

Engender submission of evidence to the Equality and Human Rights Committee call for evidence on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill

16 October 2020

1. INTRODUCTION

Engender works to advance women’s economic, social and cultural, and political equality with men. We undertake policy and advocacy work with the ambition to make visible the ways in which women’s unequal access to resources, safety, rights and power impact Scotland.

Women and girls in Scotland have yet to experience the full realisation of rights enumerated across the international instruments to which the UK is a state party, including the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The promotion and realisation of women’s human rights is integral to the breadth of our policy work, as well as specific elements such as membership of groups including the Scottish Human Rights Consortium and through our own engagement with national and international monitoring mechanisms. In 2018 Engender co-ordinated Scottish civil society’s shadow reporting to the UN CEDAW Committee’s examination of the UK. Our final shadow report,¹ which was supported by 25 Scottish civil society organisations,² set out a range of areas in which women’s rights have yet to be realised.

This interest in the human rights of women and girls means that Engender welcomes incorporation of the UN Charter of Children’s Rights (UNCRC) into Scots law and supports the United Nations Convention on the Rights of the Child (Incorporation)

¹ Engender (2019) Convention on the Elimination of All Forms of Discrimination Against Women Shadow Report. Available at: <https://www.engender.org.uk/content/publications/CEDAW-Scotland-report-Jan-2019.pdf>.

² Zero Tolerance, ALLIANCE, Inclusion Scotland, Rape Crisis Scotland, Equality Network, Coalition for Race Equality and Rights, Nourish Scotland, Scottish Women’s Convention, YouthLink Scotland, EQUATE Scotland, Scottish Youth Parliament, Together, LGBT Youth Scotland, Poverty Alliance, Carers Scotland, Close the Gap, Women 50:50, Glasgow Disability Alliance, Scottish Council for Voluntary Organisations (SCVO), Scottish Women’s Aid, Coalition for Ethnic Minority Voluntary Organisations, Women’s Support Project, Scottish Women’s Rights Centre, One Parent Families Scotland, and Women’s Enterprise Scotland.

(Scotland) Bill. Women's rights and children's rights are closely connected, both because of women's gendered social roles as mothers and caregivers as well as for the protection of the rights of girls and young women. However, Engender does not have a particular expertise in the operation of the UNCRC. Instead we view the UNCRC as the first step in a comprehensive human rights legal framework for Scotland, one which will include women's rights both overtly and holistically, and a critical component in advancing the rights of women and girls.

2. WILL THE BILL MAKE IT EASIER FOR CHILDREN TO ACCESS THEIR RIGHTS?

The Bill broadly represents a maximalist approach to incorporation of children's rights, and we welcome that the Scottish Government has pursued a generally comprehensive approach. We believe that this model offers benefits that could also lead development of subsequent human rights protection, including women's rights. We are ambitious to see culture change delivered through actions such as the Children's Rights Scheme (s.11-13), use of Child Rights and Wellbeing Impact Assessments (s.14) and reporting duties on listed authorities (s.15-16).

However, we also note that our experience of CEDAW suggests that a lack of public awareness and understanding prevents full realisation of women's rights in Scotland.³ We believe strongly that commitment to rights must be coupled with strong accountability and enforcement opportunities as well as public information. While a preventative approach to breaches of rights, whether children's or other groups, is a positive move, we are also pleased that this Bill includes powers to assess the compatibility of legislation with the UNCRC's requirements (s.18-21) and for children or their representatives to challenge breaches of their rights (s.7).

Engender fully supports the incorporation of the UNCRC and have strongly argued that it is necessary that this includes accountability and obligations for public authorities. In our response to the Scottish Government's consultation on plans for incorporation, we were clear that consistency between the interpretation of rights at international level and UK level was a vital element in the realisation of children's rights to the highest possible standard.⁴ UN Committees, while not offering a binding legal authority, have amassed a great body of interpretation, guidance, learning and best practice from the experiences of signatories.

³ Engender (2018) CEDAW: How can women's rights be better realised in Scotland? Available at: <https://www.engender.org.uk/content/publications/CEDAW-incorporation-paper.pdf>.

⁴ Engender (2019) Engender response to the Scottish Government's consultation on incorporation of the UN Charter of Children's Rights. Available at: <https://www.engender.org.uk/content/publications/Engender-response-to-the-Scottish-Governments-consultation-on-incorporation-of-the-UN-Charter-of-Childrens-Rights.pdf>.

