

Engender response to the Scottish Government's consultation on incorporation of the UN Charter of Children's Rights

INTRODUCTION

Engender works to advance women's economic, social and cultural, and political equality with men. We make visible the ways in which women's inequality impacts Scotland through policy and advocacy work. 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).

We undertake a wide range of activities to promote and measure women's rights, including membership of groups such as 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 the opportunity to comment on the Scottish Government's proposals relating to incorporation of the UN Charter of Children's Rights (UNCRC).

¹ Engender. 2019. "Convention on the Elimination of All Forms of Discrimination Against Women Shadow Report." <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.

ABOUT THIS RESPONSE

We are fully supportive of intentions to incorporate the treaty into Scots Law and view the UNCRC as the first step in a human rights legal framework for Scotland, one which will include women's rights both overtly and holistically. We are however concerned that some of the Scottish Government's proposals would not lead to a comprehensive and rigorous system for the protection of children's rights. While we recognise that children's rights and women's rights are frequently closely connected, we do not consider Engender to have any particular expertise in the UNCRC. We have therefore approached this consultation in its broad themes in order to highlight some key areas of support and concern.

THEME 1: LEGAL MECHANISMS FOR INCORPORATING THE UNCRC INTO DOMESTIC LAW

A. HUMAN RIGHTS, WOMEN'S RIGHTS AND CHILDREN'S RIGHTS IN SCOTLAND

It is commonly acknowledged that effective human rights fulfilment depends on their implementation at domestic level and the state's implementation of international commitments through policy, law and practice.³ **We are strongly supportive of plans for incorporation of international human rights within Scots Law, and believe that creating domestic opportunities for accountability and monitoring will provide increased visibility for women's rights.**⁴

Offering greater protection to women will also lead to better fulfilment of children's rights. However, we are **supportive of incorporating the UNCRC in isolation, and do not believe that waiting for the process of a Scottish statutory framework to be concluded can be justified**, given the commitments made and acted upon in recent years. Similarly, the First Minister's Advisory Group on Human Rights Leadership are clear that incorporation of the UNCRC is a complementary process that should not be delayed.⁵

This does not mean that children's rights should perpetually sit in isolation, but that the two processes should be mutually reinforcing and provide opportunities to learn from one another. Opportunities to integrate children's rights should be sought as part of the process of establishing the proposed statutory framework.

³ Engender (2018) CEDAW: How can women's rights be better realised in Scotland?

⁴ See Engender (2016) Gender Matters Manifesto Twenty For 2016; Engender (2019) Scotland shadow report: CEDAW; and more recently Emma Ritch, Official Report, Equality and Human Rights Committee 13 June 2019

⁵ First Minister's Advisory Group on Human Rights Leadership (2018) Recommendations for a new human rights framework to improve people's lives Report to the First Minister

The UNCRC and CEDAW have sometimes been referred to as ‘sister conventions.’⁶ **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.⁷

While we support the incorporation of the UNCRC and the focus on children’s rights, it is vital that this interconnection is not ignored. Engender has found that a lack of public awareness and understanding around CEDAW prevents its full realisation in Scotland.⁸ The existing enforcement mechanisms for CEDAW are weak, and this will continue to have a material impact upon the lives of children in Scotland regardless of the position of the UNCRC.

We would also note here the position of the Council of Europe’s Istanbul Convention,⁹ which has not yet been ratified by the UK. The CEDAW Committee has repeatedly recommended that the UK ratify the Convention,¹⁰ 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.¹¹ This would align with the ambition of Equally Safe, Scotland’s strategy to prevent violence against women and girls, which references the Istanbul Convention.¹²

B. PROPOSED FRAMEWORK COMMENTS

Engender takes no firm view on whether the human rights are generally best implemented using what the Scottish Government describes as an incorporation or a transposition model. However, we note that terminology used in the consultation and the distinction between ‘incorporation’ and ‘transposition’ is unhelpful.

⁶ UNICEF (2019) CRC and CEDAW: Making The Connection Between Women’s And Children’s Rights Facilitator’s Guide

⁷ 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’

⁸ Engender (2018) CEDAW: How can women’s rights be better realised in Scotland?

⁹ Council of Europe (2011) ‘Council of Europe Convention on preventing and combating violence against women and domestic violence’:

¹⁰ Engender (2019) CEDAW UK Examination: annotated concluding observations

¹¹ See for example Scottish Women’s Aid (2014) Public Petition PE1529: Enforcement of child court orders

¹² Scottish Government, and COSLA. 2018. “Equally Safe: Scotland’s Strategy for Preventing and Eradicating Violence against Women and Girls.” Scottish Government.

