JustRight Scotland's Response to the Consultation on the Incorporation of the UNCRC

JustRight Scotland (JRS) is Scotland's legal centre for justice and human rights. We use the law to defend and extend people's rights. We have expertise in refugee and immigration law and the protection of the rights of women and children. You can find out more about us here: www.justrightscotland.org.uk.

Introduction

We are responding to this consultation by drawing on our lawyers' longstanding practical experience and expertise in providing legal information, advice and representation to children and young people. We work with young people across a number of areas of UK and Scots law, including immigration and asylum, human trafficking, education law, women's rights and the rights of children in care.

We welcome the Scottish Government's commitment to incorporate the United Nations Convention on the Rights of the Child ("UNCRC") into Scots law. The UNCRC is an international legal instrument of special significance. Its 54 articles set out the civil, political, economic, social and cultural rights that all children are entitled to regardless of their ethnicity, gender, religion, language, abilities or any other status. It is the most widely ratified of all the international human rights instruments.

This year is the 30th birthday of the UNCRC; it was adopted and opened for signature and ratification in 1989. It has now been 28 years since the UK ratified the UNCRC. Its importance and influence in daily life in Scotland has grown over time, to the extent that visual materials on the various rights contained within it can now be seen in schools across Scotland; it underpins flagship governmental policies like 'Getting It Right For Every Child' ("GIRFEC");[1] and it has been referenced in various guises in the statute books.[2] However, the UNCRC has still not been incorporated into Scots law and therefore children and their family members in Scotland are still unable to feel its full effect. 21 years ago, the European Convention on Human Rights ("ECHR") was incorporated into UK and Scots law through the Human Rights Act 1998 ("HRA") and

[1] Scottish Government, 'GIRFEC', https://www.gov.scot/policies/girfec/principles-and-values/
[2] For example, Children and Young People (Scotland) Act 2014

the Scotland Act 1998 ("SA"). The UK Government's 1997 White Paper outlining how it proposed to do so was titled "Rights Brought Home".[3] We believe that it is time to bring the UNCRC home to Scotland.

Theme 1: Legal mechanisms for incorporating the UNCRC into domestic law

Question 1: Are there particular elements of the framework based on the HRA as described here, that should be included in the model for incorporation of the UNCRC in domestic law? Please explain your views.

Yes. The Human Rights Act 1998 is an example of successful incorporation of an international human rights instrument. The UN Committee on the Rights of Child stated in its General Comment No.5:

> *"Incorporation should mean that the provisions of the Convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice."*[4]

The HRA does exactly this. Section 6 makes it unlawful for a public authority to act, or fail to act, in a manner incompatible with the ECHR. Section 7 provides direct recourse to a court or tribunal in the event of such an act or omission, with section 8 providing a wide discretion to the court as to available remedies. We use these powers in our daily work to enforce the rights of our vulnerable clients, including children and young people. It is, in our view, a pre-requisite for any model of incorporation.

At section 3, the HRA also contains critical interpretative provisions to ensure compatibility of primary and subordinate legislation. Where possible, legislation should be "*read and given effect in a way which is compatible*" with the ECHR. Where this cannot be done, then the courts have the power to make a declaration of incompatibility (section 4). This mechanism to ensure that legislation is rights-compatible, together with a specified remedy, is another vital aspect of any incorporation model.

Question 2: Are there any other aspects that should be included in the framework? Please explain your views.

Yes. In our view, an ideal model of incorporation would include what could be termed "upstream" measures as well as "downstream" measures. Downstream measures include those judicial mechanisms noted above which hold to account actions of public authorities and legislation to ensure ECHR-compliance. Put simply, if the rights of an

[3] UK Government White Paper, 'Rights Brought Home: The Human Rights Bill', October 1997
[4] UNCRC General Comment No.5, para 20

individual or group are arguably violated then it should be possible to seek confirmation of this and a remedy in court.

However – absolutely necessary as these downstream measures are – we have first-hand experience of the financial, emotional and at times traumatic cost of taking these court actions for a person. This is often acute when working with children and young people.