We therefore are pleased to see that the Bill (s.4) includes power to take into account the preamble, optional protocols and provisions not currently set out in the schedule when a court is making a decision on children’s rights. However, the Bill currently offers no clarity on the role of General Comments, Concluding Observations, opinions made in relation to Optional Protocol 3 and reports resulting from Days of General Discussion. While not legally binding, these invaluable sources of expertise in the UNCRC can play a vital interpretative role in mediating compliance.

While UK and Scottish courts can already access these materials in their decision making to some degree,⁵ Engender, like a majority of respondents to the Scottish Government’s consultation on incorporation, believes their interpretative roles should be clarified and strengthened.⁶ We would wish to see clarification on the extent to which courts and tribunals can and should take this jurisprudence into account, such as a duty to have due regard to UN sources and comparative decisions relating to the interpretation of the UNCRC.

3. WHAT DO YOU THINK ABOUT THE ABILITY TO TAKE PUBLIC AUTHORITIES TO COURT TO ENFORCE CHILDREN’S RIGHTS IN SCOTLAND?

Engender supports the right of children to have access to courts as a dispute resolution of last resort where there has been a denial of their rights. The UN Committee on the Rights of the Child is clear that realisation of rights requires effective remedies to redress violations. Thus, the benefits of incorporating the rights enshrined by the UNCRC will only be realised with effective mechanisms to enforce compliance.⁷ We therefore continue to believe that UNCRC rights should have direct application in Scottish courts while also recognising that children and young people may be especially vulnerable asserting their rights in court, even where supported to do so. Access to courts may also prove necessary in securing legal clarity and for interpretative purposes.

⁵ See: *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 and *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47.

⁶ Scottish Government (2019) Consultation on incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland: Analysis Report. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-analysis/2019/11/uncrc-consultation-analysis-report/documents/consultation-incorporating-united-nations-convention-rights-child-domestic-law-scotland-analysis-report/consultation-incorporating-united-nations-convention-rights-child-domestic-law-scotland-analysis-report/govscot%3Adocument/consultation-incorporating-united-nations-convention-rights-child-domestic-law-scotland-analysis-report.pdf>.

⁷ UN Committee on the Rights of the Child (2003) General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child. Available at: <https://www.refworld.org/docid/4538834f11.html>.

We therefore also welcome the power for the Children and Young People’s Commissioner to bring or intervene in proceedings at s.10 of the Bill, a move in line with the more general recommendation from the First Minister’s Advisory Group on Human Rights Leadership on “appropriate bodies” capacity to bring proceedings under a Scottish human rights framework.⁸ However we also note that the rules on standing are not made clear on the face of the Bill and recommend that the position in the Policy Memorandum that “the ordinary rules about who can bring cases in court would apply to claims brought under the Bill” is included.⁹

Women’s social roles as mothers and primary caregivers have a direct impact on the safety and wellbeing of their children. However, this close relationship also carries the risk of unintended consequences. We have previously raised concerns regarding criminal law on child neglect and risks that mothers be penalised for ‘failing to protect’ their children when they themselves are at risk.¹⁰ We would welcome additional clarity on the approach to integrating gender concerns when there is a denial of a child’s rights as part of the Committee’s scrutiny of the Bill.

4. WHAT MORE COULD THE BILL DO TO MAKE CHILDREN’S RIGHTS STRONGER IN SCOTLAND?

Meaning of public authority

Engender supports the view of Together (Scottish Alliance for Children’s Rights) that the Scottish Parliament should be included in the definition of a ‘public authority’ within the Bill and would welcome further consideration of how this may be achieved as per the Policy Memorandum.¹¹ We also welcome that ‘public authority’ may be applied to private actors exercising “functions of a public nature” but agree with

⁸ First Minister’s Advisory Group on Human Rights Leadership (2018) Recommendations for a new human rights framework to improve people’s lives. Available at: <https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>.

⁹ Scottish Government (2020) Policy Memorandum. Available at: <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill/introduced/policy-memorandum-united-nations-convention-on-the-rights-of-the-child-scotland-bill.pdf>.

¹⁰ Engender (2018) Response to the Scottish Government Consultation Protecting Children: Review of section 12 of the Children and Young Persons (Scotland) Act 1937 and section 42 of the Sexual Offences (Scotland) Act 2009. Available at: <https://www.engender.org.uk/content/publications/Engender-Response-to-the-Scottish-Government-Consultation-Protecting-Children-Review-of-section-12-of-the-Children-and-Young-Persons-Scotland-Act.pdf>.

¹¹ Scottish Government (2020) Policy Memorandum. Available: at <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill/introduced/policy-memorandum-united-nations-convention-on-the-rights-of-the-child-scotland-bill.pdf>.

Together and the SHRC that the meaning of this could be clarified within the UNCRC Bill.

