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Been There. Done That. International Interpretive Materials and Evolving Children’s Rights

Kasey McCall-Smith* and Tracy Kirk#

A. INTRODUCTION

The UN Convention on the Rights of the Child (Incorporation)(Scotland) Act 2024 (2024 Act) commenced in July 2024. The culmination of decades of work by children, young people, NGOs, elected officials and academics, the 2024 Act incorporates the UN Convention on the Rights of the Child (UNCRC) into Scots law with the intention of ensuring a “maximalist approach” to direct legal incorporation by giving “international law direct effect in national law” while ensuring justiciability.¹ The 2024 Act requires that Acts of the Scottish Parliament must, so far as it is possible to do so, be read and given effect in a way which is compatible with the UNCRC (s. 24(1)).

The widespread view that human rights treaties are ‘living’ instruments ensures that children’s rights elaborated in the UNCRC do not remain static and respond to the developments within and between the different legal and social sites of application.² To ensure the 2024 Act results in a ‘fundamental shift in the way children’s rights are respected, protected and fulfilled,’³ sections 4 and 16 of the Act list international interpretive materials produced by the Committee on the Rights of the Child (CRC) that stakeholders responsible for enforcing and implementing the Act should consider. Whilst some stakeholders are uncertain how to engage with these interpretive sources, this note demonstrates that these materials have previously contributed to developments in Scots Law and, as such, interpreting the 2024 Act should not be deemed inherently complicated simply because ‘international’ materials are now fundamental to interpreting the rights elaborated in the Act. Section B introduces the interpretive materials included in the Act. The examples of corporal punishment and the minimum age of criminal responsibility (MACR) demonstrate how the interpretive guidance of the CRC Committee has informed previous law reform projects in Scotland (Section C). Finally, we reflect on how the 2024 Act merely solidifies the need for stakeholders to engage with relevant international materials as a means of ensuring the rights of the most widely ratified treaty in the world.

B. RECOURSE TO INTERNATIONAL INTERPRETIVE MATERIALS

During the development of the 2024 Act, legal experts recommended including a range of sources, particularly CRC interpretative materials, to ensure the incorporated rights would not be interpreted too narrowly.⁴ CRC interpretations draw from the Committee’s broad understanding of implementation practices gathered through its monitoring processes, and are

* Senior Lecturer in Public International Law, University of Edinburgh.

Lecture in Child and Family Law, University of Stirling.

¹ Policy Memorandum, UNCRC (Incorporation) Bill SP Bill 80 [as introduced] (2020), paras 7, 20 (Incorporation Memo).

² UN Committee on the Rights of the Child (CRC), General Comment No. 5, CRC/GC/2003/5 (2003), para 18.

³ Incorporation Memo, para 6.

⁴ SP-OR-EHRiC, 12 November 2020, col 3-9, SP Bill 80, UNCRC (Incorporation) Bill [as introduced] stage 1 (2021).

presented in various forms, including: concluding observations on periodic reports; final views on individual communications; recommendations following days of discussion; and general comments. While these interpretive outputs are widely understood not to be legally binding,⁵ they offer authoritative interpretations and are significant reference points for understanding treaty obligations.⁶ For this reason, recourse to CRC interpretive materials ensures a responsive understanding of the priorities and needs of children as they engage and exercise their rights.

Section 4 of the 2024 Act outlines that when interpreting UNCRC requirements courts *may* consider: the Convention, the first protocol, the second optional protocol and their preambles; general comments; concluding observations; recommendations following days of general discussion; and other international and comparative law. The same materials *must* be used by Scottish Ministers in developing and reviewing Children’s Rights Schemes, which set out how ministers are complying with their duties under the Act or how they will give further effect to children’s rights (ss 14-16). Inevitably, as in the past, the use of these materials by the courts and ministers will become part of the UK’s periodic reporting dialogue under the UNCRC.

C. CRC INFLUENCES ON PREVIOUS SCOTS LAW REFORM

Two examples demonstrate how the interpretive materials produced by the CRC, as well as by other human rights treaty bodies (HRTBs), and associated dialogues with the UK contributed to a slow, but steady evolution in the protection of children’s rights in Scotland. While these interpretations were part of a broader advocacy campaigns by civil society and others, specific interpretations of children’s rights by HRTBs were reflected in legislative reforms.

I. CORPORAL PUNISHMENT

Corporal punishment was historically an accepted feature in British/Scottish schools and homes. The UNCRC requires states to protect children from torture and cruel, inhuman or degrading treatment or punishment (CIDT) (Article 37) and from all forms of physical and mental violence (Article 19). Before the 2024 Act, the prohibition against torture and CIDT was examined predominantly under the European Convention on Human Rights (ECHR) Article 3 through the Human Rights Act 1998. Nonetheless, following its ratification of the UNCRC in 1991, incremental restrictions on corporal punishment featured in the exchanges between the UK and the CRC and other HRTBs that interpret the right to be free from CIDT in their respective treaties.

