

The UN Convention on the Rights of the Child:

a study of legal implementation in 12 countries

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UNICEF UK raises funds for UNICEF's emergency and development work around the world and advocates for lasting change for children worldwide. This includes, for example, working to change government policies and practices that restrict children's rights in the UK and internationally.

This study of legal implementation of the UN Convention on the Rights of the Child in 12 countries was conducted on behalf of UNICEF UK by Laura Lundy, Ursula Kilkelly, Bronagh Byrne and Jason Kang of the Centre for Children's Rights at Queen's University Belfast.

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- Children's rights – using the UN Convention on the Rights of the Child and other relevant international standards to evaluate the laws, policies and practices that affect children's lives.
- Research with children – evaluating the best methods of conducting research on children's lives with a particular focus on approaches that involve children actively in the research process.

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1. Executive summary

The UN Committee on the Rights of the Child favours direct and full incorporation as the method of implementation, thus giving full legal effect to the binding commitments made by governments when ratifying the Convention.





1.1 Basis for analysis

UNICEF UK commissioned Queen's University Belfast to study the legal and non-legal measures of implementing the UN Convention on the Rights of the Child (CRC) in 12 countries other than the UK. The aim is to analyse the most effective, practical and impactful ways of embedding children's rights into UK domestic law.

The research team selected the 12 countries to demonstrate the variety of ways in which countries with common or civil law legal systems have provided for children's rights at national level by taking steps to implement the CRC.

This study provides an international context to compare the current status in the United Kingdom, more specifically England, and the devolved jurisdictions of Northern Ireland, Scotland and Wales.

1.2 Legal and non-legal measures of implementing the CRC

The UN Committee on the Rights of the Child favours direct and full incorporation as the method of implementation, thus giving full legal effect to the binding commitments made by governments when ratifying the CRC. **Legal measures** of CRC incorporation include:

- direct incorporation – the CRC is fully transformed into domestic law at either legislative or constitutional level
- indirect incorporation – other legal mechanisms (such as the duty on Welsh Ministers to have regard to the CRC) are used to give the CRC some effect in the domestic legal order
- sectoral incorporation – transposing relevant provisions of the CRC into relevant sectoral laws, such as those relating to education or family.

Non-legal measures refer to the processes that different countries can use to progress implementation of the CRC and include:

- national strategies and action plans for children
- child impact assessment processes to anticipate the impact of proposed laws, policies or budgetary allocations
- the establishment of children's commissioners or ombudspersons, either as distinct offices or as part of a national human rights institution
- child budgeting or the identification, allocation and monitoring of resources spent on children and children's services
- children's rights training, awareness raising and capacity building for all those working with and on behalf of children
- the development and collection of data on children's lives.

1.3 Research findings

Successful CRC implementation is key to the realisation of children's rights. However, while all States Parties to the CRC have committed to implementing its principles and provisions in law and practice, there is no single route to be taken. Few of the countries analysed during this research have fully incorporated the CRC into domestic law, but where this has happened, it has had significant effect.

The impact of incorporation

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

CRC principles as part of domestic law

Integration of the CRC principles into domestic law was taking place across the countries analysed and appears to be increasing steadily over time. Article 3 of the CRC (the best interests of the child) was the general principle that was most likely to be represented in domestic law, and most commonly in areas of child protection, alternative care and family law but sometimes in areas such as juvenile justice (Ireland) and immigration (Norway).

Article 12 (the right of the child to have their views taken into account) was the next that was most likely to be included. This had the potential to have a strong impact in practice (Belgium, Norway).

The CRC in federated systems

In many of the countries analysed, the State Party had signed and ratified the CRC, but the onus for ensuring its implementation in law, policy and practice rested with devolved or federated regions, which had significant responsibility for areas like education, health and social care (Australia, Belgium, Germany, Spain).

While all State Parties to the CRC have committed to implementing its principles and provisions in law and practice, there is no single route to be taken.

A recurring theme was the inconsistency of approaches or divergence in the commitment to the CRC across the different internal jurisdictions, with competence varying between regions thus leading to a lack of clear accountability for children's rights.

A recurring theme was the inconsistency of approaches or divergence in the commitment to the CRC across the different internal jurisdictions, with competence varying between regions thus leading to a lack of clear accountability for children's rights. In each country, certain areas were identified as being at the forefront of CRC implementation (such as Victoria in Australia, Catalonia in Spain, Berlin in Germany and, in different respects, the Flemish and French Communities in Belgium). However, there was an apparent risk that the duty on the State Party to ensure implementation was diluted in the transfer of responsibility to the regions, with the central government often limiting its role to monitoring and compiling the State Party's report.

Promotion and awareness raising of the CRC

The need for CRC training and awareness was highlighted at every level from legislation to case law, and policy development to service provision for children, and effective implementation was contingent upon awareness of children's rights. This did not simply involve knowledge of the CRC articles or issues like child protection, but an understanding of children as the subject of rights, who are entitled to be treated with dignity and respect and to exert influence over their own lives.

Child rights monitoring bodies

Most of the countries analysed had a Children's Commissioner or Ombudsperson. Each had varying powers and resources that were often not as extensive as those invested in the four UK children's commissioners. Where an Ombudsperson approach had been adopted (as in Norway, Spain and Ireland), it was considered that the ability for children to make complaints directly to the office for investigation played an important role in the enforcement of the CRC.





The Commissioner or Ombudsperson was also core to monitoring implementation over time, to holding government to account, and to ensuring consistency in the implementation of the CRC at times of political change.

National plans for children

Almost all of the countries had a national plan for children, but not all have been kept current. National plans are most effective when accompanied by concrete action plans and targets. Even where national plans were not explicitly linked to implementation, it is clear that an ambitious national strategy can drive CRC implementation in particular areas (such as participation rights in Ireland).

Comprehensive data on children

Children's rights implementation is underpinned by comprehensive data, which needs to be collected in a systematic manner that identifies the most vulnerable categories of children, with change tracked over time. Several governments commission and/or publish useful official annual reports on the state of children's rights reports (Spain, Germany). Some have invested in data collection (such as the Growing up in Ireland study and Australia's Child Development Index) thus enabling an evidence base for policy development to be built up over time. However, in most instances, the focus was on key child development and well-being indicators, rather than the full range of children's rights. Attempts to develop and employ child rights indicators remain rare (South Africa is a notable exception).

Children's participation

Child participation was widely recognised as an important aspect of implementation of the CRC. In Norway and Belgium, the principle has been implemented in domestic law and policy, and there appears to be recognition that participation is required at all levels of decision making. These countries had relatively good examples of children's participation in individual decision making in the areas of child protection and alternative care, and in private family law matters.

Child participation appeared to be less systematic elsewhere, but there were significant examples of effective working in many contexts, including children's involvement in city-planning decisions (Melbourne, Australia), and embedding child participation in local authority decision making (Ireland). Ireland made an explicit commitment to listen to the views of children in national policy, which has clearly been instrumental in supporting a participation agenda across a whole range of governmental decision making.

Child impact assessment

There are good examples of child impact assessments being introduced in the legislative review process. Sweden, in particular, has had a system of child impact assessment for some years, as part of its wider national child rights strategy. More recently, the Flemish Region in Belgium has introduced an evaluation process, known under the acronym JOKER, which must be conducted for every draft decree that directly impacts the interests of young people under 25 years.



Child budgeting

There was a large amount of interest in child-specific budgets, but few examples of it in practice. South Africa was the exception. Here, researchers have been collaborating with the National Treasury to produce budgetary analysis of expenditure in relation to the implementation of child welfare legislation.

Vulnerable children

In all countries analysed, the most vulnerable groups of children (separated children, asylum-seeking children, indigenous children and children in conflict with the law) continued to fare less well in comparison to their peers. In several countries, interviewees suggested that separated children and asylum seekers were not seen as rights holders in the same way as other children. Some of the most effective forms of redress were perceived to lie in constitutional or domestic equality protections.

Building a child-rights culture

There were a number of factors linked to establishing a culture of children's rights, including:

- a general culture of respect for rights (Norway, Belgium, Germany)
- a growing respect for rights that had developed in the wake of conflict and reconstruction (Spain, South Africa)
- public opinion, the role of the media and their combined influence on the political system.

Three significant drivers were identified as leading to increased levels of implementation by building a culture of respect for children's rights.

- Strong non governmental organisation/voluntary sector
- Key children's rights advocates or supporters in government or public office
- CRC periodic reporting process.

2. Background

Research highlights the continuing lack of accurate knowledge and awareness of child rights.





2.1 Methodology

This study comprised three key stages:

1. Literature review of human rights treaties implementation
2. Secondary analysis of 12 countries
3. In-depth analysis of six countries, including country visits and interviews, written submissions and responses to an online questionnaire.

Ethical approval for the study was obtained from the Research Ethics Committee of the School of Education at Queen's University Belfast. Data collection was carried out between February 2012 and August 2012.

For ease of reading this publication, the research team presents the in-depth analysis of six countries before the secondary analysis of six countries.

2.1.1 Literature review of the implementation of human rights treaties

The research team conducted a two-phase literature review on the implementation of human rights treaties:

- a. general measures of implementation and best practice
- b. specific legal and non-legal measures of implementation of the CRC.

With regard the latter, a search of HeinOnline, LexisNexis, ChildData and Westlaw databases was undertaken, alongside a review of UNICEF's work on *Law Reform and Implementation of the Convention on the Rights of the Child* (2007).