Child's Rights and Wellbeing Impact Assessment

Engender has consistently observed that the public sector equality duty (PSED) has failed to deliver substantive change to equalities considerations by public bodies.¹² While we welcome the duty at s.14 which requires Scottish Ministers to undertake Child's Rights and Wellbeing Impact Assessments (CRWIA) in particular circumstances, we also note that impact assessment must be suitably resourced and underpinned with sufficient capacity and competence in order to ensure compliance and effectiveness, particularly in addressing critical issues for girls. In our consultation response we also noted a recent review of CRWIA which acknowledged critical issues affecting their relevance to girls, including a lack of gender-sensitive sex-disaggregated data and failure to adequately consider equality and non-discrimination.¹³

We have previously outlined concerns in relation to the introduction of the socio-economic duty that increasing the mainstreaming responsibilities of public bodies risks even further diluting their compliance.¹⁴ While close links between EQIA processes and CRWIA processes should ideally be sought, the Scottish Government should be conscious of laying multiple duties on top of one another without ensuring necessary expertise and resources are in place, particularly if Parliament considers an extension of duties in s.14 to public bodies beyond Scottish Ministers. We also acknowledge the concerns about discretion in s.14 relating to the use of CRWIA and believe that circumstances where they are mandatory should be clarified.

5. IF YOU WORK FOR AN ORGANISATION OR PUBLIC AUTHORITY, WHAT RESOURCES DO YOU NEED TO HELP CHILDREN AND YOUNG PEOPLE ACCESS THEIR RIGHTS? WILL YOU REQUIRE ADDITIONAL RESOURCES OR TRAINING TO IMPLEMENT THE BILL, FOR EXAMPLE TO MAKE OR RESPOND TO CHALLENGES IN COURT?

N/A

¹² Engender et. al (2017) The Socio-Economic Duty: A Consultation Equality Sector Response. Available at: <https://www.engender.org.uk/content/publications/Equality-sector-response-to-the-Scottish-Government-consultation-on-Socioeconomic-Duty-September-2017.pdf>.

¹³ M. Backbier et. al. (2019) A Children's Rights Approach Recommendations to the Scottish Government on Refining Children's Rights and Wellbeing Impact Assessments in Scotland. Available at: <https://www.togetherscotland.org.uk/media/1302/crwia-report-group-a-214.pdf>.

¹⁴ Engender et. al (2017) The Socio-Economic Duty: A Consultation Equality Sector Response. Available at: <https://www.engender.org.uk/content/publications/Equality-sector-response-to-the-Scottish-Government-consultation-on-Socioeconomic-Duty-September-2017.pdf>.

6. ARE THERE ANY RELEVANT EQUALITIES AND HUMAN RIGHTS ISSUES RELATED TO THIS BILL, OR POTENTIAL BARRIERS TO RIGHTS, THAT YOU THINK WE SHOULD LOOK AT?

As outlined in our introduction, the interconnection between the rights of women and the rights of children is critical. The UNCRC and CEDAW have sometimes been referred to as ‘sister conventions.’¹⁵ It is commonly observed that children’s rights and women’s rights go hand-in-hand, and that children’s rights, safety and opportunities to flourish depend necessarily on women’s rights, safety and opportunities. As women continue to shoulder the majority of childcare, have access to fewer resources and experience men’s violence due to persistent gendered inequalities in Scotland – and the world – their experiences directly influence those of their dependent children. Equally, young women and girls live at the intersection of children’s rights and women’s rights and the protections ensured within the UNCRC and CEDAW. The UN Committees have accordingly issued a joint recommendation/general comment on overlapping harmful practices.¹⁶

We would also highlight that the recent Programme for Government reiterated the Scottish Government’s commitment to CEDAW incorporation and sincerely urge progress in this regard.¹⁷

It may also be important to note the position of the Council of Europe’s Istanbul Convention, which has not yet been ratified by the UK.¹⁸ The CEDAW Committee has repeatedly recommended that the UK ratify the Convention,¹⁹ but in the absence of legal obligation, the training and guidance which will surround UNCRC incorporation in Scotland should reflect the impact of domestic abuse on women and children, for example in child contact decisions.²⁰ This would align with the ambition of Equally Safe,

¹⁵ UNICEF (2018) CRC and CEDAW: Making The Connection Between Women’s And Children’s Rights Facilitator’s Guide. Available at: https://www.unicef.org/gender/files/CRC_and_CEDAW_Facilitators_Guide-small.pdf.

¹⁶ CEDAW and CRC (2014) ‘Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices’.

¹⁷ Scottish Government (2020) Protecting Scotland, Renewing Scotland: The Government’s Programme for Scotland 2020-2021. Available at: <https://www.gov.scot/publications/protecting-scotland-renewing-scotland-governments-programme-scotland-2020-2021/>.

