

# Consultation on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024: Statutory Guidance on Part 2 and 3 (section 18)

## Introduction

The [United Nations Convention on the Rights of the Child](#) (UNCRC) is an international treaty which sets out the civil, political, economic, social and cultural rights which all children up to the age of 18 years have, regardless of their circumstances. The UNCRC must be seen as a whole: all the rights are linked and no right is more important than another. The UNCRC includes the following general principles:

- for rights to be applied without discrimination (Article 2);
- for the best interests of the child to be a primary consideration (Article 3);
- the right to life, survival and development (Article 6); and
- the right for the child to express a view in matters that affect them and to have that view taken into account in accordance with the child's age and maturity (Article 12).

The Scottish Government is committed to ensuring that children's rights are respected, protected and fulfilled. The UNCRC (Incorporation) (Scotland) Act 2024 ("the Act") was approved by the Scottish Parliament on 7 December 2023 and received Royal Assent on 16 January 2024. The Act is a landmark piece of legislation that incorporated the UNCRC into Scots law to the maximum extent of the Scottish Parliament's powers – signalling a revolution in children's rights in Scotland.

The intent behind the Act is to deliver a proactive culture of everyday accountability for children's rights across public services in Scotland. The Act also seeks to empower our children and young people to claim their rights and help to make Scotland the best place in the world to grow up.

## Overview

In accordance with section 47(2)(a) of the Act, Part 2 (duties on public authorities) and Part 3, section 18 (reporting duties of listed public authorities) of the Act will come into force 6 months after Royal Assent. As Royal Assent was obtained on 16 January 2024, this will be on 16 July 2024.

The Act requires Scottish Ministers to publish guidance ("statutory" guidance) on Part 2 and Part 3, section 18. It also requires them to consult on that guidance. This consultation fulfils that requirement and is launched by Scottish Ministers in accordance with sections 13(3) and 20(2) of the Act.

The draft guidance attached to this consultation was developed with support from stakeholders. A [Guidance Subgroup](#) comprising of members from the [Embedding in Public Services](#) group was established to assist and support with this process.

This consultation seeks your views on the draft statutory guidance.

## **Part 2: Compatibility with the UNCRC requirements, and child rights-respecting practice**

Part 2, section 6 of the Act provides that it is unlawful for a public authority to act in a way which is incompatible with the UNCRC requirements as set out in the Act. The section 6 duty also applies to those carrying out functions of a public nature.

The meaning of “public authority” has been drawn intentionally wide so as to ensure that the duty applies to all public authorities in respect of which it is within the power of the Scottish Parliament to apply the duty. The Act makes it clear that this includes the Scottish Ministers and Scottish courts and tribunals.

Public functions are generally understood to be functions performed for the collective benefit of the general public (although in the event of a claim of unlawfulness being raised, the courts will determine whether a function is public on a case-by-case basis). Therefore, the Act will not apply to private businesses, except in relation to any instance where they carry out functions of a public nature.

The guidance is intended to provide accessible information which supports public authorities to understand and fulfil their duties under section 6, and to secure better or further effect of children’s rights.

## **Part 3: Reporting duty of listed authorities**

Part 3, section 18 of the Act places a duty on public authorities listed in section 19 to report on the actions taken and planned to comply with the Part 2, section 6 duty, and the actions taken and planned to give further effect to children’s rights. This is an important mechanism for respecting, protecting and fulfilling children’s rights.

This guidance includes an explanation of the duty in the Act and annexes with suggested reporting formats, information on inclusive communication and on producing child friendly reports. It is aimed at those with responsibilities within listed public authorities for implementing and delivering on the provisions of the Act.

## **CONSULTATION PROCESS**

### **Responding to the Consultation**

The consultation will run for 12 weeks. We are inviting written responses to this consultation before or by 16 May 2024. Responses are invited from organisations and individuals, where the response is not in relation to an organisation. Relevant organisations and networks may wish to respond jointly.

There are a number of consultation questions on which the Scottish Government would welcome views. Please do not feel obliged to answer all questions. Equally, if you would like to comment on any other aspects of the draft statutory guidance the Scottish Government would welcome your views.

We would be grateful for responses to be completed electronically via Citizen Space, where possible. This will aid handling and analysis of all responses.

If this is not possible, we would be grateful if you could use the separate consultation questionnaire (Annex A) provided and submit your answers via email. Please send your responses with the completed Respondent Information Form to: [uncrcstatutoryguidanceconsultation@gov.scot](mailto:uncrcstatutoryguidanceconsultation@gov.scot)

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at: <https://consult.gov.scot/>

## CONSULTATION QUESTIONS

### Part 2 Guidance

The following consultation questions 1-14, relate to the draft statutory guidance on Part 2 of the UNCRC Act. This is particularly relevant to public authorities.