In 1982, the European Court of Human Rights (ECtHR) decided in *Campbell and Cosans v. UK* that the traditional use of ‘corporal chastisement’ in Scottish state schools was supported by the majority of parents and the mere threat of being subjected to corporal punishment did not rise to a level of ‘degrading’ in violation of ECHR Article 3.⁷ The Court noted, however, that ‘a

⁵ eg, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 2010 ICJ Reports 639, para 66. Commenting on the Human Rights Committee (HRC) that monitors the International Covenant on Civil and Political Rights (ICCPR), to which the UK is also a party.

⁶ eg, International Law Commission, Fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, A/CN.4/694 (2016), paras. 17 *et seq.*

⁷ *Campbell and Cosans v. UK* [1982] 4 EHRR 293 (1982) [29].

particular measure is not excluded from the category of "degrading", within the meaning of Article 3, simply because the measure has been in use for a long time or even meets with general approval.⁸ This acknowledgement opened the door for reconsideration of corporal punishment in British schools, which was subsequently banned in state schools by the Education Act 1986. The 33 years between the 1982 judgment and the complete ban on corporal punishment in Scotland saw repeated HRTB engagements with the UK regarding corporal punishment. The Equal Protection from Assault (Scotland) Act 2019 (2019 Act) removed 'justifiable assault' as a defense available to persons charged with assault of a child in the course of using of physical punishment in the exercise of parental rights and responsibilities.⁹

The HRTBs views on the relationship between corporal punishment and the right to be free from CIDT developed incrementally over time and in response to a wide range of inputs by different states and stakeholders taking part in the periodic reporting processes. Starting in 1995 with its first review of the UK's implementation of the UNCRC, the CRC highlighted the inconsistency in legislative measures regarding children's physical integrity and noted concern that private schools could still use corporal punishment and recommended its absolute ban.¹⁰ England introduced a ban in private schools in 1998. Scotland followed suit in 2000.¹¹ Legislation prohibiting physical punishment in other care settings also appeared between 1996 and 2001.¹² The CRC's 2002 review of the UK welcomed the progress in eliminating corporal punishment in private schools in England, Wales and Scotland and in Welsh day care facilities but noted the gaps that persisted in prohibiting all corporal punishment across the UK.¹³ It noted specifically that retaining the defense of 'reasonable chastisement' was contrary to the UNCRC and called for its removal.¹⁴ The CRC also observed that other HRTBs shared the view that continuing to permit some forms of corporal punishment violated the dignity of children.¹⁵ The Children Act 2004 eventually banned *most* physical punishment of children in homes in England and Wales by removing the defense of 'reasonable punishment' if an implement was used or if that application of force left a mark (s 58) but this, too, was not an explicit ban on all forms of physical punishment. Scotland was not subject to this legislation. The CRC's 2008 review urged the UK to prioritize prohibiting all corporal punishment in the family, including through the repeal of all legal defenses, and to ensure that corporal punishment was explicitly prohibited in schools and all institutions and forms of alternative care.¹⁶ Notably, the CRC's 2008 recommendations,¹⁷ repeated almost verbatim in 2016, highlighted that other UNTBs also

⁸ Ibid. [29].

⁹ Previously permitted under Criminal Justice (Scotland) Act 2003, s51.

¹⁰ Committee on the Rights of the Child (CRC), Concluding Observations, Initial Report of the UK, CRC/C/15/Add.34 (1995), paras 16, 32.

¹¹ Standards in Scotland's Schools etc Act 2000, s 16.

¹² Residential Establishments Child Care (Scotland) Regulations 1996; Day Care and Child Minding (National Standards) (England) Regulations 2003, SI 2003/1996; Children's Homes Regulation Act 2001.

¹³ CRC, Concluding observations, Third periodic report of the UK, CRC/C/15/Add.188 (2002), para 35.

¹⁴ CRC, 2002 Concluding observations, paras 37, 38.

¹⁵ *ibid*, para 37, citing the Committee on Economic, Social and Cultural Rights, E/C.12/1/Add.79, para. 36.

¹⁶ CRC, Concluding observations, Fourth periodic report of the UK, CRC/C/GBR/CO/4 (2008), para 42.

