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# On The Cusp Of Maximalist Incorporation Of Children's Rights In Scotland

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# ON THE CUSP OF MAXIMALIST INCORPORATION OF CHILDREN'S RIGHTS IN SCOTLAND

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## ABSTRACT

Children's rights have long featured in Scottish politics and have been a particular focus of the Scottish National Party's platform since it became the majority governing party in 2011. In April 2019 the leader of Scottish Government pledged that the government would incorporate the CRC into national law during this parliamentary term, which ends in March 2021. This chapter explores the way in which this pledge and previous Scottish implementation efforts have supported a commitment to children's rights. It begins with a brief overview of the legal settlement between the Scottish and UK governments and the growing attention on children's rights post devolution. This is followed by an overview of key legal and non-legal measures implementing various aspects of the CRC in Scotland, including points of tension. How these measures have impacted judicial protection of children's rights will then reveal the gaps that persist in Scots law. The chapter then moves on to consider the potential for further entrenchment of the CRC in Scotland through direct, maximalist incorporation as reflected in the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill that was introduced in Scottish Parliament on 1 September 2020.

## 1. INTRODUCTION

As a devolved nation within the United Kingdom (UK), Scotland has taken an increasingly leading role in entrenching children's rights. Though the UK ratified the UN Convention on the Rights of the Child (CRC) in 1991, and subsequently ratified its first two Optional Protocols,<sup>1</sup> it has done little to implement these rights into its national law and policy frameworks.

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<sup>1</sup> UN Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2.9.1990, 1577 UNTS 3 (CRC); Optional Protocol on the Involvement of Children in Armed Conflict, adopted on entered into force

The strongest children's rights protections in the UK have been entrenched predominantly through efforts in the devolved nations, including Scotland. As a result of successive updates to its devolution settlement, Scotland is able to legislate and develop children's rights through laws and policies distinct from the UK, the actual State Party to Convention.

Children's rights have long featured in Scottish politics and have been a particular focus of the Scottish National Party's (SNP) platform since it became the majority governing party in 2011. Of the almost 5.5 million people in Scotland, just over 1 million meet the CRC definition of a child as individuals aged 0 to 17.<sup>2</sup> In April 2019 the leader of Scottish Government, First Minister Nicola Sturgeon, pledged that the government would incorporate the CRC into national law during this parliamentary term, which ends in March 2021. This chapter explores the way in which this pledge and previous Scottish implementation efforts have supported a commitment to children's rights. It begins with a brief overview of the legal settlement between the Scottish and UK governments and the growing attention on children's rights post devolution. This is followed by an overview of key legal and non-legal measures implementing various aspects of the CRC in Scotland, including points of tension. How these measures have impacted judicial protection of children's rights will then reveal the gaps that persist in Scots law. The chapter then moves on to consider the potential for further entrenchment of the CRC in Scotland through direct, maximalist incorporation as reflected in the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill that was introduced in Scottish Parliament on 1 September 2020 (CRC Incorporation Bill).

## **2. THE SCOTTISH OPPORTUNITY TO IMPLEMENT THE CRC**

The UK is a dualist state without a written constitution; therefore international law must be incorporated before it becomes binding on state actors.<sup>3</sup> Similar to Wales, discussed by Hoffman in this volume, as a devolved nation within the UK Scotland is bound to implement the CRC in line with the UK's ratification of the original treaty and the optional protocols.<sup>4</sup> The UN Committee on the Rights of the Child (the Committee) has repeatedly called upon the UK

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12.2. 2002, 2173 UNTS 222 (CRC-OP1); Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, adopted on 25.5.2000, entered into force 18 January 2002, 2171 UNTS 227 (CRC-OP2). The UK ratified the CRC on 16 December 1991, the CRC-OP1 on 24.4.2003, and the CRC-OP2 on 20.2.2009.

<sup>2</sup> The precise estimate is 1,029,162. National Records of Scotland, Mid-year Population Estimates Scotland, Mid-2019, Data and Charts, 30.4.2020, <<https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/population/population-estimates/mid-year-population-estimates/mid-2019>>.

<sup>3</sup> Constitutional Reform and Governance Act 2010.

<sup>4</sup> See S. HOFFMAN, discussion of Wales, chapter 8, this volume.

to bring its law and policy into conformity with the CRC in line with Article 4.<sup>5</sup> Moving children from passive objects of the law to active subjects of the law was a long struggle for children's rights activists, thus there was a period of almost six decades between the acknowledgement of the child in international law to the adoption of the CRC and its reformulation of children as active rights-holders.<sup>6</sup> This struggle is reflected in the UK approach to children's rights. To date, the single comprehensive attempt to reconcile UK law with the CRC was made in 2009 when the Children's Rights Bill was introduced in the House of Lords in order to 'give further effect to rights and freedoms guaranteed under the [CRC]' by directly incorporating the CRC into UK law.<sup>7</sup> The bill never progressed past its first reading and, even if it had passed, would have had little relevance in Scotland for the reasons set out below. However, the excitement prompted by the possibility of incorporating the CRC in the UK set the stage for the devolved nations to forge their own paths in relation to protecting children's rights.

A wide range of human rights related policy areas have been devolved to Scotland through the passage of the Scotland Acts of 1998, 2012 and 2016. As a result of these successive acts, the Scottish Parliament may legislate in relation to issues such as education and training, health and social services, housing, law and order, some aspects of equality, social security and taxation, as well as range of additional areas.<sup>8</sup> Because the CRC includes civil, political, economic, social and cultural rights, the ability to respond to a broad range of law and policy areas underpins the possibility of further entrenching CRC rights.

The Scotland Act 1998 sets out the legal relationship between the UK government and the devolved Scottish government and clarifies in which areas Scotland is able to develop law and policy. As with many federated systems, different areas of law are reserved to the UK government, such as immigration and ratification of treaties.<sup>9</sup> Through successive revisions of the devolution arrangement, many areas touching upon children's rights are devolved to Scotland

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<sup>5</sup> CRC, art. 4 demands that 'States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.'

UN Committee on the Rights of the Child (CRC COMMITTEE), Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Doc. CRC/C/GBR/CO/5 (12.7.2016) (Concluding Observations 2016) para. 7; CRC COMMITTEE, Concluding observations on the fourth periodic report of the United Kingdom and Northern Ireland, UN Doc. CRC/C/GBR/CO/4 (2008) paras. 10–11.

<sup>6</sup> J. TOBIN, *The UN Convention on the Rights of the Child: A Commentary*, 1<sup>st</sup> ed., OUP, Oxford 2019, p. 4.

<sup>7</sup> See <https://publications.parliament.uk/pa/ld200910/ldbills/008/10008.i-ii.html> accessed 4.5.2020.

<sup>8</sup> Scotland already had separate laws in relation to many of these areas, education, for example.

<sup>9</sup> See the case studies on Australia, Belgium, German and Spain presented in L. LUNDY, U. KILKELLY, B. BYRNE and J. KANG, *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries*, UNICEF.

– such as education, the environment, health, and housing – whereas social security, for example, remains a partially reserved matter subject to adjustment by both the UK and Scottish governments. The Scotland Act expressly permits Scotland to implement international obligations.<sup>10</sup> It also outlines that any Act of Scottish Parliament will be unlawful if it runs counter to the European Convention on Human Rights (ECHR), therefore this adds an additional layer of human rights protection that applies to all individuals in Scotland. However, the ECHR does not directly address the specific needs of children, nor does the Human Rights Act 1998 that incorporated it into UK law.<sup>11</sup> Although Scotland had already set a course for strengthening children’s rights prior to devolution,<sup>12</sup> individually and collectively the additional powers devolved to Scotland over the past two decades have the potential to make a real difference in the fulfilment of the range of children’s rights articulated in the CRC. In short, the legal demarcation between the devolved and reserved powers, even where the line is blurred such as in the area of social security, enables Scotland to pursue improving children’s rights in distinctive ways, as supported by the UK government.<sup>13</sup>

### **3. THE DRIVE FOR INCORPORATION**

Scotland benefits from an exceptionally strong children’s rights sector. For example, *Together* (Scottish Alliance for Children’s Rights) is the umbrella civil society organisation for hundreds of children’s organisations, researchers and specialists in Scotland. The organisation has been a voice in children’s rights implementation in Scotland since its inception in 1996. Working in concert, organisations such as *Together*, Children in Scotland, Youthlink, WeCare and other UK and international organisations (e.g. Barnardo’s, UNICEF) have developed a strong platform and supported Scottish Government and parliament to foster a children’s rights culture. *Together* has spearheaded the NGO campaign for full incorporation for over a decade. Since 2010 it has published an annual *State of Children’s Rights in Scotland* report, consistently assessing government efforts to embed CRC rights into national law, policy and practice.

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<sup>10</sup> Scotland Act 1998, Schedule 5, section 7(2)(a).

<sup>11</sup> Human Rights Act 1998, s29(2)(d).

<sup>12</sup> See E.E. SUTHERLAND, ‘Child and Family Law: Progress and Pusillanimity’ in E.E. SUTHERLAND, K. GOODALL AND G. LITTLE (eds), *Law Making and the Scottish Parliament*, Edinburgh University Press, Edinburgh 2011, p. 60.

<sup>13</sup> MINISTRY OF JUSTICE, *Rights and Responsibilities: Developing our constitutional framework*, Cm 7577, March 2009, para. 3.70.