Incorporation may be achieved in a number of ways including direct incorporation or a 'redrafted' model. The First Minister's Advisory Council recommends an Act which incorporates a number of human rights sources in one document, including the International Bill of Rights and specific group texts.¹³ The rights protected may overlap, meaning that an Act could possibly be more effective and streamlined by some rewording or reframing.¹⁴ In the context of the UNCRC, this particular issue does not exist as the UNCRC will be incorporated in isolation.

We also consider that using the wording and framing set out in international materials allows for more consistent interpretation by judicial bodies and reinforces the universal and indivisible nature of rights. International treaties have given us a wealth of experience, jurisprudence and interpretation from other states and from international monitoring bodies which a direct incorporation model makes easier to utilise.

We therefore broadly support the model presented by the advisory group convened by Children and Young People's Commissioner and Together¹⁵ which is both comprehensive and ambitious. We believe that this model offers benefits that could also lead development of subsequent human rights protection, including women's rights. These include the prioritisation of obligations, the proactive process 'due regard duty' and the full and direct incorporation of the rights as enumerated in the convention. This approach further enforces the indivisibility and interdependence of the package of children's rights.

Ensuring international interpretation is given status in Scots Law will ensure consistency and compatibility between states and the international commitments entered into. The 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. **We therefore believe it essential that incorporation of human rights, including the UNCRC, includes a mechanism for courts to have regard to relevant UN Committee General Comments/Recommendations and Observations of the Committee (Concluding Observations) in the interpretation of rights.** The First Minister's advisory group has suggested that the Scottish Human Rights Framework could include a duty for judicial bodies to 'take into account' interpretation of international bodies, and a similar approach could be considered for the UNCRC.

It is important that the model and framework selected should ensure clarity over the hierarchy of obligations between the UNCRC and other national legislation. UNCRC

¹³ First Minister's Advisory Group on Human Rights Leadership (2018) Recommendations for a new human rights framework to improve people's lives

¹⁴ It may, for example, prove effective to collate the multiple rights relating to education or to democratic participation together, depending upon the specific proposals for legislation which emerge.

¹⁵ Children and Young People's Commission Scotland and Together Scotland (2019) Children's Rights (Scotland) Bill

articles must be capable of direct application in Scottish courts, but we would further support the use of a ‘strike down’ power as provided under the Scotland Act 1998, as well as a requirement for a statement of compatibility to be published with legislation. Unlike the Human Rights Act, we believe that Scottish human rights legislation must include proactive duties for public bodies in the form of a ‘due regard’ duty in addition to a duty to comply. The Equalities and Human Rights Commission has concluded that the duty has ‘potential to lead to positive actions to enhance the status of treaty rights’.¹⁶

The consultation also raises the concern that the general framing of the UNCRC articles may cause uncertainty. We do not agree, as issues surrounding the application of ECHR to specific contexts concern the interpretation and implementation of rights.

As we have noted above, women’s 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, for example, 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.¹⁷ **The law and guidance surrounding child’s rights must suitably account for gendered inequality.**

THEME 2: EMBEDDING CHILDREN’S RIGHTS IN PUBLIC SERVICES

Engender recognises that a range of implementation measures should accompany incorporation, including proactive measures to promote rights-based policy making. **We therefore support the use of statements of compatibility and the necessary pre-legislative scrutiny of compliance with child’s rights.** As part of a report for Engender examining the potential options for incorporating CEDAW into Scots Law, Professor Nicole Busby noted that amending the public sector equality duty (PSED) to include a specific reference to CEDAW so as to incorporate its provisions into the duty could theoretically create a similar duty. However, she went on to acknowledge that:

“The effectiveness of the PSED in this respect might be questionable, particularly as it is very difficult to evidence the overall impact of the duty to date. The introduction of an enhanced specific gender duty which referenced CEDAW would focus the obligation and make the Convention more visible. However, the

¹⁶ Daly, A. (2018) Enhancing the Status of UN Treaty Rights in Domestic Settings

¹⁷ 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

issues of political will and added complexity outlined elsewhere in this paper might make this unlikely and undesirable.”

Scotland’s equality organisations, including Engender, have consistently highlighted that PSED as it stands has failed to deliver substantive change to equalities considerations by public bodies.¹⁸ We note that the introduction of Child’s Rights and Wellbeing Impact Assessments (CRWIA) has been recently reviewed, with recommendations for improvements including using UNCRC rights as a basis.¹⁹ However, critical issues affecting their relevance to girls were identified, including a lack of gender-disaggregated data²⁰ and failure to adequately consider equality and non-discrimination.