¹⁷ CRC, Concluding observations, Fifth periodic report of the UK, CRC/C/GBR/CO/5 (2016), para 41.

recommended prohibiting corporal punishment in all settings.¹⁸ The treaty body reporting pages chart the consistent focus of UK organisations urging the HRTBs to recommend the UK expressly prohibit all forms of corporal punishment.¹⁹ Ultimately, the policy memorandum accompanying the bill leading to the 2019 Act recounted the range of statements from the CRC and other HRTBs that underpinned its introduction.²⁰ In particular, it explained that the bill '[addressed] the concerns of the UN and [ensured] full adherence to the UNCRC.'²¹ Since the 2019 Act, the most recent CRC review commended the prohibition of corporal punishment in Scotland and Wales but continued to recommend it be explicitly prohibited in all settings throughout the UK.²²

2. MINIMUM AGE OF CRIMINAL RESPONSIBILITY

Evolution of the MACR also demonstrates HRTB contributions to law reform in Scotland. The MACR in Scotland was 8 years until 2021 when the Age of Criminal Responsibility (Scotland) Act 2019 (ACR Act) commenced, increased the age to 12 years (s. 1). UNCRC Article 40(3)(a) requires states to establish a minimum age below which children shall be presumed not to have the capacity to infringe penal law. In addition to the UNCRC, the International Covenant on Civil and Political Rights (ICCPR) (Articles 10 and 14) and the 'Beijing Rules' include commitments to treat children in a manner appropriate to their age and legal status and to avoid setting the MACR 'at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity'.²³ The work of various HRTBs contributed to what an acceptable MACR is.

The CRC's initial review of the UK in 1995 stated the low age of criminal responsibility was not compatible with the UNCRC but did not recommend what age would be appropriate.²⁴ Thereafter, the issue of whether attributing criminal responsibility to those aged 10 years old could give rise to a violation of Articles 3 (inhumane and degrading treatment), 6 (fair trial) and 14 (non-discrimination) of the ECHR was considered by the ECtHR in *V and T v UK* in 2000.²⁵ The applicants were two boys found guilty of the abduction and murder of a two-year-old in England. The applicants argued that they had suffered inhuman or degrading treatment (Article 3) when 'exposed to full criminal liability for an offence committed at an age' when they 'clearly

¹⁸ See, eg, Committee against Torture, Concluding observations, Sixth periodic report of the UK, CAT/C/GBR/CO/5 (2013), para 29; Committee on the Elimination of Discrimination against Women (CEDAW), Concluding Observations, Fifth-sixth periodic reports of the UK, CEDAW/C/UK/CO/6 (2008), para 281; CEDAW, Concluding Observations, Seventh periodic report of the UK, CEDAW/C/UK/CO/7 (2013), para 35.

¹⁹ eg, Children's Rights Alliance for England, Together, Wales UNCRC Monitoring Group, GB Civil Society Briefing in response to the UK List of Issues Response (2016), at 5; Children 1st, Submission to CEDAW, UK seventh periodic report (www.tbinternet.OHCHR.org, 2013), at 9.

²⁰ Scottish Parliament, Policy Memorandum on the Children (Equal Protection from Assault) (Scotland) Bill, SP Bill 38-PM 1 Session 5 (2018), paras 33-36, 43, 95-99.

²¹ *ibid*, para 99.

²² CRC, Concluding observations, Sixth-seventh periodic reports of the UK, CRC/C/GBR/CO/6-7 (2023), paras 4, 31.

²³ UN General Assembly, Standard Minimum Rules for the Administration of Juvenile Justice, A/RES/40/33 (1985) ('Beijing Rules') commentary to R 4.1

²⁴ CRC, 1995 Concluding Observations, para 17.

²⁵ *V and T v UK* (2000) 30 E.H.R.R. 121.

lacked full understanding' of the act and 'the full maturity and emotional control of an adult'.²⁶ They submitted that their right to a fair trial (Article 6) was breached as they were unable to participate effectively in proceedings because while they 'may have had the intellectual capacity to understand some elements', they 'lacked the emotional strength to follow the trial or to take decisions' in their best interests.²⁷ They also submitted that being held to be fully criminally responsible where a younger child or an adult with similar mental capacities, caused by mental disorder, would not have been was a violation of non-discrimination under Article 14.²⁸

The UK argued that there was 'no international consensus' on the age at which criminal responsibility begins, with 'no limit being indicated by the UN texts on children's rights'.²⁹ The ECtHR considered the Beijing Rules, which it acknowledged as non-binding, and UNCRC Articles 3, 37 and 40, which were legally binding but not justiciable in UK courts. The Court also referenced CRC Concluding Observations to the UK and other Council of Europe organs. Ultimately, it found no breach of Article 3, a breach of Article 6 and no separate issues arising under Article 14.

Following the *V and T* judgment, the CRC's 2002 UK review raised concerns about the low age of criminal responsibility and recommended raising the MACR considerably.³⁰ In 2007, the CRC's outlined that a MACR below 12 years was 'not internationally acceptable' and should be the 'absolute minimum age' while recommending states set a MACR of 14 or 16 years.³¹ This was the first time the CRC recommended a specific age and clarified the international standard MACR. The age of criminal prosecution was subsequently increased to 12 years,³² but referral to the Children's Hearing System on an offence ground remained 8 years.

