

# Scots law, 16- and 17-year-olds and the UNCRC: balancing autonomy and protection

## A. INTRODUCTION

The extent to which Scots law regulating 16 and 17 year olds needs to align with the United Nations Convention on the Rights of the Child (UNCRC) has received increased focus in light of the United Nations Convention on the Rights of the Child (Incorporation)(Scotland) Act 2024 (the Incorporation Act), which defines children as those under eighteen years of age.<sup>1</sup> In Scotland, the age of majority is 18,<sup>2</sup> while full legal capacity is attained at 16 years.<sup>3</sup> The minimum age for marriage is 16 years,<sup>4</sup> consistent with the end of all parental rights<sup>5</sup> and most parental responsibilities.<sup>6</sup> Voting in Scottish Parliament and local elections can be done from 16 years,<sup>7</sup> but voting in a Westminster election must wait until 18.<sup>8</sup> These examples, amongst many others,<sup>9</sup> underpin concerns raised by Police Scotland, the College of Senators and the Law Society of Scotland about the need to realign age limits with the UNCRC definition of a child.<sup>10</sup> However, the UN Committee on the Rights of the Child (CRC/Committee) recognises the evolving capacity of children across different areas, requiring a flexible approach to age limits. An evolving capacities approach to age limits does not necessarily run counter to Scots law but rather acknowledges the need for protection

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<sup>1</sup> SP Bill 80C United Nations Convention on the Rights of the Child (UNCRC) (Incorporation) (Scotland) Act 2024 Part 1, Article 1.

<sup>2</sup> Age of Majority (Scotland) Act 1969 s 1(1).

<sup>3</sup> Age of Legal Capacity (Scotland) Act 1991 s 1(1)(b).

<sup>4</sup> Marriage (Scotland) Act 1977 s 1.

<sup>5</sup> Children (Scotland) Act 1995 s 2(4), as clarified by s 15.

<sup>6</sup> Children (Scotland) Act 1995 s 1(3), as clarified by s 15. The only parental responsibility retained after a child reaches 16 is the responsibility for guidance.

<sup>7</sup> Scottish Elections (Reduction of Voting Age) Act 2015 s 1.

<sup>8</sup> Representation of the People Act 1969 s 1.

<sup>9</sup> Examples include the Age of Referral to the Children's Reporter, SP Bill 22 Children (Care and Justice)(Scotland) Bill [as introduced] Session 6 (2022).

<sup>10</sup> Evidence provided to the Scottish Parliament by the Law Society of Scotland, Police Scotland and the College of Senators highlighted concerns over age anomalies in Scots law. SP Bill 80 United Nations Convention on the Rights of the Child (UNCRC) (Incorporation) Bill [as introduced] stage 1 (2020).

<sup>10</sup> The Committee on the Rights of the Child also recommended the UK conduct a review of all age-based legislation in the most recent concluding observation. See Committee on the Rights of the Child, Concluding Observations on United Kingdom of Great Britain and Northern Ireland CRC/C/GBR/CO/6-7 (2023).

and increasing autonomy as a child approaches adulthood.<sup>11</sup> This increasing autonomy can mean age limits becoming emancipation rights,<sup>12</sup> where 16- and 17-year-olds have equal opportunities and equal enjoyment of rights that adults also enjoy, without any protective measures.

Legal age limits create a bright line between those who have acquired age-based rights, and those who have not.<sup>13</sup> They offer clarity, but by their very nature, age limits are arbitrary. They do not permit individualised assessments to consider whether those below or above an age have the capacity to acquire a specific right. This compares with a child's right to consent to medical treatment where an individual child is judged to have sufficient understanding in the view of a medical practitioner.<sup>14</sup> Legal systems require certainty and an approach which is not unduly burdensome;<sup>15</sup> age-based approaches provide this certainty. However, concerns about the need to realign age limits to 18 years to prevent substantial litigation<sup>16</sup> and infantilising 16- and 17-year-olds<sup>17</sup> highlights the need for clarity about the scope of Article 1 UNCRC and how it works within the wider context of the Convention. This article aims to clarify the scope of Article 1 and consider whether the Committee requires age limits to be realigned at 18 years of age.

The next section will provide further context about the incorporation of the UNCRC into Scots law and the constraints on devolution which limit the scope of the Incorporation Act. Section C will consider the scope and limitations of Article 1 and how the work of the Committee helps state parties to understand the balance between protection and autonomy

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<sup>11</sup> While the term “autonomy” is used in Scots law, the terminology varies under the UNCRC between evolving capacity and participation rights. “Autonomy” will be the preferred term in this article.