2.1.2 Secondary analysis of 12 countries

The 12 countries were identified by UNICEF UK, in conjunction with the research team and the Project Advisory Board (see Appendix 1), to reflect a suitable mix of countries with:

- common and civil law structures
- national and federated states
- strengths in different aspects of the general measures of implementation
- varied child rights legislative models.

Their perceived degree of relevance to and relative influence on the UK also affected the decision. The 12 countries were:

- Australia
- Belgium
- Canada
- Denmark
- Germany
- Iceland
- Ireland
- New Zealand
- Norway
- South Africa
- Spain
- Sweden

An analytical frame was established to guide the development of each country study (see Appendix 2). First, the research team examined State Party reports, as submitted by each country to the UN Committee on the Rights of the Child, for measures adopted in these jurisdictions. These were accessed through the UN Human Rights Treaty Bodies Database on the website of the Office of the High Commissioner on Human Rights (OHCHR).¹ Each State Party report and the Recommendations made by the Committee are structured thematically in accordance with the Committee's prescribed reporting guidelines. Amongst others, States Parties are required to report under the theme of "general measures of implementation", thus allowing for analysis by the research team.

Second, the research team examined the Concluding Observations issued to these jurisdictions by the Committee with respect to the measures adopted. Due to the nature of States Parties reports, implementation and progress can be tracked over time. A breakdown of the most recent concluding observations for the 12 identified countries is shown in Table 1.

Table 1: Most recent concluding observations of the countries studied

States Parties	Date	Periodic report
Australia	2011	Fourth
Belgium	2010	Third and Fourth
Canada	2012 (forthcoming session)	Third and Fourth
Denmark	2010	Fourth
Germany	2010	Third and Fourth
Iceland	2010	Third and Fourth
Ireland	2006	Second
New Zealand	2011	Third and Fourth
Norway	2010	Fourth
South Africa	2000	First
Spain	2010	Third and Fourth
Sweden	2009	Fourth
United Kingdom	2008	Third and Fourth

¹ Human Rights Treaty Body Database available at www.ohchr.org

Based on the information elicited from this analysis, the research team also examined relevant legislative and policy documentation from the:

- State Party in question (where available in English)
- Child Rights Information Network (CRIN)²
- Children's Rights Wiki³
- Relevant UNICEF National Committee or country office sites for each country.

A thematic content analysis of all documents was undertaken, allowing for the identification of:

- i. the types of legislative measures adopted across jurisdictions
- ii. the characteristics of said measures
- iii. the enablers and challenges in their development
- iv. their impact with respect to the implementation of children's rights.

The latter was determined from available datasets, including national data on children (in particular, the information reported across time in the State Party reports), international indices, such as the World Bank, the Programme for International Student Assessment (PISA), and UNICEF Report Cards.

Collation and analysis of documents was, however, limited to those accessible and available in English at the time of writing. Documents from Iceland, Norway, Germany and Sweden were not always available in English, and time and resource limitations prohibited any form of translation. Moreover, in attempting to assess the impact of legislative measures on child rights implementation and outcomes for children, the research team faced limitations on the type of national data available. This is because datasets and indices, such as the World Bank, PISA and UNICEF Report Cards, only focus on particular issues at a particular point in time, and not all are necessarily developed with children's rights in mind. As such, it was not always possible to obtain data that were up to date, or that considered the impact of the on-going global financial crisis on the countries involved. Furthermore, the limited data meant it was not possible to accord causality of improved outcomes for children directly to implementation of the CRC and associated legislative developments.

To offset some of these limitations and ensure that the most relevant and up-to-date information was captured, the research team, in conjunction with UNICEF UK, disseminated draft versions of country studies to international partners and contacts within UNICEF offices, academics, government and non governmental organisation colleagues for feedback that was then integrated into the country reports. These contacts were crucial in ensuring that the project team had an accurate and nuanced understanding of the reality in the State Party under investigation.

2 Child Rights Information Network (CRIN) available at www.crin.org

3 Children's Rights Wiki available at <http://wiki.crin.org/mediawiki>



2.1.3 In-depth analysis of six countries

Based on the data gathered in stage two of the methodology, the research team selected six countries for in-depth analysis and review. Selection criteria were developed in conjunction with UNICEF UK and the Project Advisory Board, and based on:

- i. efficacy, that is the apparent effectiveness and efficiency of the legislative model with respect to children's rights
- ii. feasibility, that is the appropriateness of the legislative model and implementation measures for the UK context.

On the basis of these criteria, five countries were selected for field visits: Belgium, Germany, Ireland, Norway and Spain, whilst Australia was identified for further remote study. A purposive sampling strategy was adopted and the research team targeted a broad spectrum of individuals with responsibility for, or experience of, implementing, monitoring, practicing or advising on children's rights. Details of potential participants were obtained primarily via UNICEF National Committees and in-country contacts. In total, 58 interviews were carried out through the course of the study. Those who participated in the study included representatives from:

- the relevant government department or agency with responsibility for children's rights
- children's Ombudsperson (where established)
- leading academics and researchers
- lawyers
- children's sector organisations
- service providers and practitioners
- those directly involved in the development and implementation of the legislative model, as appropriate.

Participants were offered the option of speaking to the research team face-to-face, via telephone call, or, where it was not considered possible or feasible to speak to particular individuals in person, a short qualitative survey. The survey was administered online through Questback, thus allowing for anonymity, and was based on the interview questions.

Each potential participant was provided with written information about the aims of the study, research methods, dissemination, and uses of the research data, as well as ways in which anonymity and confidentiality would be respected.

It was stressed that participation was voluntary, that there would be no adverse consequences of a decision not to take part, and that participants could withdraw at any time. Research was only conducted with individuals who gave consent. Field visits were carried out by one member of the research team accompanied by a member of UNICEF UK staff and, where possible, a representative from the Project Advisory Board. All of the interviews in Australia were conducted by telephone, as were a number of interviews in the other five countries, so as to facilitate participation by those unavailable during the field trips. All face-to-face interviews took place in the country offices of either the UNICEF National Committee or that of the interviewee. Interviews were audio-recorded with the consent of the participant for recall purposes.

3. Literature review of the implementation of human rights treaties

This section provides the reader with an understanding of the legal and non-legal measures taken for implementation of the CRC at a national level, and those taken to monitor and enforce implementation.



- 4 *Vienna Convention on the Law of Treaties*, 1969, article 26. Article 31 of the Vienna Convention states that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”
- 5 See, for example, Committee on Civil and Political Rights, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/GC/2004/21/Rev.1/Add.13, 2004; Committee on Economic, Social and Cultural Rights, General Comment No. 3, The nature of States Parties’ obligations, Geneva: UN, E/1991/23, 1990.

3.1 Introduction

The CRC is legally binding upon the States that are party to it (States Parties) according to the rules of international law, specifically, “every treaty in force is binding upon the parties to it and must be performed by them in good faith” (*pacta sunt servanda*).⁴ This means that a treaty is only binding upon a State when it has agreed to be bound to it by a process of ratification or accession. States that have ratified the CRC become known in international law as States Parties and subsequently take on both positive and negative duties to respect, protect and fulfil the rights contained in the treaty.⁵ The CRC has achieved almost universal ratification with the exception of Somalia, South Sudan and the United States.



Table 2: Ratification details of the CRC and its Optional Protocols by the 12 countries studied

Country	Date of ratification	Optional Protocol on the involvement of children in armed conflict (1)	Optional Protocol on the sale of children, child prostitution, and child pornography (2)	Optional Protocol on a communications procedure (3)	Declarations and reservations (Declarations and reservations are in place as of 31 August 2012 unless otherwise stated.)
Australia	17 December 1990	✓	✓		Reservation: Article 37(c) Declaration to Opt Pro (1)
Belgium	16 December 1991	✓	✓	Signed but not ratified	Interpretative declarations: Articles 2(1), 13, 15, 14(1) and 40 2(b)(v) Declaration to Opt Pro (1) Declaration to Opt Pro (2) Declaration to Opt Pro (3)
Canada	13 December 1991	✓	✓		Reservations: Article 21, Article 37(c) Statement of understanding: Article 30 Declaration to Opt Pro (1)
Denmark	19 July 1991	✓	✓		Reservations: Article 40 2(b)(v) Declaration to Opt Pro (1)
Germany	6 March 1992	✓	✓	Signed but not ratified	Declaration to Opt Pro (1) <i>In 2010, Germany withdrew declarations concerning Articles 9, 10, 18, 22 and 38(2), and withdrew reservations concerning Article 40 2(b) and the application of the CRC in national law.</i>
Iceland	28 October 1992	✓	✓		Declarations: Article 37 Declaration to Opt Pro (1) <i>In 2009, Iceland withdrew its declaration relating to Article 9.</i>
Ireland	28 September 1992	✓	Signed but not ratified		General Declaration to Opt Pro (1)
New Zealand	6 April 1993	✓	✓		Reservations: Article 32(2), Article 37(c) Declaration to Opt Pro (1)
Norway	8 January 1991	✓			Declaration to Opt Pro (1) <i>In 1995, Norway withdrew its reservation to Article 40 2(b)(v).</i>
South Africa	16 June 1995	✓	✓	Signed but not ratified	Declaration to Opt Pro (1)
Spain	6 December 1990	✓	✓	Signed but not ratified	Declarations: Article 21(d), Article 38 Declaration to Opt Pro (1)
Sweden	29 June 1990	✓	✓		Declaration to Opt Pro (1) Declaration to Opt Pro (2)
United Kingdom	16 December 1991	✓			Declaration to Opt Pro (1) <i>The UK withdrew its reservations relating to Articles 32 and 37c in 1997, and Article 22 in 2008.</i>

The ways in which the CRC is given legal effect is highly contingent upon the constitutional and legal systems of individual countries.