The voices and actions of children in Scotland have also played an important role in driving the Scottish Government toward incorporation. Much like the strength of civil society networks, children and young people in Scotland have carved out a definitive place in terms of public advocacy through the Scottish Youth Parliament (SYP). Launched the day before the Scottish Parliament in 1999, the SYP ensured that the youth voice remained a critical part of the conversation about how democracy would work in light of the newly devolved governance structures.<sup>14</sup> The conversation between the youth of Scotland and the government continues today though the advocacy of the SYP.

In 2003, the Commissioner for Children and Young People (Scotland) Act created a new advocacy role to promote and support children and young people in Scotland. This was a key turning point in the political dimension of children's rights in Scotland in that it created a clear, statutory entry point for children's voices into political decision-making in Scotland.<sup>15</sup> The function of the Commissioner and associated office (collectively the CYPCS) is to: promote and safeguard the rights of children; promote awareness and understanding of CRC; review the adequacy and effectiveness law, policy and practice in relation to the rights of children; to promote best practice by service providers; and research matters relating to children's rights.<sup>16</sup> The CYPCS is further supported in the work of progressing human rights more generally by the Scottish Human Rights Commission (SHRC), which began operating in 2008.<sup>17</sup> Though focused on issues affecting human rights in the broadest context, the SHRC set about delivering a roadmap to bring human rights to all people, including children. From its first Scottish National Action Plan (SNAP), the particular issues of children were highlighted. Knowledge of supranational human rights law language is widespread across Scottish civil society and it has been suggested that this local-level engagement, among other factors, significantly contributes to 'making rights real'.<sup>18</sup> The relatively small size of Scotland is conducive to close connections and coordinated work across civil society and national human rights institutions, which enabled children's rights to progress more quickly than other areas of human rights.<sup>19</sup>

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<sup>14</sup> SCOTTISH YOUTH PARLIAMENT (SYP), Our Story <<https://syp.org.uk/about-syp/our-story/>> accessed 22.4.2020.

<sup>15</sup> E.E. SUTHERLAND, above n. 12, p. 61.

<sup>16</sup> Commissioner for Children and Young People (Scotland) Act (2003), s4.

<sup>17</sup> Scottish Commission for Human Rights Act 2006.

<sup>18</sup> E. WEBSTER and D. FLANIGAN, 'Localising Human Rights Law: a Case Study in Civil Society Interpretation of Rights in Scotland' (2018) 22 *International Journal of Human Rights* 22, 30 and 36.

<sup>19</sup> Together, for example, serves as a coordinating body for hundreds of different children's charities, from small local playgroups through to large international charities, alongside individuals, academics and professionals with an interest in children's rights. See <https://www.togetherscotland.org.uk/about-us/>.

In 2011, Scotland's desire to be the leader in terms of children's rights was spurred forward by the passage of the Welsh Measure in 2011.<sup>20</sup> That year, the Scottish Government launched a consultation, which ultimately fed into the Children and Young People (Scotland) Bill directed towards making Scotland 'the best place in the world for children to grow up'.<sup>21</sup> The proposed Bill offered what was thought of as a 'once-in-a-generation opportunity to ensure that that the principles of the [CRC] become a reality for all children and young people in Scotland.'<sup>22</sup> However, from the outset there was concern that the integration of different bills would mean that children's rights would be 'lost among the wider consideration of children's services'.<sup>23</sup> As analysed elsewhere, because the Scottish Government relies on local service providers and voluntary organisations to deliver many of its frontline child and family services there is an element of mutual dependency that has no doubt driven the increased attention to legalising children's rights.<sup>24</sup> By the final stages of debate on the Bill in parliament, 'the rhetoric of "making rights real" all but disappeared' and what was left was a Bill that prioritised wellbeing policy over rights.<sup>25</sup> To date, the Children and Young People (Scotland) Act 2014 (CYP Act) is the keystone feature of Scotland's implementation of the CRC though indirect incorporation. The Act was the first Scottish legislation to explicitly reference the CRC though it fell far short of meaningful incorporation and failed to 'make rights real' in line with the government's declared policy objective. The weakness of the Act reinforced the view that Scottish Government's approach to embedding children's rights was largely a rhetorical exercise, as evidenced by the gaps that persisted in law and policy frameworks.<sup>26</sup>

The deflated 2014 Act, however, did not dissuade full incorporation supporters across civil society and shortly thereafter the political agenda began to shift in Scotland. With Scotland overwhelmingly voting to remain in the EU in the 2015 BREXIT referendum unlike the rest of the UK, the opportunity to draw a distinction between Scotland as a devolved nation presented

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<sup>20</sup> A. GADDA, J. HARRIS, E.K.M. TISDALL and E. MILLERSHIP, 'Making Children's Rights Real': Lessons from Policy Networks and Contribution Analysis' (2019) 23 *International Journal of Human Rights* 392, 397. See S. HOFFMAN, chapter 8, this volume.

<sup>21</sup> A Scotland for Children: A Consultation on the Children and Young People Bill <<https://www.webarchive.org.uk/wayback/archive/20170701074158/www.gov.scot/Publications/2012/07/718>> accessed 4.5.2020.

<sup>22</sup> TOGETHER AND CHILDREN IN SCOTLAND, 'Children's rights working group briefing - September 2012', 1 <[https://www.togetherscotland.org.uk/pdfs/Together-CiS\\_CYP\\_Bill\\_briefing\\_Sept\\_2012.pdf](https://www.togetherscotland.org.uk/pdfs/Together-CiS_CYP_Bill_briefing_Sept_2012.pdf)> accessed 4.5.2020.

<sup>23</sup> *ibid.* 4.

<sup>24</sup> *ibid.* See also A. GADDA ET AL., above n. 20, p. 397.

<sup>25</sup> E.K.M. TISDALL, 'Children's Wellbeing and Children's Rights in Tension?' (2015) 23 *International Journal of Children's Rights* 769, 782–83.

<sup>26</sup> *ibid.*, pp. 770–71.

itself in the form of human rights. Beginning in 2015, the Scottish Government began to suggest a more amenable position on progressing human rights. Noting that the government wanted ‘to go beyond simply defending the Human Rights Act’ the First Minister welcomed the ‘[exploration into] implementing and incorporating into Scots law some of the key international human rights treaties’ including the CRC.<sup>27</sup>

As the children’s rights sector arguments in favour of incorporation evolved, so, too, did the sophistication of the SYP and its campaigns. In preparing its 2016–2021 youth manifesto the SYP canvassed 72,744 children about the focus of the organisation. One of the questions included whether the CRC should be fully incorporated into Scots law. An overwhelming 72% of respondents agreed that full incorporation should be a priority for the SYP.<sup>28</sup> In response to this widespread consultation, the SYP harnessed its energies into a focused incorporation campaign and in 2017 it amplified its call for the Scottish Government to incorporate the CRC through its ‘Right Here, Right Now’ campaign.<sup>29</sup> This effort was reinforced when, in 2017, Together launched a focused campaign to educate, discuss and channel ideas about how children’s rights could be best protected through direct incorporation of the CRC into Scots law. Organising workshops across the year,<sup>30</sup> the series brought over 300 experts, practitioners and children together to unpick existing law and debate how the CRC could improve the lives of children in Scotland.<sup>31</sup> It also delivered a solid basis upon which direct incorporation of the CRC could be pursued.

Building on the post-BREXIT referendum commitments, in 2017 the Scottish Government committed to establishing an Advisory Group on Human Rights Leadership. This independent group was tasked with developing recommendations on how to further entrench human rights into Scots law.<sup>32</sup> The political commitment to entrench children’s rights was reinforced in an-

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<sup>27</sup> N. STURGEON, Address to the SNAP Human Rights Innovation Forum (9 December 2015) <<https://news.gov.scot/speeches-and-briefings/snap-human-rights-innovation-forum>> accessed 22.4.2020.

<sup>28</sup> Notably, 22 per cent responded that they were unsure about incorporation while 3 per cent disagreed. See SYP, Lead the Way, 2016–21 Manifesto, 13, <[https://d3n8a8pro7vhm.cloudfront.net/scottishyouthparliament/pages/283/attachments/original/1457781662/Lead\\_The\\_Way\\_Manifesto.pdf?1457781662](https://d3n8a8pro7vhm.cloudfront.net/scottishyouthparliament/pages/283/attachments/original/1457781662/Lead_The_Way_Manifesto.pdf?1457781662)> accessed 22.4.2020.

<sup>29</sup> SYP, ‘Right Here, Right Now’ <<https://syp.org.uk/campaign/right-here-right-now/>> accessed 22.4.2020.

<sup>30</sup> Partners for the workshop series included: the Centre for Research on Families and Relationships at the University of Edinburgh and the Centre for Child Wellbeing and Protection at the University of Stirling. The series was funded by the Scottish Universities Insight Institute.

<sup>31</sup> TOGETHER, UNCRC in Scotland seminar series <<https://www.togetherscotland.org.uk/resources-and-networks/uncrc-in-scotland-seminar-series/>> accessed 22.4.2020. The present author, along with many others in this volume, presented as part of the seminar series.