We therefore believe that upstream measures which insert compulsory, procedural, positive obligations to pay "due regard" to the UNCRC are integral to a model of incorporation. The theory is simple: if policy and law is made in a manner which consults with children and young people, and carefully, holistically assesses the impact on rights and welfare of children and their families, then it is less likely that acts and legislation will fall foul of the UNCRC in practice. A broad rights-based approach is embedded, a rights-compliant culture is cultivated, and litigation is reduced.

This is an aspect of the HRA which, in our view, is only superficially considered. Section 19 of the HRA provides for "statements of compatibility" to be produced during the passage of legislation. There is no formal requirement for scrutiny of impact or any other positive measures. The result is that most statements are rather meaningless declarations. For example, the statement of compatibility for the Immigration Bill 2014 simply read:

> *"Secretary Theresa May has made the following statement under section 19(1)(a) of the Human Rights Act 1998:*
>
> *In my view the provisions of the Immigration Bill are compatible with the Convention rights."*[5]

As was highlighted repeatedly during the process of the Bill, and as confirmed by the High Court in March 2019, this was patently not the case.[6] There are many positive lessons to be learned from the success of the ECHR incorporation through the HRA, but this is an aspect which we believe it critical to improve. We have an opportunity to reflect on and revolutionise this aspect of incorporation.

Question 3: Do you agree that the framework for incorporation should include a "duty to comply" with the UNCRC rights? Please explain your views.

Yes. Rights are only truly effective when the rights-holder is empowered to enforce them in a court of law. Without a "duty to comply" those rights can be rendered illusionary. This is well understood in our domestic legal framework through the

[5] Immigration Act 2014

[6] R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department [2019] EWHC 452 (Admin) – with respect to sections 20-37 of the Act.

application of the ECHR and the EU Charter of Fundamental Rights ("the EU Charter"). We would refer to our answers at (1) and (2) for further reference.

Question 4: What status, if any, do you think General Comments by the UN Committee on the Rights of the Child and Observations of the Committee on reports made by States which are party to the UNCRC should be given in our domestic law?

We note the concerns raised in the Scottish Government's Consultation document around interpretation of rights and the lack of judicial equivalent of the European Court of Human Rights, but we respectfully do not share them.

The first reason is because the Scottish judiciary has extensive judicial interpretation experience. Scotland is a common law country sitting within a Union with an uncodified constitution; judicial interpretation is a centuries old tradition. Prior to the coming into force of the HRA in 2000, the Scottish courts were already interpreting rights contained within the ECHR.[7] Section 2 of the HRA brought in a requirement to "take account" of, amongst other things, any judgment, decision, declaration or advisory opinion of the European Court of Human Rights. It is important to note that the judgments of the European Court of Human Rights, including those against the UK, are not binding on the Scottish courts. They are binding on the UK government by virtue of Article 46 ECHR, but not the courts. This can result in what has been called a "judicial dialogue" between domestic courts and the European Court of Human Rights on the interpretation and application of rights in our domestic landscape.[8] Therefore, there is already an inherent culture and practice of judicial interpretation of rights conferred by international treaties in the UK, including Scotland.

Secondly, and related, many rights contained within the ECHR and since expanded upon through the "living instrument" doctrine employed by the European Court of Human Rights overlap with the UNCRC. There is an expansive body of European case-law and autonomous concepts pertaining to children's rights upon which the Scottish courts can draw when engaging in their duties around judicial interpretation. In our view, there is nothing which prevents these key principles being used as a starting position when considering the UNCRC in the domestic context.

The third reason is that, as the Consultation document points out, consideration has already been given to what weight ought to be applied to UN Committee on the Rights of the Child General Comments: "*authoritative guidance".*[9] Indeed, Justice McCloskey provides a particularly thorough assessment of UNCRC General Comment No.14 and how it interplays with the ECHR and domestic primary legislation in *MK, IK and HK v*

[7] Cases affecting Scots law included *Granger v UK* (1990) a 174, *Boner v UK* (1994) A 300-B, *Maxwell v UK* (1994) 1 300-C.