The CRC's 2008 and 2016 Concluding Observations recommended raising the minimum age in accordance with its General Comment³³ and acceptable 'international standards'.³⁴ In monitoring the ICCPR, the Human Rights Committee has highlighted that an MACR of 12 years did not accord with international standards.³⁵ The CRC, too, recommended in a general comment that states set an MACR which recognises the development that occurs during the second decade of life.³⁶ The CRC recommended that states set 18 years as the MACR³⁷ to recognise the concept of evolving capacities, whereby 'children progressively acquire

²⁶ *ibid*, [82-83]

²⁷ *ibid*, [99].

²⁸ *ibid*, [110].

²⁹ *ibid*, [85].

³⁰ CRC, 2002 Concluding Observations, paras 61-62.

³¹ CRC, General Comment No.7, CRC/C/GC/10 (2007), para 32.

³² The Criminal Justice and Licensing (Scotland) Act 2010, s 52.

³³ CRC, 2008 Concluding Observations, para 78.

³⁴ CRC, 2016 Concluding Observations, para 79.

³⁵ HRC, Concluding observations, Seventh periodic report of the UK, CCPR/C/GBR/7 (2015), para 23.

³⁶ CRC, General Comment No.20, CRC/C/GC/20 (2016).

³⁷ *ibid*, para 88.

competencies, understanding and increasing levels of agency to take responsibility and exercise their rights' through maturation and learning.³⁸

In 2018, the policy memorandum accompanying the ACR Bill acknowledged the criticisms from the CRC over many years, and Scotland's commitment to international standards,³⁹ but did not engage with the neurological development arguments set out by UNTBs.⁴⁰ During stage 3 of the bill, the Scottish Parliament was advised by the Council of Europe Commissioner for Human Rights and the CRC that raising the age to 12 would not meet international standards, with 14 being the absolute minimum age recommended.⁴¹ The CRC advised that the international MACR stood at 14 years, highlighting an opportunity for Scotland to be world leading in their approach. Despite this, the MACR was only raised to 12 years. While an improvement has followed the engagements with the HRTBs, ongoing international dialogues make it clear that the MACR remains a focus.

In its 2019 general comment, the CRC recommended increasing the MACR to a minimum of 14 years pointing to developments in neuroscience indicating that 'maturity and capacity for abstract reasoning is still evolving in children aged 12 to 13 years', therefore children are 'unlikely to understand the impact of their actions or to comprehend criminal proceedings'.⁴² The CRC commended states with a MACR of 15 or 16, recognising continuing brain development during adolescence that causes increased risk-taking, problems with hot-context decision making and impulse control. The most recent CRC Concluding Observations again recommended the UK increase the MACR to at least 14 years. While a review of the MACR in Scotland is due by December 2024, it is unlikely this will result in an imminent increase. Still, the incremental increase in the MACR in Scots law reflects the increases occurring in the HRTBs demonstrating how the dialogues between the UK and the HRTBs can clarify evolving international human rights standards.

D. ENSURING CHILDREN'S RIGHTS DEMANDS ENGAGEMENT WITH INTERNATIONAL HUMAN RIGHTS INTERPRETATIONS

As demonstrated by the examples above, international interpretative materials have previously been used to support Scots law reform. Implementation of the 2024 Act should see increased resort to HRTB materials that will assist Scotland in tracking international minimum standards for children's rights. In over-thirty years of engaging with the CRC and other HRTBs, government and other stakeholders have relied on international interpretive materials even

³⁸ Ibid, para 18.

³⁹ Scottish Parliament, Policy Memorandum on the Age of Criminal Responsibility (Scotland) Bill, SP Bill 29–PM Session 5 (2018), paras 29, 31, 71, 74, 200.

⁴⁰ Ibid, para 57.

⁴¹ CYPSCS, Stage 3: ACR bill briefing on International Standard for the minimum age of criminal responsibility, , https://cypcs.org.uk/wp-content/uploads/2020/02/MACR_international_standard_briefing_CYPSCS_May_2019.pdf (accessed 15 October 2024).

⁴² CRC, *General Comment No. 24*, CRC/C/GC/24 (2019), para 22.

when not required to do so. With the dawn of the 2024 Act, the interpretive materials developed by the HRTBs offer all stakeholders the opportunity to expand their understanding of how distinctive children's rights can be implemented. In turn, this will aid them in driving culture change that enables the full realization of children's rights without requiring them to develop new, unanchored interpretations. This potential ensures that children's rights in Scotland are continually strengthened and can evolve in line with international standards.