3.2 Incorporation

The UN Committee on the Rights of the Child, the body of independent experts that monitors implementation of the CRC by its States Parties, emphasises the importance of ensuring that the provisions of the CRC are given effect at national level through legal measures of implementation.⁶ The ways in which the CRC is given legal effect is highly contingent upon the constitutional and legal systems of individual countries. In some countries (sometimes known as monist states), for example, once the CRC is ratified at international level, it automatically forms part of national law. This approach is more likely to be found in civil law countries. In other words, on ratification, the CRC automatically becomes part of the domestic legal order, meaning that it binds state authorities and may be directly enforceable by national courts.

The position that the CRC occupies in the hierarchy of the domestic legal system in such instances is variable. In some cases, it may be subordinate to the constitution, but prevail over ordinary legislation. In other countries, however, it may have the same status or standing as the constitution and, in others still, it may occupy the equivalent level as legislation.⁷ The UN Committee on the Rights of the Child states that in case of any conflict in legislation, predominance should always be given to the CRC in light of Article 27 of the Vienna Convention on the Law of Treaties.⁸ Kilkelly highlights, however, that States have entered reservations seeking to limit the application of the CRC in specific areas, or have entered interpretive declarations, allowing them to clarify their interpretation of a particular provision or phrase.⁹ Tobin suggests that irrespective of the validity of reservations, their mere existence can allow domestic courts to effectively “render the CRC subservient to domestic law.”¹⁰ Where the CRC is not incorporated automatically, as in many common law countries, only those provisions that are expressly incorporated into national law will give rise to enforceable rights and duties. Some States undertake this process at a constitutional level, whilst others do so through legislation. The UNICEF Innocenti Research Centre carried out a study showing that, at their time of writing, the CRC had been directly incorporated into national law in two-thirds of 52 identified countries, whilst provisions had been incorporated into the constitutional order in the remaining third.¹¹

Bennett Woodhouse suggests that it is at times of constitutional change that “the door is thrown open to explicit incorporation of emerging rights,”¹² whilst Tobin notes that greater attention has been accorded to the rights of children within constitutions adopted post-CRC.¹³ As the Committee emphasises, however, constitutional guarantees of rights for everyone “do not automatically ensure respect for the rights of children”, rather the test must be whether the applicable rights are “truly realised for children and can be invoked before the courts.”¹⁴ Several European countries, including Ireland, Norway and Austria, are currently engaged in processes that may lead to constitutional protection for children’s rights. Indeed, many States, including those that have not incorporated the CRC, have already given constitutional protection to the rights of children. However, those countries with relatively comprehensive constitutional provisions for children may not have any means of effective enforcement.¹⁵ Although Kilkelly notes that incorporation at a constitutional level is a “high water mark”,¹⁶ Tobin reminds us

- 6 UN Committee on the Rights of the Child, General Comment No. 5, General measures of implementation for the Convention on the Rights of the Child, CRC/GC/2003/5, 2003a, paragraph 19.
- 7 UNICEF, Law Reform and Implementation of the CRC, UNICEF Innocenti Research Centre, Florence, 2007.
- 8 Article 27 of the Vienna Convention states that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”; UN Committee on the Rights of the Child, 2003a, paragraph 20.
- 9 Kilkelly, U., ‘The CRC at 21: assessing the legal impact’, Northern Ireland Legal Quarterly, vol. 62, no. 2, 2011a, pp. 143–152, p. 145. It is important to note that Article 51 (2) emphasises that a reservation “incompatible with the object and purpose of the CRC shall not be permitted.” See also Harris-Short, S., ‘International human rights law: imperialist, inept and ineffective? Cultural relativism and the UN Convention on the Rights of the Child’, *Human Rights Quarterly*, vol. 25, no. 1, 2003, pp. 130–181.
- 10 Tobin, J., ‘Increasingly seen and heard: the constitutional recognition of children’s rights’, *South African Journal on Human Rights*, vol. 21, 2005, p. 99.
- 11 United Nations Children’s Fund, 2007.
- 12 Bennett Woodhouse, B., ‘Recognising children’s rights: lessons from *South Africa*’, *Human Rights*, vol. 26, 1999, pp. 15–18, p. 17.
- 13 Tobin, J., 2005.
- 14 UN Committee on the Rights of the Child, 2003a, paragraph 21.
- 15 Tobin, J., 2005.
- 16 Kilkelly, U., 2011a, p. 147.



that it says something but not everything about the status of children in a particular society.¹⁷ The ways in which the CRC's principles and provisions are incorporated is thus key to the effectiveness of this process of realising children's rights in practice.¹⁸

3.3 Implementation in domestic law

The UN Committee on the Rights of the Child has made clear that when a State ratifies the CRC, it takes on obligations under international law to implement it.¹⁹ Implementation in this context is the process whereby States Parties take action to ensure the realisation of rights in the CRC for all children within a jurisdiction.²⁰ The core obligation to implement is set out in Article 4. This requires States Parties to "undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present CRC. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources."

International human rights treaties do not, in general, specify how States Parties are to give effect to their obligations at domestic level, but do require that they take "all appropriate measures."²¹ As such, it is up to States to determine how best to implement their international treaty obligations, subject to the satisfaction of those obligations in practice. According to the UN Committee on Economic Social and Cultural Rights, each "State Party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights."²²

While it is, ultimately, up to individual States to determine how the CRC is implemented, in practice, implementation can fall and/or be devolved to regions within States Parties, which can lead

¹⁷ Tobin, J., 2005, p. 88.

¹⁸ Kilkelly, U. and O'Mahony, C., 'The proposed children's rights amendment: running to stand still?', *Irish Journal of Family Law*, vol. 2, p. 19, 2007.

¹⁹ UN Committee on the Rights of the Child, 2003a, paragraph 1.

²⁰ UN Committee on the Rights of the Child, 2003a, paragraph 1.

²¹ See, for example, Human Rights Committee, General Comment No. 3, Implementation at the national level, HRC/GC/1981/3, 1981, paragraph 1.

²² Committee on Economic, Social and Cultural Rights, General Comment No. 3, paragraph 4. See also Tobin, J., 2005, p. 89.

Consolidated children's statutes appear to be emerging as a trend in legislative reforms among States Parties to the CRC.²⁸

to fragmentation, inconsistencies and lack of coordination.²³ The Committee has made it clear that the State must ensure that devolved authorities have the resources and support necessary for implementation within its jurisdiction, and that decentralisation or devolution does not lead to discrimination in the enjoyment of rights by children in different regions.²⁴ In particular, the Committee considers that where a State "delegates powers to legislate to federated regional or territorial governments, it must also require these subsidiary governments to legislate within the framework of the CRC."²⁵ In its 2007 study, UNICEF notes that in many federal States national law and policy on child rights has had limited effect, due to the inability of provincial or state authorities to implement it, and to the limited power of federal or central government to legislate in matters like family law.²⁶ Effective implementation of human rights treaties, including the CRC, is undoubtedly problematic and highly contingent upon the measures adopted by a particular State. The impact of treaties at national level can be further impinged by:

- the extent to which there is a pre-existing human rights culture
- levels of awareness and training
- political will and context
- perceived relevance of human rights
- level of coordination within governments and between non governmental organisations and governments
- the political make up of States.²⁷

Consolidated children's statutes appear to be emerging as a trend in legislative reforms among States Parties to the CRC.²⁸ In a study carried out in 2008, UNICEF indicates that an estimated 69 States Parties have enacted consolidated children's statutes. In addition to welcoming this development, the Committee emphasises that an essential aspect of implementation is ensuring that all legislation, including sectoral laws, are fully compatible with and reflect the provisions and principles of the CRC. According to UNICEF, many of the 52 countries studied in its 2007 report appear to have adopted a sectoral approach to law reform. That is to say, they have examined legislation concerning different areas so as to identify and make the required changes to bring existing legislation into conformity with the CRC. Other countries have brought comprehensive laws or children's codes into action. The sectoral approach appears to have had mixed results: law reform tends to focus primarily on areas of child protection, the family and juvenile justice, whilst civil rights remain overlooked and the general principles relating to participation and non-discrimination are accorded recognition only in specific circumstances or contexts.²⁹ Williams suggests that while States Parties may "connect their domestic law to the [CRC's] requirements when reporting to the Committee, it is rare to find domestic reform explicitly based on the objectives generated by the textual system of the [CRC]."³⁰

3.4 Enforcement

In practice, this implementation of human rights treaties is impinged upon by the limited powers of treaty-monitoring bodies and the absence of effective enforcement mechanisms. This is most evident in the lack of an enforcement mechanism that allows for the adjudication of individual complaints. Whilst an Optional Protocol on a communications procedure for children's rights violations opened

- 23 Williams, J., 'Multi-level governance and CRC implementation' in Invernizzi, A. and Williams, J. (eds.), *The Human Rights of Children: From visions to implementation*, Ashgate, Farnham, 2011, pp. 239–262.
- 24 UN Committee on the Rights of the Child, 2003a, paragraph 41.
- 25 UN Committee on the Rights of the Child, 2003a, paragraph 20.
- 26 United Nations Children's Fund, 2007.
- 27 Heyns, C. and Viljoen, F., 'The impact of the UN human rights treaties at domestic level', *Human Rights Quarterly*, vol. 23, 2001, pp. 483–535.
- 28 United Nations Children's Fund, *Global Perspectives on Consolidated Children's Rights Statutes*, Legislative Reform Initiative paper series, Division of Policy and Practice, New York, 2008.
- 29 United Nations Children's Fund, 2007, p. 103.
- 30 Williams, J., 'General legislative measures of implementation: individual claims, 'public officer's law' and a case study on the UNCRC in Wales', *International Journal of Children's Rights*, vol. 20, 2012, pp. 224–240, p. 226.

for signature on 28 February 2012, this will not grant remedies in the same way as a court of domestic law. Nonetheless, this is a significant development and will enable the UN Committee on the Rights of the Child to examine communications from children and their representatives that allege violations of their rights. By September 2012, the Optional Protocol had been signed by 26 States (but is not yet in force).