[8] See *R v Horncastle and others* [2009] UKSC 14 (SC) and *Al-Khawaja and Tahery v UK* (2012) 54 EHRR 23

[9] R (SG) v Secretary of State for Work and Pensions [2015] UKSC 16, see [105-106]; Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47, see [41].

Secretary of State for the Home Department (UK Upper Tribunal, Immigration and Asylum Chamber).[10] We provide this only as an example of how these matters can be and are already deftly handled by the Scottish judiciary.

We believe that the General Comments serve an important role in providing interpretative guidance and that their status is not a matter of controversy. Similarly, with respect to Concluding Observations, they provide an insight into the state of children's rights in a certain country at a certain time. If a similar approach to section 2 of the HRA were to be employed in UNCRC incorporation, we do not see why the courts would not be able to weigh the relevance of any Concluding Observations and apply them appropriately to the Scottish context at hand.

We believe that these instruments – General Comments, Concluding Observations, and opinions made by the Committee in relation to Optional Protocol 3 – should be specifically included as interpretative guidance in any incorporation model. To do so ensures that Scotland keeps pace with, or indeed leads, international law and practice with respect to children's rights.

Question 5: To what extent do you think other possible aids would provide assistance to the courts in interpreting the UNCRC in domestic law?

We would refer to our answer to question 4.

Question 6: Do you agree that it is best to push forward now with incorporation of the UNCRC before the development of a Statutory Human Rights Framework for Scotland? Please explain your views.

Yes. We do not believe there is any reason to further delay incorporation of the UNCRC. Whilst we appreciate the obvious need for careful constitutional analysis around incorporation, it is in the best interests of children and young people in Scotland to move swiftly. The First Minister's Advisory Group on Human Rights Leadership recommended that UNCRC incorporation should be a separate and distinct process to the Statutory Human Rights Framework, and that its work shouldn't cause any delay to this.

We are encouraged by the Scottish Government's comments in the Consultation document to go "*above and beyond the rights provided in the UNCRC*". There are numerous ways and means to go about this. However, these are steps towards *implementation* of the UNCRC, which is a distinct process from incorporation. We firmly believe that incorporation is the appropriate starting point for this aspiration.

[10] Found here.

Question 7: We would welcome your views on the model of incorporation presented by the advisory group convened by the Commissioner for Children and Young People in Scotland and Together (the Scottish Alliance for Children's Rights).

We fully support the draft Children's Rights (Scotland) Bill 2018 ("the Draft Bill"). As practitioners representing children and young people, we believe that a model of incorporation reflecting the Draft Bill would function well in practice.

We recognise the experience represented by the advisory group. It is a blend of expertise in UK constitutional law, children's rights, and direct experience of UNCRC incorporation internationally and, importantly, in Wales.

We agree with the approach taken in Part One of the Draft Bill. All the substantive articles of the UNCRC, plus the Optional Protocols, should be incorporated. To do otherwise would result in cherry-picking rights and, inevitably, would lead to a weakened form of incorporation. The bill makes it clear that the duties contained therein apply only in relation to devolved powers and devolved areas. We fully appreciate that the "reserved v. devolved" question is a complex area of law – indeed, our work with children straddles both areas – and we address this at question 9. However, our view is that a simple, clear statement in the legislation is the best way to fully bring the UNCRC into Scots law.

Part Two of the Draft Bill is of particular interest to our work. It in many ways replicates the model of the HRA which we use in courts and tribunals in our daily work. We regard it as successful in enhancing and making rights real for individuals in Scotland. The Draft Bill contains two important enhancements to the HRA model which have our support.