<sup>32</sup> SCOTTISH GOVERNMENT, *2017–18 Programme for Government*, p. 22, <<https://www.gov.scot/publications/nation-ambition-governments-programme-scotland-2017-18/>> accessed 4.5.2020.

participation of the 2018 Scotland's Year of Young People when the Scottish Government highlighted its desire to 'realise more fully the rights of children and young people and further embed a rights based approach'.<sup>33</sup> To that end, the government began a comprehensive audit evaluating how to embed the principles of the [CRC] into policy and legislation'.<sup>34</sup> When the Advisory Group released its final report on Human Rights Day (10 December) 2018, it noted that its envisioned Act of Scottish parliament providing human rights leadership would be complementary to the separate process of CRC incorporation, a process that had an established history in Scotland.<sup>35</sup>

It has been suggested<sup>36</sup> that the ultimately weak children's rights protection in the CYP Act 2014 resulted from a power imbalance in the advocacy process throughout, with the pro-incorporation camp offering less by way of legal reputation and expertise while the opposing side was backed by more visibly by the Law Society of Scotland<sup>37</sup> and other family law experts.<sup>38</sup> This imbalance was not to be repeated. Capitalising on the opportunity presented by the Scottish Government's public commitments in 2017, the CYCPS and Together convened an Expert Incorporation Advisory Group on CRC Incorporation in late 2018 to analyse and advise how to take the CRC forward in Scots law and 'make rights real' for children.<sup>39</sup> The Advisory Group ultimately presented a draft bill to the Deputy First Minister on Children's Day in 2018. The draft bill was premised on full and direct incorporation of the CRC coupled with a due regard duty for Scottish Ministers. The draft bill was included as part of the 2019 consultation on incorporating the CRC into Scots law.<sup>40</sup>

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<sup>33</sup> *ibid.*, p. 14.

<sup>34</sup> *ibid.*

<sup>35</sup> *First Minister's Advisory Report on Human Rights Leadership*, Final Report, 10.12.2018, p. 54 <<https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>> accessed 4.5.2020.

<sup>36</sup> A. GADDA ET AL., above n. 20, pp. 397–98.

<sup>37</sup> LAW SOCIETY OF SCOTLAND, FAMILY LAW SUBCOMMITTEE, Response to the Scottish Government Proposed Rights of Children and Young People, December 2011 <[www.gov.scot/Resource/0038/00386652.pdf](http://www.gov.scot/Resource/0038/00386652.pdf)> accessed 4.5.2020.

<sup>38</sup> Education and Culture Committee, Scottish Parliament, Official Report 3.9.13 (Edinburgh: Scottish Parliament, 2013); K.M. NORRIE, Children and Young People (Scotland) Bill (Edinburgh: Education and Culture Committee, Scottish Parliament, 2013).

<sup>39</sup> The author, along with other contributors to this volume, including Simon Hoffman, Ursula Kilkelly and Laura Lundy, served on this group.

<sup>40</sup> SCOTTISH GOVERNMENT, Incorporating the UN Convention on the Rights of the Child into Scots Law: Consultation (CRC Incorporation Consultation 2019) <<https://www.gov.scot/publications/childrens-rights-consultation-incorporating-uncrc-rights-child-domestic-law-scotland/>> accessed 4.5.2020.

In April 2019, the First Minister committed her government to incorporating the CRC before the end of this parliamentary term in early 2021.<sup>41</sup> The Deputy First Minister confirmed this commitment following the consultation further stating that

We have listened to your views, and now we are acting on them. Today I announced to the Scottish Parliament that the Bill which I will introduce next year will take a maximalist approach. We will seek to incorporate the Convention in full and directly – using the language of the Convention – in every case possible. Our only limitation will be the limit of the powers of this Parliament.<sup>42</sup>

Delivering on this commitment, on 1 September 2020 the Deputy First Minister introduced the CRC Incorporation Bill in Scottish Parliament. The Bill aims to directly incorporate the CRC with the exception of those articles deemed outwith the competence of the Scottish Parliament under the existing devolution settlement.<sup>43</sup> It seeks to ensure that children’s rights are entrenched through the commonly referenced tripartite human rights approach – respect, protect and fulfil. Under the Bill as introduced, this would require Scottish Government to include statements of CRC compatibility alongside all new bills introduced in parliament (s18) and implementation of a Children’s Rights Scheme that is CRC compliant (Part 3). The Bill also envisions increased protection powers for the CYCPS (ss22, 27) and further enforcement options for the courts, including strike down declarators (s20) and incompatibility declarators (s21) for legislation predating the date at which the new law takes effect. On the whole, the CRC Incorporation Bill should be celebrated and the following sections set out a number of the law and policy gaps that could potentially be cured if the Bill passes in its current form.

#### **4. BELTS AND BRACES IMPLEMENTATION IN SCOTLAND**

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<sup>41</sup> N. STURGEON, Address to the SNP Conference (28.4.2019) <<https://www.snp.org/nicola-sturgeons-address-to-conference/>> accessed 22.4.2020.

<sup>42</sup> J. SWINNEY, Deputy First Minister and Cabinet Secretary for Education and Skills, Scottish Government, Letter celebrating 30<sup>th</sup> anniversary of the UNCRC, 20.11.2019, p. 1, on file with author.

<sup>43</sup> CRC, arts. 10(1) and 13(3), for example, are excluded from the Bill in its current form and other articles have been amended, such as the reference to ‘nationality’ being removed from art. 8. See United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP 80), Schedule 1 (1.9.2020) (CRC Incorporation Bill) and accompanying Policy Memorandum, pp. 47-49 (CRC Incorporation Policy Memo), both at <<https://beta.parliament.scot/bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill>> accessed 14.9.2020.

Before examining the various CRC implementation measures in Scotland up to 2019, it is important to define who qualifies as a child in Scotland. CRC Article 1 defines children as ‘every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.’ The CYP Act 2014, introduced above, similarly defines a child as ‘a person who has not attained the age of 18 years’.<sup>44</sup> Other Scottish laws define those aged 16 and over as ‘young persons’.<sup>45</sup> However, there are a number of laws where the threshold of 18 permits under-18s to exercise evolving agency for specific purposes.<sup>46</sup> Some of these purposes, such as the legal marriage age of 16, are inconsistent with the protection dimensions of the CRC.<sup>47</sup> There are also instances where individuals may continue to be protected by laws relating to children until well past the age of 18, for example, the Family Law (Scotland) Act 1985.<sup>48</sup> Thus, Scots law is inconsistent in defining who is a child and how the law views the capacity of those under age 18. Notably, the CRC Incorporation Bill aims to address this by clarifying that all individuals under 18s in Scotland are children, adopting CRC Article 1 definition and excluding room for modifying that definition under other laws.

Though there are four general principles that underpin all children’s rights, Scotland focuses on the best interests and the right to be heard. This tandem focus dominates approaches to children’s rights across most states.<sup>49</sup> Furthermore, parliament adopts phraseology alternative to ‘best interests’ in many statutes, preferring ‘the welfare of the child must be the paramount consideration’, as demonstrated in the Antisocial Behaviour etc. (Scotland) Act 2004 and the Adoption and Children (Scotland) Act 2007. Other laws, or the guidance related thereto, adhere to the ‘best interests’ phrasing.<sup>50</sup> The following subsections present a number of the most widely recognised Scottish implementation measures including non-legal measures, indirect incorporation and sectoral incorporation.<sup>51</sup> These variable measures attempt to align Scots law

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<sup>44</sup> Children and Young People (Scotland) Act 2014 (CYP Act), s97(1).

<sup>45</sup> E.g. Education (Additional Support for Learning) Act 2004, s29(1).

<sup>46</sup> Children (Scotland) Act 1995, ss1(2)(a), 2(7) and 93(2)(b).

<sup>47</sup> Marriage (Scotland) Act 1977, s1(1) sets the minimum age at 16. See criticism by CRC Committee, Concluding Observations 2016, above n. 5, paras. 20, 47.

<sup>48</sup> s1(5), which requires aliment for a child to continue up to age 25 as long as the she is still in education.

<sup>49</sup> L. LUNDY ET AL., above n. 9, p. 4.

<sup>50</sup> E.g. Age of Criminal Responsibility (Scotland) Act 2019; Human Trafficking and Exploitation (Scotland) Act 2015; Victims and Witnesses (Scotland) Act 2014; Housing (Scotland) Act 1987; Vulnerable Witnesses (Scotland) Act 2004; Mental Health (Care & Treatment) (Scotland) Act 2003; Legal Aid (Scotland) Act 1986. See discussion in L. BACKMAN ET AL., *State of Children’s Rights in Scotland 2019*, Together, Edinburgh 2019, pp. 32–33 <[https://www.togetherscotland.org.uk/media/1436/socrr\\_online\\_version.pdf](https://www.togetherscotland.org.uk/media/1436/socrr_online_version.pdf)> accessed 4.5.2020.