We therefore think that a more rigorous process, such as a Children’s Scheme, which sets out mandatory processes for more detailed Child Rights Impact Assessments, complaints and the participation of children would lead to more successful embedding of child rights. However public bodies **must also be suitably resourced and have sufficient capacity and competence in order to ensure compliance and effectiveness of this approach.** 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.²¹ **While close links between EQIA processes and CRIA processes should ideally be sought, government should be conscious of laying multiple duties on top of one another without ensuring necessary expertise and resources are in place.**

Engender therefore **supports the use of a ‘sunrise clause’** enabling public bodies to adequately prepare for additional duties and to work with experts to create appropriate methodologies for delivery.

THEME 3: ENABLING COMPATIBILITY AND REDRESS

The benefits of incorporating the rights enshrined by the UNCRC will only be realised with effective mechanisms to enforce compliance.²² We therefore are clear that UNCRC rights should have direct application in Scottish courts. However, we also recognise that children and young people may be especially vulnerable asserting their

¹⁸ Engender et. al (2017) The Socio-Economic Duty: A Consultation Equality Sector Response

¹⁹ 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

²⁰ “Gender-disaggregated” is an internationally-used shorthand for “gender-sensitive sex disaggregated data”. Gender-disaggregated data about women and men is produced using concepts, definitions and methods that reflect gender roles, relations, and inequalities in society.

²¹ Engender et. al (2017) The Socio-Economic Duty: A Consultation Equality Sector Response

²² 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, paragraph 24

rights in court, even where supported to do so. **Alternative mechanisms to seek enforcement of rights where a violation is alleged should be created.**

However, there may also be instances where a court judgement is necessary, not only for the victim of the violation but for legal clarity and interpretative purposes. Civil society has in recent years noted the gap between human rights commitments and enforcement is made wider due to ineffective legal mechanisms to facilitate challenges to violations.

Public interest litigation remains a rare and underutilised phenomenon in Scotland. Organisations with human rights expertise face barriers to engaging with enforcement processes due to the current standing rules, as well as costs and information limitations.²³ Standing under the Human Rights Act²⁴ is narrow and has prevented third sector organisations from acting on behalf of a person with vulnerabilities whose rights have been violated.

A 'sufficient interest' test as mentioned in the consultation should in theory elicit more public interest litigation than a 'title and interest' standard. However, uncertainty around what constitutes 'sufficient interest' has meant that civil society has not pursued judicial review in the numbers predicted, which suggests that more needs to be done to elucidate guidance to facilitate engagement with judicial means of enforcement. The UNCRC incorporation should consider that children may have particular vulnerabilities within formal court proceedings and ensure that children's rights advocates can offer child-friendly legal support, representation, interventions and taking a case on a child's behalf.²⁵ **This could be further enhanced by ensuring that organisations including the CYPSC and the Scottish Human Rights Commission are specifically granted powers to intervene and take cases on behalf of children and young people.**

The UNCRC Article 39 includes the right to appropriate reparation, and we support the proposals from the Children's Commissioner's office and Together that there be a presumption in the incorporating act that damages will be awarded (*c.f.* the Human Rights Act.)²⁶

We are clear that effective incorporation requires that international human rights law takes precedence where there is a conflict with domestic law. This is backed up by the evidence which suggests that the stronger the position of the UNCRC in the

²³ Human Rights Consortium Scotland and Clan Child Law (2018) Discussion Paper: Overcoming Barriers to Public Interest Litigation in Scotland

²⁴ As stipulated by Article 34 European Convention of Human Rights

²⁵ Everyday Heroes (2018) Justice Briefing

²⁶ Section 19, Children's Rights (Scotland) Bill

domestic legal system, the more likely it is to influence policy and decision making.²⁷ We would further support the principle that women's rights, as protected by CEDAW, should be capable of taking precedence against incompatible legislation. As the First Minister's Advisory Group on Human Rights Leadership has suggested that a Scottish Human Rights Act could include a strike down power, a similar mechanism could be explored for the UNCRC.²⁸ It is unclear why the Scottish Government believes it would not be possible to introduce such a power.

CONCLUSIONS

Engender is supportive of plans to incorporate the UNCRC and is broadly in favour of the model proposed by CYPSC and Together. 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 care givers. We are clear that regardless of the model ultimately pursued it is vital that human rights incorporation as a programme enables Scottish courts to make best use of international and comparative materials by enabling interpretation such as General Comments/Recommendations to be cited in decisions.

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.

²⁷ Kilkelly, U. (2019). The UN Convention on the Rights of the Child: Incremental and transformative approaches to legal implementation,

²⁸ First Minister's Advisory Group on Human Rights Leadership (2018) Recommendations for a new human rights framework to improve people's lives