- The first pertains to section 12 of the bill which addresses standing to take an action. The requirement for "victim status" is not included, as it is in the HRA model. "Victim status" in the HRA model is defined in terms of Article 34 ECHR. Our experience tells us that this is a barrier to the bringing of strategic litigation. For example, a broad policy or action which is arguably unlawful, like the current "lock-change" evictions conducted by SERCO as a contractor of the Home Office, would be best tackled by a single or collaboration of organisations with sufficient interest, without the requirement for vulnerable persons to go through a court process. The ability to bring an action without a specific "victim" is especially important with dealing with children, where capacity or vulnerability are issues at play. This element also allows preventative steps to be taken to protect children's rights before the damage of an unlawful act – or many unlawful acts - is done.

- The second speaks to the "strike out" power contained at section 18. This goes further than the declaration of incompatibility in section 4 of the HRA and more

closely resembles the enforcement power of the SA. We discuss this more below, but we agree with this approach.

Part Three of the draft bill comprises the "upstream" aspect of incorporation we discuss above at question 2. We support the measures contained in the draft bill in this regard for reasons already stated.

Question 8: How should the issue of whether UNCRC rights are self-executing be dealt with?

We would refer to and endorse the Consultation Response of the Children & Young People's Commissioner Scotland ("the Commissioner's Office"), which makes the accurate distinction between monist and dualist legal systems. We do not believe that the comments made by the Scottish Government in the Consultation document are a relevant or material consideration.

Question 9: How could clarity be provided to rights holders and duty bearers under a direct incorporation approach, given the interaction with the Scotland Act 1998?

Rights holders and duty bearers should apply their current understanding of devolved competencies and functions. The question of "reserved v. devolved" has complexities, but it was always thus. The question of where and when the incorporated rights contained in the UNCRC apply is therefore adding no further complexity. Guidance, training, and awareness raising are all ways to ensure that rights holders and duty bearers understand where the distinction lies. If necessary, the courts are also available to determine whether a matter is reserved or devolved.

Question 10: Do you think we are right to reject incorporating the UNCRC solely by making specific changes to domestic legislation? Please explain your views.

Yes. In our view this approach relates more to *implementation* than incorporation. It would result in a patchwork of various laws delivering to various extents on rights contained in the UNCRC. Developments internationally and domestically would necessitate regular review and amendments. This paints a complex picture. Many rights in the UNCRC apply in specific ways across several areas of law.

To illustrate from our own experience, part of our job as practitioners representing unaccompanied asylum seeking and trafficked children is to evaluate whether actions taken by statutory authorities were in their best interests, with overriding reference to Article 3 UNCRC. However, the way in which Article 3 UNCRC is implemented with respect to these children differs depending on the issue. Local authorities must act in the best interests of children in care with reference to section 17 of the Children

(Scotland) Act 1995. Trafficked children in care may also be subject to the best interests principle set out in section 55 of the Borders, Citizenship and Immigration Act 2009. Critically, these children's rights are all adjudicated in courts and tribunals in Scotland, and Article 3 UNCRC is clear that it applies to *"all actions concerning children, whether undertaken by...courts of law"*. Instead of a piecemeal approach requiring multiple pieces of legislation merely to "incorporate" one article of the UNCRC, we believe that it is better to embed Article 3 UNCRC in Scots law to ensure that it applies in the same manner across the board, including in Scottish courts. This illustrates the child-centred nature of the right and means that processes and legislation must fit around and empower the exercise of the right.

To be clear, legislation and legislative changes may be necessary when implementing the rights contained in the UNCRC but it does not equate to incorporation. Incorporation of the UNCRC serves to bring the entire set of universal, indivisible, interdependent and interrelated rights into Scots law, where they can be relied upon by duty bearers and rights holders alike.

We would add that we see an important aspect of fully incorporating the UNCRC as "future-proofing" the rights of children in Scotland. Europe and the West today provides examples of governments which were once liberal democracies and right-pioneering become rights-sceptical and illiberal democracies. Whilst we hope never to see this in Scotland, it is prudent to put in place a robust structure that allows children in Scotland to hold future duty bearers to account as fully as possible.

Question 11: If the transposition model was followed here, how would we best enable people to participate in the time available?