<sup>12</sup> E Brems, “Lessons for children’s rights as a distinct category of human rights”, in E Brems, E Desmet and W Vandenhoele (eds), *Children’s Rights Law in the Global Human Rights Landscape: Isolation, inspiration, integration* (2017) 93.

<sup>13</sup> C McDiarmid, “After the age of criminal responsibility: a defence for children who offend” (2016) 67(3) NILQ 327 at 332.

<sup>14</sup> Age of Legal Capacity (Scotland) Act 1991 s 2(4).

<sup>15</sup> See D Archard and J Tobin, “Article 1: The Definition of a Child”, in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (2019).

<sup>16</sup> College of Senators, SP Bill 80 United Nations Convention on the Rights of the Child (UNCRC) (Incorporation) Bill [as introduced] stage 1 (2020).

<sup>17</sup> B Dempsey, “Opinion” (Journal of the Law Society of Scotland, 19 July 2019), available at <https://www.laws Scot.org.uk/members/journal/issues/vol-66-issue-07/opinion-brian-dempsey/> (accessed 15 January 2024).

rights.<sup>18</sup> Section D will then provide a brief conclusion reiterating that age limits need not be realigned to 18 years but that age limits should provide a balance between protection and autonomy rights.

## **B. INCORPORATION OF THE UNCRC INTO SCOTS LAW**

The UNCRC is the most ratified international treaty encompassing economic, social, cultural, civil, and political rights. The UNCRC contains 54 articles and is accompanied by three Optional Protocols. The United Kingdom ratified the Convention in 1991 and has since ratified the first two Optional Protocols. The UK Parliament has implemented certain aspects of the UNCRC through sectoral legislation and policy without tethering specifically to the Convention.<sup>19</sup>

The UNCRC Incorporation (Scotland) Bill 2020 was intended to offer a “maximalist approach” to direct legal incorporation giving “international law direct effect in national law” while ensuring justiciability.<sup>20</sup> While unanimously passed by the Scottish Parliament in March 2021, the Supreme Court ruled that certain provisions of the Bill were beyond the legislative competence of the Scottish Parliament.<sup>21</sup> An amended Bill, passed in December 2023, removed or amended provisions which would attach to UK legislation where the subject area is within devolved competence.<sup>22</sup> Therefore, key pieces of legislation which regulate the rights of 16 and 17 year olds, including the Children (Scotland) Act 1995, the Age of Legal Capacity (Scotland) Act 1991, the Marriage (Scotland) Act 1977 and Education (Scotland) Act 1980, are outwith the scope of the Incorporation Act. While these limitations qualify and diminish the “maximalist” approach to incorporation, the intention of the Scottish Parliament to directly incorporate the UNCRC “signals the highest commitment to human rights delivery”.<sup>23</sup> There is now a political imperative to turn this commitment into reality,

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<sup>18</sup> While General Comments and Concluding Observations are not legally binding, they are recognised as important aides in interpreting the CRC and are recognised for this value in the Incorporation (Scotland) Bill.

<sup>19</sup> See K McCall-Smith, “The devil is in the details: entrenching human rights protections in the UK’s devolved nations” [2023] 72 NILQ 95.

<sup>20</sup> Ibid 99.

<sup>21</sup> REFERENCE by the Attorney General and the Advocate General for Scotland - United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill REFERENCE by the Attorney General and the Advocate General for Scotland - European Charter of Local Self Government (Incorporation) (Scotland) Bill [2021] UKSC 42, [2021] 1 WLR 5106.

<sup>22</sup> SP Bill 80B United Nations Convention on the Rights of the Child (UNCRC) (Incorporation) Bill [as passed] stage 3 (2021) s 20(2).

<sup>23</sup> McCall-Smith (n 19) 102.

ensuring compliance with the UK Supreme Court judgment while acting upon the recommendations of the CRC, by continuously reviewing proposed and existing legislation.<sup>24</sup> Ultimately, the Scottish Parliament will need to enact legislation to replace Acts of the UK Parliament applicable in devolved areas with Acts of the Scottish Parliament if it is to pursue a maximalist approach. In terms of age limits, this requires an understanding of the scope and limitations of Article 1 and how this engages with the wider UNCRC, particularly the principle of evolving capacities, to ensure a balance between protection and autonomy rights.

