

Education and Culture Committee
Children and Young People (Scotland) Bill
Submission from Professor Elaine E Sutherland*

SUMMARY

MISCONCEPTIONS AND MYTHS

- It is incorrect to assert that “the UN Convention was not drafted or worded to create directly enforceable legal rights in the domestic legal system”
- The claim that “Only a tiny number of countries—three or four at most—have incorporated the convention into their law” is misleading
- Beware of unfounded spectres and fears
 - The UN Convention is a sophisticated document, with the place of parents and child’s own evolving capacity lying at its core
 - Incorporation would not reduce existing children’s rights, like the paramountcy of the child’s welfare
 - Incorporation would not require changes on matters like the age of marriage or consent to sexual activity
- Incorporation would not be alien to the Scottish legal culture
- Reserved matters do not pose an insurmountable obstacle to incorporation

REASONS TO INCORPORATE

- Incorporation would signal that child-specific human rights are taken seriously in Scotland
- Child-specific rights would become enforceable in Scotland
- Incorporation would get closer to achieving the goal of making Scotland “the best place in the world to grow up in”

* Professor of Child and Family Law, Stirling Law School, University of Stirling, Scotland, (elaine.sutherland@stir.ac.uk) and Professor of Law, Lewis and Clark Law School, Portland, Oregon (es@lclark.edu).

I have taught child and family law for over thirty years in Scotland, at the Universities of Edinburgh, Glasgow and Stirling, and abroad and am the author of numerous scholarly articles and books on the subject. I respond regularly to consultations on law reform and social policy by the Scottish Parliament, the Scottish Government and other relevant bodies and have served on the Family Law Committee of the Law Society of Scotland for many years.

Background

1. In considering the Children and Young People (Scotland) Bill, one of the many important issues being addressed by the Education and Culture Committee of the Scottish Parliament is whether the legislation should incorporate the United Nations Convention on the Right of the Child (the UN Convention) into the law of Scotland.
2. In my written submissions made during the consultation process on the draft Bill, I argued in favour of incorporation¹ and this supplementary evidence relates to that topic only. Since I am currently out of the country, it was not possible for me to give oral evidence to the Committee, but it has become apparent that the issue of incorporation is a matter on which the Committee has received conflicting evidence. My concern is that misconceptions and myths have emerged in the course of the Committee's deliberations and that the Minister for Children and Young People appears to be accepting some of them as accurate.² This written submission addresses them, before reiterating the reasons why much of the UN Convention should be incorporated into Scottish law. It is my hope that my evidence will be of assistance to the Committee.

MISCONCEPTIONS AND MYTHS

3. The Committee has received evidence from a wide variety of sources, but some of that evidence is inaccurate or misleading and is challenged here.
 - **It is incorrect to assert that “the UN Convention was not drafted or worded to create directly enforceable legal rights in the domestic legal system”**
4. In his oral evidence to the Committee, my colleague, Professor Kenneth Norrie, asserted that, “the UN Convention was not drafted or worded to create directly enforceable legal rights in the domestic legal system”³ and his written evidence contains a similar statement.⁴
5. That is simply not true in respect of much of the Convention. The dedicated experts from almost all nations who, at the behest of the United Nations, devoted ten years to drafting the UN Convention had every intention that their work would lead to substantive rights for children and young people around the world. How these rights are implemented in individual countries is a matter for each country, of course, but the United Nations Committee on the Rights of the Child (UN Committee), the body that monitors compliance with the UN Convention, made

¹ Response of Elaine E Sutherland, at: <http://www.scotland.gov.uk/Resource/0040/00406353.pdf>

² *Official Report, Education and Culture Committee*, 8 October 2013, cols 2947-2948, at: <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8550&mode=pdf>

³ *Official Report, Education and Culture Committee*, 3 September 2013, col 2682, at: <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8464&mode=pdf>

⁴ *Written Evidence of Professor Kenneth McK Norrie to the Education and Culture Committee*, 3 August 2013, para 5(i), at:

[http://www.scottish.parliament.uk/S4_EducationandCultureCommittee/Children%20and%20Young%20People%20\(Scotland\)%20Bill/NorrieProfKennethMcK.pdf](http://www.scottish.parliament.uk/S4_EducationandCultureCommittee/Children%20and%20Young%20People%20(Scotland)%20Bill/NorrieProfKennethMcK.pdf)

clear its unequivocal support for incorporation of the Convention's key provisions when it noted:

"Incorporation should mean that the provisions of the Convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice."⁵

6. The UN Committee has repeatedly called on the United Kingdom to incorporate the UN Convention into domestic law.⁶
 7. Two points are worth noting in this context. First, it is not suggested that every article of the Convention should be incorporated. Parts of the Convention relate to administrative and housekeeping matters and it is simply not necessary to incorporate them. Those articles aside, other provisions may not be appropriate for incorporation. Then there is the issue of Convention rights dealing with matters reserved to Westminster which is addressed separately (see page 7, below). The Human Rights Act 1998 did not incorporate every article of the European Convention on Human Rights into the law in the various parts of the United Kingdom.⁷ Yet the 1998 Act has had an enormous impact in promoting human rights in Scotland and experience of incorporating the European Convention provides something of a model for how we might move forward on incorporating the UN Convention.
 8. Secondly, drafting a statute incorporating the UN Convention would require considered reflection, something from which the Human Rights Act 1998 benefitted. It is my belief that there is a wealth of talent in Scotland more than able to undertake the task.
- **The claim that "Only a tiny number of countries—three or four at most—have incorporated the convention into their law" is misleading.**
9. In his oral evidence to the Committee, Professor Norrie asserted that "only a tiny number of countries—three or four at most—have incorporated the convention into their law."⁸
 10. That statement is misleading, not only in terms of number, but, rather more significantly, because it fails to take account of the very different mechanisms countries employ in implementing treaty obligations. In 2007, the UNICEF Innocenti Research Centre reported that two-thirds of countries of the 52 in its

⁵ General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the child, (2003), CRC/GC/2003/5, para 20, at:

http://www2.ohchr.org/english/bodies/crc/docs/GC5_en.doc

⁶ Concluding Observations of the United Nations Committee on the Rights of the Child on the United Kingdom (2002), CRC/C/15/Add.188, paras 8 and 9 and Concluding Observations of the United Nations Committee on the Rights of the Child on the United Kingdom (2008), CRC/C/GBR/CO/4 , para 7.

⁷ For example, articles 13 (right to an effective remedy) and 15 (derogation in time of emergency) are not included.

⁸ Official Report, Education and Culture Committee, 3 September 2013, col 2683, at: <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8464&mode=pdf>

study, chosen for geographic distribution, had incorporated the Convention into domestic law.⁹ More recent research by a number of respected academics, published by UNICEF in 2012, examined 12 countries and found that the UN Convention had been formally incorporated into the law in three of them: Belgium, Norway, Spain.¹⁰

11. The 2007 study gives greater insight into what is really happening. In some 22 of the 52 countries it examined,¹¹ treaty obligations are not only incorporated into national law automatically, they take precedence over it. Thus, formal incorporation is unnecessary. In a further 10 countries,¹² treaty obligations form part of domestic law, but do not prevail over it. In addition, some countries, like South Africa, have incorporated parts of the Convention into the domestic constitution.

12. So much for the numbers game. Perhaps the real point is made in the 2012 UNICEF study which found:

CRC incorporation in and of itself is significant. The very process of incorporation raises awareness of children's rights and the CRC in government and civil society. In countries where there has been incorporation, interviewees felt that children were more likely to be perceived as rights holders and that there was a culture of respect for children's rights. Whilst incorporation provided opportunities for strategic litigation given that the CRC was part of the domestic legal system, its main value was thought to be in the strong message it conveyed about the status of children and children's rights, and the knock-on effects for implementation of children's rights principles into domestic law and policy."¹³

13. Even if only three or four countries had incorporated the UN Convention into domestic law – and as has been demonstrated that is not the case – it would be no reason for Scotland to hang back. The real question is whether we want the country to be a leader or a follower in terms of respecting children's rights. Given the benefits of incorporation, it is submitted that Scotland should be grasping the opportunity to incorporate with both hands.