<sup>51</sup> For an explanation of the different types of implementation, see U. KILKELLY, ‘The UN Convention on the Rights of the Child: Incremental and Transformative Approaches to Legal Implementation’ (2019) 23 *International Journal of Human Rights* 323; K. MCCALL-SMITH, ‘To Incorporate the CRC or Not – Is this Really the Question?’ (2019) 23 *International Journal of Human Rights* 425.

and policy with the CRC and the Committee's guidance, yet, as demonstrated below, many gaps remain in giving full effect to the protections promised by the CRC.<sup>52</sup>

#### 4.1 GIRFEC

Scotland has relied upon its Getting it Right for Every Child (GIRFEC) policy since 2006 to give effect to the general principles of the CRC. As a strategy, GIRFEC aims to coordinate policies, services and programmes across all public sectors in an effort to support children, young people and their families.<sup>53</sup> It does this through taking a child-focused approach based on an understanding of the well-being of a child in their current situation and aims to tackle needs early through joined-up working across children, young people, parents and all relevant public services. '[GIRFEC] has been described as the golden thread that knits together the Scottish Government's policy objectives for children.'<sup>54</sup>

GIRFEC is intended to 'translate' the child-focused approach of the CRC by embedding its articles within the policy, including encouraging practitioners to put the child at the centre of all decision making by considering each child as an individual, to seek out the child's voice and involve her in decision-making that affects her current and future well-being and to plan and review outcomes based on her well-being.<sup>55</sup> Notably the focus on making all engagements with children 'child-centred' is to give effect to the best interests principle. In order to ensure that all relevant practitioners and public service providers are kept informed about the needs of a child and or her family, a 'Named Person' scheme was developed to serve as a first point of contact for children and families and, where necessary, to coordinate and monitor inter-agency activity provided by Scottish public services.<sup>56</sup>

GIRFEC is underpinned by eight well-being indicators: safe, healthy, achieving, nurtured, active, healthy, respected, responsible and included (SHANARRI), which are typically measured through an outcomes-based approach. Focusing on well-being, however, is not the same

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<sup>52</sup> CRC Committee, General Comment No. 5 (2003), UN Doc. CRC/GC/2003/5, 27.11.2003, para. 1.

<sup>53</sup> SCOTTISH GOVERNMENT, Getting it Right for Every Child (GIRFEC) <<https://www.gov.scot/policies/girfec/>> accessed 4.5.2020.

<sup>54</sup> J. ALDGATE, SCOTTISH GOVERNMENT, *NCRC: The foundation of Getting it Right for Every Child*, March 2013, p.4 <<https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2013/03/uncrc-the-foundation-of-getting-it-right-for-every-child/documents/uncrc-the-foundation-of-girfec/uncrc-the-foundation-of-girfec/govscot%3Adocument/UNCRC%2B-%2Bthe%2Bfoundation%2Bof%2Bgetting%2Bit%2Bright%2Bfor%2Bevery%2Bchild.pdf>> accessed 4.5.2020.

<sup>55</sup> *ibid.*, p. 3.

<sup>56</sup> SCOTTISH GOVERNMENT, Practice Briefing 1, The Role of the Named Person, December 2010 <<https://www2.gov.scot/Resource/Doc/1141/0109328.pdf>> accessed 4.5.2020.

as a rights-based approach. As Lundy has explained, despite ‘being routinely “twinned”...they are distinctive paradigms with different histories, rationales and indeed substance.’<sup>57</sup> In Scotland, the well-being approach that has long dominated focuses on the duties and outcomes of public service providers in terms of intervention and prevention rather than the exercise of any form of agency by the children whose are being assessed.<sup>58</sup> The impact of these well-being indicators can be seen in other government policies, such as the Curriculum for Excellence (CfE), which underpins children’s education in Scotland. Reflecting the GIRFEC well-being indicators, the CfE aims to develop four lifelong capacities in children, helping them to become successful learners, confident individuals, responsible citizens and effective contributors to society in line with CRC Article 29.<sup>59</sup> To reinforce the CRC underpinnings of GIRFEC, Scottish Education offers an optional training programme on the CRC in order to link educational improvements to children’s rights.<sup>60</sup> However, the shortcomings of the well-being dominated approach become clear when implementation is challenged using a rights-based approach. In particular, implementation of GIRFEC has rarely taken heed of the CRC or the opinions of the Committee of the Rights of the Child, which oversees the implementation of the CRC at the international level. However, if the CRC Incorporation Bill provisions on a new Child Rights Scheme (ss11-13) come to fruition, Scottish Ministers will be required to have regard for the Committee’s opinions and must also consult children and the CYCPS (s12). These potential obligations will increase the rights-based approach to developing and implementing policy in Scotland as the law will demand it.

A 2018 study demonstrated that the UK has stalled on child well-being indicators, particularly those where public health interventions would be most relevant ‘and therefore more at risk in the face of threats to children’s (and particularly early years) services.’<sup>61</sup> A key problem is ineffective collection of disaggregated data to support progressive development of services, which is at the heart of GIRFEC. The 2018 study credits Scotland with its use of GIRFEC to

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<sup>57</sup> L. LUNDY, ‘A Lexicon for Research on International Children’s Rights in Troubled Times’ (2019) 27 *International Journal of Children’s Rights* 595, 598.

<sup>58</sup> E.K.M. TISDALL, above n. 25, p. 779.

<sup>59</sup> SCOTTISH GOVERNMENT, What is Curriculum for Excellence? <<https://education.gov.scot/education-scotland/scottish-education-system/policy-for-scottish-education/policy-drivers/cfe-building-from-the-statement-appendix-incl-btcl-5/what-is-curriculum-for-excellence>> accessed 4.5.2020.

<sup>60</sup> SCOTTISH GOVERNMENT, Recognising and realising children’s rights: A professional learning resource to promote self-evaluation and improvement planning <<https://education.gov.scot/improvement/learning-resources/recognising-and-realising-childrens-rights/>> accessed 4.5.2020.

<sup>61</sup> R. CHEUNG, International comparisons of health and wellbeing in early childhood, Research Report, March 2018, p. 5 <[https://www.nuffieldtrust.org.uk/files/2018-03/1521031084\\_child-health-international-comparisons-report-web.pdf](https://www.nuffieldtrust.org.uk/files/2018-03/1521031084_child-health-international-comparisons-report-web.pdf)> accessed 4.5.2020.

coordinate policies, services and programmes,<sup>62</sup> though the Scottish experience demonstrates that this collaborative potential has a number of pitfalls, particularly where well-being indicators, rather than children's rights, are the key drivers.<sup>63</sup>

#### 4.2 CHILDREN AND YOUNG PEOPLE (SCOTLAND) ACT 2014

As discussed above, the CYP Act 2014 is the singular feature of Scotland's indirect incorporation of the CRC. Part I of the Act provides 'Scottish Ministers keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the [CRC] requirements'<sup>64</sup> and to take steps to further children's rights if they find it 'appropriate'. From the outset it was evident that this 'duty' had little potential to progress the alignment of Scots law with the CRC.<sup>65</sup> Every three years Scottish Ministers must also report on the steps they have taken to progress CRC rights and, where appropriate, obtain the views of children for the purposes of preparing these reports (s1(4–5)). Public authorities are also required to publish reports to the Scottish Parliament on the steps they have taken give further effect to the CRC every three years (s2(1)).<sup>66</sup> Though the reporting processes under sections 1 and 2 have not proved to be onerous, Part III places markedly stronger duties on local authorities and public service providers to prepare, implement and keep under review child services plans.<sup>67</sup> Connecting the plans with the GIRFEC/SHANARRI well-being indicators, s12 requires local authorities and relevant health boards to report on the implementation of children's service plans and define the outcomes in relation to well-being indicators each year. The CYP Act 2014 thus moved GIRFEC from policy to statute with the intent to improve the outcomes and well-being for all children in Scotland in line with the CRC.<sup>68</sup>

Part II of the 2014 Act expanded the authority of the CYPCS to undertake investigations into what extent service providers have taken children's views into account in making decisions about service provisions relating to children broadly or specifically.<sup>69</sup> This new competence reinforces the importance of child participation but the ultimate test is what action is taken in the instance that the CYPCS finds the relevant authority failed to fulfil its duties. During the

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<sup>62</sup> *ibid.*, p. 61.

<sup>63</sup> E.K.M. TISDALL, above n. 25, pp. 783–84.

<sup>64</sup> CYP Act 2014, above n. 43, s1(1).

<sup>65</sup> E.K.M. TISDALL, above n. 25, p. 777.

<sup>66</sup> CYP Act 2014, above n. 44, s1(4) and s2(1).

<sup>67</sup> *ibid.*, s8, s12, s11.

<sup>68</sup> CYP (Scotland) Act 2014, statutory guidance, paras. 282–92.

<sup>69</sup> *ibid.*, s5. See CYPCS, About Investigations < <https://cypcs.org.uk/investigations/> > accessed 4.5.2020.

most recent CRC periodic review, the Committee noted with concern that the Commissioner had not yet exercised this new competence.<sup>70</sup> However, since 2016, the CYCPS has conducted two investigations. The first was into policies on the restraint and seclusion of children in Scottish schools, which ultimately led to the review of 28 local authority policies on restraint and seclusion.<sup>71</sup> Following its findings of serious inconsistencies across local authorities, the UK Equality and Human Rights Commission worked with the CYCPS to press for a judicial review of the policies if they were not appropriately updated. Those updates are expected in 2020, thus reinforcing Kilkelly's observations on the important role of children's commissioners in ensuring the implementation of the CRC.<sup>72</sup>

The CYP Act 2014 included additional non-legal measures aimed to complement the legal duties.<sup>73</sup> To fulfil the s1(a) duty imposed on Scottish Ministers in the development of law and policy, s1(2) provides that Ministers 'must take such account as they consider appropriate of *any relevant views of children* of which [they] are aware' (emphasis added) in determining whether the relevant proposal will impact children's wellbeing. This information is developed through the use of Children's Rights and Well-being Impact Assessments (CRWIA).<sup>74</sup> Delivery of CRWIAs is intended to be through a multistage participatory process. The ultimate goal of the process is for Scottish Ministers to examine and explain the potential impacts of any new legislation or policy on children's rights and this examination is underpinned by a proportionality analysis.<sup>75</sup>

Reviewing a number of laws and policies developed since the CYP Act 2014, it is evident that use of the CRWIAs is inconsistent and children's participation is often tokenistic rendering the practice of limited value in terms of aligning Scots law with the CRC. As noted above, interpretation of Part 1 of the CYP Act 2014 is specifically linked to the CRC (s4) and, therefore, CRC Committee guidance is instructive in relation to the use of impact assessments and

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<sup>70</sup> CRC COMMITTEE, *Concluding Observations 2016*, above n. 5, para. 15.