### C. AGE LIMITS AND THE UNCRC

Article 1 is the starting point for outlining the scope of the UNCRC: *whom* is to benefit from the rights contained within the Convention. Article 1 defines a child as “every human being below the age of eighteen years” unless “under the law applicable to the child, majority is attained earlier”. The age of majority was used to conceptualise childhood during drafting of the UNCRC with recognition that while ages may vary between state parties, the intention was for the UNCRC to apply to as wide a group as possible.<sup>25</sup> The Incorporation Act contains an amended Article 1 which removes this qualification, in favour of defining a child as all those under 18 years of age. The Incorporation Act will therefore apply to all those under 18 years- However, if article 1 defines *whom* is to have the rights contained within the CRC it does not specify *what* those rights are.

The conceptualisation of the rights in the UNCRC as the “3P’s” of protection, participation and provision offers a useful pedagogical tool to consider what the rights in the UNCRC are.<sup>26</sup> Provision rights, although under theorised, are the resources required to secure

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<sup>24</sup> UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child CRC General Comment 5 para 18. Together Scotland and others have repeatedly pushed for an audit of existing legislation to identify implementation gaps, see for example *Together, State of Children’s Rights Report 2023* 5, available at [https://www.togetherscotland.org.uk/media/3266/socrr23\\_final.pdf](https://www.togetherscotland.org.uk/media/3266/socrr23_final.pdf) (accessed 15 January 2024).

<sup>25</sup> E/CN.4/L.154 at paras 28-36 and Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, Vol 1 (2007) 305.

<sup>26</sup> T Hammarberg, Commissioner for Human Rights, Council of Europe, personal communication to A Quennerstedt 16/6/2009 referred to in A Quennerstedt, “Children, but not really humans? Critical reflections on the hampering effect of the ‘3 P’s’” (2010) 18(4) IJCR 619.

basic needs<sup>27</sup> such as the provision of services in health and education.<sup>28</sup> Protection rights are arguably the “main component of children’s rights”,<sup>29</sup> reflecting the historical idea that children as a category of individuals are in need of “special protection”.<sup>30</sup> Participation rights, which are often referred to as autonomy rights,<sup>31</sup> recognise children as active agents, rather than passive rights recipients. It is the balance between protection and participation rights which recognises that children are not a homogeneous group and therefore that age limits should provide protection while also recognising autonomy as children approach adulthood. Concerns raised during drafting of the Incorporation Bill focused upon a perceived need to realign legal age limits to include everyone under 18 years of age. This led to concerns about infantilising 16- and 17-year-olds who are already recognised in Scots law as being capable of autonomous decision-making. However, the Committee do not seek to remove rights from children, by infantilising them or otherwise.<sup>32</sup> Successful implementation of the UNCRC into Scots law requires a culture change where children’s rights are not seen to be solely about protection but also about safeguarding and promoting autonomy.<sup>33</sup> This is the balance – between protection and autonomy - that will help ensure this culture change and the realisation of children’s rights in Scotland.

Evolving capacities, initially contained in Article 5 of the CRC, has been referred to as a unique innovation in international law<sup>34</sup> which, as an enabling principle, cuts across all the rights in the CRC.<sup>35</sup> While the term “evolving capacities” was not theorised during the

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<sup>27</sup> Quennerstedt (n 26).

<sup>28</sup> A Osler and H Starkey “Children’s Rights and Citizenship: Some Implications for the Management of Schools” (1998) 6 *IJCR* 313.

<sup>29</sup> Quennerstedt (n 26).

<sup>30</sup> See The Declaration on the Rights of the Child, League of Nations OJ Spec Supp 21 (1924) 43.

<sup>31</sup> A Daly, “Assessing Children’s Rights: Reconceptualising our Understanding through the UN Convention on the Rights of the Child” [2020] 28 *IJCR* 471.

<sup>32</sup> Article 41 of the UNCRC states: Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: (a) The law of a State party; or (b) International law in force for that State.

<sup>33</sup> Brems (n12).

<sup>34</sup> G Kamchedzera, *A Commentary on the United Nations Convention on the Rights of the Child, Article 5: The Child’s Right to Appropriate Direction and Guidance* (2012) 13.