For the reasons articulated in our answer to question 10, we do not support the "transposition" model or the suite of Scottish children's rights.

Question 12: What is your preferred model for incorporating the UNCRC into domestic law? Please explain your views.

Our preferred model is the full and direct incorporation envisaged by the Draft Bill discussed at our answer to question 7. The exact text of the rights in the UNCRC and the Optional Protocols should be incorporated. We do not see material difficulties in interpretation of these rights in Scotland. In our view, the approach taken in the Draft Bill combines the upstream "due regard" aspect with the downstream "duly comply" aspect. We envisage that these two elements both complement and mutually enforce each other. We firmly believe that the Scottish Government's commitment to incorporation represents an opportunity to learn lessons from the HRA incorporation and improve the protection of children's rights in Scotland. As practitioners, we see the approach set out in our previous answers and so well detailed in the Draft Bill as the best means by which to do this.

Theme 2: Embedding children's rights in public services

Question 13: Do you think that a requirement for the Scottish Government to produce a Children's Rights Scheme, similar to the Welsh example, should be included in this legislation? Please explain your views.

Yes. We would refer to and adopt the answers provided to this question in the responses of the Commissioner's Office and Together. We observe that the experience of Wales illustrates the positive impact of the Children's Rights Scheme, and provides a rich body of experience within the Union upon which to draw. With regard to Children's Rights and Wellbeing Impact Assessments ("CRWIA"), we note that these are already conducted in Scotland. We support the view put forward by the Commissioner's Office and Together these should be compulsory.

Question 14: Do you think there should be a "sunrise clause" within legislation? Please explain your views.

No. Again, we would refer to and adopt the responses of the Commissioner's Office and Together. As the Scottish Government states, and to its credit, the UNCRC has been implemented in Scotland for many years. It is now almost 30 years old. Legislation, policies and actions already ought to be compliant with the UNCRC. Given the progress in recent years in embedding upstream procedures such as CRWIAs, we do not see the need for any further delay.

Question 15: If your answer to the question above is yes, how long do you think public bodies should be given to make preparations before the new legislation comes into full effect? Please explain your views.

Please see above answer.

Question 16: Do you think additional non-legislative activities, not included in the Scottish Government's Action Plan and described above, are required to further implement children's rights in Scotland? Please explain your views.

Yes. We refer to and adopt the position in the Together response as well as that of the Health and Social Care Alliance Scotland. It is correctly noted that these measures do not constitute incorporation, but they are vital tools in ensuring that incorporation is a success and has a meaningful, proactive impact. We welcome the Scottish Government's Action Plan.

Theme 3: Enabling compatibility and redress

Question 17: Do you agree that any legislation to be introduced in the Parliament should be accompanied by a statement of compatibility with children's rights? Please explain your views.

Yes. However, we are strongly of the view that such a statement of compatibility must be practical and effective. We have discussed this element in our answer to question 2 above. It is our view that it cannot operate in the manner in which it operates in practice under section 19 of the HRA. This is where those elements set out in Theme 2 of this Consultation – the upstream mechanisms and the "due regard" duty – come to the fore. We see statements of compatibility as a natural extension of this aspect of incorporation; an affirmative confirmation that those mechanisms have been carried out.

Question 18: Do you agree that the Bill should contain a regime which allows right holders to challenge acts of public authorities on the ground that they are incompatible with the rights provided for in the Bill? Please explain your views.

Yes. Without this included in the Bill, children would be unable to enforce their UNCRC rights under law. It is a cornerstone aspect of international human rights law that an effective remedy is available to address a rights violation.[11] Indeed, the right to an effective remedy is in itself a human right within the ECHR (Article 13).

We work primarily with children in the care system, unaccompanied asylum seeking children and child victims of trafficking. As such, local authorities and the police are the main duty holders (in addition to the Home Office). At present we can raise UNCRC rights in the course of legal proceedings as part of a persuasive argument but they are not enforceable. In our view, this is a significant shortfall in the overall protection of these vulnerable children.

