

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

### **Introduction**

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

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

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

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

### **Overview**

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

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

The draft guidance attached to this consultation was developed with support from stakeholders.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

This consultation seeks your views on the draft statutory guidance.

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

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

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

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

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

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

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

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

## **CONSULTATION PROCESS**

### **Responding to the Consultation**

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

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

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

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

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

## CONSULTATION QUESTIONS

### Part 2 Guidance

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

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

- Yes  
 No

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

- Strongly agree  
 Agree  
 Neither agree nor disagree  
 Disagree  
 Strongly disagree

Please give us your views:

The information covered in Section 3 is clear and provides a good amount of information about the UNCRC and the background to incorporation.

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

- Strongly agree  
 Agree  
 Neither agree nor disagree  
 Disagree  
 Strongly disagree

Please give us your views:

We support calls from partners including [Together](#) (Scottish Alliance for Children's Rights), that it should be made clear from the outset that 'UNCRC requirements' includes the rights and obligations arising from the first and second optional protocols, as well as from the UNCRC itself.

We welcome the clear statement that independent and third-sector organisations may meet the definition of ‘public authority’ and think that the guidance could be improved by further examples of ‘public authorities’ and ‘functions of a public nature’ where this concerns the private and third sector.

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

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

Please give us your views:

This section could be helpfully improved by discussing the definition of a public authority, functions of a public authority and the nature of these duties prior to discussing remedies.

There is a need to clarify from the outset that the compatibility duty applies to both actions and omissions/failures to act (s.6(1)). Without this clarification there is a risk that omissions/failures to act are not adequately considered.

5. Section 4.2.3 ‘**Definition of a public authority**’ is clear.

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

Please give us your views:

There remains uncertainty as to what might constitute a ‘public authority’ for the purposes of the act. Although the three reflective questions on p18 are useful starting point, they may not give organisations in the Private, Voluntary, and Independent sector sufficient clarity. Case examples detailing the different ‘faces’ of a ‘public authority’ as part of the annex may be a useful way of supporting organisations and bodies to identify their role and responsibilities within the legal framework more clearly.

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

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

Please give us your views:

Definition of functions of a public nature is not sufficiently clear.

The guidance needs to give further explanation that “functions of a public nature” can include actions/inactions by private/third sector organisations under contract or other arrangement with a public authority, such as provision of secure care or school transport. The guidance also needs to be clear that actions/inactions by private/third sector organisations may be covered even if they are not publicly funded – for example non-publicly funded childcare or education. Case examples may be a useful way of making this information more accessible.

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

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

Please give us your views:

Alongside our partners Together, we welcome the opening statement that nothing in the guidance should be interpreted as preventing a public authority from acting compatibly in any situation where they are carrying out functions in relation to children. This reflects Scottish Government’s commitment to a maximalist approach.

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

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

We wish to support comments made by our partners, Together (Scottish Alliance for Children’s Rights):

**Article 2: Non-discrimination**

The opening line of this section is inaccurate. The UN Committee has made clear that Article 2 is not an obligation to “treat all children equally”:

“It should be emphasized that the application of the non-discrimination principle of equal access to rights does not mean identical treatment.” (General Comment 5, paragraph 12).

Article 2 is about ensuring that children have “equal access to their rights”. This is a fundamental distinction that recognises that some children will need more support to access their rights than others.

**Article 12: Views of the child**

We encourage Scottish Government to revisit this section, drawing from the nine basic requirements for children’s right to be heard as set out in paragraphs 132-134 of General Comment 12.

While it is very welcome to see reference to General Comment 12, the guidance should also make clear that the other General Comments provide detailed guidance on implementing Article 12 in specific contexts and for certain groups of children.

For example, we would encourage Scottish Government to refer to specific guidance in relation to:

- Adolescents (General Comment 4 and General Comment 20)
- Asylum-seeking and unaccompanied children (General Comment 6, General Comment 22 and General Comment 23)
- Babies and young children (General Comment 7)
- Disabled children (General Comment 9)
- Indigenous children (General Comment 11)
- Children affected by violence (General Comment 13)
- Children in the justice system (General Comment 24)

- Children affected by climate change (General Comment 26)

### **Respecting, protecting and fulfilling children's rights**

We welcome the diagram that clearly sets out the three categories of human rights obligations. We note that the descriptions provided are very brief and that it may be difficult to understand the examples that follow as a result. We believe that more detailed explanations would be beneficial, with an example 'built in' for each.

Potential text could be:

**“Respect:** This obligation requires States to refrain from interfering with the enjoyment of human rights. In terms of children's rights, it means that the government must not take any actions that infringe upon these rights. For example, respecting children's rights involves not taking forward policies that discriminate against children.

**Protect:** States must protect individuals from human rights abuses, including those that might be committed by private bodies. This involves establishing mechanisms to prevent violations of children's rights by third parties, such as protection from abuse by parents, carers, or companies. For example, this could include legislating and enforcing laws that prevent child labour or exploitation.

**Fulfil:** This requires States to take positive action to facilitate the enjoyment of basic human rights. Regarding children's rights, this means ensuring that all children have access to education, healthcare, and an adequate standard of living. For example, fulfilling children's rights can involve a wide range of actions, from funding schools and hospitals to ensuring that legal frameworks support the best interests of children.”

### **Progressive realisation**

Progressive realisation (and its constituent concepts) stem from ICESCR Article 2(1) – later captured by Article 4 UNCRC. Progressive realisation includes:

- Maximum available resources;
- Minimum core obligations;
- Non-retrogression.

It would be beneficial for the guidance to present these constituent concepts as sub-headings under “progressive realisation”.

We welcome Together's suggested draft for this section which highlights the inter-related nature of the above concept:

*“Progressive realisation requires States to work gradually towards the full realisation of rights, based on the maximum resources available. This means that States are expected to take continuous and purposeful steps forward, rather than achieving full compliance instantly. In the context of the UNCRC, progressive realisation particularly applies to economic, social, and cultural rights. This includes ensuring the right to education, the highest attainable standard of health, and an adequate standard of living. States are required to demonstrate that they*



*are making measurable progress towards these goals, based on their available resources, and are also expected to prioritise these rights in their policy and budget decisions. Progressive realisation does not mean indefinite postponement of action but rather a steady and purposeful advancement towards the full realisation of human rights, while immediately respecting and protecting the rights that can be addressed without substantial resource allocation. It encompasses the principles of:*

*Use of Maximum Available Resources: States are obliged to utilise the maximum of their available resources to fulfil human rights. This includes financial, natural, human, technological, and organisational resources.*

*Non-Retrogression: Under this principle, States must avoid taking steps backwards. In times of economic crisis, regressive measures may only be considered after assessing all other options and ensuring that children are the last to be affected, especially children whose rights are at risk.*

*Minimum Core Obligations: Despite the allowance for phased implementation, States have immediate obligations to ensure at least the minimum essential levels of each right are met.”*

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

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

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

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

Please give us your views:

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

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

Please give us your views:

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

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

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

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

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

Please give us your views:

**Annex D Scope of the Compatibility Review Framework**

The Framework is a tool to help public authorities review their compatibility with the “UNCRC requirements” as defined by the UNCRC Act. As has been noted earlier in the guidance, the “UNCRC requirements” has a specific meaning which, although closely related, is distinct from the UNCRC and its optional protocols due to the limits of devolved powers. We echo the suggestions made by partners to include an explanation that the Framework reflects the “UNCRC requirements”

as set out in the schedule to the Act, rather than the UNCRC and the optional protocols per se.

### **Aim and scope of this guidance**

At p5, the document reads: “[t]his guidance aims to provide meaningful support for...any organisation who is or would be a ‘public authority’ as defined in sections 6(5), (6), (7) and (8) of the Act **and** those acting under contract or other arrangement” (emphasis added).

As mentioned earlier in our response, there needs to be clarity that those acting “under contract or other arrangement” **are** public authorities within the meaning of the Act (s6(5)(a)(iii) and s6(6)). The use of “and” creates a risk of confusion around the definition that these contracted bodies are something ‘other’.

We support the suggestion from partner Together that “This guidance aims to provide meaningful support for....any organisation who is or would be a ‘public authority’ as defined in sections 6(5), (6), (7) and (8) of the Act **including** those acting under contract or other arrangement” (emphasis added).

## **Part 3 Guidance**

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

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

- Yes  
 No

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

- Strongly agree  
 Agree  
 Neither agree nor disagree  
 Disagree  
 Strongly disagree

Please give us your views:

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

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

Please give us your views:

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

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

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

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

Please give us your views:

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

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

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

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

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

Please give us your views:

We would like to see reporting requirements include budget scrutiny and spending decisions on advancing children's rights.