¹⁸ Council of Europe (2011) ‘Council of Europe Convention on preventing and combating violence against women and domestic violence’.

¹⁹ Engender (2019) CEDAW UK Examination: annotated concluding observations.

²⁰ See for example Scottish Women’s Aid (2014) Public Petition PE1529: Enforcement of child court orders.

Scotland's strategy to prevent violence against women and girls, which references the Istanbul Convention.²¹

While we are entirely supportive of the incorporation of the UNCRC through this Bill, we also wish to make clear that the work of the National Taskforce for Human Rights Leadership will be critical in advancing and embedding children's rights. This includes establishing processes for CEDAW's incorporation as well as the UN Convention on the Rights of Persons with Disabilities, the Convention on the Elimination of Racial Discrimination and International Covenant on Economic, Social and Cultural Rights, among other conventions in a Scottish human rights framework.²²

The two processes should be mutually reinforcing and provide opportunities to learn from one another. Opportunities to integrate children's rights should be sought in guidance and practice around implementation as well as training for public bodies. Scottish Women's Aid have previously called for the Progressing Children's Rights in Scotland: An Action Plan 2018-21 to be better strengthened through using an intersectional gender-sensitive lens to ensure girls' and young women's rights are fully upheld.²³ We would similarly agree that training and guidance for public bodies around the Bill should include understanding of the interdependency of human rights frameworks and be informed by an intersectional, gendered analysis.

7. WHAT ARE YOUR VIEWS ON THE PROVISIONS IN THE BILL THAT ALLOW THE COURTS TO STRIKE DOWN LEGISLATION JUDGED TO BE INCOMPATIBLE WITH THE UNCRC?

It is important to ensure clarity over the hierarchy of obligations between the UNCRC and other national legislation. We therefore welcome the inclusion of a strike down power for legislation preceding entry into force and the use of declaration of incompatibility for subsequent legislation. This will also ensure that the rights enshrined in the UNCRC are given the same status as that is given to ECHR rights through the Scotland Act 1998.²⁴

8. WHAT ARE YOUR VIEWS ON THE CHILDREN'S RIGHTS SCHEME AND THE REQUIREMENT ON PUBLIC AUTHORITIES TO REPORT?

²¹ Scottish Government, and COSLA (2018) Equally Safe: Scotland's Strategy for Preventing and Eradicating Violence against Women and Girls, Scottish Government.

²² Scottish Government (2020) National Taskforce for Human Rights Leadership. Available at: <https://www.gov.scot/groups/national-taskforce-for-human-rights-leadership/>.

²³ Scottish Women's Aid (2020) Progressing Children's Rights in Scotland: An Action Plan 2018-21 consultation. Available at: <https://womensaid.scot/wp-content/uploads/2019/07/CYP-rights-action-plan-response.pdf>.

²⁴ As per the Scotland Act 1998 s.29. Available at: <https://www.legislation.gov.uk/ukpga/1998/46/section/29>.

Engender is broadly supportive of the Children’s Rights Scheme included in the Bill with a similar caveat to our views on the extension of CRWIA, that additional duties should be accompanied by the necessary competence and resources to ensure their effectiveness rather than simply laid on top of existing requirements.

9. IS THERE ANYTHING ELSE YOU WANT TO TELL US ABOUT THE BILL?

Commencement

Engender notes that there is not a date for commencement given within the Bill. While we support lending time to enable public bodies to adequately prepare for additional duties and to work with experts to create appropriate methodologies for delivery, we also note that the discussion about UNCRC incorporation has been ongoing for a number of years. We believe that issues such as Covid-19 and Brexit present new urgency for the protection of rights in Scotland and would urge greater clarity on that point to ensure the protection of children’s rights and rights for other groups as soon as possible.

10. CONCLUSION

Engender warmly welcomes the UNCRC Bill and the approach the Scottish Government has taken to the incorporation of children’s rights within it. However, we would restate that children’s rights and women’s rights go hand-in-hand, and that guidance and training must be sufficiently gendered in order to protect both girls and young women and mothers and primary caregivers. We would wish to see some aspects of the Bill clarified, for example issues surrounding interpretation, as well as further detail on implementation, including the gender sensitivity of training and proper resourcing to ensure maximum effectiveness of the Bill.

FOR FURTHER INFORMATION

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ABOUT US

Engender is a membership organisation working on feminist agendas in Scotland and Europe, to increase women’s power and influence and to make visible the impact of sexism on women, men and society. We provide support to individuals, organisations and institutions who seek to achieve gender equality and justice.