In the absence of an international court, alternative mechanisms and procedures for enforcing human rights standards internationally have been developed.³¹ Implementation of the CRC's provisions has been subject to monitoring by the Committee through a periodic States Party reporting process, as provided for by Articles 43–44. Non-governmental organisations and other interested bodies can comment on the State report and/or provide additional information on how well that State Party is complying with its obligations by submitting a "shadow or alternative report to the Committee". Following an examination of these reports, the Committee then produces a set of "concluding observations" and recommendations, identifying areas where the State Party is doing well and those where it needs to improve or is in breach of particular rights. The Committee, however, has no powers to impose sanctions on those States Parties that fail to implement the recommendations made in the concluding observations. They cannot force States Parties to submit periodic reports either. An examination of the periodic reports for the countries included in this report shows that some States Parties have only submitted one periodic report to date, whilst others have submitted four periodic reports. The Committee's approach to the promotion and protection of children's rights is "advisory and non-adversarial in nature and its success relies on diplomacy rather than legal sanction".³² The significant resource and time constraints experienced by the Committee means that there can be delays in processing periodic reports and communications. Nonetheless, Donnelly suggests that treaty body reporting processes can act as an implementation tool in itself by forcing States to review existing practices.³³ In particular, the Committee's reporting guidelines on initial reports require States to provide information on the measures taken to harmonise national law and policy with the CRC, as well as information on "legislative, judicial, administrative and other measures" taken to further implementation at national level.³⁴ KilKelly notes that where States engage with the Committee in its review process in a constructive manner, it can and does lead to reform of law and policy, as well as improvements in practice.³⁵ The reporting process can also carry with it significant political and moral weight for States.³⁶

On a more general level, the Committee has emphasised that, "for rights to have meaning, effective remedies must be available to redress violations".³⁷ States need to focus on ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy (including support for self-advocacy), and access to independent complaints procedures and to the courts with necessary legal and other assistance.³⁸ The enforceability of children's rights at domestic level is, in part, dependent on whether or not the CRC enjoys the status of national law. Where the CRC is automatically incorporated into domestic law upon ratification, it

31 Balton, D., 'The Convention on the Rights of the Child: prospects for international enforcement', *Human Rights Quarterly*, vol. 12, 1990, pp. 120–129.

32 KilKelly, U., 'The best of both worlds for children's rights: interpreting the European CRC on Human Rights in the light of the UN Convention on the Rights of the Child', *Human Rights Quarterly*, vol. 23, no. 2, 2001, pp. 308–326.

33 Donnelly, J., *International Human Rights*, 3rd ed, Westview Press, Colorado, 2007.

34 UN Committee on the Rights of the Child, General guidelines regarding the form and content of initial reports to be submitted by States Parties under Article 44 paragraph 1(a) of the CRC, UN Doc. CRC/C/5, 1991, paragraph 9 (a).

35 KilKelly, U., 2011a, p. 145.

36 Balton, D., 1990; Bainham, A., *Children: The modern law*, Jordan Publishing, Bristol, 2005.

37 UN Committee on the Right of the Child, 2003, paragraph 24.

38 UN Committee on the Right of the Child, 2003, paragraph 24.



**Effective
implementation of
the CRC is not
achieved by legislative
measures alone.**

can be litigated in domestic courts. Where it is not part of national law, those seeking to have children's rights vindicated may struggle to find an effective avenue of redress, particularly with regard to rights that have not historically formed part of domestic legal frameworks and approaches, for example child participation.³⁹ The extent to which children are able to bring about judicial proceedings to enforce their rights can also be contingent upon levels of "judicial consciousness" and their receptiveness to the notion of children as rights bearers.⁴⁰ Whilst there appears to be increasing judicial readiness to cite the CRC when interpreting domestic provisions,⁴¹ Williams reminds us that it is also crucial to examine the extent to which rights-based reasoning is adopted in administrative decision-making processes outside the courts.⁴² Questions surrounding the justiciability of rights takes on added significance when considering economic and social rights, and there can be "general reluctance on the part of the courts to "trespass" into issues of resource allocation".⁴³ The Committee has emphasised that economic, social and cultural rights must be regarded as justiciable.⁴⁴ The litigation of socio-economic rights is becoming more common, although direct litigation and adjudication involving children's economic, social and cultural rights has been less frequent in the Western European context and common law jurisdictions than in other parts of the world.⁴⁵ The lack of an enforcement mechanism has led to a strategic focus on other ways in which the CRC can be made more effective. The CRC has usefully informed the case-law of the European Court of Human Rights (ECHR) for example,⁴⁶ and this had had a knock-on effect whereby the Court is enforceable at national level.⁴⁷ This has borne fruit in numerous areas, but is not, however, recognised as a direct substitute.

39 Kilkelly, U., 2011a, p. 146.

40 Tobin, J., 2005, p. 123.

41 See Williams, J., 'Incorporating children's rights: the divergence in law and policy', *Legal Studies*, vol. 27, no. 2, 2007, pp. 261–287, for examples of cases where the CRC has been referred to independently or as aids to ECHR-compatible interpretation of domestic legislation.

42 Williams, J., 2007.

43 Williams, J., 2007, p. 267.

44 UN Committee on the Rights of the Child, 2003a, paragraphs 6 and 25.

45 Nolan, A., *Children's Socio-Economic Rights, Democracy and the Courts*, *Human rights law in perspective*, no. 16, Hart Publishing, Oxford, 2011.

46 Kilkelly, U., 2001.

47 Kilkelly, U., 2011a.

3.5 Other measures of implementation

The UN Committee on the Rights of the Child has made clear throughout its General Comments, and General Comment No. 5 (2003) in particular, that effective implementation of the CRC is not achieved by legislative measures alone. It has identified a range of non-legal measures that are needed for effective implementation, including the development of particular structures, training and awareness and other activities. These are discussed below.

3.5.1 Independent national human rights institutions

Independent national human rights institutions (NHRIs) have been identified as an important mechanism to promote and ensure the implementation of the CRC, and the UN Committee on the Rights of the Child has welcomed the establishment of children's ombudspersons/children's commissioners to this end.⁴⁸ Where limited resources prohibit the establishment of the latter, the Committee has made clear that consideration should be given to the establishment of a commissioner with specific responsibility for children in those national human rights institutions that have a broad mandate.⁴⁹ The role of children's commissioners in this context is to independently monitor the State's compliance with the CRC and progress towards implementation, and to do all it can to ensure full respect for children's rights. In order to ensure their independence and effective functioning, the Committee has highlighted that children's commissioners must have adequate infrastructure, funding (including that specifically for children's rights within broad-based institutions), staff, premises, and freedom from forms of financial control that might affect their independence. They must have the power to consider individual complaints and petitions and carry out investigations, including those submitted on behalf of or directly by children.⁵⁰ NHRIs should have the power to support children taking cases to court, including the power:

Effective protection of children's rights requires a unifying, comprehensive and rights-based national strategy rooted in the CRC.

48 UN Committee on the Rights of the Child, General Comment No. 2, The role of independent national human rights institutions in the promotion and protection of the rights of the child, CRC/GC/2002/2, 2002, paragraph 1.