<sup>71</sup> CYCPS, *No Safe Place: Restraint and Seclusion in Scotland's Schools*, CCYP/2018/3, Laid before the Scottish Parliament by the CYCPS in pursuance of section 11(4) of the Commissioner for Children and Young People (Scotland) Act 2003 on 13.12.2018.

<sup>72</sup> U. KILKELLY, above n. 51, p. 331.

<sup>73</sup> L. LUNDY ET AL., above n. 9, p. 4.

<sup>74</sup> SCOTTISH GOVERNMENT, *When and how to best use the Child Rights and Wellbeing Impact Assessment (CRWIA): Guidance*, updated February 2019 (CRWIA Guidance), <<https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2015/06/childrens-rights-wellbeing-impact-assessments-crwia-guidance/documents/crwia---guidance-for-scottish-government-officials---version-2---february-2019/crwia---guidance-for-scottish-government-officials---version-2---february-2019/govscot%3Adocument/CRWIA%2B-%2BGuidance%2Bfor%2BScottish%2BGovernment%2Bofficials%2B-%2Bversion%2B%2B-%2BFebruary%2B2019.pdf>> accessed 18 November 2019.

<sup>75</sup> *ibid.*, 5.

the participation of children in developing them.<sup>76</sup> The Committee has noted that technical support and resources are necessary to ensure CRWIAs are effective.<sup>77</sup> Key to this is to ‘Publish the results of such assessments and demonstrate how they have been taken into consideration in the proposed laws and policies.’<sup>78</sup> Two 2019 studies on the Scottish Government’s CRWIAs demonstrated that the views of children were often either not sought or they did not feature in the decision-making process in terms of law and policy development.<sup>79</sup> The Committee has repeatedly expressed concern over the failure to give effective weight to children’s views in policy development and child-focused programming.<sup>80</sup> The larger proportion of CRWIAs suggest that those responsible for carrying out CRWIAs are not well-versed in the CRC and how to fulfil its obligations and, instead, are more concerned with passive observance of well-being indicators rather than active rights entrenchment. This suggests that further training and resources are required to conduct CRWIAs in way that effectively implements children’s rights.<sup>81</sup> The proposed CRC Incorporation Bill does not offer much in the way of further guidance on how the CRWIA process will be strengthened, but the entrenchment of CRC rights and concomitant enforcement procedures should compel increased attention to delivering CRWIAs that are more effective.

### 4.3 SECTORAL LAWS

Sectoral incorporation sees relevant provisions of the CRC transposed into national laws in the same area, such as those relating to education.<sup>82</sup> In the lead up to the passage of the CYP Act 2014 there was dissent among children’s rights organisations with some viewing sectoral and non-legal measures as the best approach to progress children’s rights,<sup>83</sup> thus the following introduction to the statutes that have embedded aspects of the CRC speaks to this critique to some

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<sup>76</sup> *ibid.*

<sup>77</sup> CRC COMMITTEE, Concluding Observations 2016, above n. 5, paras. 9–10.

<sup>78</sup> *ibid.*

<sup>79</sup> See M. BACKBIER ET AL., *A Children’s Rights Approach: Recommendations to the Scottish Government on Refining Children’s Rights and Wellbeing Impact Assessments in Scotland*, May 2019, and I. CHITASHVILI ET AL., *Recommendations and Notes on Scottish Children’s Rights and Wellbeing Impact Assessments*, May 2019 <<https://www.togetherscotland.org.uk/news-and-events/news/2019/06/using-crwia-to-promote-child-rights-based-decision-making/>> accessed 4 May 2020. Both studies were supervised by the author in conjunction with Together (Scottish Alliance for Children’s Rights).

<sup>80</sup> CRC COMMITTEE, Concluding Observations 2016, above n. 5, paras. 30–31.

<sup>81</sup> As reiterated by the CRC COMMITTEE, see e.g. CRC COMMITTEE, Concluding Observations 2016, above n. 5, paras. 9, 11(b), 13. See also L. LUNDY ET AL., above n. 9.

<sup>82</sup> L. LUNDY ET AL., above n. 9, p. 3.

<sup>83</sup> A. GADDA ET AL., above n. 20, p. 399.

extent. The laws discussed below fall predominantly into two categories, laws designed to recognise children’s participation rights and those focused on protecting children and will be presented in chronological order under each category, which aids in mapping these laws onto the evolving ambitions of the Scottish Government discussed above.

#### 4.3.1 *Participation Rights*

Article 12 of the CRC mandates that each state ‘shall assure’ that the views of children are taken into account in all matters affecting the child in line with the child’s age and maturity. In addition to the CRWIA being used as an overarching approach to child participation, the following sectoral laws offer an account of how the participatory dimension of the CRC has been embedded into Scots law.

The Children (Scotland) Act 1995 reflects Articles 3(2) and 18 of the CRC, and s6(1), provides that children’s views will be taken into account in all decisions affecting them ‘so far as practicable’. This language clearly departs from the ‘shall assure’ language of Article 12 of the CRC and the Scottish approach has been criticized as tokenistic.<sup>84</sup> The statute aligns with a number of other Scottish laws recognising the evolving competencies of children with a focus on age 12 as the age at which some minimal level of competence can be presumed,<sup>85</sup> often referred to as the ‘magic 12’.<sup>86</sup> Section 11(7), couples the principle that courts ‘shall regard the welfare of the child concerned as its paramount consideration’ with the right to be heard. Subsequent amendments to the 1995 Act, however, prioritised the welfare of the child in terms of the need to protect a child from abuse but resulting in half-measures in terms attention to the child’s views.<sup>87</sup>

Since 1971, decisions relating to children and young people who need care or protection or are alleged to have committed offenses have been referred to a Children’s Panel, rather than a traditional court.<sup>88</sup> The system is based on the idea that support rather than punishment should

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<sup>84</sup> See, for example, K. MACKAY, ‘The Approach in Scotland to Child Contact Disputes Involving Allegations of Domestic Abuse’ (2018) 40 *Journal of Social Welfare and Family Law* 477, 489.

<sup>85</sup> The minimum age at which a child is presumed to be able to engage in legal transactions is defined as 16 by the Age of Legal Capacity (Scotland) Act 1991, s1 but is subject to a range of exceptions under s2.

<sup>86</sup> Children (Scotland) Act 1995 s6 (1): ‘...taking account of the child’s age and maturity ... a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view.’ This phraseology is repeated in Children’s Hearings (Scotland) Act 2011, s27(4).

<sup>87</sup> Children (Scotland) Act 1995 s11(7A)–(7E), as amended by the Family Law (Scotland) Act 2006 s24. See discussion in E.E. SUTHERLAND, above n. 12, p. 67.

<sup>88</sup> Social Work (Scotland) Act 1968, Part 3 established the Children’s Hearing System, which began operating in 1971.

be the basis of the treatment for children interacting with the justice system, therefore recognising the special care and protection required by children but only up to age 16, with some exceptions.<sup>89</sup> The Children's Hearings (Scotland) Act 2011 does not explicitly reference the CRC but outlines that the welfare of the child is of paramount importance (s25(2)). The 2011 Act notably affords departure from welfare being the 'paramount' consideration to a 'primary' consideration if the public is at risk (s26).<sup>90</sup> The Children's Panel system models its child participation on Article 12 of the CRC (ss27 and 121) though it is not expressly referenced. Strengthening the participatory dimension of the Children's Hearings was a focus of the Children (Scotland) Bill (s1) passed in August 2020 by the Scottish Parliament.

Articles 29 and 12 of the CRC were transposed into Scots law by the Standards in Scotland's Schools Act 2000 s1 and s2, respectively, though there is no direct reference to the CRC. The right to an education and responsibility of parents to ensure children attended school was part of Scots law for many years prior to the Act.<sup>91</sup> Notably, s2(2) states that

...an education authority shall have due regard, so far as is reasonably practicable, to the views (if there is a wish to express them) of the child or young person in decisions that significantly affect that child or young person, taking account of the child or young person's age and maturity.

Section 41 permits a child who has been excluded from school to personally challenge the decision, thus reinforcing a child's right to participate in decision-making, albeit after the fact. The limited progression of a child's right to challenge her own exclusion from school is, however, undermined by potential conflicts under the Age of Legal Capacity (Scotland) Act 1991 as well as the lack of legal aid to support a challenge.<sup>92</sup>

The issue of taking views into account in education decisions is subject to a further participation dimension when the child requires additional support. The Education (Additional Support for Learning) (Scotland) Act 2004 requires that a child for whom additional support needs

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<sup>89</sup> Children's Hearings (Scotland) Act 2011, s119. See discussion in K.M. NORRIE, *Children's Hearing in Scotland*, 3<sup>rd</sup> ed., W. Green, Edinburgh 2013.