This is an access to justice issue in its most fundamental form. Access to justice more broadly is not merely satisfied by the availability of a remedy. To be real and effective for children it must be accompanied by child-friendly measures. We would therefore encourage the Scottish Government to engage with the children's rights sector in order to assess ways in which utilising an effective remedy can be made truly accessible to children, and its processes designed to ensure they are child-friendly.

[11] UN Human Rights Council, Resolution 25/6, 'Rights of the child: access to justice for children'

Question 19: Do you agree that the approach to awards of financial compensation should broadly follow the approach taken to just satisfaction damages under the HRA? Please explain your views.

Yes. The right to compensation is another uncontroversial cornerstone of international human rights law. As noted in the question, it is a key feature of the HRA model and indeed the European Court of Human Rights model. The legal principle of *restitutio in integrum* is already established in Scots law and therefore the courts are able to consider whether, when and how damages should be awarded.

Question 20: Do you agree that the UNCRC rights should take precedence over provisions in secondary legislation as is the case under the HRA for ECHR rights? Are there any potential difficulties with this that you can see?

Yes. The UNCRC General Comment No.5 states that "*Incorporation should mean that…the Convention will prevail where there is a conflict with domestic legislation or common practice*."[12] Perhaps of even more significance is that this is the method used already in the HRA. If the UNCRC incorporation model did not follow this then it would have an inferior status; we cannot see any legal justification for this.

We would only add that the UNCRC is designed to be a set of minimum standards for children's rights, and it is open (indeed encouraged) for states to go above and beyond these. The Scottish Government in its Consultation document has outlined its aspirations to do so. For the avoidance of doubt, it is commonly understood that where secondary legislation goes beyond the UNCRC standards then they are not in conflict.

Question 21: Do you agree that the Bill should contain strong provisions requiring an ASP to be interpreted and applied so far as possible in a manner which is compatible with the rights provided for in the Bill? Please explain your views.

Yes. This is an important aspect of the HRA model. Section 3 of the HRA provides that, if upon reading the ordinary construction of primary or subordinate legislation it is incompatible with the ECHR, then "*a possible meaning must be found that will prevent the need for a declaration of incompatibility."*[13] The object of section 3 is to avoid wherever possible an action by a public authority which be unlawful under section 6 of the HRA. This is a positive judicial mechanism.

On the face of it the provision presents constitutional and interpretative challenges, however the judiciary now has long experience in navigating these waters. It is clear that Parliamentary Sovereignty is preserved under the HRA model and section 3 "*does not enable the court to change the substance of a provision from one where it says*

[12] Supra n.4

[13] *R (Wardle) v Crown Court at Leeds* [2001] UKHL 12, at para 79

one thing into one where it says the opposite".[14] Any use of this interpretative mechanism must ensure that interpretation "*goes with the grain of the legislation"*.[15] This means that public authorities and other duty bearers would still have certainty as to their obligations when acting in accordance with legislation. This is all the more so if, as is set out in the Draft Bill, comprehensive upstream procedures have been fully applied to assess the compatibility and impact of the provision in practice. This is where the downstream and upstream provisions dovetail well.

Question 22: Should the Bill contain a regime which would enable rulings to be obtained from the courts on the question of whether a provision in an ASP is incompatible with the rights secured in the Bill? Please explain your views.

Yes. For the reasons outlined in this consultation response we believe that it is entirely proper to have the Scottish courts adjudicate on whether a provision of an Act of the Scottish Parliament ("ASP") is incompatible with the rights secured in the Bill. The HRA and the SA models both contain provisions giving the courts the power to declare a provision unlawful. We agree that the UNCRC incorporation model should also contain this power. We endorse the Draft Bill at section 17 in this regard.

Where the HRA and the SA diverge is what happens next after such a declaration. Under section 4 of the HRA, a declaration of incompatibility is issued. This is where the court has been unable to interpret the provision to be compatible with the ECHR, and therefore declares it incompatible with the ECHR. In essence, the provision or legislation remains valid and the matter then moves back to parliament to remedy the breach.