49 UN Committee on the Rights of the Child, 2002, paragraph 6.

50 Ibid.



- a) to take cases concerning children's issues in the name of the NHRI
- b) to intervene in court cases to inform the court about the human rights issues involved in the case.⁵¹

The Committee has listed an extensive (but not exhaustive) range of activities that NHRIs should carry out in relation to the implementation of children's rights, in light of the general principles of the CRC.⁵² A 2011 study by Save the Children on the general measures of implementation across five countries in Europe found that mandates and roles differ between children's commissioners/ombudspersons.⁵³ Gran suggests that there are four broad strategies that national children's right institutions use to implement the CRC:

- using existing legislation
- calling on government to institute new legislation
- working with the media
- collaborating with other organisations.⁵⁴

However, not all national children's rights institutions are obliged to monitor the CRC and much will depend upon the establishing legislation.⁵⁵ Indeed, the establishment of a national children's rights institution can be seen as an "indicator of political will to promote and protect children's rights."⁵⁶

3.5.2 A national strategy for children and young people

The UN Committee on the Rights of the Child states that effective protection of children's rights requires a unifying, comprehensive and rights-based national strategy rooted in the CRC.⁵⁷ This should be developed through a process of consultation with children and young people and those living and working with them, and give particular attention to identifying and prioritising marginalised and disadvantaged groups of children.⁵⁸ The Committee states that the strategy must be endorsed at the highest level of government and be linked to national development planning and budgeting. Furthermore, it must include a description of a sustainable process for realising the rights of children, setting real and achievable targets in relation to all rights in the CRC, as well as set out specific goals, targeted implementation measures and allocation of financial and human resources.⁵⁹ According to Save the Children, a wide range of approaches have been adopted at national level to the development and contents of national strategies and action plans for children, with common shortcomings relating to time-frames, measurable targets and indicators, lack of co-operation and coordination, and limited resources.⁶⁰

3.5.3 Visible cross-sectoral coordination

The Committee on the Rights of the Child highlights that effective implementation of the CRC requires visible cross-sectoral coordination to realise children's rights across all government departments, between different levels of government, and between government and civil society, including children and young people themselves.⁶¹ To this end, the Committee recommends that a special unit with high level authority would contribute to the overall purpose of making children more visible in government and ensure respect for children's rights across all levels of government.⁶² Such a

51 UN Committee on the Rights of the Child, 2002, paragraph 25.

52 UN Committee on the Rights of the Child, 2002, paragraph 19.

53 Save the Children, *Governance Fit for Children: To what extent have the general measures of implementation of the UNCRC been realised in five European countries?*, Save the Children, Stockholm, 2011.

54 Gran, B., 'The roles of independent children's rights institutions in implementing the CRC', in Invernizzi, A. and Williams, J. (eds.), *The Human Rights of Children: From visions to implementation*, Ashgate, Farnham, 2011, pp. 219–238.

55 Gran, B., 2011, p. 235.

56 Lansdown, G., *Independent Institutions Protecting Children's Rights*, UNICEF Innocenti Research Centre, Florence, 2001.

57 UN Committee on the Rights of the Child, 2003a, paragraph 28.

58 UN Committee on the Rights of the Child, 2003a, paragraph 29.

59 UN Committee on the Rights of the Child, 2003a, paragraph 32.

60 Save the Children, 2011.

61 UN Committee on the Rights of the Child, 2003a, paragraph 39.

62 UN Committee on the Rights of the Child, 2003a, paragraph 39.

unit could be given responsibility for developing the comprehensive children's strategy and monitoring its implementation, as well as coordinating reporting under the CRC.⁶³ The importance of cross-sectoral coordination is reflective of the reality that children's lives do not fall neatly into the realms of single government departments or thematic areas. In practice, however, coordination mechanisms can vary depending on the national context, with responsibility lying with particular ministries, individuals or networks. The effectiveness of coordination mechanisms can be undermined by lack of sufficient authority and resources to drive a children's rights agenda across government, and/or a lack of clarity surrounding the exact mandate of coordination mechanisms.⁶⁴

3.5.4 Child impact assessment

As stated by the UN Committee on the Rights of the Child, ensuring that children's rights are respected in law and policy, and implemented at all levels of government, demands a continuous process of child impact assessment to predict the impact of any proposed law, policy or budgetary allocation on children and the enjoyment of their rights, and to evaluate the actual impact of implementation.⁶⁵

Accordingly, this process needs to be built into government at all levels and as early as possible in policy development.⁶⁶ Whilst policy impact assessment on a range of issues is relatively common, for example on the basis of gender, environment and health, the systematic use of child impact assessment remains comparatively rare.⁶⁷ Research suggests that child impact assessments could have positive implications for encouraging greater collaboration both within and between different levels of government, facilitating greater evidence-based decision making, and leading to greater transparency and accountability.⁶⁸ Success factors include:

- political commitment
- involvement of senior policymakers
- a supportive strategic and policy environment
- clarity of purpose
- availability of good data
- meaningful participation of children
- subsequent and ongoing evaluation of impact.⁶⁹

Linked to this is the idea of mainstreaming. Human rights mainstreaming is a key way in which human rights principles and standards have been integrated into policy and practice. Some countries have favoured a "light-touch" approach to mainstreaming based upon enabling legal and institutional mechanisms, whereas others have adopted a more regulatory approach with an emphasis on monitoring, compliance and legal enforcement.⁷⁰ Mainstreaming has been defined as "the reorganisation, improvement, development and evaluation of policy processes, so that a human rights perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy making."⁷¹ The idea of mainstreaming has become increasingly popular amongst children's rights lobbyists and has become recognised as a key tool for the promotion of children's rights at EU level.⁷² The rationale for such an approach lies in its efficacy as a "yardstick" in determining the extent to which policies and action plans promote children's



- 63 UN Committee on the Rights of the Child, 2003a, paragraph 39.
- 64 Save the Children, 2011.
- 65 UN Committee on the Rights of the Child, 2003a, paragraph 35.
- 66 UN Committee on the Rights of the Child, 2003a, paragraph 35.
- 67 See for example, Hunt, P. and MacNaughton, G., *Impact Assessments, Poverty and Human Rights: A case study using the right to the highest attainable standard of health*, UNESCO, Paris, 2006; Corrigan, C., *The Development and Implementation of Child Impact Statements in Ireland*, Office of the Minister for Children, Dublin, 2006a.
- 68 Hanna, K., Hassall, I. and Davies, E., 'Child impact reporting', *Social Policy Journal of New Zealand*, vol. 29, 2006, pp. 32–42, p. 39; McCrudden, C., 'Mainstreaming human rights', in Harvey, C. (ed.), *Human Rights in the Community: Rights as agents for change*, Hart Publishing, Oregon, 2004, pp. 9–28.
- 69 Mason, N. and Hanna, K., *Undertaking Child Impact Assessments in Aotearoa New Zealand Local Authorities: Evidence, practice, ideas*, Office of the Children's Commissioner, Aotearoa, New Zealand, 2009.
- 70 Chaney, P. and Rees, T., 'The Northern Ireland Section 75 Duty: An international perspective', in McLaughlin, E. and Faris, N. (eds.), *A Review of the Section 75 Statutory Duty*, OFMDFM, Belfast, 2004.
- 71 McCrudden, C., 2004, p. 9.
- 72 Drywood, E., 'Child-proofing' EU law and policy: interrogating the law-making processes behind European asylum and immigration provision', *International Journal of Children's Rights*, vol. 19, 2011, pp. 405–428.



rights.⁷³ However, Drywood cautions that whilst the importance of mainstreaming in the context of children and young people is often highlighted, there is little guidance on what this looks like in practice.⁷⁴ To this end, she identifies three central characteristics of children's rights mainstreaming:

1. Mainstreaming should accommodate the heterogeneity of childhood and children's rights in policy and legislative processes
2. There should be appropriate structures with trained personnel who engage directly with and involve children in decision-making processes
3. There needs to be a coherent children's rights knowledge base to underpin decision making.⁷⁵

3.5.5 Budgeting

Article 4 requires States to fulfil children's economic, social and cultural rights to the "maximum extent of their available resources." The UN Committee on the Rights of the Child emphasises that this cannot be done without first identifying and monitoring the actual resources available and allocated to children in national and other budgets.⁷⁶ 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 governments' commitment to children, increasing transparency and accountability.⁷⁷ Tracking expenditure on children in an effective and meaningful manner, whilst complex, is pertinent in the context of ongoing budgetary cuts and/or where an increase in one part of the budget necessitates a decrease in another. Clearly documented and accessible information is an important prerequisite in developing children's budgeting, as is the existence of child-specific budget lines.⁷⁸ Gore suggests that the need to build capacity in budget analysis amongst policymakers, in order to enable

73 Euronet, Recognition of the rights of the child in the Charter of Fundamental Rights, submission to the drafting group for an EU Charter of Fundamental Rights, 2000; cited in Drywood, E., 2011, p. 413.

74 Drywood, E., 2011.

75 These characteristics have been identified in the context of EU governance.

76 UN Committee on the Rights of the Child, 2003a, paragraph 51.

77 Save the Children and HAQ: Centre for Child Rights, *Budget for Children Analysis*, Save the Children Sweden Regional Office for South and Central Asia, Kathmandu, 2010.