<sup>90</sup> See discussion in C. MCDIARMID, 'Making Best Interests Significant for Children Who Offend: A Scottish Perspective' in E.E. SUTHERLAND and L.-S. BARNES-MACFARLANE, *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being*, Cambridge University Press, Cambridge 2016, pp. 300 et seq.

<sup>91</sup> Education (Scotland) Act 1980, s1 and s30; the Human Rights Act 1998 also brought in the right to education under the European Convention on Human Rights, Optional Protocol 1, art. 2.

<sup>92</sup> J.M. SCOTT, 'Education: Could Do Better' in E.E. SUTHERLAND ET AL., above n. 12, p. 160.

have been identified be consulted if the decision-making agency deems the child to have capacity to understand the variable aspects that feed into the decision-making process. And while an education that enables a child to develop to her fullest potential through additional support is the goal, the power of the purse and the local authorities opinion of ‘reasonableness’ serve as limiting factors when additional learning support may be required, thus the impact of participation may be negligible.<sup>93</sup> Thus, for children with disabilities, the extent to which participation is facilitated in education decisions arguably falls short of CRC Article 23.<sup>94</sup>

In addition to general decision-making, legal proceedings and education decisions, Scotland extended voting rights to children aged 16 and 17 through the Scottish Elections (Reduction of Voting Age) Act 2015. As noted by the Committee, this is a commendable effort to give effect to their participation rights in terms of exercising civil and political rights in the context of government and public life.<sup>95</sup> Yet, more work needs to be done in ensuring the effectiveness of children’s progressive engagement with citizenship processes, particularly in relation to those that are most vulnerable.

#### 4.3.2 Protection Rights

There are many issues classified as ‘protection’ rights for children in Scotland. These include protection *against* physical and mental abuse as well as protection for those children who become entangled in the criminal justice system.

Protection against mental and physical punishment or abuse is a key field where significant progress has been made in delivering sectoral laws in line with the Articles 19 and 37 of the CRC.<sup>96</sup> Section 16 of the Standards in Scotland’s Schools Act 2000 banned corporal punishment by all individuals associated with provision of education. However, until 2019 there remained a defence of ‘justifiable assault’ available to adults using physical punishment against children outwith the education environment. As argued by Sutherland, ‘By permitting some

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<sup>93</sup> Education (Additional Support for Learning) (Scotland) Act 2004, s1(2), s4(2)(b) and s6.

<sup>94</sup> For example, *Jack James Guild v. City of Edinburgh Council* [2002] SCLR 92, where the autistic child’s views were never sought throughout the proceedings. See L. BACKMAN ET AL., above n. 49, pp. 90–91; J. HARRIS, ‘State of Children’s Rights in Scotland 2016’ (Together, Scottish Alliance for Children’s Rights, 2016) p. 94,

<<https://www.togetherscotland.org.uk/pdfs/TogetherReport2016.pdf>> accessed 4.5.2020. See CRC COMMITTEE, Concluding Observations 2016, above n. 5, para. 57(a). The Education (Disability Strategies and Pupils’ Educational Record) (Scotland) Act 2002 also supports disabled children.

<sup>95</sup> CRC COMMITTEE, Concluding Observations 2016, above n. 5, para. 32.

<sup>96</sup> CRC COMMITTEE, General Comment No. 8 (2006), UN Doc. CRC/C/GC/8, 2.3.2007, paras. 11, 12, 26.

violence against children, it undermined the whole climate for child protection.<sup>97</sup> In 2013, the SHRC underscored the need to repeal the defence of ‘justifiable assault’ in order to better protect children in its first national action plan (SNAP).<sup>98</sup> The CRC Committee called on Scotland to give full effect to SNAP during its 2016 periodic review of the UK.<sup>99</sup> Three years later in October 2019, Scottish Parliament passed the Children (Equal Protection from Assault) (Scotland) Act 2019, finally bringing Scots law in line with the CRC and Committee’s Concluding Observations.<sup>100</sup> Even with the ban on physical punishment, there remain serious gaps in Scots law in relation to the use of restraints in residential and non-residential settings across Scotland.<sup>101</sup> Such gaps underpin the need for a stronger, rights-based framework that full and direct CRC incorporation could provide.

Any involvement of children with the criminal justice system can cause long-lasting damage to their development. For this reason, the CRC sets out certain protection rights for those children who become entangled with the criminal justice system (e.g. Articles 37, 40). Child offenders present a ‘paradox’ where they are both vulnerable and have actively breached the law, which causes some to argue that their entitlement to protection rights is curtailed.<sup>102</sup> However, to deliver a holistic response to children in conflict with the law, protection rights must be maintained and this is an area in which Scotland has struggled to keep pace with the baseline protections set by the CRC despite its much applauded Children’s Hearings system. The minimum age for criminal responsibility was historically low in Scotland with the minimum age set at 8. Beginning with its first periodic review of the UK, the Committee criticised the inconsistency of this low age with the CRC, a point echoed by civil society and developmental experts.<sup>103</sup> Following years of criticism, in 2001 the Scottish Law Commission advised that a

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<sup>97</sup> E.E. SUTHERLAND, above n. 12, p. 69.

<sup>98</sup> SCOTTISH HUMAN RIGHTS COMMISSION, *Scottish National Action Plan for Human Rights 2013–17*, p. 42 <<http://www.snaprights.info/wp-content/uploads/2016/01/SNAPpdfWeb.pdf>> accessed 4.5.2020.

<sup>99</sup> CRC COMMITTEE, *Concluding Observations 2016*, above n. 5, para. 8(c).

<sup>100</sup> CRC COMMITTEE, *Concluding Observations 2016*, above n. 5, para. 41. The Act repealed Section 51 of the Criminal Justice (Scotland) Act 2003 and received Royal Assent on 7 November 2019. It is due to go into effect in November 2020, following a one year sunrise clause designed to give Scottish Ministers time to promote public awareness and access to materials about positive parenting. This commencement day, however, has recently been extended in light of the Covid-19 pandemic.

<sup>101</sup> L. BACKMAN ET AL., above n. 50, p. 53; CYPSC, above n. 69.

<sup>102</sup> C. MCDIARMID, above n. 90, pp. 295–309, citing C. MCDIARMID, *Childhood and Crime*, Dundee University Press, Dundee 2007, pp. 165–67.

<sup>103</sup> See, CRC COMMITTEE, *Concluding Observations 2016*, above n. 5. The UN Human Rights Committee has similarly raised the point in its review of the UK’s compliance with the International Covenant on Civil and Political Rights, see UN HUMAN RIGHTS COMMITTEE, *Concluding Observations on the seventh periodic report of the UK of Great Britain and Northern Ireland*, UN Doc. CCPR/C/GBR/CO/7, 17.8.2015, para. 23. See other calls for the minimum age to be raised to 14: Parliamentary Assembly of the Council of Europe (PACE) Resolution 2010 (2014) on child friendly justice.

minimum age for criminal responsibility be discarded and replaced instead with a minimum age of 12 for prosecution.<sup>104</sup> While the prosecution age was amended, the minimum age for criminal responsibility remained.<sup>105</sup>

The CRC does not set an explicit age at which criminal responsibility is applicable though Article 40(3) demands that states clearly establish a minimum age in law. For many years, international guidance suggested that this age should ‘not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.’<sup>106</sup> In line with its role of progressively interpreting the articles of the CRC, in 2007 the Committee developed its interpretation of Article 40(3) to reflect that the minimum age for criminal responsibility should be no lower than 12.<sup>107</sup> In General Comment No 24, the Committee recommended that the absolute minimum age of criminal responsibility should be 14,<sup>108</sup> raising its previously suggested minimum age of 12 in light of evidence reinforcing that children aged 12–13 are still developing in ways that impact their ability to understand the impact of their actions or to comprehend criminal proceedings.<sup>109</sup>

In May 2019, Scottish Parliament passed the Age of Criminal Responsibility (Scotland) Act, raising the minimum age of criminal responsibility from age 8 to 12. Thus, going forward, children under age 12 can only be referred to the Children’s Panel on care and protection grounds, not as a penal matter. While raising the age has not fully responded to local or international criticism and remains one of the lowest standards in Europe,<sup>110</sup> it is a step in the right direction and the issue remains under review by the Minister for Children and Young People.<sup>111</sup> This will no doubt be one of the issues to be addressed once the CRC Incorporation Bill is passed.

#### 4.4 SUMMARY

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<sup>104</sup> SCOTTISH LAW COMMISSION, Discussion Paper on the Age of Criminal Responsibility (Discussion Paper 115 Scottish Law Commission (2001), para. 3.27.

<sup>105</sup> Criminal Procedure (Scotland) Act 1995, s41A, amended by the Criminal Justice and Licensing (Scotland) Act 2010, s 52(2).

<sup>106</sup> UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), UNGA Resolution 40/33, UN Doc. A/RES/40/33, 29.11.1985, para. 4.1.

<sup>107</sup> CRC COMMITTEE, General Comment No. 14, UN Doc. CRC/C/GC/14, 29.5.2013.