⁹ *Law Reform and Implementation of the Convention on the Rights of the Child* (UNICEF Innocenti Research Centre, 2007), at 5-7, at: http://www.unicef-irc.org/publications/pdf/law_reform_crc_imp.pdf

¹⁰ Laura Lundy, Ursula Kilkelly, Bronagh Byrne and Jason Kang, *The UN Convention on the Rights of the Child: a study of implementation in 12 countries* (UNICEFUK, 2012), para 1.3, at: http://www.unicef.org.uk/Documents/Publications/UNICEFUK_2012CRCImplementationreport%20FINAL%20PDF%20version.pdf

¹¹ Argentina, Belarus, Burkina Faso, Chile, Costa Rica, the Czech Republic, Guatemala, Honduras, Italy, Japan, Lebanon, Mexico, Morocco, Nepal, the Netherlands, Paraguay, Syria, Togo, Tunisia, Russia, Slovenia and Viet Nam.

¹² Belgium, Bolivia, Cyprus, Egypt, Ethiopia, Finland, Korea, Portugal, Rwanda and Sudan (prior to division).

¹³ *The UN Convention on the Rights of the Child: a study of implementation in 12 countries*, above, para 1.3.

- **Beware of unfounded spectres and fears**

14. In his written evidence to the Committee, Professor Norrie highlighted a number of dire and unintended consequences that he claimed would result from incorporation of the UN Convention into Scottish law and he cited the examples of the downgrading of the place of the welfare of the child and of the raising of the age of marriage and consent to sexual activity.¹⁴ This introduces spectres and fears that, in reality, are unfounded.
15. The UN Convention is a sophisticated document. It does not simply lay out a list of human rights for children. Rather, it sets them in the context of an appreciation of the importance of parents and other caregivers in guiding children and is permeated by the concept of the “evolving capacity” of the child or young person.¹⁵ Grasping the significance and nature of this evolving capacity is crucial to understanding the whole structure and import of the Convention.
16. It is stating the obvious, perhaps, to note that the term “children and young people” covers a wide range of individuals with very different needs and capabilities. In response to that, the Convention is premised on the notion that the child’s capacity to exercise rights responsibly will develop over time. By recognising the child as a rights-holder from birth, the Convention allows for that process of development to begin, with the protective role of parents being greatest in respect of young children and the young person’s own capacity expanding with age. In short, the Convention provides for rights that operate differently in different contexts.
17. The suggestion that incorporating the Convention would downgrade welfare because it makes it “a primary consideration”, when Scots law accords it the status of “the paramount consideration”, is unfounded. Any difference between the two terms is the sort of things with which academics like to amuse ourselves, but any practical difference is minimal.¹⁶ In any event, where domestic law accords the child *more* rights than the Convention, then these greater rights prevail, something made perfectly clear in the UN Convention itself when it provides, in article 41, that:
 “Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:
 (a) The law of the State Party; or

¹⁴ *Written Evidence of Professor Kenneth McK Norrie to the Education and Culture Committee*, 3 August 2013, above, para 5(iv).

¹⁵ See, for example, article 5 which provides: “States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”

¹⁶ Take, for example, the case of divorce. There is ample evidence that parental divorce can have an adverse impact on children. It could be argued that, if the welfare of the child is accorded “paramount” status, then parents of children under 18 would simply not be permitted to divorce. If the child’s welfare is only a “primary” consideration, then the interests of others, like parents wishing to divorce, would also carry weight, rendering it more likely that divorce would be available to them. Yet, as we know, the paramountcy of welfare in Scottish law has not precluded parental divorce.

(b) International law in force in that State.”

18. It is no part of the scheme under the UN Convention to set fixed age limits on marriage or sexual consent.¹⁷ Nor does the UN Committee seek to dictate to countries what age limits should be set. When commenting on the progress made in implementing the Convention in the United Kingdom (and, thereby, Scotland), the Committee has never raised concern over the age of marriage or sexual consent.
19. Certainly, the Committee sometimes offers general guidance to all states in its *General Comments*.¹⁸ However, even there, it couches its guidance in diplomatic, advisory language. Thus, for example, when commenting on the age of criminal responsibility, it noted the wide range of ages of criminal responsibility adopted in different states, “from a very low level of age 7 or 8 to the commendably high level of 14 or 16”.¹⁹