78 Gore, R., *Influencing Budgets for Children's Rights*, working paper, UNICEF, New York, 2004.

them to understand and use budgetary information in a way that is child rights based and to influence budget decisions using this information, is also important.⁷⁹

3.5.6 Data collection

Sufficient and reliable data collection on children, disaggregated to enable identification of discrimination and disparities in the realisation of rights, is an essential part of implementation of the CRC.⁸⁰ An annual comprehensive report on the state of children's rights in the jurisdiction is recommended by the UN Committee on the Rights of the Child. Reports such as these should be published, widely disseminated, and debated in parliament and in public.⁸¹ The collection of good quality data on children's lives is particularly important in facilitating an examination of the disparity between "the *de jure* protection and *de facto* realisation of human rights",⁸² and in helping to identify and explain the causes and variation in the failure to implement children's rights.⁸³ The Committee also encourages States to "collaborate with appropriate research institutes and aim to build up a complete picture of progress towards implementation, with qualitative, as well as quantitative data."⁸⁴

3.5.7 Training and awareness

The State has a duty under the CRC to develop training and capacity building for all those involved in the process of implementation and for all those working with and for children, and this should be integrated into all professional training codes and educational curricula.⁸⁵ The UN Committee on the Rights of the Child states that training needs to be systematic and on-going, and have the purpose of emphasising the status of the child as a holder of human rights, increasing knowledge and understanding of the CRC, and encouraging respect for its provisions.⁸⁶ Periodic evaluation must also be taken of the efficacy of child rights training by reviewing the knowledge of the CRC, and the extent to which this training has contributed to developing attitudes and practices that actively promote enjoyment of children by their rights.⁸⁷ The significance of raising awareness is grounded in Article 42 of the CRC, which obliges States Parties to make its principles and provisions widely known. As such, the Committee emphasises that the State should develop a comprehensive strategy for disseminating knowledge of the CRC throughout society.⁸⁸ This should include information on those bodies involved in implementation and monitoring, and on how to contact them. The Committee requires the text of the CRC to be made widely available in all languages.⁸⁹ Yet, in spite of the emphasis in the CRC on children being informed about their rights, research highlights the continuing lack of accurate knowledge and awareness of child rights.⁹⁰

3.5.8 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. The UN Committee on the Rights of the Child states that involvement of

79 Gore, R., 2004.

80 UN Committee on the Rights of the Child, 2003a, paragraph 48.

81 UN Committee on the Rights of the Child, 2003a, paragraph 29.

82 Landman, T., *Protecting Human Rights: A comparative study*, Georgetown University Press, Washington D.C. 2005, p. 5.

83 Carvalho, E., 'Measuring children's rights: an alternative approach', *International Journal of Children's Rights*, vol. 16, 2008, pp. 545–563, p. 545.

84 UN Committee on the Rights of the Child, 2003a, paragraph 48.

85 UN Committee on the Rights of the Child, 2003a, paragraph 53.

86 UN Committee on the Rights of the Child, 2003a, paragraph 53.

87 UN Committee on the Rights of the Child, 2003a, paragraph 55.

88 UN Committee on the Rights of the Child, 2003a, paragraph 33.

89 UN Committee on the Rights of the Child, 2003a, paragraph 72.

90 See for example Alderson, P., 'Civil rights in schools: the implications for youth policy', *Youth and Policy*, vol. 64, 1999, pp. 56–72; Covell, K. and Howe, B., 'The impact of children's rights education: a Canadian study', *International Journal of Children's Rights*, vol. 7, no. 2, 1999, pp. 171–183; Howe, R. B. and Covell, K., *Empowering Children: Children's rights education as a pathway to citizenship*, University of Toronto Press, Toronto, 2005.



and consultation with children must avoid being tokenistic and aim to ascertain representative views. With a view to building communication channels with children and young people, the Committee says that governments must develop a direct relationship with them, not one simply mediated by non governmental organisations, and that relationship must ensure and encourage the active participation of youth in all spheres of society and in decision-making processes at all levels.⁹¹ Arnott suggests that it is only relatively recently that children have entered into policy discourse as “policy actors”,⁹² and that this has subsequently gained increasing momentum.⁹³ Nonetheless, the fragmentation of the policy environment can prove challenging to ensuring meaningful and consistent engagement with children and young people across sectoral areas. There are also concerns that those children and young people involved in policy-making processes are not always representative of local or targeted childhood populations and that such processes do not necessarily lead to impact on tangible policy outcomes.⁹⁴

A range of participatory methods can be employed as a means of accessing children’s views effectively.⁹⁵ In line with a rights-based approach, the participatory methods adopted to ensure children’s participation should be both age appropriate and reflective of children’s evolving capacities. The Committee also states that in any consultative process, children must be informed as to how their views have been interpreted and used and, where necessary, provided with the opportunity to challenge and influence the analysis of the findings. Children are also entitled to be provided with clear feedback on how their participation has influenced any outcomes.⁹⁶ Wherever appropriate, children should be given the opportunity to participate in follow-up processes or activities.⁹⁷ Monitoring and evaluation of children’s participation needs to be undertaken, where possible, with children themselves.⁹⁸

- 91 UN Committee on the Rights of the Child, 2003a, paragraph 12. See also UN Committee on the Rights of the Child, General Comment No. 12, The right of the child to be heard, CRC/C/GC/12, 2009.
- 92 Arnott, M., ‘Public policy, governance and participation in the UK: a space for children?’, *International Journal of Children’s Rights*, vol. 16, 2006, pp. 355–367.
- 93 Tisdall, K. and Davis, J., ‘Making a difference? Bringing children and young people’s views into policymaking’, *Children and Society*, vol. 18, no. 2, 2004, pp. 131–142.
- 94 Tisdall, K. and Davis, J., 2004.
- 95 See, for example, Tisdall, E. K. M., Davis, J. and Gallagher, M. (eds.), *Researching with Children and Young People: Design, methods and analysis*, Sage, London, 2009; Thomas, N. and Percy Smith, B. (eds.), *A Handbook of Children and Young People’s Participation*, Routledge, London, 2009.
- 96 Lundy, L., ‘“Voice is not enough”: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child’, *British Education Research Journal*, vol. 33, no. 6, 2007, pp. 927–942.
- 97 UN Committee on the Rights of the Child, 2009, paragraph 132.
- 98 UN Committee on the Rights of the Child, 2009, paragraph 134.

4. In-depth analysis of six countries

Here, the research team presents an in-depth analysis of six countries as part of this research report: Australia, Belgium, Germany, Ireland, Norway and Spain.

Each country study is structured as such:

- Key points
- Context
- Implementation in law
- Non-legal measures of implementation
- Summary



KEY POINTS

- The CRC has not been incorporated
- The *Human Rights (Parliamentary Scrutiny) Act 2011* introduced a requirement for a statement of compatibility to accompany all new bills. This must include an assessment of compatibility with the CRC
- Australian legislation contains a significant number of examples of integration of the CRC principles, most notably the best interests principle.

4.1 Australia



4.1.1 Context

In 2010, the population of children (0–18 years) in Australia was 5,114,000, approximately 22.9 per cent of the total population.⁹⁹

Australia is a federal constitutional monarchy and parliamentary democracy. The Parliament of Australia is bicameral and consists of the Senate and House of Representatives. Australia has six states¹⁰⁰ and several territories, three of which are self-governing: Australian Capital Territory (ACT), Northern Territory (NT) and Norfolk Island (NI). Each state has its own constitution, and so Australia has seven sovereign parliaments.

Julia Gillard of the Australian Labor Party (ALP) has been Prime Minister since 2010. Following the 2010 Federal Election, the ALP formed a minority government with the support of the Australian Greens and three independent MPs. Australia has a common law system. As such, treaties are not self-executing, but do require legislative implementation to be effective in Australian law. The CRC has not been incorporated.

The number of children living in relative poverty decreased from 14.7 per cent in 2005, to 10.9 per cent in 2009.¹⁰¹ The percentage of 15–19 year olds not in education or employment decreased from 13.3 per cent in 2003, to 11.6 per cent in 2009.¹⁰² Public expenditure on education has decreased from 4.9 per cent gross domestic product (GDP) in 1998, to 4.4 per cent GDP in 2008.¹⁰³

Australia's performance in reading declined by 13 per cent from 2003 to 2009 (although it still remains one of the top performers in the PISA 2009 assessment), and performance in mathematics declined by 10 per cent (and is now closer to the average figures as provided by the Organisation for Economic Cooperation and Development).¹⁰⁴

4.1.2 Implementation in law

Constitution and human rights legislation

The Australian Constitution is principally concerned with the establishment of the federal organs of government and with the distribution of constitutional power between the Commonwealth and State Governments, and refers only to limited individual rights, none of which are specific to children. Each State Constitution is mainly concerned with the establishment of government rather than rights per se. Only Victoria and the ACT have specific human rights legislation. Sections 17 and 23 of the *Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic)* and Sections 11 and 20 of the *Australian Capital Territory Human Rights Act 2004 (ACT)* provide for the right to protection of families and children in the criminal process. In 2011, a review of the *Victorian Charter on Human Rights and Responsibilities Act 2006* considered whether rights from the CRC should be included. However, this suggestion was rejected by the Scrutiny of Acts and Regulations Committee and by the Government because no "problem in Victoria's existing laws" had been identified that would be remedied by inclusion.¹⁰⁵

- 99 UNICEF *The State of the World's Children: Children in an urban world*, UNICEF, New York, 2012a.
- 100 New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania.
- 101 OECD, *PISA 2009 Results: Learning Trends: Changes in Student Performance Since 2000 (Volume V)*, OECD Publishing, Paris, 2010.
- 102 UNICEF *Report Card 1: A league table of child poverty in rich nations*, UNICEF Innocenti Research Centre, Florence, 2000; UNICEF *Report Card 6: Child poverty in rich countries*, UNICEF Innocenti Research Centre, Florence, 2005.
- 103 OECD, Country statistical profiles, 2011, available from <http://bit.ly/RzI3ng>.
- 104 World Bank, World Development Indicators, 2012, available from <http://bit.ly/TG9Pyi>, accessed 29 October 2012; UNICEF *Report Card 10: Measuring child poverty: new league tables of child poverty in the world's rich countries*, UNICEF Innocenti Research Centre, Florence, 2012b.
- 105 Parliament of Victoria, Review of the Charter of Human Rights and Responsibilities Act 2006, Victorian Government response, 2012, p. 6. However, see, Pounder, L., 'A Charter for Children? The effectiveness of the Victorian Human Rights Charter in protecting child rights', unpublished Master's thesis, University of Melbourne, 2011, for a critique of the Charter's capacity to promote children's rights in its current form.



