, the terms of that treaty automatically become part of domestic law. These states are called "monist" states and include Germany. By contrast, when some states ratify an international treaty a further step is required before it becomes part of domestic law. These are called "dualist" states and include Norway and Belgium. States' approaches to incorporation include:

1. **Direct incorporation:** such as the incorporation of the ECHR into UK law via the Human Rights Act 1998.
2. **Sectoral approach:** this is the most common approach. States take children's rights into account when passing individual laws.

¹⁵ Conservative Party (2017). Conservative Party Manifesto <https://s3.eu-west-2.amazonaws.com/manifesto2017/Manifesto2017.pdf> [Date accessed: 30.11.2017].

¹⁶ Together (2016). *State of Children's Rights* report, pg 16. <http://www.togetherscotland.org.uk/pdfs/TogetherReport2016.pdf> [Date accessed: 1.12.17].

¹⁷ Scottish Youth Parliament (2017). Right Here, Right Now http://www.syp.org.uk/right_here_right_now [Date accessed: 30.11.2017].

3. **Comprehensive children’s legislation:** such as a Bill of Children’s Rights. This would mirror the rights enshrined in the UNCRC but subject to certain limitations as set out in the Bill.
4. **Self-regulating approach:** under this approach states make a legislative commitment to give “due regard” to the UNCRC. Whilst Dr McCall-Smith saw this approach as a positive first step towards protecting rights, she argued that it did carry some problems of enforceability and accountability.

This variety of approaches was illustrated by reference to the following countries approaches to UNCRC incorporation:

Germany

As a monist state, the treaties that Germany ratifies are automatically incorporated into German law. However, Germany made a declaration that the UNCRC would form an exception to this rule. Therefore, only certain UNCRC rights form part of enforceable German law.¹⁸

Denmark

Denmark adopts a sectoral approach and it has introduced domestic children’s rights legislation. However, problems have arisen regarding funding and implementation of this legislation which has drawn criticism from the UN Committee.¹⁹

Moldova

Moldova has introduced children’s rights-protecting legislation. However, this in itself is not sufficient – resources must be provided to support implementation, an area where Moldova has faced problems. Whilst there have been successes such as raising the minimum age of criminal responsibility, there are other areas of legislation, policy and practice which struggle to comply with the UNCRC. For example, the prevalence of early marriage among the Roma community which results in girls dropping out of school.²⁰

Lebanon

The Lebanese Constitution enables lawyers to refer in court to any international treaty which Lebanon has ratified which means the UNCRC can be argued in cases before Lebanese courts. However, the benefits of this are not always enjoyed by children and young people due to restricted access to lawyers and court processes.²¹

Countries which are members of the UNCRC have used a variety of legal approaches to incorporate the Convention. Dr McCall-Smith emphasised the important role that the law plays in protecting and promoting children’s rights through incorporation, and noted the significant cultural change that can occur as a result of incorporation into law of the UNCRC. To fully protect children’s rights there must be both legal protection of rights and positive cultural change.

¹⁸ Certain children’s rights are enshrined in law at both a Federal Government and Länder level. For example, the right to education, the right to assistance for development, and the right to participate in certain decision-making processes are all enshrined in *Book VIII of the Social Code (Child and Youth Services) (Section 8(1)) (1990)*. However, the CRC is still to be incorporated into the German Constitution.

¹⁹ CRC/C/DNK/CO/4: Paras 12, 14 and 21.

²⁰ CRIN (2017). Republic of Moldova: Children’s Rights references in the Universal Periodic Review <https://www.crin.org/en/library/publications/republic-moldova-childrens-rights-references-universal-periodic-review> [Date accessed: 1.12.17].

²¹ DLA Piper (2014). Access to Justice for Children (Lebanon). https://www.crin.org/sites/default/files/lebanon_access_to_justice_0.pdf [Date accessed: 1.12.17].

What would an ideal model of incorporation look like?

Dr Hoffman presented different models of incorporation and questioned which, if any, of these was an “ideal model”. It is important to address the following points when considering incorporation of the UNCRC:

What are we hoping to achieve by incorporation?

The UN Committee has outlined the [aims of incorporation in detail](#). However, discussions around incorporation often focus on the court processes that are relied on after rights are violated, rather than the preventative role that incorporation plays in ensuring that legislation and policy is UNCRC-compliant at the outset.

What legal mechanism would best achieve incorporation?

1. Human Rights Act model

The first model is based on the approach taken to incorporate the ECHR into UK law through the Human Rights Act 1998. This approach makes it unlawful for public authorities to act in a manner incompatible with the ECHR. However, Dr Hoffman noted the limitations of this model, stating that it provides a primarily reactive solution to rights violations and that this approach could be described as “minimum compliance”.

2. “Due regard” model

Under the Rights of Children and Young Persons (Wales) Measure 2011, Welsh Ministers must have due regard to the UNCRC when exercising their duties. This means that child rights considerations operate throughout policy processes. A failure to have due regard is grounds for judicial review. However, the due regard model can be criticised on the basis that it does not compel any particular outcome and that it merely assumes that good outcomes will follow where decision-making takes account of children’s rights.

3. Mixed model

Dr Hoffman suggested that a third model may be most effective. This “mixed model” would draw elements from both the Human Rights Act model and the due regard model, addressing the strengths and weaknesses of each. Under this approach, the Human Rights Act element of ensuring compliance and providing a legal remedy would be utilised, and a due regard duty would be active at the policy development stage. There should also be a general statutory duty to conduct Child Rights Impact Assessments. Dr Hoffman argued that the wider textual system of the UNCRC should also be incorporated as part of this approach - including General Comments, Concluding Observations and jurisprudence of the UN Committee.

Conclusion

Having considered the strengths and weaknesses of the above models, Dr Hoffman concluded that a mixed model for incorporating the UNCRC would be most effective in the Scottish context and elsewhere.

The future role of ROCK

Delegates at the conference highlighted the importance of participation of children and young people in decision making and how they can be supported by member organisations of ROCK to have their voice heard. Particular emphasis was placed on supporting younger and children with a disability to have their views taken into account on more complex matters, such as incorporation, and making sure that issues around implementation of the UNCRC are discussed in an accessible way. Partnership working amongst

ROCK members would allow for learning between organisation working directly with children and young people and those working on policy and legislative child rights issues, ensuring that more complicated messages were able to be communicated in a simple and effective way.

ROCK can also work to further engage the academic community in research around children's rights. Students of all levels can be encouraged to take on projects in all areas of children's rights in order to strengthen research on issues such as incorporation.

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

Email: info@togetherscotland.org.uk **Tel:** 0131 337 9015

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