1. I have read the draft statutory guidance on Part 2 of the UNCRC Act

- Yes  
 No

2. Section 3, '**Background and introduction to the UNCRC Act**', provides sufficient information on the UNCRC and the background to incorporation.

- Strongly agree  
 Agree  
 Neither agree nor disagree  
 Disagree  
 Strongly disagree

Please give us your views:

Section 3 gives a good overall background to the UNCRC and the introduction on the Act. A few things, however, should be addressed:

1. The UNCRC does not 'duplicate' rights found in other international treaties, but rather **expands** on the existing human rights, to give a specific children focus.
2. It would be helpful to list the specific treaties to which the UNCRC expands on, particularly the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).
3. It would also be helpful to clarify that other treaties, such as the UN Convention on the Rights of Persons with Disabilities, or the UN Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) are useful to better understand the overlaps of different characteristics (disabled children for example).
4. It is not necessarily helpful to use the framework of the Charter of the United Nations, as the majority of it is related to the building-blocks of the UN as an inter-state organisation.

5. The guidance can make clearer the need for general planning from all duty-bearers in order to realise the rights in the Act. It can also indicate, for example, that Children's Rights Impact Assessments can be a useful tool for public authorities to ensure their actions are complying with their statutory obligations.

3. Section 3.4, '**Meaning of UNCRC requirements**', clearly articulates what is meant by this in relation to the section 6 duty.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Please give us your views:

In relation to section 3.4:

It should be made clear that the European Convention on Human Rights is also incorporated in the Scotland Act 1998. This clarifies that any legislation from the Scottish Parliament that is incompatible with the Convention is beyond the competence of the Scottish Parliament.

In relation to the proposed new human rights Bill, it should be clear that the Bill seeks to also enhance the protection of cultural and environmental rights.

4. Section 4.2, '**Remedies for unlawful acts (sections 7 to 10)**' is useful.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Please give us your views:

Section 7 should clarify that Courts can award remedies when a public authority has failed to act in a way that is incompatible with the UNCRC, and not only when it has acted incompatibly (acts and omissions). This is clear in section 6 (1) of the Act, and essential in guaranteeing adequate prevention to breaches to children's rights.

The time-bar limit for judicial proceedings in section 7 might be confusing, for which we recommend a chart or diagram to improve accessibility for all, including duty-bearers.

We support the CYPCS submission in relation to other aspects of this section, particularly related to the point of exhaustion of domestic remedies and the SPSO, as well the aspects of public interest litigation.

5. Section 4.3.2 '**Definition of a public authority**' is clear.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Please give us your views:

We agree with our colleagues at the CYCPS that this section is overly complex, and at times, difficult to follow. We agree with the suggestion that this section should be reviewed and strengthened.

While we understand the usage of the definitions found in the HRA (core and hybrid authorities), this terminology is not employed in the UNCRC Incorporation Act, and can add further confusion at this stage.

We welcome the clarity provided around the application of the duties to private, voluntary and independent sector. It does not, however, seem to be helpful to indicate that 'it will ultimately be for the court to determine whether or not a function is public.' Amendments to section 6 of the then Bill were precisely done to ensure that legal clarity and certainty was achieved, so as to ensure that the duties applied to those that have been contracted on behalf of a public authority to deliver a service. Statutory guidance should not create potential confusion in this regard.

6. Section 4.3.1 '**Definition of functions of a public nature**' is clear.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree

Strongly disagree

Please give us your views:

Given the comments and concerns above, it seems that section 4.3.1 can be misleading or misinterpreted. In particular, under the Act (and in accordance with section 4.3.2 of this guidance) there can indeed be functions that are perceived both as private and public. For example, the provision of a health service, performed by a private provider on behalf of an NHS Trust, is an activity that would be both public (a service for the general public) and private (intended to make profit for the company involved). This general distinction seems to disregard that private entities (for profit or non-profit) might be subject to the compatibility duties of the Act, if they have been contracted out by a public authority for a specific rights-based service (as clarified later in section 4.3.2 of the guidance).

We recommend that section 4.3.1 be redrafted to ensure that there is a clearer understanding between public functions and private entities acting on behalf of Scottish public authorities.

7. Section 4.4, '**Explanation of the duties on public authorities in Part 2, section 6**' clearly explains the nature of the section 6 duty on public authorities, including clearly articulating that the section 6 duty applies only when a public authority is carrying out devolved functions conferred under Acts of the Scottish Parliament or common law powers.