In 2009–10, the Australian Government undertook a National Human Rights Consultation, seeking the public's (including children and young people's) views on the protection and promotion of human rights. In April 2010, the Australian Government responded to the report by announcing *Australia's Human Rights Framework*, which commits to a variety of measures to strengthen human rights protection in Australia across seven core human rights treaties, including the CRC. The framework, which is intended to create a human rights culture in Australia, contains plans for a series of reforms, including:

- increased human rights education
- a National Human Rights Action Plan
- a federal Parliamentary Joint Committee on Human Rights to scrutinise existing and new legislation for compliance with Australia's human rights obligations
- a requirement for all new federal legislation to be accompanied by a statement of compatibility with Australia's human rights obligations.¹⁰⁶

Several interviewees noted that these reforms were a second tier compromise as Australians were not thought to be ready for a human rights act.

In terms of the latter reform, the *Human Rights (Parliamentary Scrutiny) Act 2011* introduces a requirement for statements of compatibility to accompany all new bills. The statement of compatibility must contain an assessment of whether the bill or legislative instrument is compatible with the seven core international human rights treaties that Australia has ratified, including the CRC. The procedure is new and there is no published example of change occurring as a result of a perceived incompatibility with the CRC as yet.¹⁰⁷ Interviewees, however, were generally positive about the procedure's potential, suggesting *inter alia* that it provides the

¹⁰⁶ Human Rights Branch, *Australia's Human Rights Framework*, 2010, available at <http://bit.ly/SYxZWf>

¹⁰⁷ Summaries of statements will eventually be published on a database.

“architecture” for a review of legislation and policy, will require those who may be opposed to children’s rights to be held to account publicly, and encourage more public officials to undertake human rights training.

One interviewee thought that one particular advantage of the procedure is that it is not limited to the CRC and would, for instance, require a greater focus on social and economic rights as a result of the inclusion of the International Covenant on Economic Social and Cultural Rights. Other interviewees suggested that it remains to be seen how effective the process will be and, in particular, whether it will be too bureaucratic and therefore inaccessible to those advocating for rights-based approaches. Another noted a danger in that a “compliance model” will not be taken seriously.

Integration into domestic law

A tracking of State Party reports suggests that, over time, there has been increasing engagement with the CRC at federal, state and territorial levels to the extent that it is beginning to be explicitly referred to in legislation.¹⁰⁸ At federal level, for example, the *Age Discrimination Act 2004 (CTH)* is the primary source of anti-discrimination protection for people of all ages, including children and young people.¹⁰⁹ Amendments to the ADA, which took effect in June 2011, created the office of an Age Discrimination Commissioner. Section 60CA of the *Commonwealth Family Law Act 1975* states that the best interests of a child is the paramount consideration in making orders concerning a child. This Act (as amended 2009) enshrines children’s right to know and be cared for by their parents, to be protected from violence and abuse, and to enjoy their culture (Section 60B), whilst the *Commonwealth Family Law Amendment (Shared Parental Responsibility) Act 2006* replaced all references to a child’s “wishes” with a child’s “views”. The *Commonwealth Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* amends Section 60B of the *Family Law Act* to give effect to the CRC.¹¹⁰ Whilst recognising these developments, the UN Committee on the Rights of the Child has noted that there continues to be no comprehensive child rights act at national level that gives full and direct effect to the CRC in national law.¹¹¹

108 See, for example, NSW Court of Appeal, *re Tracey*, 43 2011, which states that although relevant to decisions made in respect of children by administrative and judicial decision-makers, the CRC is not conclusive.

109 It should be noted that one aim of the Human Rights Framework is to harmonise and consolidate all anti-discrimination legislation

110 Parliament of Australia, Consultation paper on the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011, 2010. The consultation paper stated that “The effect is that decision-makers including family courts must take account of the Convention on the Rights of the Child when dealing with matters in relation to children under Part VII of the Act.”

111 UN Committee on the Rights of the Child, Concluding observations: Australia, CRC/C/AUS/CO/4, 2012, paragraph 11.

At State level, the best interests principle is enshrined in the *Children, Youth and Families Act 2005* (Victoria), the *Children’s Protection Act 1993* (South Australia) and the *Child Protection Act 1999* (Queensland). In the Australian Capital Territory (ACT), the best interests of the child is the paramount principle under the *Children and Young People Act 1999* and this has been further strengthened through amendments passed in 2006. Similarly, the NSW *Children and Young Persons (Care and Protection) Act 1998* states that “the safety, welfare and well-being of the child or young person are paramount” (Section 9) and sets out the conditions and circumstances under which children should be provided the opportunity to participate in decisions affecting them (Section 10). The *Adoption of Children Act 2000* (NSW), modelled on Article 21 of the CRC, also states that the “best interests of the child, both in childhood and in later life, must be the paramount consideration” for persons making decisions about the adoption of a child (Section 8). The ACT *Children and Young People Act 2008* contains similar provisions in the context of juvenile justice, including the right to participate in decision-making processes. Under the Victoria *Children,*

Youth and Families Act 2005, a practitioner acting for a child in the Children's Court is mandated to act in accordance with any instructions given or wishes expressed by the child in so far as is practicable, taking into consideration the maturity of that child. The Queensland *Child Protection Act 1999*, however, enshrines the principle that the child and the child's parents have the opportunity to participate in making decisions about their lives and to have their views heard and considered. Article 94(3) of the ACT *Children and Young People Act 2008* states that "the youth justice principles are intended to be interpreted consistently with relevant human rights instruments and jurisprudence" and makes explicit reference to the CRC.

Interviewees recognised many of the advances that had been made in terms of integration of CRC principles into domestic legislation. In particular, it was acknowledged that the best interests principle had become widely accepted as a core principle in legislation affecting children. However, it was felt that a child rights-based approach was not always explicit and that the incorporation of CRC principles was not systematic across States. In this context, the UN Committee on the Rights of the Child noted that the absence of national child rights legislation has resulted in fragmentation and inconsistencies in the implementation of child rights, with children in similar situations being subject to variations in the fulfilment of their rights depending on the State or Territory in which they reside.¹¹² Several interviewees suggested that child-centred legal reforms would take place in any event and that the CRC would be mentioned as an afterthought. Some considered that the new parliamentary scrutiny procedure would have the effect of foregrounding human rights considerations into the legislative drafting processes and the process has also been highlighted as a positive development by the Committee.¹¹³

The Australian State Party report cites two cases whereby the CRC was important in decision making.¹¹⁴ One interviewee suggested that the CRC had "no penetration" in domestic cases and that, where it is mentioned, reflects the individual judge's interest in international law. Moreover, another said that these high-level cases are not where child rights issues were played out in any event, and that the main cases that impact on children are at a much lower level and are influenced by rights-based principles being a core aspect of the domestic legislation.

4.1.3 Non-legal measures of implementation

Central government responsibility for children's rights rests with the Minister for Families, Housing, Community Services and Indigenous Affairs, a position that has been criticised by the UN Committee on the Rights of the Child that recommends the establishment of a mechanism that is resourced to advise the Council of Australian Governments COAG on implementation. Furthermore, there is no comprehensive national plan for children and young people in spite of repeated recommendations by the Committee following its consideration of the 2005 and 2012 reports.¹¹⁵ *Australia's Framework on Human Rights* includes the *National Human Rights Action Plan*, which considers the CRC along with the other six core treaties, but it is not specific to children.¹¹⁶ There are formal government strategies for coordination across States, including Council of Australian

¹¹² UN Committee on the Rights of the Child, 2012, paragraph 11.

¹¹³ UN Committee on the Rights of the Child, 2012, paragraph 4.

¹¹⁴ Australia, *Fourth Periodic Report to the UN Committee on the Rights of the Child*, 2011; High Court of Australia, *Cattanach v. Melchior*, 38, 2003, (wrongful birth case) or High Court of Australia, Secretary, *Department of Health and Community services v. JWB and SMB* (Marion's case), 175 CLR 218, 1992, (concerning sterilisation).

¹¹⁵ UN Committee on the Rights of the Child, 2012, paragraphs 15–16. The Australian Research Alliance for Children and Youth are in the process of developing a national plan for children's well-being and have consulted widely on this. See 'The nest: a national plan for child and youth well-being', 2012, available at www.thenestproject.org.au/what-is-the-nest, accessed on 12 October 2012.

¹¹⁶ The first draft, published in September 2012, has two pages on children and youth that focus mainly on aspects of child protection and juvenile justice.

Governments (COAG) agreements across various issues relating to children.¹¹⁷ Interviewees suggested that these could be an effective way of ensuring further consistency, particularly in the formation of national agreements. It was also thought that the central Australian Government could exert influence through budget allocation (“the power of the purse”) and through increased regulation.

Australia has been slow to establish a national commissioner for children and young people. The *Australian Human Rights Commission Amendment (National Children’s Commissioner) Act 2012* established the statutory Office of the National Children’s Commissioner in June 2012. This was welcomed by interviewees who considered that it provides a national advocate for children and young people. However, the Committee expressed concern that the resources initially allocated to the National Children’s Commissioner are not adequate to ensure the full realisation of its mandate, particularly with regard to having effective capacity to fully and promptly address and remedy complaints from or for children.¹¹⁸ It does not have a formal power to conduct investigations, although such a power is vested in the Australian Human Rights Commission and has been exercised in relation to children’s rights issues. All States and Territories in Australia have a commissioner or guardian for children and young people with different terms of references.¹¹⁹ Interviewees pointed out that many of these have a child protection focus and that practice and resourcing varies considerably across States.