- **Incorporation would not be alien to the Scottish legal culture**

20. The idea, again advanced by Professor Norrie,²⁰ that incorporation would be alien to the Scottish legal culture is inaccurate. Scots law has its roots in the civilian legal systems of Europe. Common law has been overlaid on these roots, with the result that Scotland is one of a small number of mixed jurisdictions, drawing on the traditions of both legal families. The Scottish judiciary has long experience of interpreting statutory and non-statutory concepts. So, for example, a whole body of case law has developed interpreting the subtle concept “the welfare of the child”. Similarly, the courts have long experience of addressing the, sometimes conflicting, rights of different stakeholders. I have no doubt that the Scottish legal system is operated by individuals with the talents necessary to deal with the rights under the UN Convention.
21. While the UN Convention embodies some rights that are fairly straightforward, others are more aspirational. The fundamental point to bear in mind, however, is that it is not anticipated that every article of the Convention would be incorporated and it will be for those drafting the statute to distinguish the solid from the aspirations and to find the appropriate means of incorporation. Even in the context of more aspirational rights, there is abundant guidance on how the right should be implemented in the form of reports from the United Nations Committee

¹⁷ The definition of “child” aside, the only place where a fixed age limits appears in the context of the UN Convention is in relation child soldiers. Article 38(2) of the Convention requires states to “take all feasible measures to ensure” that persons under the age of 15 do not take direct part in hostilities. Later, an Optional Protocol, ratified by the United Kingdom in 2003, was added to the Convention prohibiting compulsory recruitment of persons under the age of 18 into the armed forces and urging states to raise the age for voluntary recruitment: *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (2000), General Assembly resolution 54/263. Arguably, the special case of child soldiers justifies a more directive approach.

¹⁸ These can be found at: <http://www2.ohchr.org/english/bodies/crc/comments.htm>

¹⁹ *General Comment No 10, Children’s rights in juvenile justice*, CRC/C/GC/10, 25 April 2007, para 30.

²⁰ *Official Report, Education and Culture Committee*, 3 September 2013, col 2682.

on the Rights of the Child, including its highly-informative *General Comments*.²¹ A Scottish court would not be bound by these sources, of course, but it could use them in appropriate cases just as it used other resources, like reports from the Scottish Law Commission and academic texts.

- **Reserved matters do not pose an insurmountable obstacle to incorporation**

22. As a matter of principle, it would be highly desirable for the UN Convention to be incorporated into all of the legal systems across the United Kingdom. Given the current constitutional framework, there would be practical benefits. That, however, is unlikely to happen in the foreseeable future, but inaction by Westminster is no reason for the Scottish Parliament to do nothing.

23. The issue of reserved matters must be addressed, of course, and any incorporating statute would have to exclude matters reserved to the Westminster Parliament (at least for the time being). Again, this is not an insurmountable obstacle to the Scottish Parliament incorporating such parts of the UN Convention into Scottish law as are within its competence.

REASONS TO INCORPORATE

- **Incorporation would signal that child-specific human rights are taken seriously in Scotland**

24. Children in Scotland already have rights under the European Convention on Human Rights so, in that sense, the first step has been taken to acknowledge them as rights-holders. It is important to remember, however, that the European Convention is primarily adult-focussed and was drafted at a time when the concept of children's rights was barely recognised. The UN Convention, in contrast, is child-centred, its primary focus being the rights of children.

25. Incorporating the UN Convention into Scots law would acknowledge that the child-specific human rights of children and young people are as deserving of recognition as are the human rights available to all under the European Convention. It would amount to taking children's rights seriously – showing that, in Scotland, their rights have the full force of the law and are considered in all contexts.

- **Child-specific rights would become enforceable in Scotland**

26. Having rights is something of an empty concept if one cannot enforce them. With the coming into force of the Human Rights Act 1998, the substantive rights set out in Section I of the European Convention, along with the Protocols which have

²¹ These can be found at: <http://www2.ohchr.org/english/bodies/crc/comments.htm>

been ratified by the United Kingdom,²² became part of the domestic law of the various parts of the country.²³ Proposed legislation is now subject to pre-scrutiny to determine its compatibility with the Convention; the courts may issue a “declaration of incompatibility” in respect of Westminster legislation,²⁴ while Acts of the Scottish Parliament will be declared unlawful if they are inconsistent with the provisions of the Convention;²⁵ and acts of public authorities may be challenged and declared unlawful where they violate the Convention.²⁶ In addition, wherever possible, all legislation must be read so as to be compatible with the European Convention²⁷ and Convention rights must be interpreted with full regard to the interpretation of the European organs, particularly the European Court of Human Rights.²⁸

27. The UN Convention, in contrast, has a lesser status. It is no more than a treaty obligation and, as such, every effort is made to honour the obligations under it. So, for example, where a statute is ambiguous, it will be interpreted in a way that will lead to compliance with the UN Convention.²⁹ However, where a provision of Scottish law is clear, the fact that it is unambiguously inconsistent with the UN Convention means that the statute, rather than the Convention, will prevail.³⁰ There is no pre-scrutiny of proposed legislation to check whether it complies with the UN Convention and acts of public authorities are not open to challenge simply because they violate it.

28. By incorporating the UN Convention into Scottish law, the child-specific rights it contains would become enforceable through a process that is as accessible and available as is the process for enforcing rights under the European Convention. This becomes particularly important when one remembers that a party who is unhappy with a domestic court’s decision on European Convention rights can, ultimately, take the case to the European Court of Human Rights. A party who is dissatisfied with the decision of a Scottish court on a matter governed by the UN Convention has no such “last resort” since there is no Court of the Rights of the Child.³¹

- **Incorporation would get closer to achieving the goal of making Scotland “the best place in the world to grow up in”**

²² Protocols 1, 6 and 13.

²³ Human Rights Act 1998, s.1(1).

²⁴ Human Rights Act 1998, s. 4(2).

²⁵ Scotland Act 1998, s.29.

²⁶ Human Rights Act 1998, s.6.

²⁷ Human Rights Act 1998, s. 3(1).

²⁸ Human Rights Act 1998, s. 2(1).

²⁹ See, e.g., *Mortensen v Peters* (1906) 8F. (J.) 93; *Waddington v Miah* [1974] 1 W.L.R. 683; *ex p. Brind* [1991] 2 W.L.R. 588.

³⁰ See, e.g., *Kaur v Lord Advocate*, 1980 S.C. 319; *Salomon v Commissioners of Customs and Excise* [1967] 2 Q.B. 116; *I.R.C. v Collico Dealings Ltd* [1962] A.C. 1.

³¹ While the Optional protocol on the Rights of the Child on a Communications Procedure, General Assembly resolution 66/138, 27 January 2012, established what is, effectively, a complaints procedure, that protocol is not yet in force and, in any event, is unlikely to be ratified by the United Kingdom any time soon, if it is ratified at all.

29. Referring to the Children and Young People (Scotland) Bill, the Minister for Children and Young People expressed the view that, “With the bill, we have set out our ambition to make Scotland the best place in the world to grow up in.”³² In many respects much fine work has already been done in Scotland in implementing the obligations under the UN Convention. So, for example, children’s participation rights are facilitated at various levels of government³³ and legislation requires that children’s views are heard when decisions affecting them are taken by courts and tribunals in both the “private law” and “public law” spheres.³⁴ Thus, incorporating the UN Convention would not effect a sea-change in the country but, rather, would be the continuation of a process already begun.
30. Yet the Minister’s goal remains just that: a goal. There is much room for improvement in terms of respecting children’s rights. So, for example, there remains concern over both the hearing of children’s views and their impact on outcomes in the court setting³⁵ and the defence of “justifiable assault”, available to parents who hit their children (within the permitted parameters),³⁶ is a continuing embarrassment on the world stage.
31. By incorporating the UN Convention into Scottish law, Scotland would join that band of world-leaders that have already done so, whether by specific legislation or otherwise. Certainly, Scotland will not become “the best place in the world to grow up in” as long as we lag behind the more proactive nations of the world.

Elaine E Sutherland
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³² *Official Report, Education and Culture Committee*, 8 October 2013, col 2944.

³³ That the Scottish Government includes a Minister for Children and Young People is a good example, as is the Scottish Youth Parliament.

³⁴ Express statutory provision began with the Children (Scotland) Act, ss 11 and 16, and has continued through more recent legislation, including the Adoption and Children (Scotland) Act 2007 and the Children’s Hearings (Scotland) Act 2011.

³⁵ Karen Laing & Graeme Wilson, *Understanding Child Contact Cases in Scottish Sheriff Courts* (Scottish Government, Edinburgh, 2010), available at:

<http://www.scotland.gov.uk/Resource/Doc/334161/0109246.pdf>

³⁶ Criminal Justice (Scotland) Act 2003, s 51.