- Strongly agree  
 Agree  
 Neither agree nor disagree  
 Disagree  
 Strongly disagree

Please give us your views:

8. Annexes A.1 – A.5, '**Clarification of conceptual aspects of the UNCRC**' are clear.

- Strongly agree  
 Agree  
 Neither agree nor disagree  
 Disagree  
 Strongly disagree

9. Annexes B.1 – B.4 '**Sources to guide interpretation**' are useful.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

**10.** Annex C, '**Framework for Reviewing Compatibility (s.6 duty)**' is presented in an accessible manner, e.g. the content, style, and length make this a user-friendly and practical resource.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Please give us your views:

This narrative section covers Annexes A, B and C

Annex A

We welcome the more extensive explanation of the issues covered in Annex A, which are central to the full realisation of children's rights. We, however, would suggest that this is titled 'clarifications of the inherent obligations of the UNCRC' rather than 'conceptual aspects.' This is important given that everything addressed in the annex is related to the core responsibilities states have to ensure that rights are fulfilled, not theoretical concepts to which the duty-bearer can consider and not seriously take into account.

We further agree with our colleagues at the CYCPS that in **section A.1** it would be more accurate to describe the general principles of the UNCRC as "underpinning" the rest of the articles, rather than 'assist in.' With further agree with their comments in relation to article 2.

**Article 6 (right to life)** should be further expanded to include various international obligations to which the UK is committed to, and the various authoritative interpretations provided by the European Court of Human Rights and various UN Human Rights Treaty Bodies.

We welcome the clarification of **progressive realisation and maximum available resources**. However, we note that these are framed as 'international legal concepts' and not as clear unequivocal international legal obligations, to which there is no doubt in the treaties that the UK has ratified. Both obligations are considered to be the cornerstone of the protection of economic, social, and cultural rights, and various human



rights treaties are very clear that these constitute fundamental obligations. It is important to also clarify that economic, social and cultural rights do have certain obligations that must take immediate effect, these include obligations such as non-discrimination as well as minimum core obligations (to which the guidance indicates that it will be up to the courts to decide).

On **progressive realisation**, it could be useful for the guidance to clarify exactly what 'deliberate, concrete and targeted steps' means. This could include, for example, having specific plans (per duty-bearer) on how they will realise the rights of the Act.

We note that the guidance makes no mention of the prohibition of **non-retrogression**. In relation to economic, social, and cultural rights, states have an obligation to ensure that the existing levels of enjoyment of human rights do not deteriorate. Retrogressive measures might include cuts to programmes related to rights or the withdrawal of funding of services aimed to achieve the realisation of human rights. If any deliberately retrogressive measure is taken, a duty-bearer is required by international law to demonstrate that they introduce such measure after the most careful consideration of all alternatives and that they are duly justified in order to fulfil all rights. The guidance fails in making clear that non-retrogression is fundamental for the enjoyment of children's rights.

On **maximum available resources**, it would be helpful for duty-bearers to have clarity on the aspects related to recourse mobilisation, recourse allocation, and resource expenditure. Conditions for the compliance of these criteria have been developed over time by UN treaty bodies, which can further support the domestic implementation of children's rights.

Annex B

We agree with our colleges from the CYCPS in relation to section B.2.

11.I clearly understand how to use the Compatibility Review Framework.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Please give us your views:

We refer to the submission from our colleagues at the CYCPS.

12. Overall, the guidance is presented in an accessible manner, e.g. the content, style, and length make this a user-friendly and practical resource.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

13. Overall, the guidance supports an improved understanding and ability to fulfil the duties under Part 2 of the Act.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

14. Are there any areas where you think the Part 2 guidance could be improved? Please cite specific parts of the guidance if relevant.

Please give us your views:

### Part 3 Guidance

The following consultation questions 14-20, relate to the draft statutory guidance on Part 3 (section 18) of the UNCRC Act. This is particularly relevant to public authorities listed in section 19 of the Act.

15. I have read the draft statutory guidance on Part 3 (section 18) of the UNCRC Act

- Yes
- No

16. Section 4, '**Reporting duties of listed authorities**' is sufficiently clear on the reporting requirements under Part 3 of the Act.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Please give us your views:

17. Section 5, '**Publication requirements of reports**' is sufficiently clear on the publication requirements under Part 3 of the Act.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Please give us your views:

18. Section 6, '**Policy intention of children's rights reports under section 18 of the Act**', clearly explains how the reporting process contributes to progressing children's rights.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

19. Annexes B.1 – B.4 **Frameworks for children's rights reporting** are helpful.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Please give us your views:

20. Annex C, '**Scottish Government use of children's right's reports**', is clear.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

**21.** The guidance is presented in an accessible manner, e.g. the style, length and content are useful in aiding implementation of duties in respect of the Act.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

**22.** Are there any areas where you think the Part 3 guidance could be improved?  
Please cite specific parts of the guidance if relevant.

Please give us your views: