



CONSULTATION

Scottish Government
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
16 May 2024

Introduction

1. NASUWT welcomes the opportunity to comment on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024: Statutory Guidance on Part 2 and 3, section 18.
2. NASUWT is the Teachers' Union, representing teachers and school leaders in all sectors of education and across all 32 local authorities in Scotland.

GENERAL

3. As a consequence of the incorporation of the UNCRC into law, legal obligations on public bodies will be established, including the Scottish Government, national agencies and local authorities, which require them to act in ways that are compliant with the UNCRC, or to be exact the slightly amended version of it set out in the UNCRC Act. In this context, NASUWT agrees that statutory guidance is absolutely necessary.
4. The purpose of any guidance should be to address the uncertainties about what compliance with the UNCRC Act will mean in practice, given the potentially significant consequences for non-compliance.

While some of the content set out within the proposed statutory guidance is helpful, unfortunately it fails to provide the certainty and precision to which public bodies are entitled. Clarity is essential to give purposeful and meaningful effect to the UNCRC as well as to avoid legal challenge.

5. The draft guidance repeatedly recognises that there is a significant degree of uncertainty around how the provisions of the UNCRC Act will be interpreted by the courts. Whilst acknowledging this as fact, NASUWT would stress that it remains deeply unsatisfactory. The Scottish Government is taking forward a significant amendment to the domestic legal framework, and in so doing creating serious and significant obstacles to any determination of what these amendments will mean, or indeed are intended to mean, in practice.
6. It is deeply regrettable that interpretation of much of the UNCRC Act will be dependent on cases brought before the courts and that the impact of the Act will be determined by judge-made law to a wholly disproportionate extent. It should be noted that such a courts-led approach to incorporation is strongly dis-preferred by the Committee on the Rights of the Child (CRC) precisely because it creates legal uncertainty in areas that have not been subject to legal determination and further encourages cases to be brought merely for the purpose of creating definitions of the UNCRC's provisions.
7. A clear demonstration of this flawed approach to incorporation is found in the numerous attempts in the draft guidance to elide the ambiguities associated with practical interpretation of the Act by suggesting that 'legal advice' should be sought. Unfortunately, because these ambiguities are inevitably inherent in the framework the Scottish Government has chosen to establish, it is difficult to envisage what could be gained from seeking such advice other than a confirmation of the uncertainties that the draft guidance itself acknowledges exist.

8. Undoubtedly confusion and inappropriate interpretations of the UNCRC are very likely to result as a consequence of the manner in which the Scottish Government has sought to take forward incorporation: and this will be the responsibility of the Scottish Government alone. For the reasons summarised below, the draft statutory guidance would, if adopted, fail to mitigate these impacts or provide the degree of certainty that children, their families and public servants responsible for compliance with the UNCRC require and deserve.

SPECIFIC

9. Given that the UNCRC Act is intended to impact on the ways in which public bodies meet the needs and interests of children, it is notable and regrettable that the draft guidance was produced with no input from serving teachers and leaders. We note that no teachers or school leaders served on the guidance sub-group or on the wider UNCRC Embedding in Public Services Group responsible for the content of the draft guidance. It is wholly unacceptable for draft guidance in an area of such practical significance to be developed in this way. In large part, it is not unreasonable to conclude that this is why the draft guidance fails to meet the Scottish Government's test that it should provide 'pragmatic information to public authorities not to act incompatibly with UNCRC requirements.'
10. Frequent reference is made throughout the document to the non-statutory guidance, 'Taking a children's rights approach', as a means of interpreting the provisions of the statutory guidance in practice. For example, in relation to the requirement on public bodies to make determinations about the extent of 'maximum available resources' under the Act, the draft statutory guidance points to provisions set out in 'Taking a children's rights approach' on the allocation of budgets to meet this legal expectation (p.29). This appears to create an expectation in the statutory guidance that following non-statutory guidance is, in effect, a statutory expectation. This is not a helpful or sensible approach as it attempts to give 'Taking a children's rights

approach' a legal status that it does not have, and fails to recognise that it was developed and published on the basis that it would not have legal force.

