

Consultation on incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland

Analysis Report

November 2019

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Presented to the **Scottish Government** by
Arad Research

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1. Introduction

Arad Research was commissioned by the Scottish Government to analyse and report on the responses to the Scottish Government's consultation on incorporating the United Nations Convention on the Rights of the Child into domestic law in Scotland.

1.1 About the consultation

The Scottish Government's mission is to achieve the national outcome for children and young people as set out in the *Protecting Scotland's Future: the Government's Programme for Scotland 2019-2020*: "we grow up loved, safe and respected so that we realise our full potential". The Scottish Government believes delivering the rights of children and young people, as enshrined in the UN Convention on the Rights of the Child (UNCRC), is fundamental to making children's rights real and Scotland the best place in the world to grow up. This year marks the 30th Anniversary of the UNCRC, the most complete statement of children's rights ever produced. The UNCRC is the most widely ratified human rights treaty in history, covering all aspects of a child's life.

To underline its commitment, the Scottish Government intends to deliver new legislation in this parliamentary session to incorporate the UNCRC into domestic law. In line with the Programme for Government 2018-19 commitment, this consultation sought views on the best way of incorporating the UNCRC within the context of Scots law, public services and the powers of the Scottish Parliament. The complete consultation document is [available online on the Scottish Government's website](#).

1.2 Approach to analysis

1.2.1 Consultation responses

A total of 162 responses were received to this consultation. Table 1.1. below presents detail on the different categories of respondent that contributed to the consultation (organisations were categorised based on advice from the Scottish Government). There were significantly higher numbers of responses from some types of respondent than others. The analysis in this report refers to the proportions of different types of respondent which raised particular views; however, significant caution must be taken in interpreting these proportions, due to the very low numbers of responses from particular types of respondent.

Table 1.1: Total number of consultation responses, by type of respondent

Respondent type	Total number
Individuals	30
Public bodies	29
Third sector	91
Academics	7
Legal profession/organisation	3
Other	1
Unspecified organisation	1
Total	162

1.2.2 Analysis methodology

Inception and scoping phase

Arad initially held an inception meeting with the Scottish Government to confirm the analytical approach, timescales for analysis and reporting, the format for presenting indicative high-level findings and the final report, and arrangements for transferring / managing data. Arad subsequently reviewed relevant consultation documentation to ensure that all members of the team were familiar with the policy context, proposals and consultation questions.

Initial review of responses

Arad first reviewed a sample of responses in an exploratory method. Based on available timescales, the total number of consultation responses received and previous experience of undertaking public consultation analyses, Arad judged it appropriate to review 50 responses to each question during this stage, to ensure appropriate coverage in this analysis. The purpose of this stage was to identify key response themes, types of respondent groups (individuals, organisations etc) and variation in depth of responses. The sample of responses was selected at random, ensuring that a different 50 responses to each question was selected for this initial review. The exploratory method focused on allowing researchers to identify key views or points arising in responses without reference to a previously established or assumed framework.

The research team used the findings from the initial review to develop an overarching analytical framework which guided the analysis of all remaining responses in a consistent manner. This process involved collaboration between researchers to agree a consistent approach to assigning themes to responses, identifying differences in views raised by different types of respondent and reporting.

Indicative high-level overview

Following the initial review stage, Arad presented a high-level indicative findings paper to the Scottish Government. This paper presented an initial overview of the main (and most frequently recurring) themes and views expressed per question, without elaborating on the supporting arguments or rationale in detail.

Full thematic analysis

Once the overarching analysis framework was established, the main analysis of consultation took place. This analysis occurred by means of an evidence log, which logged (or coded) the constituent group and a variety of themes arising in the responses. Qualitative analysis software was available to coders to facilitate this process where necessary. All consultation responses were analysed, and final analysis and reporting was facilitated by an easily navigated evidence log.

Responses which did not directly follow the consultation question structure

Out of the 162 responses, 36 were submitted in Word or PDF form (i.e. not submitted directly through the online consultation form). Each of these 36 responses was logged in the overarching evidence log alongside the online responses and was analysed.

1. Some of these Word or PDF responses followed the structure of the consultation questions to at least some extent (some answered the majority of the consultation questions, whereas some only answered a few). These responses were analysed in the same way as those submitted online and have therefore been included in quantitative data and qualitative analysis presented under relevant questions.
2. Other responses did not strictly follow the structure of the consultation questions. These were all reviewed firstly with the aim of identifying commentary which did in fact relate directly to particular questions – this commentary was then analysed as per step 1 above.
3. Commentary which did not directly relate to a particular question was also analysed, with findings presented in section 6 of this report.
4. With regard to the closed questions in the consultation (those which required a yes/no/don't know response), all 36 Word or PDF responses were reviewed during steps 1 and 2 to identify whether the respondent had clearly stated a yes/no/don't know opinion. If so, these responses have been counted within the closed question data. For example, if a response had started their response to a particular question by writing "yes, we agree that...", this was logged as a 'yes' response to the relevant closed question. Word or PDF responses which did not express a clear, unequivocal opinion was entered as 'not specified' in the closed question.

Quality assurance

The Project Director was the team's designated quality assurer during the study. The Project Director oversaw the analysis process, ensuring that all consultation questions, regardless of how they were submitted, were analysed consistently and fully in line with the framework agreed with the Scottish Government. The designated quality assurer also took overall responsibility for reviewing outputs, including the final analysis report and accompanying datasets.

This report

The analysis presented in this report is based on an analysis of all consultation responses. The analysis is presented for each individual consultation question (grouped under three Themes, as in the consultation document). The three Themes are:

- legal mechanisms for incorporating the UNCRC into domestic law;
- embedding children's rights in public services; and
- enabling compatibility and remedies.

The analysis for each question contains:

- Data from closed questions (yes / no / don't know) where relevant. This data is presented in two different tables.

- In each case, the first table presents data *including* respondents who did not answer the closed question. These respondents appear as two separate categories: ‘not answered’ applies to those who completed the online consultation and did not select a particular response; ‘not specified’ applies to those of the 36 Word or PDF responses which did not state an unequivocal yes/no/don’t know response, even if they did discuss the relevant question.
- The second table presents findings *excluding* those respondents who either did not answer or did not specify a response.
- This method ensures the proportions of respondents who agree or disagree with the closed question can be interpreted appropriately.
- A note on the number of respondents who provided written comments in relation to each question. Throughout the report, we have provided information on the number of respondents who expressed particular views. In some cases there is reference to ‘few’ or ‘several’ respondents. As a guide, where reference is made in the report to ‘few’, this corresponds to three or fewer respondents. The term ‘several’ refers to more than three but typically fewer than ten.
- A discussion of key views and issues arising in these written comments, with those views or issues raised most frequently or by the largest number of respondents presented first for each question.
- Notes on how prominently each view arose in the responses of different population groups. Section 1.2.1 (above) explains that significant caution must be exercised when interpreting these proportions, due to the very low numbers of responses from some respondent types.
- Finally, although a large number of responses were received overall, it is worth underlining that the views presented here should not be taken as representative of the wide range of stakeholders invited to respond to this consultation, nor should they be generalised too broadly. This analysis reflects only the views of those individuals and organisations who chose to respond.

In this document we use the term ‘direct incorporation’ to refer to a method of incorporation that takes the content of an international convention and gives it effect in domestic law – essentially by lifting the wording from the international convention and putting it into domestic law. Some respondents use the term ‘full incorporation’ to describe this model of incorporation. Where the term ‘full incorporation’ is used in excerpts from responses, this has not been changed.

Section 5 includes a stand-alone analysis of 13 responses which specifically represented the views of children and young people. These 13 responses are also considered within the overall analysis in sections 2, 3 and 4.

Appendix A includes a list of consultation respondents who agreed to have their responses published (either including or excluding an individual’s name).

2. Theme 1

The focus of the questions under theme 1 of the consultation was the legal mechanisms for incorporating the UNCRC into domestic law.

2.1 Question 1

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

Option	Total	Percentage
Yes	102	63%
No	7	4%
Don't know	15	9%
Not answered	21	13%
Not specified	17	10%

n=162

Option	Total	Percentage
Yes	102	82%
No	7	6%
Don't know	15	12%

n=124

A total of 122 respondents provided written comments to explain their views. The key views arising in these comments are set out below, in order of frequency.

The most popular view expressed by respondents was that **the element of the framework that prohibits public authorities from acting incompatibly with the ECHR should be replicated for the UNCRC**. This view was expressed by half of those who provided comments (62 respondents). This would ensure that the incorporated UNCRC is binding, not guiding, for public authorities. This view was raised by just over half of third sector organisations (40 respondents), just under half of public bodies (11 respondents) and a quarter of individuals (5 respondents). It was also raised by 4 out of 6 academics and 1 out of 3 legal professions/organisations.

“Section 6 of the Human Rights Act 1998 prohibits public authorities from acting incompatibly with the Act. We believe it is vital that the chosen model for incorporation makes it unlawful for public authorities to act incompatibly with the UNCRC and the Optional Protocols which the UK has signed up to. This will achieve the goal of ensuring the UNCRC is binding and not just guiding.” (Charity / non-profit organisation)

Two-fifths of respondents who provided comments (49 respondents) suggested that **the element of the framework that ensures substantive and legal remedies when a violation occurs should be included**. These respondents commented that for the incorporation of the UNCRC to be meaningful, children’s rights must be enforceable in a court of law. In other words, rights must be justiciable and legal redress must be available for children’s rights to be fully protected. On occasion, respondents support this view by noting that the UN Committee on the Rights of the Child (the UN Committee) has made clear that for rights to have meaning, effective remedies must be available to redress violations. These points were raised by just under half of third sector organisations (33 respondents), just over a fifth of public bodies (5 respondents) and a fifth of individuals (4 respondents). It was also raised by 4 out of 6 academics and 1 out of 3 respondents from legal professions/organisations.

“One of the major critiques of the international rights-based framework is the lack of enforcement mechanisms (Hollingsworth, 2017; Kilkelly, 2008b; Goldson and Kilkelly, 2013), so we would argue that it is particularly important that, as in the HRA, rights can be invoked before the courts as a means of upholding children’s rights.” (Children’s rights organisation)

Over a quarter of those who provided comments in response to this question (34 respondents) expressed the view that **the element of the framework that requires legislation to be compatible with the provisions set out in the UNCRC should also be included**. These respondents explained that this requirement means there should be a statement of compatibility made when introducing a Bill to the Scottish Parliament. They also explained that courts should have power to declare legislation incompatible, necessitating amendments to the legislation (although there was minimal discussion of whether such a power comprises an ability to make a statement of incompatibility or a ‘strike down’ power). They suggest that this element would ensure children’s rights are at the forefront of legislative developments in Scotland, as long as there is sufficient scrutiny of declarations of compatibility. These issues were raised by just under a third of third sector organisations (22 respondents), under a fifth of public bodies (4 respondents) and under a fifth of individuals (3 respondents). It was also raised by 3 out of 6 academics and 1 out of 3 respondents from legal professions/organisations.

“Like the requirement in Section 19 of the Human Rights Act, [we believe] that for every bill introduced to the Scottish Parliament, Scottish Ministers must include a statement of compatibility with the UNCRC and Optional Protocols. This move would ensure children’s rights are at the forefront of policy development and legislative change in Scotland.” (Children’s rights organisation)

Over a quarter of those who provided comments in response to this question (34 respondents) **agreed in general terms that the framework based on the Human Rights Act 1998 (HRA) is an appropriate existing model to follow.** These respondents commented that the HRA framework is a model that has been proven to be effective and key framework elements are already familiar to public authorities. The HRA framework is seen to include suitable and successful mechanisms for embedding international conventions into domestic law, which have already been ‘tried and tested’ at UK level. Respondents commented that the HRA framework already delivers important protections for human rights which can also be secured for children’s rights through following a similar framework. This view was raised by just under a third of third sector organisations (21 respondents), just over a fifth of public bodies (5 respondents) and a fifth of individuals (4 respondents). It was also raised by 1 out of 6 academics and 2 out of 3 respondents from legal professions/organisations.

“The HRA has been part of our domestic law for some 20 years now. The framework has been tried and tested. Those working with the HRA, for example employers, solicitors and the Courts, broadly know how the model works. As such, it would be beneficial for the framework of the HRA to be followed in the model for incorporation of the UNCRC into domestic law.” (Legal profession/organisation)

Just under a fifth of those who provided comments in response to this question (22 respondents) **expressed general agreement with the Incorporation Advisory Group convened by Together and the Children & Young People's Commissioner Scotland** and supported the HRA framework approach reflected in their draft Children’s Rights (Scotland) Bill 2018 contained within the consultation.¹ These respondents commented that the approach to incorporation based on the HRA framework set out by these key stakeholders is the appropriate way in which to make use of the existing HRA model of protecting human rights. This issue was raised by just over a quarter of third sector organisations (18 respondents). It was also raised by 2 out of 20 public bodies and 2 out of 6 academics.

Over a tenth of those who provided comments in response to this question (17 respondents) noted that **the element of the framework that requires legislation to be read and give effect in a way which is compatible with the ECHR should be included.** Separate but related to the theme of ensuring legislation is compatible, these respondents emphasised the need for courts and tribunals to interpret and apply primary and secondary legislation in a way which is compatible with the rights given effect by the incorporation of the UNCRC. These interpretative obligations are discussed further in responses to question 21 of this consultation. This view was raised by over a tenth of third sector organisations (10 respondents) and over a tenth of individuals (3 respondents). It was also raised by 1 out

¹ <https://www.togetherscotland.org.uk/media/1200/childrens-rights-scotland-bill-2019.pdf>

of 20 public bodies, 2 out of 6 academics and 1 out of 3 respondents from legal professions/organisations.

Just over a tenth of respondents who provided comments in response to this question (15 respondents) **also expressed general support for the direct incorporation of the UNCRC, or commented that whatever framework is used, the UNCRC should be incorporated 'in its entirety'**. These respondents suggested this was necessary to ensure children's rights are fully protected within Scottish domestic law and that protections are implemented without bias, ensuring the rights of children are protected across the board. Respondents commented that the UNCRC can only fully ensure children's rights when incorporated as a whole and without any adjustments. This view was raised by just over a tenth of third sector organisations (9 respondents) and over a tenth of individuals (3 respondents). It was also raised by 1 out of 20 public bodies and 2 out of 6 academics.

A further tenth of respondents who provided comments (13 respondents) expressed support for **the principle of incorporation in general, which respondents foresee will have a positive impact on children's rights and represents a positive step forward in Scottish leadership for children's rights**. Rather than focusing on key elements of the HRA framework, these respondents commented that incorporation into domestic law is the most certain way of placing children's rights high on Scotland's public agenda and improving the lives of children in Scotland. This view was raised by less than a tenth of third sector organisations (5 respondents) and a quarter of individuals (5 respondents). It was also raised by 2 out of 20 public bodies and 1 out of 6 academics.

"[We consider] that by following this model Scotland will become recognised as a world leader in children's rights, and that this is a critical step in making Scotland a fair, compassionate and great country in which to grow up. We believe that the time for action is now and call on the Scottish Government to take swift and appropriate steps to enable full incorporation within the life of this parliament." (Charity / non-profit organisation)

Just over a tenth of those who provided comments in response to this question (13 respondents) noted that, **in addition to key elements of the HRA framework, there is a need to include a duty for public authorities to give due regard to the UNCRC while developing policy and making decisions**. These respondents noted that a further step should be taken to ensure Scottish public authorities take a preventative approach to protecting children's rights, through giving due regard to children's rights before violations occur. This view is discussed more fully in the analysis of responses to questions 2 and 3 of the consultation. It was raised by a tenth of third sector organisations (7 respondents) and a quarter of public bodies (6 respondents).

A further tenth of those who commented on this question (12 respondents) noted that **the intersection between incorporating the UNCRC and existing legislation (including the Scotland Act 1998 and the HRA) should be carefully considered when deciding on an appropriate incorporation framework**. These respondents emphasised that the scope of devolved powers must inform the overall incorporation approach, including whether or not the HRA framework is an appropriate model to follow. The overall incorporation approach must also be informed by potential tensions between children’s rights as provided for in the UNCRC and existing human rights legislation (including the rights of families and parents). This view was raised by a tenth of third sector organisations (7 respondents) and under a fifth of public bodies (4 respondents). It was also raised by 1 out of 3 respondents from legal professions/organisations who contributed to the consultation.

“Difficulties may arise if there were to be a conflict between the HRA, ECHR and the UNCRC. In our view, the HRA and ECHR would need to prevail. The HRA and ECHR protect the fundamental rights and freedoms which are central to democracy. The Scottish Parliament could not, in any event, pass legislation that conflicted with ECHR.” (Legal profession/organisation)

Other views were expressed by a small number of respondents (between 1 and 7 in total):

- Any framework for incorporation must ensure the rights of particular target groups are protected, such as disabled children (raised by third sector organisations and individuals).
- Any framework for incorporation must ensure children receive sufficient support or advocacy to exercise their rights (raised by third sector organisations and individuals).
- Additional non-legislative activities will also be necessary, alongside a legal framework for incorporation (raised by third sector organisations, a public body and an academic).
- That incorporation based on the HRA framework would reflect the views of the UN Committee on appropriate incorporation of the UNCRC (raised by third sector organisations, a public body and an academic).
- There are some limitations to the framework based on the HRA – specifically, the provisions in ECHR are sufficiently precise to be able to be applied within a court of law, unlike the UNCRC articles which are drafted in broader language to be applicable in different states and contexts (raised by academics, a third sector organisation and a respondent from a legal profession/organisation).
- Due regard should be given to international expertise and experience in incorporating the UNCRC (third sector organisations and academics).
- Respondents would value further clarity on how such an incorporation framework would be implemented in practice (raised by public bodies, one individual and one third sector organisation).

2.2 Question 2

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

Option	Total	Percentage
Yes	91	56%
No	13	8%
Don't know	15	9%
Not answered	25	16%
Not specified	18	11%

n=162

Option	Total	Percentage
Yes	91	76%
No	13	11%
Don't know	15	13%

n=119

A total of 115 respondents provided written comments to explain their views. The key views arising in these comments are set out below, in order of frequency.

The most popular view expressed by respondents was that alongside a duty to comply and provided substantive legal remedies, **it is necessary to legislate to require public authorities to have 'due regard' for children's rights**, ensuring a children's rights-based approach to decision-making, policy and practice. This view was expressed by just over a third who provided comments on this question (40 respondents). These respondents commented that having such a 'due regard' duty would commit duty bearers to putting children's rights at the forefront of their work, thereby upholding the rights of children in the first instance. It was raised by half of third sector organisations (34 respondents) and over a tenth of public bodies (3 respondents). It was also raised by 2 out of 18 individuals.

A similar proportion – over a third of those who responded (38 respondents) – noted that **there is a need to ensure a proactive, preventative approach to children's rights**, which addresses potential violations before they occur and before legal remedies become necessary. A proactive element to the framework was considered by respondents to be a key element of creating a strong children's rights culture and is seen to complement (not replace) reactive legal remedies and duties to comply. Respondents noted that the aim of this preventative approach would be to avoid a breach of children's rights from occurring, thereby avoiding the challenges and potential negative impact on children's wellbeing associated with legal routes for redress. These respondents commented that incorporation of the UNCRC should ensure children's rights are embedded in the way policy and practice is undertaken, and the UNCRC not just used as a mechanism for legal redress. This view

was raised by a little under half of third sector organisations (30 respondents). It was also raised by 2 out of 21 public bodies, 2 out of 18 individuals and 4 out of 5 academics.

“Along with the duty to comply, a pro-active duty on public authorities to promote rights-based policy and practice should be included in the legislation. Both duties are required to create a strong framework, that focuses on progressive realisation of children’s human rights.”
(Academic)

“Proactive duties and measures to promote rights-based decision-making should be included to complement the reactive duties and measures from the Human Rights Act framework. The ‘due regard’ duty provides an opportunity to hold Ministers to account to help protect children’s interests and influence policy outcomes, promoting rights-based decision-making and preventing breaches from occurring. The benefits of a ‘due regard’ duty has been recognised in a recent report by the Equalities and Human Rights Commission, concluding that the duty has ‘potential to lead to positive actions to enhance the status of treaty rights’.” (Children’s rights organisation)

Just under a fifth of those who responded to this question (18 respondents) noted that **the Incorporation Advisory Group’s draft Children’s Rights (Scotland) Bill 2018 includes key measures to ensure “due regard” and a proactive, preventative approach is taken by public authorities.** These respondents make specific reference to this draft Bill, noting that they support the provisions it sets out as they provide a good model for incorporation comprising both proactive and redress elements. This view was expressed by just over a fifth of third sector organisations (15 respondents). It was also raised by 1 out of 21 public bodies and 2 out of 5 academics.

Over a tenth of those who provided comments (16 respondents) commented that **the process for accessing legal remedies in the case of a breach of children’s rights should be clear and accessible for children.** These respondents felt that support, advocacy, guidance and clear information should be provided for children to fully exercise their rights. Respondents comment that enforcement mechanisms should be sufficiently powerful to uphold children’s rights and that children should be effectively supported throughout any process of legal redress. Respondents commented that implementation of legal remedies should always be child-centred, and on occasion, respondents referenced specific redress mechanisms which could be considered as appropriate models for accessible redress, notably Children’s Hearings and less formalised tribunals for resolution. This issue was raised by a tenth of third sector organisations (7 respondents), just over a tenth of public bodies (3 respondents) and just over a fifth of individuals (4 respondents). It was also raised by 2 out of 5 academics.

“The right to independent advocacy for children and young people should be enshrined within the framework, to support their Article 12 rights and provide an accessible mechanism for children and young people to seek redress where their UNCRC rights have not been upheld.” (Charity / non-profit organisation)

Over a tenth of those who provided comments in response to this question (12 respondents) noted that regardless of any decision taken relating to the framework for incorporation, **the UNCRC and associated rights and duties should be communicated clearly and effectively with duty bearers and rights holders**. These respondents commented that any framework for incorporation should be clear and practical. Comprehensive, accessible guidance should be produced for duty bearers to support preparation and planning, as well as training for staff in public authorities and those implementing Children’s Rights and Wellbeing Impact Assessments (CRWIA). The UNCRC, the incorporation framework, and rights to redress should be communicated in an accessible, inclusive manner to rights holders, to support them to exercise their rights. It was raised by under a tenth of third sector organisations (5 respondents) and a quarter of public bodies (5 respondents). It was also raised by 1 out of 18 individuals.

“To support and facilitate incorporation, we would support the development of comprehensive, accessible guidance, detailing how existing domestic legislation and processes comply with (or potentially go beyond) the UNCRC. To address concerns within public authorities about the potential impact of incorporation, and to support planning and preparation, we believe that this process should be undertaken before the UNCRC is given effect in domestic law.” (Other category of organisation)

Over a tenth of those who provided comments in response to this question (12 respondents) expressed the view that **the Rights of Children and Young Persons (Wales) Measure 2011 is seen as a model for a “due regard” requirement**. As with the Incorporation Advisory Group’s Children’s Rights (Scotland) Bill 2018, these respondents noted that the Welsh Measure example is an existing framework of incorporation that addresses the need for a preventative, proactive approach to incorporation. Respondents report that the Welsh Measure can therefore be used as a model for a suitable incorporation framework in Scotland, ensuring that the theme of prevention and ‘due regard’ discussed above is incorporated effectively. This view was raised by under a fifth of third sector organisations (11 respondents). It was also raised by 1 out of 5 academics.

Over a tenth of those who provided comments (12 respondents) expressed the view that **CRWIAs must be included within the framework for incorporation**. These respondents see CRWIAs as sitting alongside a preventative, proactive approach to UNCRC incorporation. Legislation and policy developments should include a consideration of their potential impact on children’s rights as identified in the incorporated UNCRC. Such

assessments ensure that appropriate due diligence is carried out before policies or legislation are implemented, and that statements of legislative compatibility are based on evidence. This view was raised by just over a tenth of third sector organisations (9 respondents) and just over a tenth of public bodies (3 respondents).

“We consider that the framework should also include a requirement that any legislation introduced in the Scottish Parliament should be accompanied by a child’s rights impact assessment (CRIA). Those carrying out the children’s right impact assessment must have training on the UNCRC and children’s rights. This would aid the Scottish Parliament’s scrutiny of the proposed Bill’s compliance with the UNCRC.” (Legal profession/organisation)

Under a tenth of those who provided comments to this question (10 respondents) noted that, **alongside the legal framework for incorporation, non-legislative actions will also be necessary**. Key examples of the types of activities noted by these respondents include producing a Children’s Rights Scheme, undertaking evaluations or audits, establishing a robust compliance reporting framework and establishing mechanisms for children and families to participate in an advisory capacity. These mechanisms are seen to add value to a legal framework by strengthening transparency and accountability. These issues were raised by just under a tenth of third sector organisations (6 respondents) and just under a fifth of public bodies (4 respondents).

Under a tenth of those who provided comments (8 respondents) expressed the view that **the rights of particular groups of children require additional focus through incorporation of the UNCRC**. These respondents commented that particular groups of children tend to face additional barriers in exercising their rights. Respondents provided examples of the types of groups which need particular consideration within the incorporation framework (including disabled children, looked after children and deaf or blind children) as well as national issues which need particular consideration (such as gender inequality). This view was raised by under a tenth of third sector organisations (6 respondents). It was also raised by 2 out of 18 individuals.

Under a tenth of those who provided comments (7 respondents) noted that **as part of giving due regard to children’s rights, public authorities should engage and consult with children and young people as part of their rights-based decision-making**. These respondents reported that children have a right to a say in decisions which affect their lives, including the design of an incorporation framework, promotion of children’s rights as provided for in the UNCRC and evaluation of the impact of UNCRC incorporation. On occasion, respondents specify that this could be achieved through the establishment of an advisory group. This view was expressed by under a tenth of third sector organisations (4 respondents) and over a tenth of public bodies (3 respondents).

“Youth voice is important as everyone deserves a say in decisions that will affect them, even young people! Young voices can be used to create the changes needed by everyone, and can offer a different perspective from the situations we're experiencing right now!”

“Youth participation and inclusion allows young people to feel listened to and have somewhere that they can be themselves and say what they're thinking. It allows young people and adults to work together to find solutions that suit everybody.” (Young people represented in response by public body)

2.3 Question 3

Do you agree that the framework for incorporation should include a “duty to comply” with the UNCRC rights? Please explain your views.

Option	Total	Percentage
Yes	125	77%
No	7	4%
Don't know	3	2%
Not answered	13	8%
Not specified	14	9%

n=162

Option	Total	Percentage
Yes	125	93%
No	7	5%
Don't know	3	2%

n=135

A total of 132 respondents provided written comments to explain their views. The key themes arising in these comments are set out below, in order of frequency.

The most popular view expressed by respondents was that a **duty to comply will ensure full legal compliance with UNCRC, by identifying an unequivocal responsibility for public authorities within Scottish domestic legislation.** This view was expressed by a little under half of those who provided comments (59 respondents). Compared to a ‘due regard’ duty, these respondents noted that a duty to comply will ensure that the UNCRC will become binding, not only guiding, for public authorities. Respondents commented that such a clear demand for compliance will ensure public authorities take appropriate actions and

make changes to their policy and practice. Following on from this, public authorities can be held accountable for their actions. Respondents commented that it is only through a duty to comply that incorporation of the UNCRC will have full legal force in Scotland. This view was raised by over half of third sector organisations (41 respondents), just under a third of public bodies (8 respondents) and just over a third of individuals (7 respondents). It was also raised by 2 out of 7 academics.

“Anything other than the inclusion of a “duty to comply” provision would not be full incorporation. We agree that incorporation must make children’s human rights binding and not just guiding. A duty to comply places binding duties on public authorities to respect and protect children’s rights and allows children to challenge breaches of their rights in domestic courts.” (Charity / non-profit organisation)

Over a quarter of those who provided comments in response to this question (36 respondents) expressed the view that **a duty to comply will ensure substantive legal redress is guaranteed when necessary**. These respondents commented that a duty to comply ensures that rights holders have clear, legal recourse options when their rights are violated. A legal structure must be in place to ensure rights holders can challenge duty bearers in a court of law if violations of their rights occur. As such, respondents commented that the incorporation of the UNCRC would only be meaningful if incorporation includes robust enforcement mechanisms; such mechanisms can only exist alongside a clear legal duty to comply. This issue was raised by just over a third of third sector organisations (28 respondents), just over a tenth of public bodies (3 respondents) and over a tenth of individuals (3 respondents). It was also raised by 2 out of 6 academics.

A quarter of those who provided comments (33 respondents) noted that a **duty to comply is a more robust mechanism for the protection of children’s rights than a duty of due regard**. These respondents noted that, by itself, a due regard duty can be inconsistently and ineffectively applied by public authorities, leading to a negative impact on children’s rights (particularly groups of children who face additional barriers to exercising their rights). A duty of due regard only could be easily brushed aside and does not provide sufficient guarantees that children’s rights will be protected in practice. On occasion, respondents commented that a duty to comply focuses on ensuring positive outcomes for children, while there is a risk that a duty of due regard only could focus primarily on the decision-making process. This issue was raised by just under a fifth of third sector organisations (14 respondents), just over half of public bodies (14 respondents) and over a fifth of individuals (3 respondents). It was also raised by 2 out of 7 academics.

“We believe that the framework for incorporation should include a ‘duty to comply’ with the UNCRC rights. The Children and Young People (Scotland) Act 2014 already contains a duty on public bodies to report on implementation of the UNCRC. However this does not place a duty on public bodies to actually implement the UNCRC, rather it asks public bodies to report on work related to the UNCRC. Placing a ‘due regard’ within the framework, rather than a ‘duty to comply’, may lead to a superficial approach to children’s rights and contradict the intention to enhance children’s rights in Scotland.” (Public body)

Under a quarter of those who provided comments in response to this question (31 respondents) commented that a **duty to comply will ensure positive outcomes for children**. These respondents noted that a duty to comply is likely to have a positive impact on the protection of children’s rights in Scotland by bringing about ‘real change’ in public policy and practice. A duty to comply comprises a duty to ensure outcomes which are compliant with provisions set out in the UNCRC, rather than a due regard duty which ensures consideration of UNCRC provisions. On occasion, respondents emphasise that a duty to comply is necessary to ensure positive outcomes for vulnerable children in particular. This view was expressed by just over a quarter of third sector organisations (19 respondents) and a third of public bodies (9 respondents). It was also raised by 2 out of 20 individuals.

“A duty to comply has an emphasis on outcome rather than process. It will result in the realisation of rights, rather than just the consideration of rights”. (Public body)

Under a quarter of those who provided comments (30 respondents) **emphasised that there is a need for the framework of incorporation to include both a duty to comply with and a duty to give due regard to the UNCRC**. These respondents felt that this dual approach is necessary to secure both a proactive/preventative approach to children’s rights, as well as ensuring compliance and redress mechanisms. They also commented that compliance with the UNCRC can be seen as a minimum standard for Scotland, with a duty to give due regard included as an addition to embed the UNCRC within policy and practice. Including both duties within the framework for incorporation is identified as a holistic approach which will both ensure compliance amongst public authorities and encourage a cultural and behavioural change in how children’s rights are considered within the Scottish policy and legislative context. This issue was raised by just under a third of third sector organisations (23 respondents) and over a fifth of public bodies (4 respondents). It was also raised by 1 out of 20 individuals and 2 out of 7 academics.

“It must be reiterated, the UNCRC is a floor, not a ceiling for rights protection. A duty to comply would ensure that the UNCRC is always at the forefront of law and policy-making and deliver the basic minimum standards for children’s rights protections, though clearly in anticipation that Scotland will go above the bare minimum if it is truly to be the ‘gold-standard’. This proactive dimension to the draft Children’s Rights (Scotland) Bill aids in guarding against children needing to take their grievances to court by working as a preventative duty.” (Academic)

Under a tenth of those who provided comments (8 respondents) commented that **the availability of sufficient resources for public bodies for implementing a duty to comply, as well as practical issues surrounding implementation, should also be considered**. These respondents noted that resources and a clear responsibility and commitment amongst public bodies will be necessary for such a duty to be effective in upholding children’s rights. They commented that public bodies will need capacity and time to review their systems, policies and processes to ensure compliance. New legislation such as the legislation which will put the incorporation of the UNCRC onto a statutory footing, must be introduced alongside sufficient resources, otherwise respondents felt there would be a risk of incompatibility between the actions of public bodies and the rights enshrined in the UNCRC, regardless of the intentions of the public bodies. This view was expressed by under a tenth of third sector organisations (4 respondents) and just over a tenth of public bodies (3 respondents). It was also raised by 1 out of 7 academics.

“What is far more important, is that the incorporation of the UNCRC is fully implemented and resourced. There are already standards that operate across Scotland that seek to improve outcomes for children and young people. What makes the difference, is widespread understanding and sense of collective responsibility to achieve good outcomes; [we] would expect there to be planning and resourcing to ensure this is achieved.” (Charity / non-profit organisation)

Under a tenth of those who provided comments (7 respondents) noted that **associated guidance on the expectations to be placed on public bodies and how they should interpret these new duties will be necessary to support effective implementation**. These respondents suggested that if a duty to comply is introduced, duty holders (public bodies) must truly understand the scope and purpose of these duties, including how their policy and practice should reflect this duty. Respondents commented that language should be clear and accessible – for both duty bearers and rights holders to understand the new duty – and that the difference between a duty to comply and a duty to give due regard should be clearly set out. This issue was raised by less than a tenth of third sector organisations (4 respondents). It was also raised by 2 out of 27 public bodies and 1 out of 7 academics.

The few respondents who did not agree or did not give a definite response were more likely to express concerns around resourcing and implementation or discuss the respective merits of both a duty to comply and a ‘due regard’ approach without stating a particular preference. For example, respondents note that while a duty to comply is a more robust option for securing children’s rights, it is likely to lead to added complexity in public policy and practice, whereas a duty to give due regard is less enforceable but provides scope to balance conflicting priorities. This view was expressed by 2 out of 7 academics and 1 third sector organisation.

“There are differing views as to which duty would be most appropriate in relation to the incorporation of the UNCRC. We note that there are an increasing number of duties imposed on public authorities, and that this is likely to continue to grow. Consideration should be given to how to ensure that public authorities have the necessary resources and capacity to meaningfully comply with the range of duties and are supported to manage situations where different duties may conflict. Failure to do so may result in a situation where the issues, including children’s rights, that are intended to be mainstreamed are lost in the wider context of compliance, only superficially addressed due to pressures of time and resource and desensitisation to the number of checks required.” (Legal profession/organisation)

2.4 Question 4

What status, if any, do you think General Comments by the UN Committee on the Rights of the Child should be given in our domestic law?

A total of 121 respondents provided written comments in response to this question.

Respondents indicated in their consultation responses that the UN Committee’s General Comments should be used as guidance, outlining a range examples of ways in which they could be used.

The most popular view expressed by respondents was that **the UN Committee on the Rights of the Child’s General Comments and Concluding Observations provide valuable interpretive guidance and should be used as an aid to interpret and ensure effective implementation of the UNCRC.** This view was expressed by around two thirds of those who provided comments (76 respondents). These respondents noted that the General Comments by the UN Committee provide authoritative general guidance on the protection of children’s rights under the Convention. Respondents observed that the General Comments should be taken into account when interpreting and applying the articles in the context of Scottish domestic law. This view was expressed by just over two thirds of third sector organisations (47 respondents), just under two thirds of public bodies (15 respondents) and a third of individuals (7 respondents). It was also raised by 5 out of 6 academics and 1 out of 2 respondents from legal professions/organisations.

“General Comments... help to attach meaning to what can be perceived as abstract rights. The General Comments are authoritative interpretations of individual human rights or of the legal nature of human rights’ obligations. They provide orientation for the practical implementation of human rights and form a set of criteria for evaluating the progress of states in their implementation of these rights.” (Children’s Rights Organisation)

Linked to the point above, over a third of those who provided comments (44 respondents) noted that **courts should have regard to the UN Committee’s General Comments when determining children’s rights cases**. These respondents noted that the General Comments should be used to inform court decisions around children’s rights, drawing on the authoritative guidance and international expertise they contain. This view was expressed by just under half of third sector organisations (29 respondents) and just over a third of public bodies (8 respondents). It was also raised by 2 out of 21 individuals, 4 out of 6 academics and 1 out of 2 legal professions/organisations who responded.

“In our view legislation should ensure that UN Committee General Comments and Concluding Observations are taken into account by public authorities when exercising their functions which directly or indirectly affect children, and by the Courts when deciding cases which engage children’s rights.” (Academic institution)

Under a quarter of those who provided comments (29 respondents) noted that **General Comments and Concluding Observations provide a source of international expert opinion**. These respondents suggested that drawing on the learning and expertise included in General Comments will enable Scotland to keep pace with developments in international law and practice, while retaining judicial independence. Using the General Comments to aid interpretation and legislative processes would, respondents proposed, help ensure that children’s rights in Scotland are promoted, supported and protected in a way that is consistent with current internationally agreed understanding of the UNCRC, drawing on the experiences of other countries that have incorporated the UNCRC. This view was expressed by a third of third sector organisations (22 respondents) and under a fifth of public bodies (4 respondents). It was also raised by 2 out of 21 individuals and 1 out of 6 academics.

“The process of realising and operationalising children's rights in practical, real-world, everyday terms that matter to children's experience is an ongoing one, driven by continued advances in theory, research, policy, and practice.... Adopting a document from 30 years ago as a static expression of those rights is inadequate as it would ignore massive developments in understanding and enacting best practices in this area.”
(Individual respondent)

Just over a tenth of those who provided comments (16 respondents) noted that **the UN Committee’s General Comments and Concluding Observations are not legally binding in international law and should not be given any status under domestic law, other than being used as guidance.** To give General Comments legal status, these respondents argued, risks leading to a situation where the Scottish Government is required to comply with decisions taken elsewhere. Scottish courts should be free to interpret the wording of the UNCRC. It was suggested that a legal requirement for Scottish domestic law to give effect to recommendations set out in General Comments or Concluding Observations would make the UN Committee the ‘arbiter of children’s rights in Scotland’, circumventing the Scottish Parliament and preventing Scotland from development more stringent requirements to protect children’s rights. This point was raised by over a tenth of third sector organisations (10 respondents). It was also raised by 2 out of 23 public bodies, 1 out of 21 individuals, 1 out of 6 academics and 2 out of 2 respondents from legal professions/organisations.

“The general comments of the UN Committee on the Rights of the Child are not legally binding in international law nor are the Observations of the Committee in reports made under the UNCRC in response to reports made by states.” (Legal profession/organisation)

Over a tenth of those who provided comments (13 respondents) felt **it is essential that, when taking into consideration this guidance, courts and public authorities interpret the guidance as it applies in a Scottish context, aligning the guidance to Scottish domestic law.** Respondents underlined the need to apply learning from the General Comments and Concluding Observations in a way that can be adapted to fit to the Scottish context. While the General Comments are seen as being valuable as authoritative comments, respondents noted the need to allow Scotland to develop an approach to the application of the UNCRC that is suitable to its particular circumstances and context. This point was raised by under a tenth of third sector organisations (5 respondents) and just over a fifth of public bodies (5 respondents). It was also raised by 2 out of 21 individuals and 1 out of 6 academics.

“Such comments and reports may be taken into account by the Courts as an aid to interpretation but should not be binding in any way to allow domestic jurisprudence to develop taking into account the unique Scottish context and individual facts and circumstances within that context.”
(Public body)

“Our context as a nation should always be the driver behind our children's needs and rights and we should not incorporate something just because another country did it well. Consultation and context should be key principles.” (Individual respondent)

A tenth of those who provided comments (12 respondents) **felt that the General Comments and Concluding Observations should be given a high status or the 'highest status'**. These respondents noted that the General Comments should be given high status and incorporated in Scottish domestic law, where possible. These also argued that direct incorporation into law would signal clearly that change is required to promote and protect children's rights. This view was expressed by under a tenth of third sector organisations (6 respondents). It was raised by 1 out of 21 public bodies and by 5 out of 21 individuals.

“General comments by the UN Committee on the rights of the child and observations of the committee should be given very high status in Scottish domestic law, where compatible and necessary.” (Individual)

2.5 Question 5

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

A total of 106 respondents provided written comments in response to this question.

The most popular view expressed by those who commented on this question **was the need to learn from countries where the UNCRC has been incorporated into domestic law**. This view was expressed by two-fifths of those who provided comments (43 respondents). There are lessons to be learnt from how other countries have implemented the rights set out in the UNCRC and how these have been actioned or interpreted through courts. In particular, Norway, Sweden and Spain were cited repeatedly as countries where case law is developing that could be used by courts in Scotland to aid interpretation. In addition, there may be good practice to be applied from other devolved administrations, including the Welsh Government. Scotland should look to learn from international judgements, previous cases and challenges relating to children's rights, particularly where complaints have been upheld by the UN Committee. This view was expressed by just over half of third sector

organisations (30 respondents) and just under a third of public bodies (7 respondents). It was also raised by 2 out of 18 individuals and 3 out of 6 academics.

“We recognise that courts already have extensive experience and expertise in the interpretation of EU and international law, but support the idea that courts should be able to consider adjudications in other jurisdictions when interpreting UNCRC in Scotland – especially whilst a local body of case law is being built.” (Public body)

“We consider that the other aids provided will be of great assistance to the courts in terms of providing direction, experience and understanding of the applications of the provisions. Particularly the courts decisions of other countries which have also transposed the UNCRC into domestic law, especially if those countries are of a similar size and context to Scotland.” (Charity / Non-profit)

Just under a quarter of those who provided comments (24 respondents) noted that **courts would be assisted by referring to international jurisprudence that offers insights and learning for the judicial system in Scotland**. This includes national case law, UNCRC General Comments and Optional Protocol 3 communications procedures. These respondents also frequently referred to the need to draw on lessons from the European Court of Human Rights. Respondents agreed with the point in the consultation paper that courts may obtain assistance from decisions made under other international treaty regimes such as the ECHR where a right in the UNCRC overlaps with a right in the ECHR. This issue was raised by a little under a third of third sector organisations (16 respondents) and just over a fifth of public bodies (5 respondents). It was also raised by 1 out of 18 individuals and 2 out of 2 legal professions/organisations.

“There is developing jurisprudence through case law from countries that have already incorporated the UNCRC, such as Norway and Iceland. In addition, courts will be able to draw from wider jurisprudence from countries that have incorporated wider international human rights protections into law, such as South Africa.” (Children’s Rights organisation)

The same proportion – under a quarter or 24 respondents – emphasised that **the Courts are experienced in interpreting, and adjudicating on, human rights cases which will aid them in interpreting rights under the UNCRC**. These respondents noted that Scottish courts and tribunals already make reference to the UNCRC in relevant cases and draw from appropriate sources where necessary. Scotland and the wider UK are already accustomed in doing this, including when considering cases under the HRA and EU law. Respondents referred to examples of the General Principles of the UNCRC that are already contained in Scottish domestic law, such as Article 3 which describes the best interests of

the child (Children (Scotland) Act 1995) and courts are used to dealing with them.² This view was expressed by just over a quarter of third sector organisations (15 respondents), under a fifth of public bodies (4 respondents) and under a fifth of individuals (3 respondents). It was also raised by 2 out of 6 academics.

“Domestic courts in Scotland are increasingly familiar with interpreting laws in line with human rights principles. They have had to do so because of the HRA and related ECHR jurisprudence. Domestic courts have already been engaging with key principles of the UNCRC, as they are presently included in domestic law. For example, children have individual participation rights in such legislation as the Children (Scotland) Act 1995 and the Children’s Hearing (Scotland) Act 2011.” (Academic respondent)

A tenth of those who provided comments (11 respondents) **suggested a need for greater support and representation for children during legal processes.** This, it was suggested by respondents, could involve greater use of child advocates and arrangements to ensure contributions from trusted community representatives to support children (e.g. schools, police, social workers) during hearings or cases. This issue was raised by under a tenth of public bodies (3 respondents) and a third of individuals (6 respondents). It was also raised by 1 out of 6 academics.

Under a tenth of those who provided comments (9 respondents) suggested that **further training for courts, legal practitioners and other stakeholders could be of assistance in preparing for the interpretation of the UNCRC.** This could include the use of case studies, to raise awareness of the relevance of the UNCRC to their work. These respondents referred to previous training programmes developed for the legal profession and courts to assist with the interpretation of the ECHR and suggested that similar or equivalent programmes should be developed in the context of the UNCRC, drawing on international experiences and cases. There were also suggestions that training should target public agencies to raise awareness of the UNCRC to their work, including across agencies who may not consider their work to be principally focused on children or children’s rights. This view was expressed by under a fifth of public bodies (4 respondents). It was raised by 3 out of 55 third sector organisations and 1 individual out of 18.

A number of other points were raised by small numbers of respondents. These are not broken down by sub-group in view of the small numbers of responses in question.

Respondents also suggested that better and clearer information and guidance is necessary to help children and their families to understand the legal processes through which decisions about children’s rights are made. It was suggested that the Scottish Government should take action to raise awareness of the UNCRC among parents, including a ‘comprehensive and sustained communications programme targeting parents and those with parenting responsibilities’. This could aim to provide clearer explanation to

² <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

parents and the wider public about what the UNCRC is; how it is intended to support children; the steps parents will be able to take to support their child in defending their rights if they are infringed.

Respondents referred to specific legislative aids to help articulate the UNCRC’s provisions more clearly to help embed them in the existing framework of Children’s Rights. This could involve statutory guidance and/or non-statutory guidance to explain the content and corresponding duties on public authorities and provide examples of their operationalisation.

While the UK is not a signatory to Optional Protocol 3, some respondents noted that Scottish courts should be enabled to refer to decisions or complaints upheld by the UN Committee when interpreting UNCRC rights.³ Communications under Optional Protocol 3 can help public bodies interpret the UNCRC articles and a duty to take these into account could strengthen the interpretation of the UNCRC in domestic law.

Echoing some of the earlier points outlined, some respondents felt that additional aids are unnecessary. Respondents noted that they have confidence in the ability of Scottish courts to adjudicate on social rights. The HRA and EU law are already used in consideration of cases and therefore courts will have the expertise and knowledge to interpret the UNCRC in Scottish domestic law.

2.6 Question 6

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

Option	Total	Percentage
Yes	113	70%
No	12	7%
Don’t know	11	7%
Not answered	17	10%
Not specified	9	6%

n=162

Option	Total	Percentage
Yes	113	83%
No	12	9%
Don’t know	11	8%

n=136

³ The 3rd Optional Protocol of the UNCRC allows children to submit a complaint to the United Nations when their rights have been violated and their own country’s legal system were not able to offer a solution.

A total of 126 respondents provided written comments in response to this question.

The most popular view expressed by respondents who commented on this question was that **the Scottish Government should push forward with incorporation at the earliest possible opportunity and certainly within the current session of the Scottish Parliament**. This view was expressed by over two-fifths of those who provided comments (52 respondents). It was suggested that a Bill should be introduced this year, allowing sufficient time for the Scottish Parliament to give it proper scrutiny. A number of respondents noted that the First Minister had committed to incorporating the UNCRC during the current parliamentary session and were keen for this commitment to be delivered. Following on from the above point, respondents see incorporation of the UNCRC as the culmination of a long-standing campaign and suggested that was no reason for any delay. This view was expressed by just over two-fifths of third sector organisations (31 respondents), just over two-fifths of public bodies (11 respondents) and just over a quarter of individuals (5 respondents). It was also raised by 3 out of 6 academics and 2 out of 2 legal professions/organisations.

“The campaign to incorporate the UNCRC in Scotland has been active for many years and has garnered a wide breadth of support. It is essential that the Scottish Government delivers on its commitment to incorporate within this session of Parliament.” (Children’s Rights organisation)

Following a similar viewpoint, around a fifth of respondents (25 respondents) **suggested that incorporation of the UNCRC should not wait until the development of the Statutory Human Rights Framework of Scotland and should progress as soon as possible**. These respondents broadly welcomed the intention set out in December 2018 by the First Minister’s Advisory Group on Human Rights Leadership to develop a Statutory Human Rights Framework; however this should not hold up activity to incorporate the UNCRC. It was noted that incorporating UN treaties into Scottish domestic law is a complex and lengthy task, requiring significant additional work. Considerable progress has already been made to transpose elements of the UNCRC into Scottish domestic law and it was suggested that the next step is direct incorporation.

In addition the following associated issues were raised:

- Incorporation of UNCRC prior to the development of the Statutory Human Rights Framework could enhance practice and standards – subsequently the process of incorporating the UNCRC would inform the Statutory Human Rights Framework. It could provide a ‘useful roadmap’ for the incorporation of other UN treaties which will form the Statutory Human Rights Framework.
- Some respondents noted that transposing the rights of children under the UNCRC into another framework could result in less importance being placed on children’s rights than if it is incorporated into Scottish domestic law ‘in its own right’. Respondents suggested that a sounder approach would be to establish the UNCRC

as a standalone raft of rights, referenced in any future Statutory Human Rights Framework.

These points were raised by just over a fifth of third sector organisations (16 respondents), under a fifth of public bodies (4 respondents) and a sixth of individuals (3 out of 18 respondents). It was also raised by 2 out of 6 academics.

“Yes. [Incorporation of the UNCRC] is a separate process that has already been initiated and should be completed independently. Once the proposals for the Statutory Human Rights Framework are fully developed, measures can be adopted to ensure the coherence and complementarity between both sets of instruments.” (Individual respondent)

“There should not be a delay for the Statutory Human Rights Framework. UNCRC incorporation should contribute to the development of SHRF rather than the other way around.” (Children’s rights organisation)

Under a fifth of those who provided comments (21 respondents) argued that **there is a need to push forward with incorporation of the UNCRC while there is consensus and momentum**. There is commitment and cross-party political support in place for incorporation, it was suggested, which should be capitalised upon. Linked to this, these respondents noted concerns that external factors could delay implementation if incorporation isn’t pushed forward soon. In particular, respondents referred to the following factors which could impact on the context for incorporation in future: changes in levels of political support for the incorporation of the UNCRC; UK withdrawal from the EU could have implications for the rights framework for children and disabled people set out in the EU Charter of Fundamental Rights. This view was expressed by over a quarter of third sector organisations (19 respondents). It was also raised by 1 out of 18 individual respondents and 1 out of 6 academics.

“There is currently strong political support across the Scottish Parliament for an emphasis on rights in legislation and specifically for incorporation of the UNCRC. However, the UK’s decision to leave the EU may produce uncertainties in UK legislation that would support an argument for establishing procedures to plan for a Bill to be passed in the Scottish Parliament in this Parliamentary session. Incorporation within this time period has the potential to mitigate the impact of a range of issues on children’s rights, including the impact of welfare reform on children in Scotland.” (Public body)

Under a tenth of those who provided comments (11 respondents) noted that **it would be better to include the incorporation of the UNCRC as part of an inclusive Statutory Human Rights Framework for Scotland**. This was seen by some as being a more holistic

approach, setting out in one framework the rights belonging to all people in Scotland. These respondents noted that a comprehensive and consolidated framework of human rights would be easier for people in Scotland to understand, setting out how children's rights sit within a broader framework. Respondents also cited concerns about possible confusion when developing a Statutory Human Rights Framework at a later date. This view was expressed by 5 out of 72 third sector organisations and 3 out of 26 public bodies. It was also raised by 2 out of 18 individual respondents and 1 out of 6 academics.

“The UNCRC should be included within the development of a Statutory Human Rights Framework so that legislation is both comprehensive and clear enough for rights holders to understand.” (Religious/faith organisation)

2.7 Question 7

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

A total of 123 respondents provided written comments in response to this question.

The most popular view expressed by respondents who commented on this question was that **the model presented by the Commissioner for Children and Young People in Scotland and Together sets out children's rights clearly and comprehensively**. This view was expressed by over a third of those who provided comments (41 respondents). Respondents commented that the model reflects the holistic nature of the UNCRC, highlighting the principle that all rights under the UNCRC are universal, interrelated and indivisible. Several respondents also noted that the model set out is future-proofed, insofar as the proposed legislation will ensure that any further powers devolved to the Scottish Parliament are also covered under the Act. These respondents felt that the model represented a comprehensive approach to incorporation by proposing to draw down the Preamble, articles of the UNCRC (1-42) and the First and Second Optional Protocols to make them part of Scottish domestic law. This view was expressed was raised by just over two-fifths of third sector organisations (30 respondents), over a quarter of public bodies (6 respondents) and just under a fifth of individuals (3 respondents). It was also raised by 1 out of 7 academics.

“It is a simple and clear mechanism for incorporation recognising and dealing with the complexities of a devolved nation. We believe it offers a straightforward route to achieving full incorporation and, as such, would be happy to see it or a very similar model adopted. In particular, as an organisation supporting families, we welcome the drawing down of the Preamble, as well as the Articles and First and Second Protocols. The Preamble recognises the family as the best place for children, sees

parents as rights holders and places obligations on the State to provide them with support in this duty.” (Charity/Non-profit)

“We fully support the model of direct incorporation put forward by the Commissioner for Children and Young People in Scotland and Together. The UNCRC was drafted in such a way that it can be directly incorporated into domestic law and is comprehensive in that is the rights contained include both civil and political rights, as well as social, cultural and economic ones. We therefore believe that the full UNCRC and its optional protocols should be incorporated and no article should be omitted or altered.” (Charity/Non-profit)

A quarter of those who provided comments (31 respondents) noted that **the proposed model of incorporation includes both a duty to comply with the UNCRC and a ‘due regard duty’**. These respondents noted that it therefore combines proactive and reactive approaches to ensure children’s rights are promoted and protected. These twin duties will ensure that there is a system in place that ensures redress where children’s rights are breached; and also that the Scottish Government, public authorities and other duty bearers are required to act in the best interests of all children in Scotland. This view was expressed by just over a third of third sector organisations (25 respondents). It was also raised by 2 out of 21 public bodies, 1 out of 18 individuals and 3 out of 7 academics.

“The model aims to ensure a proactive culture of children’s rights across government at all levels in Scotland, embedding children’s rights-based approaches to policy and legislative decision making at an early stage, while also providing redress where children’s rights are breached. It seeks to ensure that government at all levels is able to act in the best interests of all children in Scotland.” (Charity / Non-profit)

A fifth of those who provided comments (24 respondents) expressed the view that **the proposed model seeks to promote and embed children's rights in policy and legislation. It puts children’s rights at the forefront of policy making and law-making processes**. These respondents noted that it promotes a culture of children’s rights at all levels of government. They noted that it provides a clear framework of rights for the Scottish Parliament and other public authorities, thereby ensuring that they have considered the wide range of children’s rights that could be impacted by government action, law or policy. This point was raised by just over a fifth of third sector organisations (15 respondents), just over a tenth of public bodies (3 respondents) and just under a fifth of individuals (3 respondents). It was also raised by 3 out of 6 academics.

A little under a fifth of those who provided comments expressed support for the model but provided very little or no additional commentary or reasons for their support (20 respondents).

A tenth of those who provided comments in response to this question (12 respondents) asserted that **the model enables the Scottish Government to apply the UNCRC as a ‘minimum standard’, providing scope to further enhance children’s rights over and above the provisions in the UNCRC.** These respondents noted that the Scottish Government has set out its ambition to ‘go further’ than the UNCRC where possible, something that is endorsed by children and young people, based on submissions by children’s rights organisations. Respondents expressed support for this idea, noting that Scotland has an opportunity to become a world leader and push the boundaries by bringing forward legislation and policy that exceeds the standards required by the UNCRC. This view was expressed by just over a tenth of third sector organisations (10) and 2 out of 18 individuals.

A tenth of those who provided comments (12 respondents) **described the model and the Incorporation Advisory Group’s draft Children’s Rights (Scotland) Bill as the ‘gold standard’ model of UNCRC incorporation.** These respondents noted that the Bill provides for a model of direct incorporation, specifying that the articles of the UNCRC and Optional Protocols One and Two should be part of Scottish domestic law. Several respondents commented that this is consistent with the UN Committee’s statement that *‘States Parties are required to implement the CRC as a whole, in recognition of the status of children as rights holders and in light of the indivisible and inter-dependent nature of CRC provisions’.* This point was raised by just under a fifth of third sector organisations (12 respondents).

Under a tenth of those who provided comments (11 respondents) highlighted that the **model draws on best practice internationally and the experiences and expertise developed in other countries.** These respondents noted that the model was developed with input from a team of international and Scottish experts (the Incorporation Advisory Group) from academic, legal and children’s rights backgrounds, with extensive knowledge of the UNCRC, incorporation, and the Scottish legal system. In addition, the model uses international learning from countries such as Norway, Sweden, Finland and Belgium where the UNCRC has already been incorporated, as well as careful consideration of the Scottish context. This view was expressed by a tenth of third sector organisations (7 respondents). It was also raised by 2 out of 21 public bodies and 2 out of 7 academics.

“We fully support the model for full and direct incorporation put forward by the Commissioner for Children and Young People in Scotland and Together. This is based on advice from global experts on children’s human rights and incorporation and offers an approach which is based on effective approaches from the experience of other countries and the advice of the UN Committee on the Rights of the Child.” (Charity / Non-profit organisation)

Over a tenth of those who provided comments in response to this question (18 respondents) **voiced reservations or opposition to the model presented by the**

Incorporation Advisory Group. This comprised under a tenth of third sector organisations (6 respondents), a third of public bodies (7 respondents). It was also raised by 1 out of 18 individuals, 2 out of 7 academics and 2 out of 2 legal professions/organisations. Reasons for their reservations included:

- They felt that direct incorporation would leave the UNCRC articles open to interpretation, which could impact on how consistently they were applied.
 - Unless the wording of the UNCRC was tailored/modified it was suggested that practical and constitutional difficulties could arise – respondents suggest that some articles are ‘instructions to states’ rather than the ‘conferral of rights’ and may need to be re-worded to ensure clarity in law.
 - Respondents foresee difficulties, in the event of direct incorporation, in enforcing rights set out in the UNCRC that relate to reserved matters.
- These respondents tended to favour transposition of the UNCRC so that articles are framed or tailored explicitly to Scottish domestic law.

2.8 Question 8

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

A total of 101 respondents provided written comments to explain their views. The key themes arising in these comments are set out below, in order of frequency.

The view presented most frequently by those who responded to this question was that **this issue (of how to deal with self-executing rights) is not a concern in the event of direct incorporation**. This view was raised by just under two-fifths of those who provided comments (38 respondents). These respondents were in support of Together Scotland’s statement which outlined that they “do not believe that the concerns raised by Scottish Government are relevant to Scotland. The act of incorporating the UNCRC into Scots law is what gives UNCRC rights practical effect”, it was suggested. In light of this point, respondents suggested that all articles within the UNCRC should be directly incorporated into Scottish law as this removes the issue of the necessity to deal with whether particular UNCRC rights are self-executing. This point was raised by just over half of third sector organisations (27 respondents) and over a quarter of public bodies (6 respondents). It was also raised by 1 out of 18 individuals, 3 out of 6 academics and 1 out of 2 legal professions/organisations.

“The consultation paper appears to contemplate that Convention”rights” might be incorporated into domestic law but with the courts retaining the option not to enforce them because they are not”self-executing”. It is not understood how this would be consistent with the direct incorporation model. If Parliament enacts a law, the courts will require to enforce it.”
(Legal profession/organisation)

Under a fifth of those who provided comments (18 respondents) noted that the **courts should be responsible for dealing with the issue** of whether particular UNCRC rights are self-executing. With this in mind, it was noted that the courts should have a duty to comply and act compatibly with the UNCRC. Respondents outlined how the courts and law-making institutions are competent to deal with this issue, with a suggestion that courts should develop doctrines to deal with this issue on a case by case basis. A further suggestion was for the courts to provide advice on legislation which would need to be enacted to make a right self-executing. This view was expressed by under a fifth of third sector organisations (9 respondents), just over a tenth of public bodies (3 respondents) and just over a fifth of individuals (4 respondents). It was also raised by 1 out of 6 academics and 1 out of 2 respondents from legal professions/organisations.

“...decisions in this area should be left to the courts to develop doctrines for dealing with this issue on a case by case basis. Courts in Scotland and the wider UK are already used to doing this when considering cases under the Human Rights Act 1998.” (Charity / non-profit organisation)

Under a tenth of those who provided comments (9 respondents) outlined the **importance of clarity in order to avoid mis-interpretation of children’s rights**. It was suggested that there should be a clear list of rights that impose obligations on public authorities to achieve substantive outcomes or make changes to their processes. These rights should be enforceable by rights-holders. Further support for this view was identified in comments from respondents that legislation should provide clarity as to which UNCRC rights are self-executing. This issue was raised by under a tenth of third sector organisations (5 respondents). It was also raised by 2 out of 18 individuals, 1 out of 21 public bodies and 1 out of 6 academics.

“This should still be stated so everything is crystal clear from the start and mis-interpretation, by accident or design, is minimised.” (Individual)

A few respondents noted that there should be **careful scrutiny of each individual right in order to understand if they need further interpretation within domestic law**. These respondents recognised that as the terms of the UNCRC are written in order to enable their application across legal, political and cultural context and to allow for local variation and enshrinement in law, they are general and lack detail. Therefore, careful consideration should be taken when determining whether each individual UNCRC right is self-executing. This view was raised by 1 out of 52 third sector organisations, 1 out of 21 public bodies and 1 out of 18 individuals.

“Whether or not particular rights are able to be enforced directly by the courts without the need for additional legislation (i.e. self-executing), careful scrutiny of these individual rights will be required to understand if

they need further interpretation or enhancement within domestic law. This would relate not only to the principles of the rights but also to the specifics and intentions behind them. This would be especially pertinent in the case of decision-making for, for example, children with incapacity. This is stated within the PANEL principles for taking a human rights-based approach i.e. '[p]eople who face the biggest barriers to realising their rights should be prioritised'." (Public body)

2.9 Question 9

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

A total of 117 respondents provided written comments to explain their views. The key views arising in these comments are set out below, in order of frequency.

The most popular view expressed by respondents who commented on this question was that **fully accessible guidance should be developed** for both rights holders and duty bearers. This view was raised by just under half of those who provided comments (54 respondents). These respondents felt that efforts should be made to ensure this guidance is accessible for all, through developing easy read versions in multiple formats (e.g. braille) to prevent exclusion of certain groups. Guidance for duty bearers should facilitate a clear understanding of the implications of the UNCRC in Scotland. One suggestion was the development of a code of practice for duty bearing organisations. Guidance for duty bearers is particularly important due to the complexity of implementation of UNCRC rights which apply to both reserved and devolved issues. This view was expressed by over two-fifths of third sector organisations (30 respondents), just under three quarters of public bodies (17 respondents) and just under a fifth of individuals (3 respondents). It was also raised by 2 out of 6 academics and 1 out of 3 legal professions/organisations who responded.

"In order to provide clarity to rights holders and empower them to claim their rights, it is imperative that accessible information and guides are available to everyone, including for example in multiple formats (Easy Read, BSL, braille, etc)." (Public body)

"To achieve clarity, it is important that information and guidance be made available for both rights holders and duty bearers that explains the status of individual rights in Scotland and that guidance is understandable, widely available and authoritative." (Public body)

"Given the complexity of the implementation of how UNCRC rights could apply both in a reserved and a devolved context, it will be important for there to be clear guidance and clarity about the intermediary roles of

organisations such as the Scottish Human Rights Commission, the Commission for Children and Young People and Together.” (Public body)

The same proportion – just under half or 54 respondents – felt that **awareness-raising activities should be undertaken** to ensure a good level of knowledge and understanding amongst both right holders and duty bearers. Suggested awareness-raising activities mentioned by respondents included a national campaign to raise public awareness; the development of learning materials for children, such as an app which details children’s rights; the use of online resources and social media to disseminate information in relation to children’s rights; and incorporating children’s rights within the Curriculum for Excellence, through lessons such as personal and social education (PSE). It was also suggested that human rights organisations should work with Scottish Government to raise awareness of the UNCRC. This work should include a campaign which addresses and targets individual groups including vulnerable groups and each of the protected characteristics to highlight the different aspects of the UNCRC and how the UNCRC can be most relevant to individual groups. It was raised by just over two-thirds of third sector organisations (45 respondents) and a third of public bodies (8 respondents). It was also raised by 1 out of 17 individuals.

“A communications and awareness programme would provide clear information to children and young people on what their rights are and what actions are taking place with regards to the incorporation of UNCRC, key dates, and why it is happening. In essence training and awareness is required at every level from legislation to case law, and policy development to service provision for children and young people, as effective implementation will be contingent upon awareness of children’s rights. This requires an understanding of children and young people as the subject of rights, to be treated with dignity and respect and to exert influence over their own lives.” (Charity / Non-profit organisation)

“With additional measures such as rights education and awareness raising we would urge the Scottish Government to ensure there is a targeted effort to engage with potentially vulnerable and/or overlooked groups including children and young people in Armed Forces families.” (Charity / Non-profit organisation)

“A public facing campaign could be launched to make children and young people aware of their rights and what direct incorporation means. Ideally, this would be incorporated into materials that fit into the Curriculum for Excellence, which would allow learners to explore what the legislation means in practice, allowing them to reflect on how it would impact on their lives.” (Children’s Rights organisation)

Just over a third of those who provided comments (42 respondents) outlined the **importance of providing training** for staff within duty bearing organisations. Respondents

suggested that this training should aim to achieve a clear understanding amongst duty bearing organisations in relation to implementing the changes required following incorporation of the UNCRC. A few respondents expressed the view that this training should be made mandatory. This point was raised by just under a half of third sector organisations (30 respondents), over a quarter of public bodies (7 respondents) and just under a quarter of individuals (4 respondents).

“...training and guidance to be provided for all those responsible for UNCRC incorporation into Scots law – especially in relation to the health rights of children and young people. We strongly believe that established organisations should be supported to provide training and guidance, rather than creating new bodies. This should be supported with appropriate long-term funding.” (Charity / Non-profit organisation)

Over a tenth of those who provided comments (17 respondents) suggested **independent advocacy or children’s support services** would help provide clarity to rights holders under a direct incorporation approach. These services would provide support for children, advising them and assisting them in exercising their rights. Such a service is particularly important in providing support to the most marginalised and excluded groups to help them understand and exercise their rights. This view was expressed by a fifth of third sector organisations (13 respondents) and just over a tenth of public bodies (3 respondents). It was also raised by 1 out of 17 individuals.

“The CSAP highlights that, if we are to continue to raise children’s awareness of their rights, we need to have sustainably-funded specialist services available to them across Scotland in order to comply with their rights and improve their outcomes. Equally, if duty bearers have understanding of children’s rights, they are more likely to look to ensure children’s rights are being upheld.

For instance, Article 39 is children’s right to recovery from abuse, neglect, torture and violence. Yet every local authority area in Scotland does not offer a specialist recovery service for children who have experienced domestic abuse, for example, meaning that many children’s rights might not be upheld. We would urge Scottish Government and local government to consider such provisions urgently and to assess how they will comply in a meaningful and effective way to ensure that the full suite of children’s rights can be met and upheld, particularly for vulnerable children.” (Charity / Non-profit organisation)

A tenth of those who provided comments (12 respondents) expressed the view that public authorities, as duty bearers, are already well equipped with existing knowledge, having **already developed a clear understanding of devolved competencies and functions.**

They would, therefore, require little guidance for a direct incorporation approach, respondents noted. This point was made by over a tenth of third sector organisations (10 respondents). It was also raised by 1 out of 24 public bodies and 1 out of 17 individuals.

“In terms of duty bearers, public authorities have been working in the context of devolution for 20 years and have developed a clear understanding of devolved and reserved competencies and functions over this time. UNCRC incorporation would of course only apply to devolved matters. Public authorities would therefore be well-equipped to apply their existing knowledge and understanding when fulfilling their duties arising from UNCRC incorporation.” (Charity / Non-profit organisation)

In providing comments to this question, several respondents underlined **the importance of public participation**. More specifically, these respondents outlined the importance of encouraging children’s involvement in the design of information resources for rights holders. They suggested that the involvement of children would help ensure guidance and information resources developed present clear, understandable messages for rights holders. This view was raised just under a tenth of third sector organisations (6).

“...would recommend the involvement of children and young people with the rollout of the changes and from there onwards; enabling the messages to be heard by the right people in ways that makes sense to the audience. The ‘I Witness, the Concluding Observations’ gives some very clear messages outlining this very view with messages including:

“Encourage involvement, working together is the best way to move forward!” – Young Person, Article 12 in Scotland: UNCRC Outcomes Seminar, Glasgow.

“Marginalised groups of young people can be very isolated, help make sure everyone is involved and supported!” – Young Person, Article 12 in Scotland: UNCRC Seminar, Glasgow.” (Charity / Non-profit organisation)

“Clarity can be provided to rights holders and duty bearers through a range of provisions, including a public participation process on implementation, awareness-raising programmes and independent advocacy. Child-friendly guides and resources should be co-developed with children and young people to ensure the information is accessible and relevant to their lives.” (Charity / Non-profit organisation)

2.10 Question 10

Do you think we are right to reject incorporating the UNCRC solely by making specific changes to domestic legislation?

Option	Total	Percentage
Yes	105	65%
No	6	4%
Don't know	14	9%
Not answered	25	15%
Not specified	12	7%

n=162

Option	Total	Percentage
Yes	105	84%
No	6	5%
Don't know	14	11%

n=125

A total of 112 respondents provided written comments to explain their views. The key views arising in these comments are set out below, in order of frequency.

The most popular view expressed by respondents who commented on this question was that incorporating the UNCRC solely by making specific changes to domestic legislation is **problematic because it does not take into account the full suite of rights enshrined in the UNCRC**. This view was raised by just under a third of those who provided comments (34 respondents). These respondents explained that this approach is, therefore, too diluted, lacks robustness and thus does not sufficiently protect children's rights. This view was expressed by just under a third of third sector organisations (20 respondents), just under a third of public bodies (6 respondents) and a third of individuals (6 respondents). It was also raised by 1 out of 7 academics and 1 out of 2 respondents from a legal profession/organisation.

"Yes. Indirect incorporation of the UNCRC may result in a scattered approach to children's rights and delay implementation, creating a situation where children are not able to claim all of the rights provided for in the Convention." (Charity / non-profit organisation)

"We agree with Together and CCYPS that a piecemeal approach to incorporating the UNCRC would not be an effective choice. It leaves significant room for gaps in protection, whereas the UNCRC in full is internationally seen as the most comprehensive scheme for upholding children's rights. Various disparate amendments to existing legislation would also be less accessible to children and young people wishing to

find out about their rights than being able to access the UNCRC in full.”
(Children’s rights organisation)

“Making specific changes to domestic law would be a huge undertaking. It would limit how rights were incorporated as would have to be done within the confines of the way in which existing legislation worded. It would represent a piecemeal approach. Rights may be overlooked or the effect of specific changes not fully anticipated creating problems at a later stage.” (Public body)

Over a quarter of those who provided comments (31 respondents) were of the view that **incorporating the UNCRC solely by making specific changes to domestic legislation is a fragmented, and therefore not sufficiently cohesive, approach**. There was a consensus amongst these respondents that direct incorporation would be the most comprehensive approach. This point was raised by a third of third sector organisations (21 respondents), over a tenth of public bodies (3 respondents) and over a fifth of individuals (4 respondents). It was also raised by 3 out of 7 academics.

“Changes can be made piecemeal and in an unco-ordinated manner whereas incorporation is an overarching legal framework governing future development of legislation, policy and practice and acting as an organic entity responding to and being informed by international best practice. Making selective changes to domestic legislation would not be incorporation. Full incorporation would ensure a comprehensive and rigorous programme to bring legislation into line with the UNCRC and ongoing review to ensure continuous improvement.” (Charity / non-profit organisation)

“The UNCRC is meant to be indivisible – if different articles are enacted through separate pieces of legislation then the coherence of the treaty as a whole is lost, and the opportunity to ensure everyone is aware of their rights and their role as duty bearers will be weakened” (Charity / non-profit organisation)

“To effectively and meaningfully incorporate the UNCRC into domestic law, the model for incorporation must create a comprehensive framework which embeds the UNCRC across all levels of government. Making specific changes to domestic legislation would ultimately amount to a fragmented and disjointed approach to incorporation.” (Children’s rights organisation)

Under a fifth of those who provided comments (21 respondents) noted that **incorporating the UNCRC solely by making specific changes to domestic legislation is a piecemeal approach, which will not give effect to the UNCRC as a whole**. Recognising the

importance of protecting children's rights, these respondents explained that this piecemeal approach will therefore mean children's rights would not be given the full respect deserved. This point was raised by under a fifth of third sector organisations (11 respondents) and a quarter of public bodies (5 respondents). It was also raised by 2 out of 18 individuals, 2 out of 7 academics and 1 out of 2 legal professions/organisations.

"Children's rights deserve more than a piecemeal approach. The UNCRC is not the only possible framework for full incorporation of children's human rights into law, but Scotland should, one way or another, enact sweeping change in our legal system to ensure children's rights are afforded full respect." (Individual)

"Making specific changes to domestic law would be a huge undertaking. It would limit how rights were incorporated as would have to be done within the confines of the way in which existing legislation worded. It would represent a piecemeal approach. Rights may be overlooked or the effect of specific changes not fully anticipated creating problems at a later stage." (Public body)

Under a fifth of those who provided comments (18 respondents) suggested that **incorporating the UNCRC solely by making specific changes to domestic legislation may result in gaps in, and inconsistencies between, legislation.** Consequently, these respondents were concerned that rights within the UNCRC may be omitted from domestic legislation. This would lead to gaps in the rights children can exercise. This point was raised by under a fifth of third sector organisations (10 respondents) and under a fifth of individuals (3 respondents). It was also raised by 2 out of 20 public bodies and 3 out of 7 academics.

"...making specific and individual changes to domestic legislation would not result in the full protection of children's rights. It would result in a pick n' mix approach to incorporation. This piecemeal approach could result in omissions and in inappropriate judgements. Full incorporation takes away the hazards of a patchy approach to children's human rights." (Charity / non-profit)

Over one tenth of those who provided comments (15 respondents) suggested that the approach of **incorporating the UNCRC solely by making specific changes to domestic legislation lacks clarity.** These respondents suggested that this, in turn, could lead to a lack of understanding of children's rights amongst rights holders and duty bearers. The rights set out in the UNCRC are interrelated and indivisible and therefore direct incorporation would be the most appropriate approach to ensure understanding of children's rights amongst rights holders and duty bearers. This view was expressed by just under one fifth of third sector organisations (10 respondents). It was also raised by 3 out of 20 public bodies and 1 out of 18 individuals.

“We need to move away from the mixed landscape of legislation in specific areas and make children’s rights more visible and more user-friendly, particularly for the rights holders—children and young people. The new legislation must incorporate the UNCRC as a standalone piece of legislation visible to right holders and those applying and interpreting it.” (Legal profession/organisation)

“Children’s Rights should be an easily interpreted international standard we all adhere to. If this was left to different individual domestic legislative arrangements, it would be harder to have clarity and understanding. The UNCRC is meant to be indivisible. If different articles are enacted through separate pieces of legislation, then the coherence of the treaty will be lost and the opportunity to ensure that everyone is aware of their rights and their role as duty bearers will be weakened.” (Public body)

2.11 Question 11

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

A total of 106 respondents provided written comments in response to this question. The key views arising in these comments are set out below, in order of frequency

The most popular view expressed by respondents who commented on this question was that **they disagreed with the transposition model**, noting that their preferred model is direct incorporation. This view was raised by just over two-fifths of those who provided comments (43 respondents). It was raised by just under half of third sector organisations (27 respondents), over a quarter of public bodies (6 respondents) and just over a quarter of individuals (5 respondents). It was also raised by 3 out of 5 academics and 2 out of 2 legal professions/organisations.

Just under a fifth of those who provided comments (20 respondents) noted that a **consultation exercise would enable public participation**. These respondents noted that this consultation exercise should be accessible nationwide and thus several different methods should be used to enable different groups to respond. Suggested consultation methods included online surveys, public events/local events or conferences, the utilisation of social media and a citizen’s panel. This point was raised by just under a fifth of third sector organisations (11 respondents), just under a quarter of public bodies (5 respondents) and under a fifth of individuals (3 respondents). It was also raised by 1 out of 2 legal professions/organisations.

“To engage people effectively and efficiently, the suite of children’s rights would need to be drafted and then clear and specific questions about it should be put out for wide-ranging consultation. The consultation must be

made known on a national scale for meaningful engagement, and accessible to all relevant persons and bodies. To be effective, this would be necessarily time-consuming.” (Charity / non-profit organisation)

Linked to the issue raised above, under a fifth of those who provided comments (17 respondents) emphasised the importance of nationwide involvement. These respondents explained that this **nationwide involvement can only be achieved by raising awareness and understanding, through the development and dissemination of fully accessible information**. It was noted that having access to this information promotes empowerment amongst rights holders. This point was raised by just under a fifth of third sector organisations (11 respondents) and under a fifth of individuals (3). It was also raised by 2 out of 21 public bodies and 1 out of 2 legal professions/organisations.

Just over a tenth of those who provided comments (14 respondents) noted that effective **participatory approaches require time, therefore plenty of notice would be required**. However, a few of these respondents raised concerns that the timescales are insufficient and unrealistic to enable nationwide participation in an effective manner. This view was expressed by just under a tenth of third sector organisations (5 respondents), a quarter of public bodies (5 respondents) and under a fifth of individuals (3 respondents). It was also raised by 1 out of 5 academics.

“The timescale for this is unrealistic. Community participation requires sufficient time to allow for meaningful engagement otherwise consultation can appear tokenistic and limited in scope.” (Individual)

“...concerned that free, meaningful and active participation by children, young people, families, and duty bearers in relation to a complicated exercise like a transposition model would be difficult to achieve in such a short period of time.” (Public body)

Just over a tenth of those who provided comments (14 respondents) expressed the view that it is important that **approaches to encourage participation enable the participation of a broad range of individuals**, including vulnerable groups. These respondents noted that the use of a range of different participatory approaches would be necessary to encourage participation of different groups. This point was raised by around a fifth of third sector organisations (11 respondents). It was also raised by 1 out of 21 public bodies and 1 out of 18 individuals.

“A range of participatory options would be needed so as to be inclusive of all strands of Scottish society. Local participation meetings and online options would be required. A focus on the participation of children and young people would be desirable, and those with additional support

needs should be provided with effective support to ensure they can participate.” (Charity / non-profit organisation)

“There may be occasions where there are conflicts between different groups of rights holders. For example, the freedom of religion and the freedom of gender identification. The Scottish Government must ensure that all groups are given the opportunity to participate in this process and that implementation is not held up by competing interests.” (Children’s rights organisations)

“Within the context of full and direct incorporation, however, we strongly support the use of mechanisms to ensure that children, young people, carers and broader civic society are meaningfully engaged throughout the process. There is an associated need to promote awareness of and access to independent advocacy for vulnerable and marginalised people and groups, to enable them to contribute to participation and consultation processes and ensure that their voices are heard throughout.” (Charity / non-profit organisation)

A tenth of those who provided comments (10 respondents) outlined that approaches to encourage participation should **engage particularly with children and young people**. Respondents noted that participatory approaches should proactively reach out to this group to raise awareness and encourage their participation. Examples provided of institutions or individuals who could play an important role in encouraging children’s participation include schools, youth workers and social workers. This point was raised by a tenth of third sector organisations (6 respondents) and just over a tenth of public bodies (3 respondents). It was also raised by 1 out of 18 individuals.

“We need to go and speak to children and young people in their schools and communities. One possible way is to develop questions which can be used by schools, youth workers, social workers etc. This could also be taken forward through the regional collaboratives, with staff from government and local authorities engaging with children in their localities.” (Charity / non-profit organisation)

2.12 Question 12

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

A total of 134 respondents provided written comments in response to this question. The key views arising in these comments are set out below, in order of frequency

Just under two thirds of those who responded identified direct incorporation as their preferred model (82 respondents). This model was preferred by over three quarters of third sector organisations (63 respondents), just under a third of public bodies (7 respondents) and a third of individuals (7 respondents). It was also preferred by 3 out of 7 academics and 1 out of 3 legal professions/organisations.

Respondents who expressed a preference for a direct incorporation model provided further commentary on their rationale for preferring this model.

- Just under a third of respondents (43 respondents) commented that **the model proposed by the Incorporation Advisory Group convened by Together and the Children and Young People Commissioner Scotland (reflected in the draft Children’s Rights (Scotland) Bill) is an appropriate model of incorporation.** This model is seen by these respondents as being appropriate as it fully and directly incorporates the UNCRC and its Optional Protocols into Scottish domestic law, includes a duty on public authorities to comply with the UNCRC and its Optional Protocols and ensures the UNCRC is accorded high priority in the Scottish domestic legal system, when in conflict with domestic legislation. This view was raised by just under half of third sector organisations (38 respondents). It was also raised by 2 out of 23 public bodies, 1 out of 21 individuals and 2 out of 7 academics.
- Just over a fifth of those who provided comments (29 respondents) asserted that **a model of direct incorporation does not preclude the option of going further in strengthening children’s rights.** These respondents noted that a model of direct incorporation could be further strengthened through the inclusion of a preventative ‘due regard’ duty, as well as ensuring that other domestic legislation which goes beyond the rights set out in the UNCRC can be maintained. This point was raised by over a quarter of third sector organisations (23 respondents) and over a tenth of public bodies (3 respondents). It was also raised by 3 out of 7 academics.
- Over a tenth of those who provided comments (15 respondents) noted that **the rights set out in the UNCRC are interrelated, indivisible, interdependent and universal.** It would not be possible to take a selective approach to incorporating the UNCRC articles, as the articles represent rights which should apply to all children equally and together form a comprehensive basis for children’s rights law. This point was raised by just under a fifth of third sector organisations (13 respondents). It was also raised by 2 out of 23 public bodies.
- Over a tenth of those who provided comments (14 respondents) also stated that **direct incorporation will avoid a piecemeal approach to embedding the UNCRC in domestic law.** These respondents identified a risk that unless the UNCRC is incorporated directly, children’s rights will be diminished, diluted or undermined through omission or re-writing to suit particular domestic contexts or limitations. This view was expressed by over a tenth of third sector organisations (11). It was also raised by 1 out of 21 individuals, 1 out of 7 academics and 1 out of 3 legal professions/organisations.
- A tenth of those who provided comments (13 respondents) noted that **direct incorporation is likely to lead to a clear positive impact on children’s wellbeing.** These respondents commented that under a direct incorporation model,

there is likely to be a greater cultural understanding of children's rights and children are more likely to enjoy a high level of protection, leading to Scotland being an excellent place for children to live. This point was raised by over a tenth of third sector organisations (12 respondents). It was also raised by 1 out of 7 academics.

- A tenth of those who provided comments (13 respondents) pointed out that **direct incorporation will ensure children's rights in Scotland stay up-to-date with changes in the international children's rights consensus, as well as staying current with any changes in devolved powers.** These respondents commented that a direct incorporation model is a guaranteed way of ensuring that children's rights in Scotland remain current and in-line with international best practice. This was raised by just under a fifth of third sector organisations (13 respondents).
- Under a tenth of those who provided comments (10 respondents) noted that **direct incorporation ensures clarity in the way children's rights are interpreted.** These respondents felt that duty bearers and rights holders will have certainty and clarity about the rights of children as set out in the UNCRC, with limited scope for misinterpretation. This was raised by just over a tenth of third sector organisations (9 respondents). It was also raised by 1 out of 7 academics.
- Under a tenth of those who provided comments (10 respondents) also expressed the view that **there are examples of international best practice in implementation which can guide a direct incorporation model.** These respondents noted that other states have successfully incorporated the UNCRC using a direct incorporation model, meaning their experience can guide Scotland's incorporation approach. Guidance from the General Comments by the UN Committee are also available. This issue was raised by just over a tenth of third sector organisations (10 respondents).
- Just under a tenth of those who provided comments (10 respondents) noted **that a direct incorporation model will ensure legal redress is available.** These respondents commented that such a model is the most certain way of ensuring children's rights are enforceable under Scottish domestic law. It was raised by a tenth of third sector organisations (8 respondents). It was also raised by 1 out of 21 individuals and 1 out of 3 legal professions/organisations.

"[We believe] that a suite of Scottish children's rights rooted in UNCRC is problematic as the decision-making process for agreeing what rights should be included would be long and complex. We fear this could result in a watered-down version of children's rights. There are also longer-term implications in terms of how this approach would develop and align with international human rights over time. Scotland could lose step with other countries as updates to the UNCRC through General Comments and Observations would not automatically be relevant." (Children's rights organisation)

"The rights identified in the UNCRC are inalienable, indivisible, interdependent and interrelated. If Scotland is looking to incorporate children's human rights, then all of the rights in the UNCRC must be

included. Direct incorporation ensures that children’s human rights are not undermined by omission or by rewriting new variations of the articles, which would not be able to be held up against international standards.” (Children’s rights organisation)

Just under a fifth of respondents expressed uncertainty as to the preferred model and/or could see the benefits and challenges associated with the various options (25 respondents). No definitive opinion was expressed by over a tenth of third sector organisations (11 respondents), just over a quarter of public bodies (6 respondents) and a tenth of individuals (5 respondents). No definitive opinion was also expressed by 1 out of 7 academics and 2 out of 3 legal professions/organisations. Respondents reported that they either did not feel capable to express a preference or reported that they were not in a position to do so. Well under a tenth of respondents (6 respondents) provided commentary on the benefits and challenges associated with different models of incorporation (echoing views raised elsewhere in the analysis of responses to this question) or acknowledged that the model proposed by the Incorporation Advisory Group convened by Together and the Children and Young People Commissioner Scotland could potentially provide an appropriate model.

Just over a tenth of respondents expressed a preference for transposing the UNCRC through a suite of Scottish children’s rights (15 respondents). This model was preferred by over a third of public bodies (8 respondents). It was also preferred by 2 out of 21 individuals, 3 out of 78 third sector organisations and 2 out of 7 academics.

Respondents who expressed a preference for transposing the UNCRC through a suite of Scottish children’s rights provided further commentary on the rationale for their preference. Reasons for preference included: transposing through this model would allow necessary adjustments to complement the existing Scottish legislative and social context; that a suite of rights would create less ambiguity and less room for interpretation than a direct incorporation model; and that it would sit alongside future intentions to develop a Statutory Human Rights Framework for Scotland.

“The preferred model for incorporating the UNCRC into domestic law would be a tailored and evolving but systematic approach to transposition, arising from comprehensive consultation and co-production with a defined suite of Rights for Scotland’s children; anticipating in due course a Statutory Human Rights Framework for Scotland.” (Public body)

Well under a tenth of respondents expressed a preference for **transposing the UNCRC through changes to domestic legislation** (4 respondents). Respondents reported that the current model of transposition through domestic legislation has worked effectively and has ensured a lack of ambiguity in how UNCRC articles apply to the Scottish policy and practice. This model was preferred by 2 out of 23 public bodies, 1 out of 21 individuals and 1 out of 78 third sector organisations.

Well under a tenth respondents expressed a preference to **combine different models** (4 respondents). Respondents commented that this approach would both maintain the integrity of the UNCRC as well as specify how the articles would apply in a Scottish context. This model was preferred by 2 out of 21 individuals, 1 out of 78 third sector organisations and 1 out of 7 academics.

Well under a tenth of respondents expressed **general opposition to the incorporation of the UNCRC and/or additional children's rights mechanisms** (4 respondents, all individual respondents).

3. Theme 2

The focus of the questions under theme 2 of the consultation was embedding children's rights in public services.

3.1 Question 13

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

Option	Total	Percentage
Yes	116	72%
No	14	9%
Don't know	0	0%
Not answered	18	11%
Not specified	14	9%

n=162

Option	Total	Percentage
Yes	116	89%
No	14	11%
Don't know	0	0%

n=130

A total of 126 respondents provided written comments to explain their views. These are the key views which arise, in order of frequency, in responses from those who **agreed** that a requirement for the Scottish Government to produce a Children's Rights Scheme should be included in this legislation.

The most popular view expressed by respondents was that **producing a Children's Rights Scheme would contribute to greater accountability** and establish a system by which **the Scottish Government and Scottish Ministers can demonstrate they are acting in compliance with their duties** under the UNCRC. This view was expressed by just over a third of those who provided comments (47 respondents). These respondents noted that a model similar to that currently used in Wales would help hold Ministers, the government and other public bodies to account for their actions. This view was expressed by just under half of third sector organisations (36 respondents) and just over a quarter of public bodies (7 respondents). It was also raised by 2 out of 21 individuals and 1 out of 5 academics.

“We believe this is important in order to establish a system by which the Scottish Government and Scottish Ministers can demonstrate they are acting in accordance and in compliance with their duties under the UNCRC. It also helps foster an environment where children’s rights are considered at the beginning of any decision-making process. Such a scheme would also help to improve transparency about the processes Ministers are following.” (Charity / non-profit organisation)

“We need a shift in our thinking and understanding about the impact our children and young people can have on policy and practice development. Too often adults are not prepared to pass over responsibility and allow change to happen. The Welsh example makes services accountable and asks them to demonstrate that they have changed their practice to include the voices of CYP in policy and practice decisions.” (Charity / non-profit organisation)

Just over a quarter of those who provided comments (33 respondents) welcomed the Children’s Rights Scheme as a way of **helping to create opportunities for children, young people and wider stakeholders to inform how the UNCRC is implemented. These respondents felt that children and young people should be consulted and meaningfully involved in the development and review of the Children’s Rights Scheme.** Several respondents referred to the wording of the draft Children’s Rights (Scotland) Bill, as prepared by the Incorporation Advisory Group, and agreed with requiring the Scottish Government to undertake a broad consultation with children, young people and with the Children and Young People’s Commissioner Scotland in order to develop the Children’s Rights Scheme. Respondents went on to recommend additional opportunities for children and young people and others to scrutinise progress and to engage with decision making. This point was raised by just under two-fifths of third sector organisations (28 respondents) and just over a tenth of public bodies (3 respondents). It was also raised by 2 out of 5 academics.

“In particular, we welcome the opportunities that could be provided for children, young people and other relevant stakeholders to engage with and contribute to the development, implementation and review of the scheme. Providing opportunities for people to take part in and scrutinise decisions which affect them is a key element of a human-rights based approach to decision-making.” (Charity / non-profit organisation)

“It has introduced a new and important dynamic in the relationship between children, children’s representatives and government in Wales. This begins with the development of a scheme. The Measure provides for children and their representatives, including the Children’s Commissioner to participate in the development of a scheme. This was highly significant in Wales where Ministers (via their officials) engaged in dialogue with

stakeholders over the content of the scheme. In this way stakeholders were able to influence the mechanisms and structures to give effect to children's rights in Wales." (Academic organisation)

Linked to the remarks about children and young people's participation in decision-making, a quarter of respondents who provided comments (31 respondents) **pointed to the key role played by CRWIA's and that** a Children's Rights Scheme should be supported by CRWIA's. Respondents noted that CRWIA's are already introduced in Scottish Government policy and is being rolled out to other organisations, but that this should be strengthened and made mandatory for drafting new policy and legislation. This issue was raised by just over a third of third sector organisations (25 respondents) and just under a fifth of public bodies (4 respondents). It was also raised by 1 out of 21 individuals and 1 out of 5 academics.

"Child-proofing legislation and policy through child impact assessments is also an important instrument. There are good examples of child impact assessments being introduced in the legislative review process. For example, Sweden, has had a system of child impact assessment for some years as part of its wider National Children's Rights Strategy. More recently, the Flanders Region in Belgium has introduced an evaluation process, which must be conducted for every draft decree that directly impacts the interests of young people." (Children's Right/ Children's organisation)

"Furthermore, there should be a statutory duty for Child Rights and Wellbeing Impact Assessments to be undertaken as standard in the development of future policy and there should be regular reporting and accountability to Parliament on this." (Charity/Non-profit)

Over a fifth of those who provided comments (26 respondents) noted that a **Children's Rights Scheme would strengthen or embed children's rights**. A Children's Rights Scheme was seen as a way to enact the practical implementation of legislative duties and respondents welcomed an approach that encourages and enables the embedding of children's rights. This view expressed by over a quarter of third sector organisations (19 respondents) and a fifth of public bodies (5 respondents). It was also raised by 1 out of 21 individuals and 1 out of 5 academics.

"Legal change will be insufficient to make rights real for children and so a range of integrated measures are needed." (Charity/Non-profit)

"We believe that a key part of making UNCRC rights 'real' in a Scottish context is about embedding children's rights in public service, discourse and understanding. This is a key part of 'upstream' interventions which

will support policy makers, legislators, and key stakeholders to protect children’s rights from the outset, and minimise incidences of children’s rights being breached.” (Charity/Non-profit)

Over a tenth of those who provided comments (19 respondents) expressed the view that a **Children’s Rights Scheme would help to ensure transparency in the realisation of children’s rights** and noted that it could prove useful in ensuring that robust processes are in place and in demonstrating those processes. This Children’s Rights Scheme could bring together the various plans and exercises across legislation and different agencies in a way that is more transparent and accessible. Respondents further noted that the Children’s Rights Scheme should incorporate clear and transparent complaints procedures and clear steps setting out what children, young people or their representatives can do if they think Ministers have not had due regard for the UNCRC. This view was expressed by a little under a fifth of third sector organisations (12 respondents) and just over a tenth of public bodies (3 respondents). It was also raised by 1 out of 21 individuals and 2 out of 5 academics.

“The Children’s Rights Scheme ensures transparency as to how the Scottish Government are implementing a Children’s Rights Act. It also gives opportunity for children and young people and civil society to engage with the Government and hold them to account regarding their progress under the Act.” (Children’s Right/ Children’s organisation)

“A Children’s Rights Scheme, such as the one set out in the draft Bill, would mean that everyone would know (or could find out) what specific steps the Scottish Government were proposing to take.” (Individual)

Fewer than ten per cent of respondents thought that a Children’s Rights Scheme should not be included in the legislation with respondents tending to express that explaining that it was either not needed in legislation or that there was a risk of causing confusion or diluting rights.

3.2 Question 14

Do you think there should be a “sunrise clause” within legislation? Please explain your views.

Option	Total	Percentage
Yes	50	31%
No	53	33%
Don’t know	20	12%
Not answered	22	14%
Not specified	17	10%

n=162

Option	Total	Percentage
Yes	50	41%
No	53	43%
Don't know	20	16%

n=123

A total of 118 respondents provided written comments to explain their views. These are the key views which arise, in order of frequency, in responses from those who **agreed** that there should be a "sunrise clause" within legislation.

The most popular view conveyed by respondents was that **duty bearers will need to assess and make changes to current policies and procedures where required to ensure that they are compliant with the new Act. This includes duty bearers participating in the development and implementation of the rights.** This view was raised by just over a third of all respondents who provided comments in response to this question (42 respondents). Respondents commented that creating a two-stage process with a first transitional period would allow time for public authorities and duty bearers to ensure their policies and practices are aligned with the rights in the new Act. At the end of the transitional period, duty bearers would be under a duty to comply, with clear timelines and clarity given to the process. This view was also most prominent in responses by public bodies with two thirds of respondents raising the view (19 respondents). It was raised by under a quarter of third sector organisations (16 respondents) and under a fifth of individuals (3 respondents). It was also raised by 2 out of 2 of legal professions/organisations and 1 out of 5 academics.

"This bill will have a profound and far-reaching effect on the lives of children and young people and their families, and particularly on some of the most vulnerable. It is important therefore for public authorities are given the time to get it right: to be able to develop, trial and refine their structure and to accommodate any unforeseen consequences."
(Religious / Faith Group)

Over a quarter of all respondents who provided comments in response to this question (31 respondents) noted that **duty bearers should be required to provide necessary training, awareness raising and workforce development activities to ensure knowledge and understanding of a new Act.** Respondents mentioned that increasing knowledge and awareness about the UNCRC among children, young people, county council and government agencies through knowledge-enhancing measures would be needed. This would include assessing the impact of new legislation, identifying gaps in provision and services, developing and implementing new processes and developing and delivering awareness-raising activities among staff. This would ensure continued and systematic transformation work with duty bearers fully prepared for a new Act. Over two-fifths of public bodies (12 respondents) and under a quarter of third sector

organisations expressed this view (15 respondents). This point was also raised by 2 out of 2 legal professions/organisations and 1 out of 5 academics. 1 individual out of 18 also expressed this view.

Over a fifth of respondents who provided comments in response to this question (26 respondents) felt that **duty bearers require a clear timeframe in order to prepare and ensure that services and policies are compliant**. These respondents commented that having a clear, definitive timeline for preparation and compliance would be preferred than to delay the date the legislation is enacted. This will ensure that duty bearers are aware of what's expected of them and ensuring that their policies and procedures are compliant within the given timeframe. This view was expressed by around half of public bodies (12 respondents). Under a fifth of third sector organisations raised this point (10 respondents). It was also raised by 2 out of 5 academics, and 1 out of 2 respondents from a legal profession/organisation. 1 individual out of 18 also expressed this view.

“These changes are vast, systemic, cultural and attitudinal, and may take a generation to be fully realised. We should not try to do this overnight and we should be strategic and systematic in our approach to the work. Agreed definite milestones should be identified in a series of ‘sunrise’ clauses, and that the purpose of any such clause would be to eliminate drift and ensure progress towards clearly stated legislative objectives.”
(Public body)

Just under a tenth of all respondents who provided comments in response to this question (8 respondents) noted that **allowing a “sunrise clause” would enable duty bearers to fully embed policies and procedures which would result in more sustainable long-term changes within organisations and public authorities**. These respondents felt that this would result in proper care given in the developmental stage in order to ensure long-term protection and fully embedded legislation across all policies, procedures and systems within organisations and public authorities. This issue was raised by around a tenth of third sector organisations (5 respondents). It was also raised by 1 out of 2 academics, 1 out of 18 individual responses and 1 out of 29 public bodies.

A small proportion of respondents (6 respondents) noted that **care should be given to ensure that all duty bearers are aware of a new Act, as it takes time to generate public knowledge and understanding**. Legislation which is imposed too quickly may have a negative effect and may undermine the benefits of a new Act, respondents suggested. This view was raised by a tenth of public bodies (3 respondents), and 3 out of 63 third sector organisations.

“Will this be rushed in because it’s the right thing to do, or because it’s right for the government’s profile? Rushed legislation will make this messy and full of loopholes.” (Parent supported by third sector organisation)

The key views arising by respondents who did not agree with the “sunrise clause” within legislation are set out below, in order of frequency.

Just under two fifths of all respondents who provided comments in response to this question (43 respondents) referred to the **ongoing work on the implementation of the UNCRC. Aspects of the UNCRC are already embedded into legislation, policy and practice in Scotland.** These respondents commented that there is already a government-led programme on children’s human rights and the duties in the Children and Young People (Scotland) Act 2014 with incorporation of the UNCRC campaigned for a considerable time already.⁴ Respondents commented that public authorities should be well underway with preparations to ensure alignment with the new Act as a result of this. Respondents also mentioned that the “*UNCRC has already been embedded into legislation, policy and practice in Scotland over many years*”. This point was raised by under half of respondents from third sector organisations (30 respondents), under a third of Public bodies (8 respondents) and under a fifth of individuals (3 respondents). 1 out of 5 academics mentioned this view.

Just over a fifth of all respondents who provided comments on this question noted **that aspects of the UNCRC should already be embedded into legislation** (24 respondents). Over a quarter of third sector organisations raised this view (17 respondents), with around a fifth of charities / non-profit organisations, academics and individuals raising this view. Under two-fifths of individuals raised this view (3 respondents), a tenth of public bodies also raised this view (3 respondents). 1 out of 5 academics also raised this view.

Just under a tenth of all respondents who provided comments in response to this question noted that they **agreed with the response to the consultation presented by Together** (10 respondents). Just over a tenth of third sector organisations responded in this way (7 respondents). 1 out of 29 public bodies, and 2 out of 5 academics also noted that they agreed with Together.

Over a third of all respondents who provided comments in response to this question (42 respondents) **expressed the view that the UNCRC should be incorporated into Scottish domestic law as soon as possible.** Respondents commented that a “sunrise clause” would cause undue delay and urged the Government to incorporate the UNCRC as a matter of urgency. Other respondents commented that incorporation must begin as soon as possible if it is to be achieved in the current parliamentary session. Two-thirds of third sector organisations expressed this view (25 respondents). It was also noted by a third of

⁴ <https://www.gov.scot/publications/progressing-human-rights-children-scotland-action-plan-2018-2021/>

individuals (6 respondents), and just under a third of public bodies (9 respondents). 1 out of 5 academics also expressed this view.

Under a tenth of all respondents who provided comments in response to this question (8 respondents) **expressed the view that the UNCRC should be incorporated within the current Parliamentary term.** This was suggested by over a tenth of public bodies mentioned that the UNCRC (4 respondents) and by a small proportion of third sector organisations also expressed this view (4 respondents out of 63).

“Incorporation as urgently as possible is essential in ensuring children’s rights are respected, protected and fulfilled. The “sunrise clause” gives a definitive timeline to duty bearers.” (Public body)

A small number of respondents who provided comments in response to this question (7 respondents) felt **there has been sufficient consultation, therefore duty bearers should be familiar with the expectations upon them as a result of a new Act.** These respondents explained that there has been consultation over a number of years regarding the UNCRC, and as a result of this public authorities should be familiar enough with the expectations to quickly ensure that policies and practices are aligned with the new legislation. Respondents noted that the Children and Young People (Scotland) Act 2014 places duties on Scottish Ministers and public bodies to report on the steps they have taken to give further effect to the UNCRC requirements and will be reporting on this for the first time in 2020. 4 third sector organisations raised this issue, along with 1 out of 5 academics, 1 out of 29 public bodies and 1 out of 18 individuals also raised this view.

Over a quarter of respondents (33 respondents) expressed the view that duty bearers should be familiar with the expectations upon them as described by a new Act. Just over a third of third sector organisations also raised this point (23 respondents). It was also noted by around a fifth of public bodies (6 respondents) and under a fifth of individuals (3 respondents). It was also raised by 1 out of 5 academics.

“It has been thirty years since the UNCRC was agreed upon. In this time, Scotland has had several consultations on the incorporation of children's rights. Children learn about human rights in school, but have no ability to utilise them when it matters - we cannot allow this to continue. We must empower our young people and show that when we say they have rights, we mean it.” (Academic)

3.3 Question 15

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

A total of 54 respondents provided written comments in response to this question.

In answering this question, around two thirds of respondents (39 respondents) suggested a specific length of time that public bodies should be given to make preparations before the new legislation comes into full effect. These timescales and the number of respondents suggesting each timescale are presented in the table below.

Timescales suggested	Number of respondents
4 months	1
Less than 1 year	1
1 year	10
1-2 years	1
18 months	4
18-24 months	3
2 years	13
2-3 years	1
3 years	2
4 years	1
By 2021	2
Total	39

The timeframe suggested most commonly in responses was two years. This suggested timeframe was noted by one third of those who suggested a timeframe (13 respondents). It was raised by over one quarter of public bodies (5 respondents), just under one third of individuals (4 respondents) and just under one third of third sector organisations (4 respondents).

The second most commonly suggested timeframe was 1 year. This suggested timeframe was raised by just under one quarter of those who suggested a timeframe (10 respondents). It was raised by over one quarter of public bodies (5 respondents), one fifth of individuals (2 respondents) and just under one third of third sector organisations (3 respondents).

Just under two fifths of respondents (20 respondents) offered additional comments in relation to the length of time public bodies should be given to make preparations before the new legislation comes into full effect. The views emerging from these comments are summarised below:

- It was suggested that the new legislation should come into full effect as a matter of urgency.
- The decision on timescales should be made by those who understand the processes involved in preparing for implementation.
- Different elements of the legislation would require different lengths of time to prepare for implementation.
- Suggestion that a full consultation on timings is required.
- 1 year was suggested to be suitable because it reflects the planning cycle of most public bodies.
- Consideration should be taken to the length of time required to adjust budgets when considering this timescale.
- Public bodies should already be prepared and thus a "sunrise clause" would not be required.
- Some public bodies would require more time than others.
- The length of time should be as long as it would take to ensure all staff within public bodies are sufficiently trained.

3.4 Question 16

Do you think additional non-legislative activities, not included in the Scottish Government's Action Plan, are required to further implement children's rights in Scotland?

Option	Total	Percentage
Yes	118	73%
No	6	4%
Don't know	12	7%
Not answered	18	11%
Not specified	8	5%

n=162

Option	Total	Percentage
Yes	118	87%
No	6	4%
Don't know	12	9%

n=135

A total of 128 respondents provided written comments in response to this question. The key views arising in these comments are set out below, in order of frequency.

In answering this question, respondents took the opportunity to suggest types of non-legislative activities that they were of the view would be required to further implement children's rights in Scotland. These are outlined in the following paragraphs.

Under two-thirds of those who provided comments (81 respondents) suggested that further **children’s rights awareness raising activities** are required to support the implementation of children’s rights in Scotland. These respondents outlined a wide range of awareness raising activities such as media and social media campaigns; the development of a wide range of information and guidance resources aimed at raising public awareness, which could be made available in libraries, health centres, schools and citizen’s advice centres; peer education programmes; the embedding of rights based approach in schools and including children’s rights within the Curriculum for Excellence. Awareness raising activities should be aimed at individual groups, including all children (including vulnerable and marginalised groups), parents/carers and individuals working with children. These awareness raising activities should aim to increase individuals understanding of children’s rights. This issue was raised by almost three-quarters of third sector organisations (57 respondents), just over a third of public bodies (9 respondents) and just over half of individuals (9 respondents). It was also raised by 5 out of 7 academics and 1 out of 2 legal professions/organisations.

“...a new law is not enough to create a culture change; any new legislation needs to be accompanied by a wide-spread, comprehensive awareness-raising programme.” (Children’s rights organisation)

“Legislation is only part of the action required to make UNCRC incorporation meaningful for all children in Scotland. In order to have real impact for children, their families and wider society, everyone has to be included in understanding the importance of children’s rights and their role in upholding them. Awareness raising across all of Scottish life is necessary so individuals (including children as well as organisations) understand what their role and responsibility is in relation to upholding, implementing and supporting children to access and use their rights.” (Children’s rights organisation)

Just under a third of those who provided comments (41 respondents) noted the importance of **UNCRC rights training** for all duty bearers, including professionals working with children and young people, policy makers at both a local and national level and parents. It was suggested that an online training module should be developed which goes above and beyond the Scottish Government’s existing ‘Introduction to the UNCRC’ ten-minute training tool. It was suggested that children’s input in the design of this online tool should be sought. One respondent outlined the modules that they suggested should be included in this online training tools. These modules are listed below:

- Underline the status of children as holders of human rights
- Increase knowledge and understanding of the UNCRC
- Explain how the UNCRC fits within the Scottish legislative context
- Emphasise the importance of listening to children’s voices and supporting participatory approaches

This point was raised by just under two-fifths of third sector organisations (30 respondents), just under a fifth of public bodies (4 respondents) and just under a fifth of individuals (3 respondents). It was also raised by 4 out of 7 academics.

“Under the CRC there is a duty to develop training and capacity-building for all those involved in the process of implementing convention rights and for all those working with and for children. There is an expectation that this should be systematic, ongoing, and integrated into all professional training codes and educational curricula.” (Charity / non-profit organisation)

Just over a quarter of those who provided comments (34 respondents) suggested the need to **improve approaches to collecting monitoring data and measuring impact** following the implementation of the UNCRC. The importance of the CRWIAs in the process was recognised by these respondents. It was suggested that the CRWIAs can be a useful tool for organisations when developing policies and providing an evidence record of the process. Furthermore, it was suggested that the use of the CRWIA process would only be effective if widely adopted across services. For this to happen, the development of guidance and training on the use of CRWIA would be required. These views were expressed by just over a quarter of third sector organisations (22 respondents) and just over two-fifths of public bodies (10 respondents). This issue was also raised by 1 out of 16 individuals and 1 out of 7 academics.

“We support the proposal in the draft Children’s Rights (Scotland) Bill to the effect that Child Rights Impact Assessments are mandatory. We refer to the Together Briefing.” (Children’s rights organisation)

“Monitoring and accountability are central to a human rights approach, as ensuring a vital circle between rights holders and duty bearers (Collins 2019). For example, Scotland currently has extensive statistics and other data on children and children’s services: to what extent do they cover the requirements of the UNCRC and what are the gaps? With the incorporation of the UNCRC, a review of existing monitoring and accountability systems would be required, to ensure they are firmly based on a children’s rights approach.” (Academic)

A fifth of those who provided comments (26 respondents) recognised the importance of **advocacy services** for children. These respondents noted that advocacy services are crucial to ensuring children’s voices are heard. However, it was acknowledged that there are a number of areas in Scotland where children do not have access to advocacy services. Therefore, respondents recommended that to support the incorporation of the UNCRC, advocacy access should be assessed and resourced accordingly. Moreover, respondents suggested ways of improving existing advocacy services, including ensuring appropriate

levels of funding and better support is provided to these services, particularly third sector organisations that provide support to children to express their views. This issue was raised by just over a quarter of third sector organisations (21 respondents) and just over a tenth of public bodies (3 respondents). It was also raised by 1 out of 16 individuals and 1 out of 7 academics.

“...the right to independent advocacy for children and young people would support their Article 12 rights and provide an accessible mechanism for children and young people to seek redress where their UNCRC rights have not been upheld. There is patchwork provision of independent advocacy services across Scotland, meaning that every child is not able to access this vital service; in order to ensure that children’s rights are being implemented and made real for every child, suitably resourced independent advocacy should be embedded in the government’s Action Plan.” (Charity / non-profit organisation)

A little under a fifth of those who provided comments (22 respondents) were of the view that the **active involvement of young people should be encouraged** as this is pivotal to developing and engaging in the process of non-legislative activity. Particular efforts should be made to ensure the involvement of children from marginalised groups to prevent the exclusion of these groups. Respondents suggested examples of including children in the development of resources to raise awareness of children’s rights and delivering engagement events for children and young people. This issue was raised by just under a fifth of third sector organisations (15 respondents) and just over a tenth of public bodies (3 respondents). It was also raised by 2 out of 16 individuals and 2 out of 7 academics.

“Participation Article 12 provides both for the right of children and young people to express their views on all matters concerning them and to have those views given due weight in accordance with their age and maturity. This right applies to all children without discrimination. CHS would like the involvement of and consultation with children to avoid being tokenistic and aim to ascertain representative views to ensure tangible outcomes for children.” (Charity / non-profit organisation)

“We would also like to see more engagement events such as the #RightsRoadtrips to create discussion with young people about the UNCRC.” (Charity / non-profit organisation)

A tenth of those who provided comments (13 respondents) emphasised the importance of **children’s rights-based budgeting**. These respondents suggested that government and duty bearers should be required to evidence that budgetary planning and decision-making takes into account the best interests of children as a primary consideration. Monitoring of resources in budgets is important to ensuring children’s rights are protected. This issue was

raised by a little under a fifth of third sector organisations (12 respondents). It was also raised by 1 out of 24 public bodies.

“UNCRC Article 4 requires States to fulfil children’s economic, social and cultural rights to the ”maximum extent of their available resources.” There is a requirement to identify and monitor available resources and to allocate to children in national and other budgets. Furthermore, effective monitoring of resources in budgets is crucial to protecting children from changes in economic policies or financial downturns. As such, child budgeting can act as a powerful tool to monitor the Scottish Government’s commitment to children, increasing transparency and accountability.” (Charity / non-profit organisation)

“The Scottish Government should work to ensure that all levels of government adopt children’s rights approaches to budgeting to ensure children and young people’s rights are protected at all times, particularly during periods of economic instability.” (Children’s rights organisation)

4. Theme 3

The focus of the questions under theme 3 of the consultation was enabling compatibility and remedies.

4.1 Question 17

Do you agree that any legislation to be introduced in the Parliament should be accompanied by a statement of compatibility with children’s rights?

Option	Total	Percentage
Yes	120	74%
No	5	3%
Don’t know	6	4%
Not answered	17	10%
Not specified	14	9%

n=162

Option	Total	Percentage
Yes	120	92%
No	5	4%
Don’t know	6	5%

n=131

A total of 117 respondents provided written comments in response to this question.

There is clear support among consultation respondents for a statement of compatibility with children’s rights to accompany any legislation to be introduced in parliament. The key views arising in these comments are set out below, in order of frequency.

“The proposed requirement to produce a statement of compatibility with children’s rights would appear to be a proportionate response to ensure that the totality of the legislative framework of the Scottish Parliament fully considers children’s rights.” (Public body)

The most popular view set out in written responses to this question was **that any statement of compatibility should be intrinsically linked to the introduction of CRWIAs**. Over a quarter of those who provided comments (31 respondents) expressed this view. These respondents outlined that this approach would help to ensure that consideration of compatibility with children’s rights is always included from the outset of the legislative process. Linking these two elements would strengthen Parliament’s scrutiny of any Bill’s compliance with UNCRC at all stages and would contribute to mitigating against any negative impacts on children’s rights, reflecting that all aspects of their life can be

affected by multiple features of policy and decision making. This view was expressed by just over a third of third sector organisations (24 respondents) and just under a quarter of public bodies (5 respondents). It was also raised by 2 out of 6 academics.

“These measures will ensure that children’s rights are at the heart of legislative reform and they will support the Parliament to scrutinise proposed legislation from a child rights perspective.” (Children’s rights organisation)

Just under a tenth of those who provided comments (13 respondents) **considered that a statement of compatibility would deliver enhanced scrutiny and accountability when introducing legislation.** They outlined that it would ensure that children’s rights are fully understood during the development of a bill before it is laid before the Parliament for consideration, thereby contributing to identifying any non-compliance issues before any proposed law makes its legislative journey in Parliament. This point was raised by around a sixth of third sector organisations (11 respondents). It was also raised by 1 out of 22 public bodies and 1 out of 17 individuals.

Under a tenth of those who provided comments (8 respondents) believed that a statement would therefore offer the opportunity for legislators to rectify any issues before parliamentary scrutiny picked them up, saving vital parliamentary time and resources. Knowing that this is a requirement was also considered to mean that **legislators will design laws to ensure compliance with children’s rights from the outset**, which it was hoped can lead to better decisions and law-making. This point was raised by 5 third sector organisations out of 70. It was also raised by 2 out of 17 individuals and 1 out of 22 public bodies.

Over a tenth of respondents who provided comments (14 respondents) noted that **a statement was also considered to allow the identification of issues of compatibility at an early stage, thereby mitigating against any negative impacts on children’s rights.** As such, a pre-legislative consideration of compatibility with the UNCRC was considered by respondents to be a way of preventing the passage of law which enables infringement of children’s rights. Statements of compatibility were outlined as ‘useful tools’ to formalise the recognition of UNCRC compliance and embed consideration of the UNCRC rights in the law-making process. This issue was raised by almost a fifth of public bodies (4 respondents) and around an eighth of third sector organisations (9 respondents). It was also raised by 1 out of 6 academics.

Under a tenth of all respondents who provided comments (10 respondents), felt that a statement of compatibility must be accompanied by sufficient ‘upstream’ work to ensure that children’s rights are a prime consideration at all stages in the process at a wider policy making level. These **respondents outlined that a statement would contribute to promoting awareness of children’s rights among decision makers while also ensuring that children’s rights influence other areas of policy.** This issue was raised by

over a tenth of third sector organisations (9 respondents). It was also raised by 1 out of 22 public bodies.

“Simply making a statement of compatibility will be inadequate without thorough consideration of all the potential impacts on children’s rights, including those of marginalised groups.” (Charity / non-profit organisation)

Under a tenth of all respondents who provided comments (9 respondents) **also noted that the requirement helps to ensure that Bills which may not initially appear to be relevant to children, are also subject to the same scrutiny where wider implications can be explored.** Again, this was considered to potentially contribute to better legislation and ensure that the **recognition of children’s rights is a key part of wider policy and decision-making processes.** Respondents highlighted that it is important to ensure that children’s rights are considered beyond the children’s sector. For example, transport policy should address travel requirements for families with young children, young people and those with additional needs. It was raised by just under a tenth of third sector organisations (6 respondents) and public bodies (2 respondents). It was also raised by 1 out of 17 individuals.

“This would allow people to know how to incorporate the new legislation into current policies or how to make new ones to ensure the law was adhered to and that this is always addressed in advance at Bill stage.” (Individual)

“A Statement of Compatibility would enhance and complement existing pre-legislative checks. Such a statement would support and provide information and greater awareness to elected members.” (Charity / non-profit organisation)

A tenth of all respondents (13 respondents) who provided comments on this question **provided general expressions of agreement with the Incorporation Advisory Group convened by Together and the Children & Young People’s Commissioner Scotland.** This view was expressed by over a tenth of third sector organisations (9 respondents) and just under a tenth of public bodies (2 respondents). It was also raised by 2 out of 6 academics.

“We agree with Together that a Statement of Compatibility would play an important role in ensuring that any new legislation introduced in the Parliament is compatible with the UNCRC and that the statement should be accompanied by a CRIA that explicitly sets out how the Bill furthers

UNCRC compliance and mitigates against any negative impacts on children’s rights.” (Charity / non-profit organisation).

4.2 Question 18

Do you agree that the Bill should contain a regime which allows right holders to challenge acts of public authorities on the ground that they are incompatible with the rights provided for in the Bill?

Option	Total	Percentage
Yes	131	81%
No	5	3%
Don’t know	6	4%
Not answered	13	8%
Not specified	7	4%

n=162

Option	Total	Percentage
Yes	131	92%
No	5	4%
Don’t know	6	4%

n=142

A total of 126 respondents provided written comments in response to this question. The key views arising in these comments are set out below, in order of frequency.

The most popular view expressed by respondents who commented on this question was **support for a regime which allows right holders to challenge acts of public authorities**. This view was expressed by around a quarter of all respondents who provided comments (32 respondents). It was also highlighted by respondents that the justiciability of children’s rights is a ‘crucial part of UNCRC implementation’ as well as being a basic tenet of constitutional democracy. Therefore, it was considered vital that children, young people, their parents and carers and representative organisations are all given appropriate opportunity **for remedy and redress** to challenge public authorities when they believe that children and young people’s rights have been breached. This issue was raised by over a quarter of public bodies (7 respondents) and just under a third of third sector organisations (23 respondents). It was also raised by 1 out of 5 academics and 1 out of 3 legal professions/organisations.

“The ability of rights holders to go to court to vindicate their rights is a basic feature of a constitutional democracy, it helps to guarantee compliance, and provides an authoritative forum for deciding whether or not rights have been complied with.” (Public body)

Around a tenth of all respondents who provided comments (11 respondents) **noted that all groups must be able to use, and have confidence in, the legal system. These respondents also felt it was essential that children’s rights are reinforced.**

Respondents noted that children and young people face additional barriers to accessing justice and therefore public authorities and other organisations should be compelled to remedy issues which are in violation of children’s rights. To make sure this takes place, it is important that sufficient resources are allocated to ensure that children have access to children’s rights officers and advocacy services in all parts of Scotland. This was raised by around an eighth of third sector organisations (10 respondents). It was also raised by 1 out of 17 individuals.

“One of the aims of incorporating international human rights law into domestic legislation is to ensure a human rights-based approach is taken from the beginning (e.g. planning and design stages), thereby ensuring greater compatibility with rights once implementation is underway. However, not all non-rights respecting obstacles will be ‘designed out’ and this is why it is also important to include accountability mechanisms for when infringements do occur.” (Public body)

Under a tenth of all respondents who provided comments (10 respondents) argued for a **regime that would provide further means of ensuring the compliance of legislation with children’s rights.** These respondents argued that the way in which the UNCRC is incorporated needs to be effective and real and not merely symbolic. This point was raised by a quarter of public bodies (6 responses). It was also raised by 3 out of 76 third sector organisations and 1 out of 3 legal professions/organisations.

“Any right which cannot be demanded directly by the right holder is worthless”. (Individual)

“It is essential that the rights-holders are able to challenge the acts of public bodies if such actions are incompatible with the provisions of the new Bill. It is essential that those individuals are able to have protection of their rights when coming in to contact with public bodies in the looked after, educational or any other settings in both instances of breaches of rights and by acts of omission.” (Legal profession/organisation)

For respondents, clear pathways to remedy and redress that would include a complaints system as well as full legal processes. Rights holders should be able to raise their concerns directly with duty bearers in the first instance without fear of reprisal or repercussions. Public authorities are required to comply with legislation and therefore rights holders must have the opportunity to challenge their action or inaction in order to prevent or remedy violations of children’s rights. It was considered important to ensure that

children (or those acting on their behalf) are able to fully interact with the process of challenging any breach to their rights.

A small minority of respondents (7 respondents out of 126) **noted the particular importance of a regime to support the most vulnerable children.** In terms of redress, the consultation does not give a great deal of consideration to ease of access to redress and resource for representation / advocacy for children in taking action. This is crucial, especially for vulnerable children, including looked after children, who may wish to take redress against public bodies who hold corporate parenting responsibilities in general and local authorities in particular, who may hold some parental responsibilities in respect of them. This point was raised by over a tenth of public bodies (4 respondents) and 3 third sector organisations out of 77.

“It is also important that there are sanctions to deal with instances of incompatible actions. Given that we may be dealing with the needs of people who are among the most vulnerable, there must be steps taken to empower them.” (Third sector organisation)

Almost a third of all respondents who provided comments (37 respondents) **highlighted the importance of developing child-friendly approaches and clear routes for challenge in order to ensure right holders have the opportunity to recourse.** These respondents felt that it is important that a range of child sensitive and child friendly procedures are developed for children and young people and their representatives to ensure accountability and remedy and raise concerns directly with duty bearers. It was noted that it is important these procedures include support for self-advocacy or independent advocacy, victim support services, access to independent child friendly info and complaints procedures and to courts with necessary legal and other assistance as well as info on timescales and right to appeal. This issue was raised by a third of public bodies (8 respondents) and a third of third sector organisations (25 respondents). It was also raised by 2 out of 3 legal professions/organisations, 1 out of 5 academics and 1 out of 17 individuals.

A number of other points were raised by small numbers of respondents. These are not broken down by sub-group in view of the numbers of responses in question.

A small number of respondents (individuals and public bodies) did not agree with a regime **and cited concerns about increased litigation, clarifications regarding the definition of a child and a preference for dialogue before legal processes.** Others, though expressing support for a regime, also outlined reservations such as the potential for an increase in the amount of litigation relating to children’s rights rather than an actual improvement in children's rights. Careful implementation and guidance was therefore considered to be required to dovetail this with other rights to challenge along with providing public bodies with time to become compliant through resources to identify and eliminate

poor practice. It was also suggested that any regime will need to be formalised and will need to operate consistently across the country.

“This would be a perfect way to ensure that public bodies are swamped by entirely vexatious challenges.” (Individual)

“Challenge should be possible, however there should be clear routes for challenging and resolving most rights issues with public authorities at an earlier stage. One possible option would be via nominated rights champions, and consideration of how rights issues are handled within or in addition to existing complaints processes.” (Children’s rights organisation)

Other suggestions were outlined by respondents in order to ensure right holders have easy access to independent advice and support. Suggestions included the Children and Young People’s Commissioner Scotland, the Equality and Human Rights Commission and the Scottish Human Rights Commission as routes to raise concerns. The creation of an independent children’s rights tribunal with availability of legal aid advocacy and representation to facilitate the hearing of complaints and access to remedies was suggested. Young people consulted proposed various ways in which enforcement and redress including: independent committees made up of young people and adults which have powers to hold public authorities to account and community agencies to seek redress if rights have been violated.

“The Commissioner for Children and Young People in Scotland would be the logical guardian of children’s rights. He or she would be well placed to identify any violations and take appropriate action to protect the rights of children and to make a challenge on behalf of a child who asserts that their rights have been breached”. (Legal profession/organisation)

4.3 Question 19

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

Option	Total	Percentage
Yes	73	45%
No	5	3%
Don’t know	31	19%
Not answered	32	20%
Not specified	21	13%

n=162

Option	Total	Percentage
Yes	73	67%
No	5	5%
Don't know	31	28%

n=109

A total of 95 respondents provided written comments in response to this question. The key views arising in these comments are set out below, in order of frequency.

The most popular view expressed in response to this question was **support for following the proposed approach to be taken to just satisfaction and damages under the HRA**. This view was expressed by almost a fifth of all respondents who provided comments (17 respondents). The HRA model of just satisfaction is considered to have demonstrated itself as an effective proven model within the Scottish legal system. Just satisfaction is seen as a cornerstone of international human rights law and the **UNCRC itself is noted to enshrine the right to appropriate reparation and it was considered natural to follow this approach**. This issue was raised by over a quarter of third sector organisations (14 respondents). It was also raised by 1 out of 2 legal professions/organisations, 1 out of 22 public bodies and 1 out of 13 individuals.

“UNCRC Article 39 enshrines this right, and it therefore follows that if the Scottish Government goes ahead with full incorporation as per its commitment then this would be part of Scots Law and would need to be implemented. Article 39 makes it clear that there should be appropriate reparation, including compensation”. (Charity / non-profit organisation)

Around a tenth of all respondents who provided comments on this question (8 respondents) **outlined that just satisfaction is a core mechanism for ensuring those whose rights are violated receive satisfactory acknowledgement of such violation**. This was linked closely to the purpose of awards of compensation in that the victim should be placed in the same position, as far as is possible, as if the breach of their human rights had not occurred. It was noted therefore, that there should be an acknowledgement of rights violations and a process to redress these through just satisfaction and, where appropriate, financial compensation. This view was expressed by around a tenth of third sector organisations (5 respondents) and public bodies (2 respondents). It was also raised by 1 out of 6 academics.

“The HRA model works satisfactorily. But we sound a note of caution on the terminology used here. Damages under the HRA are not meant to be compensatory but to give recognition that a breach has occurred. The European Court of Human Rights talks of “just satisfaction” rather than compensation and we strongly recommend that that language be used instead of “financial compensation” which risks promising to aggrieved

parties far more than (we assume) the new legislation is intended to give.”
(Academic)

Over a tenth of all respondents who provided comments (11 respondents) noted that this approach should include appropriate means of reparation, including compensation, and, where needed, **measures to promote physical and psychological recovery, rehabilitation and reintegration as part of a wider redress approach**. These respondents felt that this approach towards **wider redress** should also be assured alongside a financial compensation model of just satisfaction. This point was raised by a sixth of third sector organisations (8 respondents). It was also raised by 2 out of 13 individuals and 1 out of 22 public bodies.

A tenth of all respondents who provided comments (13 respondents) expressed the view that decisions should be decided on case by case basis and **that guidance would be required on levels of compensation awards in relation to 'just satisfaction'**. These respondents underlined the need for a **fair system that is transparent** and treats each case with equal respect. There was interest in other proven models and whether an institution such as the ECHR could provide guidance on levels of award. These issues were raised around a fifth of third sector organisations (9 respondents). It was also raised by 1 out of 13 individuals, 2 out of 22 public bodies and 1 out of 2 legal professions/organisations.

“The approach to awards of financial compensation for just satisfaction damages under the HRA is tried and tested. Decisions made in relation to just satisfaction damages under the HRA should be considered and used as guidance for awards of financial compensation made for breaches of rights in terms of the UNCRC. It may however take time to develop a body of case law on this.” (Legal profession/organisation)

Under a tenth of all respondents who provided comments (8 respondents) noted **that care must be taken to ensure a child-centred approach to just satisfaction, protecting the interests of the child above other stakeholders**. It was outlined that there needs to be flexibility in the system to accommodate the child's needs, whether simple or complex, that would allow them to seek compensation when their rights have been breached. This point was raised by around a tenth of public bodies (2 respondents). It was also raised by 2 out of 13 individuals and by 4 third sector organisations (out of 51).

“Financial compensation should be awarded but access to justice should be more straightforward and affordable for all children and young people who wish to seek redress.” (Charity / non-profit organisation)

“Most of the young people we spoke to our consultation sessions felt that where breaches had occurred the most important thing was that support

for recovery was available. This is in line with article 39 of the UNCRC – the right to recovery.” (Charity / non-profit organisation)

Respondents outlined that there must be consequences for duty bearers that fail to uphold rights linked to any approaches for just satisfaction for children deprived of their rights. It was considered that this could also provide a deterrent and a motivation for duty bearers to implement children’s rights as far as possible. Respondents suggested that violations of rights should also result in legislation being amended or developed to prevent similar violations in the future and therefore reducing the likelihood of future financial compensation being required.

“Financial compensation has value, but it is not sufficient. If a legal case proves damages from abuse of rights, redress should go beyond financial compensation, and should include a legal requirement for immediate structural change in the offending institution, monitored by the courts, to address potential further abuse.” (Individual)

Under a tenth of all respondents who provided comments (7 respondents) expressed the view that **proportionality was nevertheless felt to be key by respondents to avoid the development of ‘no win, no fee’ litigation.** These respondents considered any actions leading to this will do little to protect rights and could potentially have a negative impact on services and practice. In addition to the reputational damage to duty bearers, a significant financial penalty could harm public services for all citizens so it was outlined that a balance needs to be struck. There were suggestions that there should thus be some assessment of the potential cost implications of the potential for increased litigation involving public services and analysis of impact on delivery of support for children and their families. This point was raised by around a fifth of public bodies (4 respondents). It was also raised by 1 out of 13 individuals and 1 out of 50 third sector organisations.

Linked to the above, a view was expressed by a tenth of all respondents who provided comments (10 respondents) **that just satisfaction must be proportionate and appropriate** and be applied consistently. The approach should recognise, for example, the difficulty in measuring losses accurately when children’s rights are violated or taking into consideration the potential impact on public service delivery. This point was raised by a tenth of third sector organisations (6 respondents). It was also raised by 2 out of 13 individuals and 1 out of 22 public bodies.

“Children and young people need to feel empowered to challenge breaches of their rights that are protected under the UNCRC, however we cannot allow a culture of speculative legal claims to become prevalent. This would have a negative impact on young people, and the public services that they rely on.” (Children’s rights organisation)

“While financial recompense will rarely be a principal motivation in such cases, it is important nonetheless to fairly reflect the impact that a breach has had on an individual.” (Individual)

“I am unsure if financial compensation is appropriate other than defined losses as this may lead to adults applying pressure to children for financial gain.” (Individual)

Among those respondents who responded that they did not know, or did not answer, some felt unable to express a judgement on this particular issue while others expressed a need for further detail and specific proposals on financial compensation before they were able to form an opinion. It was also suggested that alternative approaches should be additionally be fully utilised in first instance including complaints processes and Duty of Candour.

4.4 Question 20

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

Option	Total	Percentage
Yes	89	55%
No	6	4%
Don't know	18	11%
Not answered	30	19%
Not specified	19	12%

n=162

Option	Total	Percentage
Yes	89	79%
No	6	5%
Don't know	18	16%

n=113

A total of 98 respondents provided written comments to explain their views. The key views arising in these comments are set out below, in order of frequency.

The most popular view expressed by respondents was that **UNCRC rights should take precedence over provisions in secondary legislation because it is essential to maintain consistency with the approach to wider human rights set out in the HRA.** This view was expressed by just over a quarter of those who provided comments (25 respondents). These respondents noted that in order for the UNCRC to have the same legal status as the ECHR, it is necessary to ensure that UNCRC rights are given precedence over provisions in secondary legislation, rather than being allocated a lower status that human rights are as provided for in the ECHR. It was raised by just over a

quarter of third sector organisations (14 respondents) and two-fifths of public bodies (8 respondents). It was also raised by 1 out of 14 individuals, 1 out of 6 academics and 1 out of 3 legal professions/organisations.

Just under a quarter of those who provided comments (22 respondents) felt that **ensuring UNCRC rights take precedence over provisions in secondary legislation provides clear constitutional commitment to children’s rights and ‘full force’ to the UNCRC rights**. It is likely this approach would ensure the UNCRC rights have a positive impact on policy and decision-making, according to comments from these consultation respondents. Respondents commented that giving UNCRC rights precedence over provisions in secondary legislation will ensure incorporation is more than ‘symbolic’ and that such precedence will provide the strongest defence of children’s rights. This issue was raised by just under a third of third sector organisations (16 respondents). It was also raised by 1 out of 20 public bodies, 2 out of 14 individuals and 3 out of 6 academics.

“Constitutionalisation of the UNCRC would evidence a commitment to recognition of children’s rights at the highest level. Interviewees in a...study on incorporation of the UNCRC suggested that “the constitutional commitment to children’s rights created a symbolic ‘red line’ that could not be crossed”. We believe that giving children’s fundamental rights precedence over secondary legislation will give them the strongest protection possible.” (Charity / non-profit organisation)

Over a fifth of those who provided comments (21 respondents) felt that a **secondary legislation should be compatible with UNCRC rights**. Compatibility would be ensured through a thorough review of existing secondary legislation and/or ensuring new secondary legislation is compatible. These respondents acknowledge this would be an important but challenging task which would involve in-depth consideration of the extent to which domestic legislation already complies with (or goes further than) UNCRC provisions. On occasion, respondents commented that much secondary legislation should already be compatible with UNCRC provisions, as Scottish duty bearers and courts already give due consideration to the UNCRC. This view was expressed by over a tenth of third sector organisations (9 respondents) and two-fifths of public bodies (8 respondents). It was also raised by 1 out of 14 individuals, 1 out of 6 academics and 1 out of 3 legal professions/organisations.

“The Scottish Government already uses UNCRC as a framework to ensure consideration is given to children’s rights where decisions are made on policy matters and as an underpinning principle of the Getting It Right for Every Child (GIRFEC) model. Part 1 of the Children and Young People (Scotland) Act 2014 places obligations on public authorities to report every three years on the steps which they have taken to secure or give further effect to UNCRC. In developing any framework for incorporation, the extent to which domestic law is already consistent with,

or exceeds the requirements of UNCRC will require to be considered.”
(Legal profession/organisation)

Just under a fifth of those who provided comments (17 respondents) felt that **learning from other states which have incorporated the UNCRC suggests that this approach has a clear positive impact on policy and decision-making**. These respondents comment that international evidence suggests that providing UNCRC rights with an elevated status in domestic legal hierarchy has a positive impact on societal awareness and understanding of children’s rights, as well as a positive impact on how children experience their rights in practice. On occasion, respondents identify particular states which are deemed to have successfully allocated precedence to UNCRC rights over secondary legislation, such as Norway. This point was raised by a quarter of third sector organisations (13 respondents). It was also raised by 2 out of 20 public bodies and 2 out of 6 academics.

“The visibility of the UNCRC in domestic law promotes and strengthens understanding of children as rights holders, which is essential for UNCRC rights to have meaning and be effectively implemented in practice. The Norwegian model of incorporation sets out that the UNCRC has precedence over other legislation and prevails over domestic law in the case of a conflict (alongside the ECHR). Norway is seen as a successful model of incorporation that has had a significant impact on the realisation of children’s rights. This has included improved awareness and understanding of the UNCRC, evidenced by a significant increase in the number of references to the UNCRC in Supreme Court cases after incorporation. The UNCRC also has precedence in Spain and Belgium.”
(Children’s rights organisation)

Just over a tenth of those who provided comments (13 respondents) expressed that **the UNCRC encompasses fundamental, inalienable rights which should, by their nature, take precedence over provisions in secondary legislation**. It was noted that the UNCRC, like the ECHR, comprises rights which, once incorporated, will be a strong legal foundation for children’s rights; the UNCRC rights would act as a foundation for all other secondary legislation in this case. Respondents commented that the rights should be central to how domestic legislation should be developed and interpreted. This point was raised by over a tenth of third sector organisations (8 respondents) and a fifth of public bodies (4 respondents). It was also raised by 1 out of 14 individuals.

“The rights outlined in the UNCRC are not aspirational but inalienable and therefore should be considered as preeminent.” (Children’s rights organisation)

Around a tenth of those who provided comments (12 respondents) expressed that **ensuring precedence for UNCRC rights is in-line with the UN Committee’s standpoint that incorporation should mean that the provisions of the UNCRC prevail where there is a conflict with domestic legislation or common practice.** These respondents generally do not provide substantive commentary to support this view, but simply note that the proposal to give UNCRC rights precedence over provisions in secondary legislation is in-line with the international consensus as represented by the UN Committee’s standpoint. This issue was raised by just under a fifth of third sector organisations (10 respondents). It was also raised by 2 out of 6 academics.

A tenth of those who provided comments (10 respondents) noted that the **children’s best interests should always be prioritised, regardless of any contradiction between the UNCRC rights and provisions in secondary legislation.** Respondents commented that, although it may seem reasonable to give UNCRC rights precedence over provisions in secondary legislation, it may prove challenging to interpret whether provisions within secondary legislation are actually in the best interest of the child, as noted in the text of Article 3. Care must be taken to ensuring that any provisions which are overridden by the UNCRC rights are not themselves central to the protection of a child’s wellbeing or their parents’ rights. This view was expressed by under a tenth of third sector organisations (3 respondents) and a fifth of public bodies (4 respondents). It was also raised by 2 out of 14 individuals and 1 out of 3 legal professions/organisations.

“In general, as a matter of principle this is consistent, and if there are specific elements of subordinate legislation that can be challenged on UNCRC grounds then there should be a mechanism for review. However, there could be a difficulty if some provision in secondary legislation is key within specific processes to the delivery of safety and best interests of a child or children involved.” (Public body)

Just under a tenth of those who provided comments (9 respondents) noted that **provisions in secondary legislation should be given precedence over UNCRC rights when these provisions represent a stronger defence of children’s rights.** This is in-line with Article 41 of the UNCRC which emphasises that the Convention does not affect other domestic legislative provisions which are more conducive to the realization of the rights of the child.⁵ Respondents noted that the UNCRC comprises fundamental rights for children but this does not preclude states from going further in legislating or interpreting legislation in a way which ensured additional or strengthened children’s rights. No incompatibility is therefore considered to exist between the UNCRC and provisions in secondary legislation which go beyond UNCRC provisions. This view was expressed by just under a tenth of third sector organisations (5 respondents) and over a tenth of public bodies (3 respondents). It was also raised by 1 out of 3 legal professions/organisations.

⁵ <https://www.cypcs.org.uk/rights/uncrcarticles/article-41>

“Because the UNCRC is widely seen as the “floor and not the ceiling” where children’s rights are concerned, [we believe] it should take precedence over secondary legislation, provided secondary legislation does not call for a higher level of rights. If secondary legislation calls for a higher level of rights it would have to be considered. Our understanding is that this is in line with how the Scottish Government regards the ECHR in relation to the HRA.” (Public body)

Among those who didn’t agree that UNCRC rights should be given precedence over provisions in secondary legislation, or could not express a particular view, comments (each raised by under a tenth of all respondents who provided comments in response to this question) were as follows:

- A few respondents noted that further discussion is needed about how such a precedence would be interpreted and implemented in practice (4 respondents), as well as additional guidance for public authorities judging incompatibility between the UNCRC rights and secondary legislation (3 respondents).
- Several noted that the rights and responsibilities of parents should be taken into account (5 respondents).
- Several respondents also reported they are unable to provide a response (7 respondents).

4.5 Question 21

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

Option	Total	Percentage
Yes	82	51%
No	3	2%
Don’t know	20	12%
Not answered	34	21%
Not specified	23	14%

n=162

Option	Total	Percentage
Yes	82	78%
No	3	3%
Don’t know	20	19%

n=105

A total of 74 respondents provided written comments to explain their views.

The most popular view expressed by those who commented on this question was that **including such provisions would ensure the UNCRC incorporation Bill is consistent with the HRA and the Scotland Act**. This view was expressed by just under a third of those who provided comments (23 respondents). These respondents commented that the proposed provisions requiring an ASP to be interpreted and applied so far as possible in a manner compatible with UNCRC rights has legal precedent, in the provisions of the HRA and Scotland Act in relation to the ECHR. Courts are therefore familiar with such provisions and UNCRC rights should have the same legal status as rights enshrined in the ECHR. The limitations associated with devolved responsibility do not preclude provisions requiring an ASP (rather than Acts of UK Parliament) to be interpreted and applied compatibly. This view was expressed by just under a third of third sector organisations (13 respondents) and a quarter of public bodies (4 respondents). It was also raised by 1 out of 9 individuals, 4 out of 4 academics and 1 out of 2 legal professions/organisations.

“This is an important aspect of the HRA model. Section 3 of the HRA provides that, if upon reading the ordinary construction of primary or subordinate legislation it is incompatible with the ECHR, then “a possible meaning must be found that will prevent the need for a declaration of incompatibility.” (R (Wardle) v Crown Court at Leeds [2001] UKHL 12, at para 79). The object of section 3 is to avoid wherever possible an action by a public authority which be unlawful under section 6 of the HRA. This is a positive judicial mechanism.” (Children’s rights organisation)

About a quarter of those who provided comments (18 respondents) noted that **such provisions would ensure the best outcomes for children and the strongest defence of the rights enshrined in the UNCRC**. These respondents commented that children will have better opportunities to exercise their rights if ASPs are interpreted compatibly with children’s rights from the beginning. Interpreting and applying ASPs compatibly will secure children’s rights further and allow enforcement, ensuring that any incompatibility in legislation will actually be addressed or justified effectively through the courts. This point was raised by over a quarter of third sector organisations (13 respondents) and just under a third of public bodies (5 respondents).

“We agree with this approach as it minimises the risk that the legislation will be found incompatible with the UNCRC rights. This also provides the ability to correct any incompatibility between the legislation and the UNCRC rights.” (Charity / non-profit organisation)

Just over a fifth of those who provided comments (15 respondents) re-iterated that provisions should be included in the model of UNCRC incorporation to ensure courts **read and give effect to primary and subordinate legislation of the Scottish Parliament in a way which is compatible with the UNCRC**. These respondents confirmed that interpreting and applying an ASP compatibly should be included in the Bill, presented as a

requirement to ‘read and give effect’ to the ASP in a manner which is compatible with the rights provided for in the Bill. On occasion, respondents reference the views of Incorporation Advisory Group convened by Together and the Children and Young People’s Commissioner Scotland to support their response. This issue was raised by just over a quarter of third sector organisations (11 respondents). It was also raised by 2 out of 16 public bodies and 2 out of 4 academics.

Under a tenth of all respondents who provided comments in response to this question (6 respondents) expressed **general agreement** that the Bill should contain strong provisions requiring an ASP to be interpreted and applied so far as possible in a manner which is compatible with the rights provided for in the Bill. These respondents did not provide additional commentary. Broad agreement was noted by just over a tenth of third sector organisations (3 respondents). It was also raised by 2 out of 16 public bodies and 1 out of 9 individuals.

Less than a tenth of all respondents who provided comments in response to this question (5 respondents) commented that **such provisions are completely necessary for the correct and effective incorporation of the UNCRC**. These provisions are necessary for the incorporation of the UNCRC to be meaningful. This was raised by less than a tenth of third sector organisations (3 respondents). It was also raised by 1 out of 9 individuals and 1 out of 2 legal professions/organisations.

4.6 Question 22

Should the Bill contain a regime which would enable rulings to be obtained from the courts on the question of whether a provision in an ASP is incompatible with the rights secured in the Bill?

Option	Total	Percentage
Yes	91	56%
No	9	6%
Don’t know	0	0%
Not answered	43	27%
Not specified	19	12%

n=162

Option	Total	Percentage
Yes	91	91%
No	9	9%
Don’t know	0	0%

n=100

A total of 82 respondents provided written comments to explain their views. The key themes arising in these comments are set out below, in order of frequency.

Among the issues raised by those who answered ‘Yes’ were:

The most popular view expressed in response to this question was the need to include **‘strike down’ powers within the model of incorporation. This would have the effect that any law passed by the Scottish Parliament would no longer be considered a law if it was decided by a court that it breached the rights set out in the UNCRC.** This was raised by around a third of all respondents who provided comments in response to this question (25 respondents). The Children’s Rights (Scotland) Bill, as drafted by the Incorporation Advisory Group convened by Together and the Children and Young People’s Commissioner Scotland, includes ‘strike down’ powers that would allow courts to declare an ASP to be incompatible with the UNCRC and the Optional Protocols. This mirrors the protections given to ECHR rights under the Scotland Act 1998 and would ensure that the rights enshrined in the UNCRC are given the same status as that given to ECHR rights through the Scotland Act 1998.

Linked to the above, there was frequent reference to the consultation’s affirmation that it would not be possible to introduce ‘strike down’ powers without modification to the Scotland Act 1998. The consultation document indicated that granting such a power to the Scottish courts is beyond the competence of the Scottish Parliament. This was questioned repeatedly by respondents who challenged the Scottish Government to provide further details and an explanation for this. If this does prove to be the case, respondents noted that provisions should be made to enable Scottish courts to issue ‘statements of incompatibility’, which were seen as being a ‘weaker alternative’ because in this case incompatible provisions in legislation remain in law until the UK Parliament amends them.

“This consultation suggests that granting such a power to the Scottish courts is outwith the competence of the Scottish Parliament. It isn’t clear what is the basis for this determination. We would argue that it is essential that UNCRC rights are valued as fundamental and not optional. This would best be achieved through the ‘strike down’ power discussed above. However, it is essential regardless of whether a strike down within competence, that there is a mechanism for the Courts to examine compatibility of Acts with UNCRC rights.” (Children’s Rights organisation)

The issues noted above were raised by four in ten third sector organisations (20 respondents). It was also raised by 3 in 5 academics and 2 out of 16 public bodies.

Over a quarter of those who provided comments (22 respondents) noted **the Bill should provide a regime which enables rulings to be made on incompatibility in order to ensure that children’s rights are not weakened or violated.** These respondents argued that this would strengthen the protection of children’s rights, acting as a ‘failsafe’ and demonstrating to children and young people ‘that their rights are paramount’. Respondents noted that this approach has been tried and tested through the Scotland Act 1998, which had helped ensure a preventative approach to safeguarding rights and create a human rights culture in Scotland. This point was raised by just under a third of third sector

organisations (16 respondents) and a quarter of public bodies (4 respondents). It was also raised by 2 out of 7 individuals.

“Yes. This mechanism would allow for the courts to highlight to the Parliament that there is an issue that needs to be remedied. It would also allow for preventative action to be taken to ensure that children’s rights are not violated. (Legal profession/organisation)

Under a quarter of those who provided comments (19 respondents) felt that **courts should have the power to rule that legislation is unlawful or incompatible with the UNCRC. Courts are uniquely placed to be able to deliver rulings objectively.** These respondents noted that the system of incorporation should have appropriate ‘checks and balances’ and that the power to declare ASPs incompatible should fall within the jurisdiction of the Courts. This view was expressed by just under a third of third sector organisations (16 respondents). It was also raised by 1 out of 16 public bodies, 1 out of 5 academics and 1 out of 3 legal professions/organisations.

“Yes. This mechanism would allow for the courts to highlight to the Parliament that there is an issue that needs to be remedied. It would also allow for preventative action to be taken to ensure that children’s rights are not violated.” (Legal profession/organisation)

“The court of law should be the ultimate place where decision making should rest as it can take account of the full set of circumstances in each individual instance.” (Academic respondent)

Those who answered ‘no’ provided very few substantive comments to support their response.

4.7 Question 23

Do you consider any special test for standing to bring a case under the Bill should be required? Please explain why.

Option	Total	Percentage
Yes	24	15%
No	64	40%
Don’t know	23	14%
Not answered	37	23%
Not specified	14	9%

n=162

Option	Total	Percentage
Yes	24	22%
No	64	58%
Don't know	23	21%

n=111

A total of 101 respondents provided written comments to explain their views. The key themes arising in these comments are set out below, in order of frequency.

There was overlap in the views and issues raised by respondents who answered 'yes', 'no' and 'don't know' to this question. On occasion, respondents who answered 'yes' and 'no' provided similar or related reasons for their answers. Views raised frequently across the consultation responses are set out below.

The most popular view expressed by respondents who commented on this question was that **the 'sufficient interest' test of standing should be applied for those wishing to bring a case under the Bill**. This view was expressed by just over two-fifths of those who provided comments (44 respondents). These respondents suggested that there is a need for a broader definition of standing than that used in the HRA, which requires an individual to be a 'victim' of a violation of rights. Within this group of respondents, a few argued that the concept of 'sufficient interest' set out following the case of AXA should be given effect.⁶ This would ensure that individuals (including children and young people) wishing to bring a case do not have to demonstrate personal interest or rely on being a victim to bring a case. This is seen by these respondents as being significant given the potential burden on the victim of bringing such a case, and the timeframe for justice systems. This point was raised by just over half of third sector organisations (33 respondents) and just under a third of public bodies (6 respondents). It was also raised by 2 out of 10 individuals and 2 out of 6 academics.

"We consider that the definition of standing should include the following: a child whose rights have been breached, those holding parental responsibilities and rights in respect of the child, those who can satisfy the test of "sufficient interest" in the child as per provisions and interpretation of such test under section 11 of the Children (Scotland) Act 1995, the Commissioner for Children and Young People in Scotland and the Scottish Human Rights Commission." (Legal profession/organisation)

Over a quarter of those who provided comments (30 respondents) suggested **that provision should be made to enable third party representatives to bring cases or contribute to judicial proceedings relating to children's rights**. There were repeated references in consultation responses to ensuring that the Children and Young People's Commissioner Scotland is able to bring challenges before the courts similar to the way in which the Equalities and Human Rights Commission can.

⁶ <https://www.supremecourt.uk/cases/docs/uksc-2011-0108-judgment.pdf>

“In child cases it is not desirable to wait for a child victim before a challenge can be brought by, or on behalf of, that child. There should be provisions to allow the Commissioner to bring challenges in advance of any harmful effect of legislation.” (Legal profession/organisation)

Respondents also noted that automatic standing should be given to the Children and Young People’s Commissioner Scotland, the Scottish Human Rights Commissioner and the Equalities and Human Rights Commission.

“Law Officers should be able to participate in and to initiate proceedings. Consideration should also be given to a range of advocates and representatives, such as - but not limited to - Children and Young People’s Commissioner Scotland, a representative organisation or charity, a trusted professional etc.” (Charity / non-profit organisation)

This issue was raised by just over a third of third sector organisations (22). It was also raised by 2 out of 19 public bodies, 2 out of 10 individuals, 2 out of 6 academics and 2 out of 2 legal professions/organisations.

Just under a quarter of those who provided comments (23 respondents) **felt that there should be no special test for standing and that children and young people should be enabled to bring a case or seek redress through the courts.** The model of incorporating the UNCRC should include provisions that enable children and young people to bring a case if and when a public authority fails to comply with the UNCRC or its Optional Protocols. Respondents also noted that children with the capacity to instruct a solicitor or other representative should be able to bring a case. Also, respondents noted that there should be provisions to enable collective action (by groups of children of young people or children in association with other representative organisations) to challenge breaches to their rights as a means to reduce burdens on any one child. This view was expressed by just over a quarter of third sector organisations (17 respondents). It was also raised by 2 out of 19 public bodies, 1 out of 10 individuals and 3 out of 6 academics.

“Full incorporation of the UNCRC means that children are protected under domestic law and are therefore able to take a case in their own name. Under Scots law, children have legal capacity at age 16 and are presumed to be able to instruct a solicitor over the age of 12.” (Children’s rights organisation)

Over a fifth of those who provided comments (22 respondents) emphasised **the need to minimise the barriers for children and young people in bringing proceedings to protect their rights. Therefore no special test should be applied which may present**

barriers or discourage cases from being brought. Respondents noted that it can be particularly challenging for children and young people to bring a case before the court and their voices are frequently not heard in court proceedings concerning them; as such numerous respondents expressed clear opposition to the introduction of any special test which may make this more difficult. However it also important to recognise that children and young people may need and want guidance, support and representation to engage in legal proceedings. This point was raised by a quarter of third sector organisations (16 respondents) and a little under a fifth of public bodies (3 respondents). It was also raised by 3 out of 6 academics.

“[We] believe support and guidance must to offered to children to assist them in deciding if bringing a case is the most appropriate course for action. That is why we support the measures proposed in the draft Children’s Rights (Scotland) Bill. The Bill seeks to create early protections in the decision making process, and ensuring that legal standing is provided for the child who is directly subject to an adverse effect of legislation and to those ‘with sufficient interest in the subject matter of the proceedings’.” (Children’s rights organisation)

5. Responses from organisations representing the views of children and young people

This appendix provides a stand-alone analysis based on consultation responses by eleven respondents identified by the Scottish Government as being organisations that represent the views of children and young people. These eleven responses have also been considered as part of the overall analysis in sections 2, 3 and 4.

The responses included in this analysis are those received from the following:

Children 1st
Children at Harmeny School
Children in Scotland
Children's Parliament
East Ayrshire Children and Young People's Cabinet
Glenrothes Youth Forum
Highland Children and Young People's Forum
LGBT Youth Scotland
Our Hearings Our Voice
Scottish Youth Parliament
Scottish Learning and Disability Commission
Young Scot
Youth Link Scotland

The analysis should be considered alongside that presented in the preceding sections of this report, as many of the points raised reflect issues raised by other organisations. The views presented combine responses by organisations and also views of children and young people collected by these organisations during consultation events, young people's forums and workshops. In the case of consultation questions that included closed questions we have presented the number of respondents within this sub-group who answered yes/no/don't know or who did not answer or did not specify a response.

Theme 1: Legal mechanisms for incorporating the UNCRC

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

Ten out of thirteen organisations representing the views of children and young people answered 'yes' to this question. One answered 'don't know' and two other respondents did not specify an answer to the closed question in their written submission.

Organisations representing the views of children and young people emphasised that the model for incorporation should provide a duty for public authorities to comply in order to

ensure public authorities do not act incompatibly with the UNCRC. They noted that the HRA framework contains important mechanisms to ensure compatibility with the ECHR and provides redress and remedy if these rights are breached. It was suggested that similar mechanisms should therefore be included in the model of UNCRC incorporation for Scotland.

“Children’s rights must be legally binding in courts and tribunals across Scotland, and all public authorities should be legally obliged to act in a way which is compliant with the UNCRC and the Optional Protocols to which Scotland is a signatory.”

Some organisations included in their consultation responses references to views collected by young people during consultation events. One such organisation noted that young people felt that there should be provisions to enable the framework to be updated and revisited, ensuring the needs of children are met ‘continuously’. Young people consulted noted that the framework should go beyond ‘the minimum standard’. Another response which presented the views of young people emphasised the importance of ensuring accountability and compliance with the ECHR.

“...young people in our group believe that a statement on any new bill explaining its compatibility with the UNCRC would help maintain a consistent level of accountability with regards to the rights of children and young people. They agree with the principle of section 3, that legislation must comply with the ECHR as far as possible because this another means through which the rights of young people in Scotland can be upheld.”

Several organisations representing children and young people noted that they support the position of The Children and Young People’s Commissioner Scotland and Together in response to Question 1.

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

Eleven out of thirteen organisations representing the views of children and young people answered ‘yes’ to this question, proposing that there should be other aspects included in the framework. One answered ‘don’t know’ and one other respondent did not specify an answer to the closed question in their written submission.

Calls for a proactive and preventative approach to upholding children’s rights were prominent in consultation responses by organisations representing children and young people. It was suggested that children and young people may not be fully aware of their

rights, underlining the need for public authorities to be proactive in ensuring rights are safeguarded and promoted, as opposed to solely reacting to situations in which rights are breached.

One group of schoolchildren, whose views were fed into the consultation *'liked the idea that everyone involved in their lives would be involved in promoting their rights'*.

This category of respondents also emphasised the value of placing a duty on Ministers to have 'due regard' to the UNCRC in the exercise of their functions. This would ensure that children and young people's rights are at the forefront of policy and decision-making.

It was suggested that a CRWIA should be presented alongside any new bill laid before the Scottish Parliament. This, respondents argued, should be in addition to a statement of compatibility and would ensure that the rights and wellbeing of children and young people are given full consideration during the development and implementation of new legislation.

One organisation noted that the framework should specify 'key actions' and duties for those delivering services to and on behalf of children and young people, including schools.

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

Ten out of thirteen organisations representing the views of children and young people answered 'yes' to this question, agreeing that the framework for incorporation should include a 'duty to comply' with rights included in the UNCRC. One did not answer the question and two respondents did not specify an answer to the closed question in their written submission.

In their comments, respondents noted that a duty to comply would ensure compliance and accountability. It would mean that it is 'incumbent on public bodies and Ministers to comply', leading to positive impacts on children and young people. One organisation noted that incorporation should mean that protecting and promoting children's rights is binding and not simply 'guiding'.

The voices of children and young people featured prominently in some responses, setting out views in favour of including a 'duty to comply':

"It's important because if you don't make children's rights law, then there will still be children that need help. If they are made law, then more adults will listen."

"All of the young people felt there should be a "duty to comply" with the framework for the UNCRC. The young people felt that if this was the case for the Human Rights Act, why would this be any different for the rights of young people specifically. This would ensure that any work being

undertaken is compatible with the UNCRC, but the young people felt that any public authority should also be required to give evidence of this. This would allow each to demonstrate not only that their work is compatible but also to identify improvements that could be made in order to do more.”

“Enforce children’s rights instead of just letting it be optional...”

(Views of children and young people in consultation response)

Some respondents felt that a duty to comply would have particular benefits in supporting the rights of groups with protected characteristics, including LGBT and disabled young people.

Question 4: What status, if any, do you think General Comments by the UN Committee on the Rights of the Child should be given in our domestic law?

The children and young people’s organisations who answered this question considered that the UN’s General Comments should be used to help interpret and support the implementation of the UNCRC. Respondents noted that this will ensure Scotland keeps pace with developments in international human rights law, while also being able to apply learning in a way that is appropriate in the Scottish context.

“General Comments have been used effectively since 2001, providing clarity and consistency, and ensuring that the UNCRC is relevant in an ever-changing world. In other European nations who have incorporated the UNCRC, UN Committee General Comments and Observations are seen by the courts as a valuable tool for interpreting the Convention.”

Responses also pointed out that General Comments and Concluding Observations help rights holders to understand and interpret their rights. It was suggested that courts should be able to refer to these when complaints are raised about breaches of children and young people’s rights.

One organisation drew attention to the importance of using the General Comments to support the interpretation of individual articles, noting that this could be the case in respect of Article 23 of the UNCRC, which refers to the rights of children with disabilities.⁷

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

⁷ <https://www.cypcs.org.uk/rights/uncrcarticles/article-23>

Children and young people’s organisations underlined the need to learn from countries where the UNCRC has been incorporated. Respondents also noted that Scottish courts are used to drawing from the UNCRC when considering cases under the HRA and wider EU legislation.

“A United Nations database provides access to jurisprudence from caselaw considered by United Nations Treaty Bodies including the Committee on the Rights of the Child, the Human Rights Committee and the Committee on the Rights of Persons with Disabilities. This resource allows access to a vast body of legal interpretation of international human rights law that has developed over a number of years.”

Youth organisations echoed the submission by Together, drawing attention to the body of jurisprudence that is emerging through case law in Sweden, Spain, Norway and Belgium, among others.

“It was agreed by all of the young people that it can only be positive to learn from other communities on how they successfully incorporated the UNCRC and the challenges they faced. This would allow the Scottish Government to understand what works and what doesn’t in their approach. In order to incorporate the UNCRC successfully there needs to be as much information and advice as is possible in order to make informed decisions. The young people felt this was about coming together to support each other and learn.”

In incorporating the UNCRC, attention should be given to other jurisdictions that have fully incorporated the UNCRC into their domestic law systems and have upheld the rights of LGBT young people.

“We know from experience with the Equalities Act (2010) that there are significant gaps in case law in relation to LGBT people in the UK; this means that there is often ambiguity on how the Act is interpreted and limits the meaningful realisation of equalities.”

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

Ten out of thirteen organisations representing the views of children and young people answered ‘yes’ to this question, proposing that the Scottish Government should push

forward with incorporation at the earliest opportunity - and within the current parliamentary session. Two answered 'no' and one respondent did not specify an answer to the closed question in their written submission.

Respondents pointed out that children and young people have made their views clear through the Scottish Youth Parliament's '*Right Here, Right Now*' campaign in 2018, and argued that there should be no delay to await the development of a Statutory Human Rights Framework.

"The First Minister has committed to incorporating the UNCRC within this Parliamentary session. It is essential that this promise is upheld, not only to underline Scotland's commitment to children's rights but also to strengthen existing work to support and protect children and young people, and to improve the outcomes for some of the most vulnerable members of our society....full and direct incorporation of the UNCRC now would capitalise on the momentum provided by the Year of Young People activity and would ensure a fitting legacy for a year where children and young people clearly demonstrated their enthusiasm for shaping Scotland's future."

"2019 marks the 30th anniversary of the UNCRC. Introducing a bill to parliament this year would serve as a timely demonstration of the Scottish Government's belief in the principles of the UNCRC."

Children and young people's views were set out in a number of consultation responses. There was unequivocal support for pushing forward now in some quarters: "*The children felt that now was the right time to make this happen!*" Other organisations also outlined reasons behind the need for prompt action, noting:

"Through our work with children, parents/carers, professionals, and decision-makers, it is clear that there is still a lack of awareness and understanding about children's human rights and how they keep children healthy, happy and safe. As a result, children continue to face difficult and sometimes traumatic circumstances that infringe upon their rights and reduce outcomes for their later lives. Children have been, and continue to be, failed by the adults and systems around them and therefore any delay in moving forward with incorporation will continue to place children at risk of harm."

Another organisation noted that children and young people have been advocating enshrining children's rights as law in Scotland for over 20 years since the establishment of the Children's Parliament, and that many children and young people are '*often dismayed to learn that children's human rights are not already law in Scotland*'. Young people consulted

noted that momentum and support have been built for the incorporation of the UNCRC and felt that this ‘should be capitalised on while it is a priority’.

“With an uncertain political climate, the young people didn’t want the incorporation of the UNCRC to get lost or forgotten, especially when so much work has already gone in.”

“Can't wait, there is significant demand and need for this amongst young people and an election may possibly result in a government where this is no longer priority or part of the programme for government.”

“I think that children’s rights should be a law because if a kid can’t get their rights, it can ruin their day or even their life.”

A small number of children and young people’s organisations disagreed with the proposal to push forward now with incorporation. These organisations felt that it was important to get incorporation right, which may require further discussion about needs and rights as they apply to certain groups, including children and young people with learning disabilities.

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

A clear majority of children and young people’s organisations (11 out of 13 respondents) were supportive of the model presented by the Children and Young People’s Commissioner Scotland and Together. Respondents welcomed that the model sets out children’s rights clearly and comprehensively, and advocates: direct incorporation of UNCRC into Scottish domestic law; a duty on public authorities to comply with UNCRC proactively; and ‘due regard’ given to UNCRC in law, recognising children and young people as rights holders. Organisations representing the views of children and young people expressed the view that direct incorporation was the most desirable way to incorporate the UNCRC into domestic law. Some made the distinction between the model presented by Together and a transposition model, which they considered a less attractive approach.

“[we] believe that the UNCRC is clear and comprehensive and rewriting the articles as a suite of Scottish Children’s Rights risks diluting its principles and undermining children’s rights.”

“... we recognise the importance and impact that a rights-based culture can have on the experiences of and outcomes for children. Incorporating the UNCRC into domestic law is a huge step, but one that needs to be supported by broader measures to spur a larger culture change in

Scotland. In addition to legal protections and mechanisms for remedy and redress, there needs to be a holistic approach to incorporating and implementing children’s human rights so that children grow up in an atmosphere of happiness, love and understanding.

“Rights should be part of the culture of life.”

“Ministers need to think about us and tell the truth. They need to know how we are feeling and what we think. So, speak to more children and visit more schools and communities. But really do it, not just see it in the paper.”

Not all respondents were supportive of the model, however. One respondent noted that the young people with whom they had consulted felt that this approach “didn’t make sense”. This response noted that young people felt the model did not give sufficient consideration to the specific needs of children in Scotland.

“...by not tailoring the UNCRC to Scotland the rights of children could be lost and confused by those interpreting them. For the rights that are suitable for a Scottish context, they should be directly incorporated but those that can’t should be interpreted for Scottish law.”

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

A number of children and young people’s organisations did not answer this question, noting that they did not consult on this level of detail.

Some respondents noted that the consultation distinguishes between articles which confer rights on children and other articles, which require action by states or duty bearers to prevent rights breaches. Respondents felt that this would not be a concern under a model of direct incorporation. Although a right may not be directly enforceable, in practice breaches to children’s rights can be addressed, with courts able to make a ‘declaration of incompatibility’ where primary legislation is incompatible with the ECHR.

One organisation’s response, which included the views of children and young people, emphasised the importance of clarity and communicating the UNCRC to rights holders.

“It needs to be clear to all children and young people the rights they have, but also the rights that are potentially self-executing and what this might mean for them and their circumstances.”

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

Organisations suggested a need for accessible guidance, training, awareness-raising and other measures to provide clarity to rights holders. Some respondents provided further comments on ways in which greater clarity could be supported: these included:

- A public-facing campaign to make children and young people aware of their rights and what direct incorporation means;
- The development of learning materials that can be used as part of the Curriculum for Excellence, *‘allowing learners to explore what the legislation means in practice, allowing them to reflect on how it would impact on their lives’*;
- A campaign which addressed and targeted each of the protected characteristics individually to highlight the different aspects of the UNCRC that can be employed, and would highlight to children and young people in Scotland how it can be most relevant to them.

‘...young people liked the idea that these reserved rights should be legislated for in the event that at some point these rights become a matter for the Scottish parliament because of possible constitutional change affecting what matters are devolved and reserved. This would ensure the rights of young people were protected from day one of the Scottish Parliament gaining any new competencies.’

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

Eleven out of thirteen organisations representing the views of children and young people responded ‘yes’ to this question, agreeing with the proposal to reject making specific changes to domestic legislation. One did not answer and one other did not specify an answer to the closed question in their written submission.

These respondents felt that the approach taken to date of implementing elements of the UNCRC into domestic law does not go far enough to ensure children’s rights are “championed in society and fully enshrined in public policy and practice”. Respondents expressed the view that making specific changes to legislation did not amount to direct incorporation.

“[it] does not go far enough in codifying children’s human rights in Scots law. Only full direct incorporation fully upholds the range and extent of children’s human rights contained in the UNCRC and the Optional Protocols”.

“Yes – while we welcome the steps that have been taken in recent years to make specific changes to Scottish legislation that embeds a rights based approach this piecemeal approach would take far too long to complete, and therefore would not realistically deliver a consistent and comprehensive rights framework for children within a reasonable timescale.”

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

Representative organisations and children and young people themselves expressed opposition to the transposition model. Some of the responses drew on consultation events with children, young people and their families that took place across Scotland. There was consensus among these respondents that the transposition model was not viewed as being an appropriate route to incorporation, for a number of reasons:

“As the UNCRC is designed to be a comprehensive international standard, there is a danger that countries developing their own suites of rights could end up with narrower rights in the long term. Furthermore, direct incorporation allows Scottish courts to look to the work that the UN Committee on the Rights of the Child has done to develop how the UNCRC can be delivered in practice.”

“The repeated message was that while people found creating a Scottish suite of children’s rights superficially attractive, their preferred option was the full and direct incorporation of the UNCRC, giving children in Scotland the same rights as children in other countries that have incorporated the UNCRC.”

One respondent that works with children and young people underlined the important role of children in helping to shape and influence how the UNCRC is implemented in Scotland. This response also noted children and young people’s preference for direct incorporation and disagreement with a transposition model.

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

Almost unanimously, organisations representing the views of children and young people favoured the model set out in the Children’s Rights (Scotland) Bill, as drafted by the Incorporation Advisory Group convened by Together and the Children and Young People’s Commissioner Scotland. All bar two respondents expressed the view that this model of direct incorporation ensures the UNCRC, General Comments, Concluding Observations and Optional Protocols are incorporated in an effective way in the Scottish context.

Respondents expressed agreement with the submission by Together, which noted that UNCRC rights are ‘interrelated and indivisible’. Respondents outlined that children and young people favour the direct incorporation model *‘because it exactly reflects the UNCRC and nothing would be left out, it would be fairer, and it would be more in line with what other countries are doing’*.

Examples of the views of children and young people, as expressed in consultation responses, are provided below.

“If the UNCRC makes rights that are international, everyone should use those rather than alternative versions for different countries.”

“[Full incorporation] establishes what children and young people can do [and] how children and young people should be looked after.”

“If it's the same language, then it will be familiar to people who already know the UNCRC.”

“Some of these things sound like pros but they could actually be cons, like making something specific to Scotland [a suite of rights] sounds good, but then it's not necessarily what other countries are doing so it could be missing some things out.”

“If we make good decisions [about how we incorporate the UNCRC], then other countries might look to us.”

Children also recognised that Scotland has an opportunity to be internationally recognised for putting into practice its commitment to children’s human rights through legislation that respects, protects and fulfils the rights outlined in the UNCRC and the Optional Protocols.

Organisations representing the views of children and young people with protected characteristics also noted that the whole convention should be adopted in order to retain the spirit of the UNCRC fully. This includes LGBT young people and disabled children and young people.

One children and young people’s organisation noted that their preferred model of incorporation was through a suite of rights with a long-term view to establish a Statutory Human Rights Framework.

“This is so long as the rights are determined by the courts as to whether they are self-executing and that these decisions are anchored by the UN Committee decisions, international examples and err on the side of affording the maximum protections to rights-holders.”

Another respondent advocated a blended model that combines the "copy and paste" model with the "transposition" model. This, it was suggested could involve:

"directly incorporating the parts of the UNCRC that can be in the context of Scottish laws, but interpreting the parts that don't fit seamlessly to ensure the rights of children and young people in Scotland are respected."

Theme 2: embedding children's rights in public services

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

Eleven out of thirteen organisations representing the views of children and young people responded 'yes' to this question, agreeing that a requirement to produce a Children's Rights Scheme, similar to the Welsh example, should be included in the legislation. Two respondents did not specify an answer to the closed question in their written submission.

Respondents stated that a Children's Rights Scheme would clarify the practical steps that Scottish Government and other public bodies are committed to undertaking in order to implement the UNCRC. A Scheme could also connect the measures already in place through current legislation and structures, and supplement them with further mechanisms to ensure accountability and transparency.

Based on experiences in Wales, it was felt that a Children's Rights Scheme would also help to create opportunities for children, young people and wider stakeholders to inform how the UNCRC is implemented.

"The young people felt that [a Children's Rights Scheme] would ensure that people are responsible for their actions and the implementation of the UNCRC is successful in Scotland. This would also help to raise awareness of the rights of children and young people. The young people felt that there would be no reason for incorporating the UNCRC if it isn't going to be held to an appropriate standard and develop as society develops. It can help to support children and young people ensuring they are at the heart of decision making."

Several organisations noted that they agree that CRWIAs should be a statutory requirement and one underlined that there should be a Parliamentary Committee with designated responsibility for scrutinising Scottish Government actions to ensure rights are being upheld

both by the Scottish Government and duty bearers. In addition to CRWIAs, respondents noted that the Children’s Rights Scheme should ensure:

- Clear complaint procedures
- Regular reporting on compliance
- Participation of children and young people in the development and review of the Scheme

Question 14: Do you think there should be a “sunrise clause” within legislation?

Six out of thirteen organisations representing the views of children and young people answered ‘no’ to this question, noting that there should not be a “sunrise clause” in any legislation. One respondent answered ‘don’t know’ and three others answered ‘yes’. Three respondents did not specify an answer to the closed question in their written submission.

A mix of views were presented by children and young people’s organisations in response to this question. Those who responded ‘no’ noted that although public bodies will need time to prepare before the new legislation comes into effect the foundations for implementation should be largely in place.

Children consulted as part of the consultation exercise noted that while they did not want public bodies to rush any changes, which could result in decisions being made too hastily.

“Things don’t happen overnight, so they’ll need time to prepare and it takes years for laws to go through the process and be set. If it’s too short, then it’ll be rushed.”

However, children also underlined the need for the lead-in period to be defined and limited, ensuring that duty bearers are required to make changes over the course of a reasonable period of time. They noted the risk that allowing decisions to ‘drag on’ can leave them feeling ‘confused’ or ‘doubtful’ that anything will change: *“If it’s too long or gets extended, then it may never get done.”*

A number of respondents were unable to answer or did not specify.

One organisation representing the views of young people noted that a ‘sunrise clause’ should be included in legislation as this would ensure *“certainty over when rights are coming into law as opposed to waiting for public authorities to bring it in on their own accord”*.

Those who answered ‘yes’ referred to practical reasons for including a ‘sunrise clause’ in the legislation. They noted that such a clause would allow public authorities with time to review their internal practices and policies to ensure they are compatible and compliant with

the new legislation. They would be able to assess the likely impact of new legislation, address any gaps in their services and develop new arrangements to ensure staff in their organisations are aware of the UNCRC.

“This would give authorities a time to comply which would mean it can’t be ignored but will also help to ensure children and young people know what to expect. As well as this, it would help to ensure all public authorities can put in place measures to support the rights of children and young people.”

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

Very few children and young people’s organisations provided additional information in response to this question. In the case of one organisation, a youth forum advised a period of four months in response to the question. Others argued for a longer period of time (up to a year) to provide opportunities for public bodies to prepare.

Question 16: Do you think additional non-legislative activities, not included in the Scottish Government's Action Plan, are required to further implement children’s rights in Scotland?

Eight out of thirteen organisations representing the views of children and young people responded ‘yes’ to this question. Two answered ‘don’t know’, one did not answer and two did not specify an answer to the closed question in their written submission. Those who responded ‘Don’t know’ noted that they did not consult on this question.

Those who did provide comments in response to this question noted:

- The need to raise understanding and awareness of children’s rights among children/young people and among duty bearers.

“Children cannot access their rights if they do not know about them and adults can overlook children’s rights if they do not understand them.”

- The importance of ‘meaningful’ engagement with children and young people.

“Meaningful engagement happens when participation is ethical, accessible, fun, informed, facilitated, resourced and one that leads to a dialogue whereby children as partners know what influence their contribution has made and understand the context of any decisions taken that differ from their contributions.”

- Inclusive engagement with children and young people from communities and with characteristics who are sometime under-represented or not consulted.
- The importance of advocacy services for children.

“Children and young people have frequently discussed the importance of receiving help, support and advocacy to enable them to assert their rights. They have particularly mentioned the importance of youth workers, mental health workers, teachers, social workers, counsellors and independent advocates.”

- Respondents referred to the cross-cutting nature of the UNCRC and the need to strengthen the links between children’s rights and other Scottish Government agendas.

“Realisation of the Scottish Government’s aspirations around adverse childhood experiences (ACEs) link closely with the progress that will need to be made in ensuring that children’s rights to protection and recovery under Articles 19 and 39 are delivered.”

Theme 3: Enabling compatibility and remedies

Question 17: Do you agree that any legislation to be introduced in the Parliament should be accompanied by a statement of compatibility with children’s rights?

Nine out of thirteen organisations representing the views of children and young people responded ‘yes’ to this question, agreeing that any legislation to be introduced in the Parliament should be accompanied by a statement of compatibility with children’s rights. One did not answer and three did not specify an answer to the closed question in their written submission.

Respondents noted that there is a precedent for statements of compatibility established through the HRA and the Scotland Act 1998.

“By including a statement of compatibility about children’s human rights, the Scottish Government is recognising the international importance of the UNCRC and establishing the place it holds legally and culturally in Scotland.”

Children’s views were included in a number of consultation responses. They expressed views about the importance of such statements in ensuring that children’s rights are at the forefront of policy and legislative processes, whilst also acknowledging that this may result in additional pressures on officials when drafting Bills.

“It makes [new laws] safer for children.”

“We need something to prove it follows children’s rights.”

“A Minister needs to know that when they make a decision about anything, he or she has to have your best interests and rights at heart.”

“It probably will make children’s lives safer, but the Scottish Government’s jobs harder and it might take longer to pass things.”

A number of respondents also noted that a statement of compatibility should be accompanied by a CRWIA that explains how a Bill ensures compliance with the UNCRC and mitigates against any negative impacts on the rights of children and young people.

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

Twelve out of thirteen organisations representing the views of children and young people responded ‘yes’ to this question. The other respondent did not specify answer to the closed question in their written submission.

Respondents considered that it was essential that there is an opportunity to recourse for children and young people if their rights have been breached. Respondents noted the importance of ensuring clear pathways to remedy and redress that would include a complaints system as well as full legal processes.

Children whose views fed into the consultation felt that it was important that 'something could be done' where their rights were not being protected and promoted. Respondents

emphasised that the process of redress should be as accessible and uncomplicated as possible. There should be support made available in terms of advocacy or legal advice. *“The pathway to redress should be clear for both complaints that can be considered without reference to court as well as a clear path through legal measures if required.”*

Linked to this, children and young people recognise that making complaints can be difficult and daunting. Responses noted that children can worry about not being taken seriously, or that their complaint will not lead to any change. Some children were concerned that making a complaint may lead to further problems or repercussions. Children and young people stated:

“Just because people have power, it doesn’t mean they’ll do the right thing.”

“Children might think adults might not take them seriously. They might think children are lying.”

“Children feel powerless.”

Respondents noted that the Bill should outline a:

“clear and accessible process for how children, or adults representing children, can raise complaints if they feel Scottish Government or other public bodies are not respecting or fulfilling children’s human rights, including access to the courts as a last resort.”

During consultation events, children and young people identified a range of individuals or groups with whom they would raise a complaint:

- Parents or carers
- Other relatives
- Teachers or pupil support
- Friends
- Children’s Parliament
- Children and Young People’s Commissioner Scotland
- Childline
- Police
- Doctor
- The local council
- MSPs or MPs
- Scottish Courts

Children and young people see their parents and carers as the primary defenders and upholders of their rights. Few children identified staff in public bodies as having a role in defending their rights.

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

Seven out of thirteen organisations representing the views of children and young people responded ‘yes’ to this question, signalling that they agreed that the approach to awards of compensation should follow the approach taken to just satisfaction damages under the HRA. Two answered ‘don’t know’ to this question and four did not specify an answer to the closed question in their written submission.

Relatively few comments were received in support of answers to the closed question.

Those respondents who did comment noted that financial compensation as a means of providing ‘just satisfaction’ is an established or a ‘tried and tested’ method. One organisation noted that, in addition to financial compensation and reparation, the approach should also include:

‘measures to promote physical and psychological recovery, rehabilitation and reintegration’

Echoing this, another response noted that young people felt that the most important thing was that support for recovery was available, as is set out in Article 39 of the UNCRC – the right to recovery.

Respondents referred to the need to reach determinations on financial compensation by drawing on the experience of judges and other experts.

“Judges should be provided with suitable guidance about appropriate levels of reward in different circumstances.”

“It was felt that this should be decided by experts on the UNCRC, with a ‘menu’ of fixed amounts that can be claimed or paid out.”

Young people whose views were set out in one response noted that ‘group claims’ should be allowed, with any financial compensation paid into trust funds, to allow the young people to benefit in the future.

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

Eight out of thirteen organisations representing the views of children and young people responded 'yes' to this question. Two answered 'don't know' to this question and three did not specify an answer to the closed question in their written submission.

Very few supporting comments were provided. Those who did comment noted that UNCRC rights should take precedence, in line with the UN Committee's standpoint that incorporation should mean that the provisions of the UNCRC prevail where there is a conflict with domestic legislation or common practice. This was considered essential to maintain consistency with the approach to wider human rights set out in the HRA.

Young people whose views were presented in one response felt that this should be decided on a case by case basis, ensuring that the rights of children and young people are respected, and that any outcomes are in line with the UNCRC.

"The UN Committee on the Rights of the Child is clear that incorporation should mean that the provisions of the Convention will prevail where there is a conflict with domestic legislation or common practice."

"We believe that UNCRC rights should take precedence over secondary legislation unless a higher standard exists in domestic law. This is in line with Article 41 of the Convention."

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

Eight out of thirteen organisations representing the views of children and young people responded 'yes' to this question. Two answered 'don't know' and three did not specify an answer to the closed question in their written submission.

One organisation noted that the Bill should contain strong provisions requiring an ASP to be interpreted in a way that is compatible with the UNCRC.

"This provision currently exists in the Human Rights Act (1998) and in the Scotland Act (1998) in relation to the European Convention on Human Rights. If a piece of legislation or provision at first appears incompatible with the UNCRC, then courts should try to read it in a way that does comply. This minimises the risk of incompatibility and ensures that courts interpret legislation in a way that supports children and young people's rights."

Several comments echoed the views of Together, noting that the model of incorporation should ensure that courts:

“give effect to primary and subordinate legislation in a way that is compatible with the UNCRC”.

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

Nine out of thirteen children and young people’s organisations answered ‘yes’ to this question. One did not answer and three did not specify an answer in their written submission. No respondents from this category answered ‘no’.

Respondents suggested including ‘strike down’ powers within the model of incorporation, meaning that any law passed by the Scottish Parliament would no longer be considered a law if it was decided by a court that it breached the rights set out in the UNCRC.

“Yes. Courts should have the power to rule that an Act of the Scottish Parliament is incompatible with the UNCRC and to the declare the legislation unlawful... If an Act of the Scottish Parliament is found to be incompatible with the UNCRC, courts should have opportunity to allow the Scottish Parliament to make changes to the legislation to make it compliant with the UNCRC.”

Responses from children and young people indicated that they felt that such a regime should be incorporated, to ensure that any decision making is looking preventatively in the case of children and young people’s rights.

“it was important [for young people] that it was made clear what could be done when legal requirements were not followed.”

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

Mirroring the responses across the whole group of respondents, there was some confusion evident in how this question was answered. In some cases, respondents who answered ‘yes’ and ‘no’ provided similar or related reasons for their answers.

No special test of standing should be required: children and others with ‘sufficient interest’ should be able to bring a case under the Bill when a public authority has failed to comply with the UNCRC. Respondents recommended a preventative approach to upholding children’s rights by introducing protective measures to ensure children’s rights are central to new legislation and in the planning and delivery of services.

“The model of UNCRC incorporation should include provisions to enable children and those with sufficient interest to bring proceedings (such as youth workers) if and when a public authority has failed to comply with the UNCRC or Optional Protocols especially when there are currently so many barriers to young people accessing justice. This approach would allow groups of children or their representatives like a youth worker to bring a case or complaint together for the young person.”

“[organisation name] believes that a person who claims to be affected (directly or indirectly) by an unlawful act, should be able to bring proceedings before a court or tribunal. The age of full legal capacity in Scotland is 16 years old however, children under this age can instruct a solicitor and bring a case under their own name if they have ‘a general understanding of what it means to do so’. This aligns with the principles of Article 12 of the Convention.”

This view was echoed by children and young people, whose views were set out in responses: children and young people expressed views (through forums and during consultation events) that it is important that they are heard and get the opportunity to raise complaints in court. However, they also noted that it would be unfair to require children – particularly young or vulnerable children – to bring cases or raise complaints in court. Therefore it is necessary to make provisions to enable children to be represented by adults or organisations in court.

“It is important that Scottish Government takes a broader definition of standing so that children can be represented by adults or organisations with ‘sufficient interest’ in the case, as proposed in the consultation paper.”

“We believe that bodies like the Scottish Commissioner for Children and Young People, the Equalities and Human Rights Commission and the Scottish Human Rights Commission are well placed to identify and challenge breaches of children’s rights that are affecting significant numbers of children and young people, and consideration should also be given to their ability to bring cases in the public interest as well as support cases brought by children or their parents.”

“It was felt by the young people that there shouldn’t be any special test for standing to bring a case under the Bill. Those standing should be a person with best interests of child (teacher, doctor, health visitor, social worker) or an elected person or groups which advocate for young people. Children and young people should feel support and should trust those around them to support them and uphold their rights. Those supporting children and young people should also have the capacity to go through this process...”

6. Additional findings

As noted in section 1.2 of this report, 35 responses to the consultation were submitted in Word or PDF form (rather than online directly following the structure of the consultation questions). Of these, 31 responses provided wider narrative surrounding the consultation and/or children's rights (in addition to any commentary directly relating to consultation questions). This section provides a summary of the key views raised within this wider narrative.

A total of 26 responses provided **detail on their organisation's objectives and/or the nature of the work they undertake**. These commentaries frame the remainder of their response, clarifying how their own work relates to children's rights and noting, where relevant, any particular groups of people they support or campaign on their behalf. This detail, therefore, provides an indication of any particular expertise the organisation has in relation to children's rights. Appendix A provides a list of those respondents who consented to have their response published.

Eight responses provided high-level commentary on the **potentially positive impact on children's rights following incorporation of the UNCRC**. These responses emphasised that incorporating the UNCRC is a way to ensure meaningful change to the lives of children in Scotland. Incorporation is seen as the best way of ensuring children's rights are given substantial protection in law, which will lead to the best outcomes for children. As such, incorporation is seen as the best way to reflect Scotland's ambition for children's wellbeing and making Scotland the best place to for children to grow up.

"Putting children's rights into domestic law will send a strong and clear message about the type of society we wish Scotland to be; a society that values and respects children and young people and puts the best interests of our children and young people at the heart of everything it does. One that is, genuinely, the best place in the world for children to grow up." (Charity / non-profit organisation)

Four responses included **narrative and evidence – based on their organisational expertise – on why additional protection for children's rights is needed**. These responses provided a narrative based on their own experience of supporting people facing particular challenges and the negative impact they have seen such challenges have on the wellbeing of children. For example, these responses report on the negative impact that issues such as homelessness, alcohol abuse, learning disabilities and contact with the criminal justice system have on children's rights. These responses therefore share evidence on why incorporation is a vital next step in the protection of children's rights.

"Having a household member in prison is recognised as an adverse childhood experience. As most primary caregivers are mothers, the

impact of maternal imprisonment is particularly devastating for children. It is estimated that around 27,000 children in Scotland experience parental imprisonment each year. Only 5% of children remain in their family home when a mother goes to prison... Full incorporation of the UNCRC should lead to better protection of children's rights in these circumstances, including consideration of the child's best interests at all stages of the criminal justice process." (Charity / non-profit organisation)

Four responses raised **practical issues which must be considered during implementation**. Three of these responses provided commentary on how duty bearers (public bodies) will need to be supported during implementation and practical issues (such as resourcing, leadership and public engagement) which will need to be considered carefully. These responses drew attention to particular actions which might need to be taken to ensure incorporation progresses smoothly and has the best outcomes for children. The fourth response drew attention in particular to how incorporation provides an opportunity to strengthen youth work provision and how youth services could best respond to implementation requirements, including ensuring processes for engagement with children and young people.

"The majority of the UNCRC articles will have direct or indirect implications on local authorities and so it is crucial, for effective delivery of services, that these implications are thought through carefully and resourced sufficiently." (Public body)

Three responses provided **a narrative on the development of the UNCRC**. These responses prefaced the remainder of their consultation response by presenting an overview of the history of the UNCRC and the international role it has played in securing children's rights. They also provided commentary on the United Kingdom's ratification of the UNCRC and how this relates to incorporation of the UNCRC into domestic law.

Three responses included commentary on why and how children and young people need support to exercise their rights. Two respondents reported that young people felt they can face discrimination due to their age. The other respondent provided commentary on why and how children need advocacy support to overcome challenges associated with exercising their rights.

"Article 12 of the UNCRC states that children have the right to be listened to, and taken seriously. This means that children and young people must be given the information they need to make good decisions and that their views and opinions need to be considered in decisions that are made about them. However, many children will, in practice, require significant support to make this a reality." (Charity / non-profit organisation)

Three responses provided **narrative on how children’s rights should look in practice**. These responses were based on consultation with children and young people, who described how children’s rights would be seen on a day-to-day basis and key components they felt were essential to the protection of children’s rights. Examples included good quality housing, healthcare and education, and equality with children’s rights across the world.

Two responses explained why and how **protection for children’s rights must align with other protections**, specifically women’s rights, gender equality, and prevention of violence against women and girls. These responses emphasised that children’s rights are inextricable from such other protections, as the two often go hand-in-hand and cannot be appropriately addressed separately. As such, these responses feel that incorporation of the UNCRC provides opportunity to address women’s rights, gender equality and the prevention of violence against women and girls; for example, through increasing visibility for these issues and through consideration of incorporating the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) at the same time.

“The UNCRC and CEDAW have sometimes been referred to as ‘sister conventions.’ It is commonly observed that children’s rights and women’s rights go hand-in-hand, and that children’s rights, safety and opportunities to flourish depend necessarily on women’s rights, safety and opportunities.” (Charity / non-profit organisation)

One response discussed how incorporation could be designed in order to provide **suitable protection for care-experienced young people** in particular. This response included detail on what a draft incorporation Bill should include to make UNCRC rights real for care-experienced young people.

Appendix A: Consultation respondents

This appendix lists the consultation respondents who agreed to have their responses published (either including or excluding an individual's name).

Individuals

30 respondents were responding as individuals (and didn't specify an organisation name).

Legal profession/organisation

Faculty of Advocates

Law Society of Scotland

Senators of the College of Justice

Academics

Child and Family Law and Policy Team, Edinburgh Napier University

Childhood & Youth Studies Research Group, MHSES University of Edinburgh

Glasgow Caledonian University

Observatory on Human Rights of Children

Strathclyde University Law School

University of Edinburgh Law School

University of Strathclyde

Public bodies

Aberdeen City Council

Children & Young People's Commissioner Scotland

Children's Hearings Scotland

City of Edinburgh Council

Community Planning West Dunbartonshire Nurtured Delivery and Improvement

COSLA

East Ayrshire Health & Social Care Partnership/ East Ayrshire Council (joint response)

Education Scotland

Fife Health & Social Care Partnership - Children's Services

Health and Social Care Alliance Scotland

Healthcare Improvement Scotland

NHS Greater Glasgow and Clyde

NHS Health Scotland

NHS Lanarkshire

NHS Lothian

North Ayrshire Council Education

Scottish Human Rights Commission

Skills Development Scotland

South Lanarkshire Council

Stirling Council

The Care Inspectorate (Social Care and Social Work Improvement Scotland)

The Scottish Children's Reporter Administration

Third sector

A Place In Childhood
A24 Scotland
Aberlour
Action for Children
Amnesty International UK - Scotland Office
Article 12 in Scotland
Barnardo's Scotland
Befriending Networks and its members
British Deaf Association Scotland
Catholic Parliamentary Office of the Bishops' Conference of Scotland
CEDAR Scotland Advisory Partnership (CSAP)
CELCIS
Centre for Youth & Criminal Justice in conjunction with Howard League
Child Health Commissioner Group
Child Poverty Action Group (CPAG) in Scotland
Children 1st
Children at Harmeny School, Edinburgh
Children in Scotland
Children's Health Scotland
Children's Parliament
Clan Childlaw
Connect
deafscotland
Down's Syndrome Scotland
Early Years Scotland
Engender
Families Need Fathers Scotland
Families Outside
FGDM
Fields in Trust, Scotland
Girlguiding Scotland
Glasgow Council for the Voluntary Sector - Everyone's Children Project
Glenrothes Youth Forum
Helm Training Limited
Highland Children and Young People's Forum (formerly Highland Children's Forum)
Home-Start Scotland
Human Rights Consortium Scotland
Inclusion Scotland
Inspiring Scotland
International Play Association, Scotland
JustRight Scotland
Kibble Education and Care Centre
LGBT Youth Scotland
National Carer Organisations
National Day Nurseries Association

NSPCC
Our Hearings, Our Voice
Parenting across Scotland
Partners in Advocacy
Play Scotland
Poverty Alliance
Prison Reform Trust
Relationships Scotland
Royal Blind
Royal College of Paediatrics and Child Health
Sacro
Save the Children
Scottish Catholic Education Service
Scottish Catholic Education Service Parent Group
Scottish Childminding Association
Scottish Commission for Learning Disability
Scottish Health Action on Alcohol Problems
Scottish Home Education Forum
Scottish Independent Advocacy Alliance
Scottish Mentoring Network
Scottish Out of School Care Network
Scottish Refugee Council
Scottish Women's Aid
Scottish Youth Parliament
Sikh Sanjog
Staf
Starcatchers
Talking Mats
The Christian Institute
The Independent Care Review
The National Parent Forum of Scotland
The Royal Caledonian Education Trust
The Royal Society for the Prevention of Accidents
The Salvesen Mindroom Centre
Together (Scottish Alliance for Children's Rights)
Unicef UK
Victim Support Scotland
Who Cares? Scotland
Young Scot
Youth Borders
Youth Link Scotland

Other

Social Work Scotland

Unspecified organisation

1 respondent noted they were responding on behalf of an organisation but did not specify an organisation name.



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