<sup>108</sup> CRC COMMITTEE, General Comment No. 24, UN Doc. CRC/C/GC/24, 18.9.2020, para. 22.

<sup>109</sup> *ibid.*, para. 22. See previous view CRC COMMITTEE, General Comment No. 10: Children's Rights in Juvenile Justice, UN Doc. CRC/C/GC/10, 25.4.2007, paras. 32–33. See C. McDIARMID, ‘After the Age of Criminal Responsibility: A Defence for Children who Offend’ (2016) 67 *Northern Ireland Legal Quarterly* 327, 329 et seq.

<sup>110</sup> Child Rights International Network (CRIN), Minimum ages of criminal responsibility in Europe <<https://archive.crin.org/en/home/ages/europe.html>> accessed 4.5.2020.

<sup>111</sup> SCOTTISH GOVERNMENT, Raising the Age of Criminal Responsibility <<https://www.gov.scot/policies/youth-justice/raising-age-criminal-responsibility/>> accessed 4.5.2020.

Numerous initiatives in Scotland have recognised variable aspects of the CRC through non-legal measures, indirect and sectoral incorporation, only a few of which are discussed here. While the CRC gives extensive consideration to the basic needs of children across mainstream rights platforms and those whose rights are marginalised due to intersectional factors, many gaps exist revealing the inadequacies of the indirect and sectoral approaches to incorporation. Such inadequacies have a much better opportunity for being addressed where the entire CRC framework is used as a legal reference point, rather than the belts and braces approach that Scotland has adopted to date. The introduction of the CRC Incorporation Bill confirms that recent Scottish legislation examples were a precursor to direct incorporation.<sup>112</sup> As introduced, the Bill would increase the potential for all children to be heard and protected in line with the full framework offered by the CRC.

## **5. THE CRC IN SCOTTISH COURTS**

While there has been progress in embedding the CRC through non-legal measures, indirect incorporation and sectoral laws, Scottish courts continue to give the Convention limited traction in decision-making. Since devolution, however, there has been a general upswing in the use of the CRC to aid in interpretation of the ECHR and statutory law. Furthermore, participation rights and the rights of children in conflict with the law have been increasingly elaborated with direct reference to the CRC. The sections below will consider the general and specific approaches in turn.

### **5.1 THE CRC AS A GENERAL INTERPRETIVE TOOL**

Scotland constitutes a separate jurisdiction from the broader UK. Therefore, Scottish courts hear all matters arising in Scotland and in certain circumstances cases can be appealed to the UK Supreme Court. Scottish criminal law is an exception and appeals may only be made to the UK Supreme Court if the case engages an issue of devolved competence, EU law or the ECHR.<sup>113</sup> In light of some aspects of children's rights bridging reserved and devolved areas, it is important to examine how Scottish courts and the UK Supreme Court engage with the CRC.

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<sup>112</sup> U. KILKELLY, above n. 51, p. 330.

<sup>113</sup> See. C. HIMSWORTH and C. O'NEILL, *Scotland's Constitution: Law and Practice*, 3<sup>rd</sup> ed., Bloomsbury Professional, London 2015.

In the Scottish judicial system as well as the UK Supreme Court, the CRC is often referenced as an interpretive tool. The best interests principle, for example, has long been a common point of reference in UK courts but was entrenched in Scotland through the Children (Scotland) Act 1995, s11(7), discussed above.<sup>114</sup> In family law cases, the paramount concern for a child's wellbeing – the alternative formulation of 'best interests' used in Scotland and elsewhere – is always crucial to the decision-making process. In immigration cases, however, the consistent position is that 'the rights of a child are not an overriding factor, but are merely a factor that must be treated as a primary consideration' rather than the 'paramount' concern.<sup>115</sup> This approach, therefore, reflects the diminished primacy of best interests as judicial actions move into non-devolved matters and inconsistency in the application of the best interests principle.<sup>116</sup>

As Acts of Scottish Parliament must comply with the ECHR, the CRC is used as an aid in determining the content of ECHR rights with respect to children. From the outset, the Named Person provision of the CYP Act 2014 was hotly contested and an action for judicial review challenging Part IV of the Act was raised shortly after it received Royal Assent.<sup>117</sup> The basis of the original claim, and the two subsequent appeals to the Outer and Inner Courts of Session, was that the provisions violated the devolved competence of Scottish Parliament. The 2016 appeal to the UK Supreme Court saw the Court interpreting ECHR Article 8 in line with Article 16 of the CRC on the right to privacy and the Article 3(2) obligation to 'ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her'.<sup>118</sup> Ultimately, the Court found that the Named Person provision was outwith the competence of the Scottish Parliament for failure to formulate the law with sufficient precision so as not to unduly interfere with their ECHR rights. In this instance, the special attention to the relationships between children and parents' rights was developed through the lens of the CRC.<sup>119</sup>

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<sup>114</sup> See, e.g., *Natasha Tariro Nyamayaro and another v. Secretary of State for the Home Department* [2019] CSIH 29, paras. 65, 79; *LRK v. AG* [2019] SAC (Civ) 33.

<sup>115</sup> *ME, Re Judicial Review* [2012] CSOH 2, para. 22. See also *Natasha Tariro Nyamayaro and another v. Secretary of State for the Home Department*, above n. 114, para. 37; *AAS and SAAS v Secretary of State for the Home Department* [2010] CSIH 90.

<sup>116</sup> A point raised by the CRC COMMITTEE, Concluding observations 2016, above n. 5, para. 27.

<sup>117</sup> *Christian Institute and Others v. The Scottish Ministers* [2015] CSOH 7. The Named Person provision of the CYP Act 2014 gave statutory footing to the GIRFEC Named Person scheme and required all children in Scotland to have a 'named person'.

<sup>118</sup> *Christian Institute and Others v. The Lord Advocate (Scotland)* [2016] UKSC 51, paras. 85, 89.

<sup>119</sup> A similar approach was discussed in *Natasha Tariro Nyamayaro and another v. Secretary of State for the Home Department*, above n. 114, para 62.

## 5.2 EXPRESS RECOGNITION OF CRC PRINCIPLES AND RIGHTS

Scottish courts first recognised the right of a child to express her views in judicial proceedings in 1981.<sup>120</sup> Yet, the way in which children's views are expressed, considered and utilised is not always straightforward. In line with the Children (Scotland) Act 1995, family law court is the predominant forum in which a child's well-being and participation rights are subject to judicial scrutiny. In *Shields v. Shields* the court established that 'the proper starting point' for determining a residence order for an 8 year-old was Article 12 of the CRC.<sup>121</sup> As noted by the court with reference to the relationship between the CRC and the 1995 Act, s11(7)(b), the 'Convention could be used as an aid to construction of the domestic legislation which later sought to implement it', in line with the common approach to the CRC in UK courts.<sup>122</sup> Ultimately the court found the lower court's failure to seek the child's views was an error for remand. It also outlined that a practicability test should be used to determine how a child might best be afforded the opportunity to convey her views in line with Article 12 of the CRC in conjunction with the evolving capacity of a child (Article 5 CRC).<sup>123</sup> It has been noted, however, that in practice children under the age of 12 are not always invited to take part in court proceedings.<sup>124</sup> Scottish case law demonstrates that participation rights are often ineffective and inconsistent.<sup>125</sup> Even with the CRC as a general point of interpretive reference and the courts expressly highlighting the requirements of Article 12, the lack of a statutory reference to the CRC prevents effective, holistic fulfilment of children's rights in terms of participation.

Over the past decade, the best interests principle has been increasingly paired with Article 40, which outlines the rights of children subject to criminal proceedings. In these instances, the CRC has played a crucial role in determining what the starting point for considering sentences

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<sup>120</sup> *Fowler v. Fowler* [1981] SLT 9, para. 9.

<sup>121</sup> *Shields [or Cunningham] v. Shields* [2002] SLT 57; [2002] SC 342, para. 6.

<sup>122</sup> *ibid.*

<sup>123</sup> *ibid.* For a discussion of the practicability test, see E.K.M. TISDALL, 'Subjects with Agency? Children's Participation in Family Law Proceedings' (2016) 38 *Journal of Social Welfare and Family Law* 362, 365–66.

<sup>124</sup> See study of almost 300 children's experience in Scottish courts, K. MACKAY, *The Child's Voice in Contact Disputes: Genuine Participation in Private Law Court Actions*, Lambert Publishing, Saarbrücken, Germany 2012.