<sup>35</sup> L Lundy and K Hanson, “Does Exactly What it Says on the Tin? A Critical Analysis and Alternative Conceptualisation of the So-called ‘General Principles’ of the Convention on the Rights of the Child” (2017) 25 *International Journal of Children’s Rights* 285; UN Committee on the Rights of the Child and the Office of the High Commissioner for Human Rights, “20th Anniversary Adoption of the Convention on the Rights of the Child: Draft recommendations as submitted by thematic Working Groups” (8–9 October 2009).

drafting process, the Committee have increasingly used the term in General Comments and Concluding Observations.<sup>36</sup> The Committee define “evolving capacities” as “an enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies, understanding and increasing levels of agency to take responsibility and exercise their rights”.<sup>37</sup> The Committee recognises the biological and neurological changes which happen during adolescence and emphasise the importance of laws balancing evolving autonomy while acknowledging vulnerabilities during this phase of life.<sup>38</sup>

The principle of evolving capacities recognises the non-homogeneity of childhood and the need for law to consider the balance of rights for older children. Age limits are one way of recognising the increasing evolving autonomy of older children, while acknowledging their need for protection. The Committee recommend that state parties establish appropriate ages which recognise “varying degrees of protection, participation and opportunity for autonomous decision making in different contexts and across different areas of decision making”.<sup>39</sup> Guidance from the Committee helps state parties establish appropriate age limits which balance protection and autonomy rights.

Since 1995, the Committee have recommended the UK amend specific age limits including raising the minimum age of criminal responsibility,<sup>40</sup> enhancing protection for children in the criminal justice system,<sup>41</sup> and extending the national minimum wage to those under 18.<sup>42</sup> Additionally, they have positively “noted” the extension of voting to 16- and 17-year-olds for devolved elections in both Scotland and Wales, and emphasised the need for the Children’s Hearing System to apply to 16 and 17 year olds.<sup>43</sup>

In 2023 the Committee recommended a review of all age limits to ensure all children, including those aged 16 and 17 years, “are defined as children in law and receive protection as children in practice”.<sup>44</sup> When setting age limits, states must consider whether there is an

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<sup>36</sup> S Varadan, “The Principle of Evolving Capacities under the UN Convention on the Rights of the Child” (2019) 27 IJCR 306.

<sup>37</sup> Committee on the Rights of the Child, General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence, CRC/C/GC/20 at para 18

<sup>38</sup> Ibid at para 5.

<sup>39</sup> G Lansdown, *The Evolving Capacities of the Child* (Innocenti Insight: 2005) 3.

<sup>40</sup> CRC/C/15/Add.34 (1995); CRC/C/15/Add.188 (2002); CRC/C/GBR/CO/4 (2008); (2016) CRC/C/GBR/CO/4.

<sup>41</sup> Ibid.

<sup>42</sup> CRC/C/15/Add.188 (2002).

<sup>43</sup> CRC/C/GBR/CO/5 (2016).

<sup>44</sup> CRC/C/GBR/CO/6-7 (2023).

adequate balance between protection and autonomy. The Committee advocates for an approach to the rights of older children which recognises their increasing capacities while providing protection, where this is required. A review of age limits should aim to redefine children's rights as both enabling evolving capacities while providing protection. It is important to acknowledge that it is entirely reasonable for Scotland to establish rights that go beyond the CRC,<sup>45</sup> such as granting voting rights to 16- and 17-year-olds. However, this does not eliminate the necessity of safeguarding this same age group in other areas, and reconciling these issues should be a priority.

#### **D. CONCLUDING REMARKS: BALANCING PROTECTION AND PARTICIPATION**

Article 1 of the UNCRC provides the upper boundary between childhood and adulthood, defining a child as anyone below 18 years, unless the age of majority is lower in the state party. In Scotland, the age of majority is 18 years, making the Convention applicable to all individuals under 18, the text of the Incorporation Act leaves this in no doubt. While Article 1 outlines *whom* is to receive the rights contained within it, it does not specify *what* the rights are or *how* age limits can be used to balance protection and autonomy rights. The rights contained within the UNCRC help establish the *what*: children have provision, protection and participation rights, referred to as autonomy rights in Scots law. The enabling principle of evolving capacities provides the *how*: recognising the autonomy of 16- and 17-year-olds while balancing their protection, where necessary. Importantly, the Committee do not mandate nor encourage realignment of age limits at 18 years but rather recognise the diversity of childhood and the unique status of older children as they approach adulthood.

Addressing concerns about anomalies in Scots law requires a culture shift from a purely protectionist conceptualisation of children's rights to an approach which recognises that children are not a homogenous group. Age limits recognise this distinction in law. To comply with the UNCRC and become a world leader in human rights, the Scottish Government should review current age limits and assess how well they recognise both protection and autonomy rights for children. The goal is not to realign all age limits to eliminate anomalies but rather to understand how to balance protection and autonomy rights.

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<sup>45</sup> Article 41 (n 32).

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