With respect to ASPs, a declaration of incompatibility under the HRA is not the remedy because the Scottish Parliament has no power to enact legislation which is incompatible with ECHR rights.[16] The same applies to subordinate legislation made by a Scottish Minister.[17] Any declaration from a court as to incompatibility with ECHR rights then is a question of *vires*; meaning the competence of the Scottish Parliament. As section 29 of the SA states, the ASP is therefore "not law". This has been termed a "strike down" power.

Generally speaking, we would favour the inclusion of a "strike down" power in the UNCRC model, as opposed to a declaration of incompatibility, as it is a stronger remedy. We note with interest that this has been included in the Draft Bill. As practitioners who primarily represent rights holders – children whose rights have been violated - our view is that declarations of incompatibility are a weaker remedy than the

[14] *Doherty v Birmingham City Council* [2009] 1 AC 367, at para 49
[15] *Ghaidan v Godin-Mendoza* [2004] 1 AC 557, paras 29-33
[16] Scotland Act 1998, section 29
[17] Scotland Act 1998, section 57(2)

"strike down" power because they do not invalidate the law, and so allow the breach to continue.

Whilst most declarations of incompatibility have been remedied promptly, there have been some key examples of declarations which have been largely ignored by Parliament, for a number of years. For instance, a declaration of incompatibility was issued in 2007 regarding the blanket ban on prisoner voting contained in section 3(1) of the Representation of the People Act 1983.[18] This was in response to a 2005 European Court of Human Rights case.[19] It took 10 years to change the law with respect to UK General Elections and for Scottish elections the law is only now in the process of being changed.[20] This is an unacceptable delay in any circumstance, and is certainly not a reflection of the Scottish Government's aspiration to ensure that children's rights are robustly secured in Scotland.

There is an important difference between the UNCRC and the ECHR when dealing with these matters. Where a declaration of incompatibility with regard to the ECHR is not acted upon, it is possible to proceed through the courts to the European Court of Human Rights and have the issue at stake adjudicated. The subsequent judgment is legally binding on the UK Government (Article 46 ECHR). With respect to the UNCRC, there is no such route to a binding judgment from, say, the UN Committee on the Rights of the Child. A declaration of incompatibility is, therefore, weaker for the UNCRC model.

However, we appreciate that the Scottish Government has stated that there may be constitutional difficulties with the "strike down" model. We do not have the reasoning for this and we would be grateful if this was forthcoming. We appreciate that if the "strike down" model was replicated exactly from the SA model then this could be difficult. The SA model is a matter of *vires* – the ASP is not law because it is beyond the legislative power of the Scottish Parliament. What is *ultra vires* is listed in section 29(2) of the SA. Compatibility with the UNCRC would require to be included in this, which is a matter for the UK Parliament to amend the SA.

On the other hand, we are unclear what, if any, barrier there is to the UNCRC incorporation Bill containing the "strike down" power without reference to *vires* and merely as a statutory remedy. This appears to be the approach in the Draft Bill. If this is possible, subject to having sight of the Scottish Government legal analysis on the point, then we would prefer this approach as it prevents continuing violations.

Question 23: Do you consider any special test for standing to bring a case under the Bill should be required? Please explain your views.

[18] *Smith v Scott* 2007 SC 345
[19] *Hirst v UK (No.2)* (2006) 42 EHRR 41
[20] Scottish Elections (Franchise and Representation) Bill

No. We refer to the responses of Together and the Commissioner's Office in this regard. We have also set out our view on this in our answer to question 7. We very much welcome the removal of the requirement for "victim status" in favour of the ordinary test for standing in Scots law. This is particularly important with respect to children who, for a multitude of reasons, are at a disadvantage in pursuing access to justice.

Should you require any further information in respect of this response, please do not hesitate to contact JustRight Scotland on 0141 406 5350 or at info@justrightscotland.org.uk.

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