<sup>125</sup> See, e.g., *Petition of ABC v Principal Reporter and Others* [2018] CSOH 81; *DM v. Locality Reporter and the Lord Advocate* [2018] CSIH 73 (though the CRC was not mentioned, the issue of participation is similar to that raised in ABC); *C v. McM* [2005] Fam LR 36. See K. MACKAY, above n. 124; K. MACKAY, *The Treatment of the Views of Children in Dispute Where There is a History of Abuse*, CYCPS, Edinburgh 2013 <<https://www.cypcs.org.uk/ufiles/views-of-children-and-domestic-abuse.pdf>> accessed 14.9.2020.

imposed on offenders under the age of 18. Directly invoking the language of Article 40 in the 2016 *OHara* appeal, Lord Brodie stated:

We see as particularly important what appears in [CRC] Article 3.1 which is that, in all court actions concerning children, the best interests of the child shall be a primary consideration, and the recognition in Article 40 that it is the right of every child who has been convicted of an offence be treated in a manner consistent with the promotion of the child's sense of dignity and worth and in a manner which takes into account his age and the desirability of his reintegration into society.<sup>126</sup>

More recently, the court in *Kinlan and Boland v HM Advocate* reduced the sentences imposed on the appellants due to their status as children on the date of the commission of the crimes relying on Articles 3 and 40 of the CRC as starting points, reflecting a growing line of case law reinforcing the role of the CRC as a starting point for the sentencing of children.<sup>127</sup> The repeated focus on the relationship between Articles 3 and 40 for child offenders entrenches these CRC rights into Scots common law.<sup>128</sup> Each of the recent Scottish cases on the starting point for sentencing juvenile offenders also refers to a 2006 UK Supreme Court case where Lady Hale elaborated the psychological and developmental differences between juvenile and adult offenders.<sup>129</sup> This is a point that has been highlighted frequently by the CRC Committee to reinforce the need to raise the minimum age of criminal responsibility, as discussed above, as well in relation to other juvenile penal considerations. However welcome, this sample of case law demonstrates the uneven approach to using the CRC as both an interpretive tool and a source of law, even if non-binding, for the construction of children's rights in Scottish courts.

### 5.3 CHANGES ON THE HORIZON

The proposed CRC Incorporation Bill has the potential to reshape the way in which courts use the CRC as a tool to assess children's rights in Scotland. Following incorporation, all under-18s will be able to raise claims alleging that a public authority has contravened the incorporated

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<sup>126</sup> *OHara v. HM Advocate* [2016] HCJAC 107, referring to *McCormick v. HM Advocate* [2016] HCJAC 50; *Hibbard v. HM Advocate* [2011] JC 149.

<sup>127</sup> *Kinlan and Boland v. HM Advocate* [2019] HCJAC 47, para. 18. See also *McCormick v. HM Advocate*, above n. 126; *Hibbard v. HM Advocate*, above n. 126.

<sup>128</sup> See also *VE v. HM Advocate* [2018] HCJAC 12; *Greig v. HM Advocate* [2013] JC 115, para. 9.

<sup>129</sup> *R (Smith) v Secretary of State for the Home Department* [2006] 1 AC 159. See also CRC COMMITTEE, General Comment No. 24, above n. 108.

CRC articles and all legislation raised before the courts will require interpretation in line with the CRC. This significant change in the protection of children's rights will render to the past oblique interpretive references to CRC. As introduced, not only will Scottish courts have an obligation to determine breaches of the CRC, under s20 courts may make a 'strike down declarator' against laws predating the commencement of the act. Section 21 also enables courts to deliver a 'declarator of incompatibility' for proposed legislation, thus protecting children's rights before a contradictory law is adopted. If the CRC Incorporation Bill passes through Scottish Parliament with these judicial capacities intact it will represent a new era in the protection and fulfilment of children's rights in Scotland, with enforcement potential unparalleled in the rest of the UK.

## 6. ON THE THRESHOLD OF MAXIMALIST INCORPORATION

The efforts invested in making rights real in Scotland through the persistence of child rights advocates, practitioners and children themselves in meeting with law and policy makers ensured that children's rights protections have improved incrementally for children since devolution. Scottish Government's 2019 pledge to incorporate the CRC to the maximum extent possible stimulated wide-ranging activities across government, Scottish Parliament and civil society to explore what this means for Scots law and policy, and, crucially, for the children for whom Scotland is home. If Scotland's laws are to align with the CRC, full and direct incorporation will require revision of a number of laws and policies and the proposed CRC Incorporation Bill is poised to set this overhaul in motion.

Direct incorporation offers the opportunity to establish a clear base from which children's rights in Scotland can be effectively developed and fulfilled. It is not suggested that the CRC is a perfect legal instrument. The difficulties that arise when translating a number of its provisions into national law have been considered frequently.<sup>130</sup> Critics have argued that the CRC is merely aspirational, not intended to 'work' in national law or could have a diluting effect on

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<sup>130</sup> e.g. U. KILLKELLY AND L. LUNDY, 'Children's Rights in Action: Using the UN Convention on the Rights of the Child as an Auditing Tool' (2006) 18 *Child and Family Law Quarterly* 331, 335–38.

existing Scots law.<sup>131</sup> Despite such push back, Scotland is no doubt a leader in striving for deeper commitment to children's rights and has incrementally worked toward comprehensive incorporation. Notably, a number of views opposing substantial incorporation in the development of the CYP Act 2014 have since eased their rigid views against incorporation.<sup>132</sup> The First Minister recognises that human rights incorporation is not a singular, perfect solution but 'an important part of the debate on how we go further in ensuring that people's rights are at the heart of everything we do [in Scotland].'<sup>133</sup> Reflecting the importance of this process, the Scottish Government's 2019 consultation on incorporating the CRC into Scots law received overwhelming support for full and direct incorporation from public bodies, civil society and individuals across Scotland.<sup>134</sup> As expressed by Together, 'The debate in Scotland is mature, and there has been extensive research and consultation carried out over the last decade.'<sup>135</sup>

This maturity is reflected in the CRC Incorporation Bill. The tedious word craft in the Bill signifies the efforts made by Scottish Government to deliver on their pledge of maximalist incorporation. While some elements of the Bill warrant further analysis, such as the role of additional interpretive tools in the consideration of children's rights, initial responses signal a triumph for children's rights.<sup>136</sup> But the celebrations cannot yet begin. While there appears cross-party support for incorporation it will take continued efforts to ensure the maximalist Bill remains strong as it progresses through parliament. Once passed, further work will be required to align laws with the CRC in a number of areas, such as reflecting the definition of a child as under-18 throughout Scots law and, more generally, transforming the children's rights culture across all public authorities and society. In anticipation of these debates, the children's rights community is preparing to collectively support the next stage in entrenching children's rights in Scotland.

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<sup>131</sup> See, e.g., LAW SOCIETY OF SCOTLAND, FAMILY LAW SUBCOMMITTEE, above n. 37. See discussion in E.K.M. TISDALL, above n. 25, pp. 774–77.

<sup>132</sup> See, e.g., K.M. NORRIE, above n. 38, cf. K.M. NORRIE, Response 64655043 to CRC Incorporation Consultation 2019 <[https://consult.gov.scot/children-and-families/uncrc/consultation/view\\_respondent?uuId=64655043](https://consult.gov.scot/children-and-families/uncrc/consultation/view_respondent?uuId=64655043)> accessed 14.9.2020; LAW SOCIETY OF SCOTLAND, FAMILY LAW SUBCOMMITTEE, above n. 37 cf. Law Society of Scotland, Child and Family Law and Constitutional Law sub-committees, Response 896200594 to CRC Incorporation Consultation 2019 <[https://consult.gov.scot/children-and-families/uncrc/consultation/view\\_respondent?\\_b\\_index=120&uuId=896200594](https://consult.gov.scot/children-and-families/uncrc/consultation/view_respondent?_b_index=120&uuId=896200594)> accessed 14.9.2020.

<sup>133</sup> N. STURGEON, above n. 27.

<sup>134</sup> SCOTTISH GOVERNMENT, above n. 40.

<sup>135</sup> TOGETHER, Briefing Paper: Incorporation in Context (November 2018), p. 4, <<https://www.togetherscotland.org.uk/media/1199/briefing-scottish-context.pdf>> accessed 22.4.2020.

<sup>136</sup> U. KILKELLY and L. LUNDY, 'The Does Legal Incorporation of the UNCRC Matter?', UCC blogpost (4.9.2020) <<https://www.ucc.ie/en/law/news/does-legal-incorporation-of-the-uncrc-matter.html>> accessed 14.9.2020.

As this collection of essays goes to print, the Scottish CRC incorporation story has yet to be fully written. Children’s rights advocates are positive that the Scottish Parliament will support the maximalist approach taken by the CRC Incorporation Bill but there remains work to be done. To ‘incorporate the [CRC] in full and directly – using the language of the Convention’ limited only by devolution,<sup>137</sup> will require forward planning and a long-term commitment to entrenching and realising children’s rights. The government’s maximalist incorporation pledge and resulting Bill envisions every government body in Scotland being legally obliged to respect children’s rights and, where they do not, children will be able to use the courts to enforce their rights.<sup>138</sup> Even so, incorporation will not magically deliver the tripartite respect, protect and fulfil approach to children’s rights overnight, though full incorporation can, and eventually will, be the touchstone for securing a better life for children in Scotland. However the final CRC Incorporation Bill is passed, further audits of existing law and detailed policy guidance will be absolutely necessary if the legislation is to have any meaningful effect. As many have affirmed, the only way for full incorporation to deliver comprehensive, enforceable rights protections for children is through a multi-layered approach with a long-term vision.<sup>139</sup>

We are on the cusp of a new era of children’s rights protection in Scotland. Maximalist incorporation will mark the end of almost three decades of advocacy campaigns to improve children’s rights protections in Scotland through the entrenchment of the CRC in national law. It will be a monumental triumph for children’s rights advocates and the children of Scotland but, in truth, it will only be the beginning of Scotland’s next chapter.

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<sup>137</sup> J. SWINNEY, above n. 42, p. 2.

<sup>138</sup> *ibid.*

<sup>139</sup> K. MCCALL-SMITH, above n. 51, pp. 436–37.