11. To be clear, the contents of 'Taking a children's rights approach' are not the law. The provisions that the Scottish Government believes should be followed in practice should be set out explicitly and in full in statutory guidance.
12. The references in the draft statutory guidance to the implications of the Supreme Court's judgement on the UNCRC Bill for the scope of the Act are sorely inadequate. While it is noted in the draft guidance that the UNCRC Act cannot apply to reserved matters, or devolved matters that are currently legislated for in Westminster enactments, the profound consequences of these limitations needs to be set out clearly to those for whom the draft guidance will be intended.
13. In respect of reserved matters, it must be made expressly clear in guidance that they include, among other provisions, the Human Rights Act 1998, the Equality Act 2010 and the Health and Safety at Work Act 1974, as well as all secondary legislation deriving from these enactments. They also include most statutory provisions in respect of employment and industrial relations. In the context of the education system, key fundamental 'omnibus' legalisation, such as the Education (Scotland) Act 1980 and the Children (Scotland) Act 1995, which provide the legal footing for the operation of schools and other education-related services, have been found to be beyond the scope of the UNCRC Act even though they relate to devolved matters.
14. Consequently, the sections of the guidance dealing with the planning, delivery and evaluation of policy and practice under the Act fail to provide support for public bodies in navigating areas that relate to provisions in the UNCRC Act but that are also addressed in excluded legislation.

15. It is not apparent that the practical effects of these limitations are widely understood currently. The production of the draft guidance provides an opportunity, which has not as yet been taken, to confirm to public bodies those areas in which consideration of the UNCRC, in the development and review of policy and practice, is not a strict legal requirement. A public body, such as a local authority, must be given every support and direction to act on the basis that where it is entitled or required to act under excluded enactments it can do so without risk of legal encumbrance by the provisions of the UNCRC Act. The Scottish Government should augment any guidance with details of areas of policy and practice that are unencumbered in this respect.
16. The draft guidance notes, correctly, that Articles 2, 3, 6 and 12 of the UNCRC represent 'general principles' that provide assistance in interpreting other rights but also that there is no hierarchy of rights. In practice, public bodies are often required to 'balance' conflicting UNCRC rights in particular cases, guided by the four general principles in order to reach proportionate and lawful decisions. Further complications can arise when the rights of one child conflict with the rights of another child or a group of children. The draft guidance provides no advice or support on how such a balance should be struck in cases where different articles might be engaged or on the application of the general principles.
17. The issues highlighted above in respect of the limited scope of the UNCRC Act and the need to balance potentially conflicting rights is likely to cause significant difficulties for public bodies. For example, it is not clear how parental rights to make decisions about their children's education will be determined in many cases. The overarching right in s.28 of the Education (Scotland) Act, that pupils are to be educated in accordance with the wishes of their parents, is not obviously congruent with the provisions related to evolving capacity in Articles 5 and 14(2) and the guidance in CRC General Comment 20 that envisages at a suitable point in a child's development 'exchange[s]' between children

and parents on such matters should take place on an 'equal footing.' Other provisions, such as the Legal Capacity (Scotland) Act 1991, which is outside the scope of the UNCRC Act and the provisions of Article 3 that require decisions to be taken in the best interests of the child, would complicate decision-making further and where the draft guidance, if issued in its current form, would provide no usable information or advice.

18. We are aware of concerns among practitioners that one of the implications of the implementation of the UNCRC Act is that they may be held individually legally responsible for any breaches of it. It would be helpful for the guidance to make clear that this is not the case and that the UNCRC Act applies only to bodies undertaking public functions as identified in the legislation and that it is only these bodies that can be subject to legal action. For teachers and leaders, it would be helpful for the Scottish Government to confirm that the relevant public bodies include local authorities or any other body that can determine how their duties are undertaken.

19. The draft guidance sections on the reviewing of UNCRC compatibility by public bodies are inadequate as they fail to recognise that the voice of those working directly with children, such as teachers and leaders in the context of the provision of education, is critical to ensuring that evaluations and decisions are taken on a secure evidential basis. Those that provide public services and their recognised trade unions are also legitimate stakeholders in the development of policy and practice. The draft guidance should be amended to underline the importance of consultation with relevant sections of the workforce.

CONCLUSION

20. At a time of significantly reduced budgets within local authority settings, whereby a number of local authorities are considering substantial reductions in their staffing contingent or the length of the school day, it seems short sighted to be requiring these bodies to divert their limited

resources to repeatedly fund legal advice, itself only needed because of unclear and imprecise statutory guidance. Given the foundational aim of supporting and securing the rights of the child, it is all the more curious that greater focus was not given to ensuring Scotland was able to benefit from a structured approach, supported by statutory guidance, that would be capable of being easily understood by all, not least of which children and young people.

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NASUWT is happy for this response to be published with our name and to be contacted again by the Scottish Government in relation to this consultation exercise. We confirm that the privacy policy has been read and consent to the data we have provided being used as set out in the policy.