One of the core principles of *Australia’s Framework on Human Rights* is human rights education, and it includes plans for this in schools and communities, as well as public servants and those working with children. Interviewees suggested that there was low awareness of the CRC among public servants. Moreover, the current

117 For details of these, see Council of Australian Governments, ‘Meeting outcomes’, 2012, available at www.coag.gov.au/meeting_outcomes_listing, accessed on 12 October 2012.

118 UN Committee on the Rights of the Child, 2012, paragraph 17.

119 For a summary of the remit and powers of state-based children’s commissioners see Australian Institute of Family Studies, ‘Children’s commissioners and guardians’, 2011, available at <http://bit.ly/RQUQDp>, accessed on 12 October 2012.





national school curriculum contains no mention of child rights or the CRC,¹²⁰ although it does include reference to human rights in the general capability of ethical behaviour.¹²¹ It has been suggested, however, that human rights education in Australian schools remains limited in the absence of a legislative mandate.¹²²

Australia does have a number of significant data sets on children and young people, including several major longitudinal studies, of which one is on indigenous children. There is also a new *Australian Early Development Index* that will track children across time and includes specific data collection for vulnerable groups, including indigenous children. The Committee on the Rights of the Child acknowledges that advances have been made in data collection, but has said that more needs to be done in terms of disaggregated data. Several interviewees suggested that data or knowledge of the issues was not a problem but that, in fact, implementation was the issue.

Australia does not have a system of child rights budgeting, although some departments have produced reports that track expenditure. It is clear from Australia's current periodic report that significant investment has been made across States and Territories, with particular emphasis on early childhood programmes and services. Australia has an array of child and youth policies, but these are rarely based explicitly on rights (an exception is the Federal Government's *Early Years Learning Framework* that directs early childhood educators to practise the principles laid out in the CRC¹²³) and one interviewee observed that this policy tends to "align incidentally" to the CRC. In addition, non governmental organisations and the Australian Human Rights Commission have expressed concern that the nature of Australia's federal system, wherein areas such as child protection, education and juvenile justice are the responsibility of States and Territories, leads to an "implementation gap".¹²⁴ Although there are examples of good practice in relation to rights-based approaches at State level (such as the *Victorian Early Years Learning and Development Framework* states that it is informed by principles of the CRC¹²⁵), this approach is not consistent.

Indigenous children continue to fare less well than other Australian children. In its 2005 and 2012 concluding observations, the Committee

120 Australian Human Rights Commission, Submission to the UN Committee on the Rights of the Child, 2011.

121 This requires the mainstreaming of human rights across the curriculum – see Australian Curriculum, Assessment and Reporting Authority, 'Scope of Ethical behaviour', 2012, <http://bit.ly/RN4gOI>, accessed on 12 October 2012.

122 Gerber, P., 'Growing a Better Future Through Human Rights Education', *Future Justice*, 2010, pp. 189–207, available at www.futureleaders.com.au, accessed on 12 October 2012.

123 Australian Government Department of Education, Employment and Workplace Relations, *Belonging, Being & Becoming: The early years learning framework for Australia*, Canberra, 2009, available at <http://bit.ly/PJTsmA>, accessed on 12 October 2012.

124 Australian Human Rights Commission, Submission to the UN Committee on the Rights of the Child, 2011, p.5; Child Rights Taskforce, *Listen to Children: 2011 child rights NGO report Australia*, Child Rights Taskforce, Sydney, 2011.

125 State of Victoria, Department of Education and Early Childhood Development, *Victorian Early Years Learning and Development Framework*, Melbourne, 2009, p.5, available at <http://bit.ly/VXTWmK>, accessed 29 October 2012.

on the Rights of the Child expressed concern at the disparities experienced by Aboriginal and Torres Strait Islander children. Reports from government agencies, non governmental organisations and academics show that these children continue to experience high levels of disadvantage across a range of outcomes, including:

- overrepresentation in the child protection and out-of-home care systems
- overrepresentation in juvenile detention
- bullying
- infant mortality rate
- low birthweight
- involvement in decision-making processes
- access to health services
- homelessness
- school attendance, literacy and attainment.¹²⁶

The fact that the CRC specifically refers to indigenous rights was said to be helpful in championing these children's rights, and indigenous advocacy groups have also used the language of human rights in their advocacy work. Whilst there have been positive developments in terms of respect for cultural rights (such as the child placement principle), federal policies designed to protect children (such as the Northern Territory Emergency response) have been criticised by the Committee and others for their adverse impact on families.

4.1.4 Summary

In summary, Australia has taken a distinctive route in the implementation of the CRC. It has chosen not to incorporate or, indeed, to attribute special status to the CRC compared to other UN treaties. It has only recently decided to have a National Commissioner for Children and Young People and has never had a National Action Plan for Childhood. On the other hand, there has been significant investment in children – all States have established Commissioners for Children and Australian domestic legislation contains a significant number of examples of the integration of CRC principles, most notably the best interests principle in Article 3.

Furthermore, Australia has some pockets of international best practice, for example those in relation to the participation of young children in decision making (as in the Melbourne City Plan). In spite of this, a recurring theme in the stakeholder interviews was that there is not yet a culture of children's rights. Those working with and for children choose language such as "child-centred" in preference to the language of rights, and there is still public anxiety surrounding human rights. Children's rights can be a stigmatising concept, and the CRC is used as an afterthought rather than as an explicit framing for law and policy. That may change, however. Australia will be an interesting jurisdiction to watch in order to see the impact of the *Australian Human Rights Framework*, both in terms of its capacity to raise awareness of and commitment to the CRC through broader human rights training and education, and the impact on legislation as a result of the parliamentary scrutiny procedure. In particular, it remains to be seen whether children's rights will be promoted more effectively through integration into a broader human rights framework and culture, or whether the distinctive nature of children's rights will be lost in the general mix.

¹²⁶ Australian Human Rights Commission, 2011; Child Rights Taskforce, 2011; Harris, M. and Gartland, J., 'Aboriginal Children Living in the Northern Territory of Australia', Submission to the UN Committee on the Rights of the Child, 2011. For detailed analysis of the rights of indigenous children see Libesman, T., 'Aboriginal and Torres Strait Islander children and contemporary child welfare', in Monahan, G. and Young, L. (eds.), *Children and the Law in Australia*, LexisNexis, Sydney, 2008, pp. 329–351; and Libesman, T., 'Can international law imagine Indigenous children?' *International Journal of Children's Rights*, vol. 15, no. 2, 2011, pp. 283–309.

4.2 Belgium



4.2.1 Context

In 2010, the population of children (0–18 years) in Belgium was 2,176,000, about 20 per cent of the total population.¹²⁷ Belgium is a federal parliamentary democracy under a constitutional monarchy. In December 2011, following the General Election and a difficult 541 days of negotiations, a Coalition Government was formed with Elio Di Rupo named Prime Minister. The Coalition includes Social Democrats (*Parti Socialiste* or *PS*), Christian Democrats (*Christen-Democratisch en Vlaams* or *CD&V*, and *Centre démocrate humaniste* or *CDH*) and Liberals (*Vlaamse Liberalen en Democraten* or *VLD*, and *Mouvement Réformateur* or *MR*).

Belgium comprises three Communities – the Flemish Community, French Community and German Community – and three Regions – Flemish Region (Flanders), Walloon Region (Wallonia) and Brussels-Capital Region. The country has a civil law system and, as a result of Belgium's ratification, the CRC forms part of domestic law. However, implementation of the CRC is complicated by the highly complex nature of the Belgian federal system. The top layer of the federal system is formed by the Federal State and the federated entities (the Communities and Regions). Whilst the Federal State retains powers in the areas of justice, social security and asylum, for example, the Communities have responsibility for young people, education and culture.

Data suggest that the number of students who felt that teachers listened to what they had to say remained fairly consistent from 2000 to 2009. This is around the OECD average.¹²⁸ From 2003 to

KEY POINTS

- The CRC forms part of domestic law, and sectoral laws appear to be compliant
- The Belgian Constitution was amended to give constitutional expression to children's rights
- A system of child impact assessment was introduced in the Flemish Community in 1997
- The CRC is invoked frequently in litigation
- Now that the legal framework is in place, the focus has shifted to how to ensure implementation in practice.

¹²⁷ United Nations Children's Fund, 2012a.
¹²⁸ OECD, 2010.



**The CRC forms part
of Belgian law and
is superior to both
the Constitution
and statute law.**

2009, Belgium's performance in mathematics declined by almost 15 per cent. However, a decrease in the socio-economic disparities of schools was also observed between 2000 and 2009.¹²⁹ The percentage of 15–19 year olds not in education or employment decreased from 17.1 per cent in 2003 to 14.1 per cent in 2008, but increased to 16.1 per cent in 2009.¹³⁰ The number of children living in relative poverty increased from 7.7 per cent in 2005 to 10.2 per cent in 2009.¹³¹ Disaggregated data that enable comparisons to be made across the three Communities on these issues are not available. Non governmental organisations have highlighted the need for a data-collection system to be developed that captures the picture nationally as well as regional levels.¹³²

4.2.2 Implementation in law

The Constitution

The CRC forms part of Belgian law and is superior to both the Constitution and statute law by virtue of ratification, but, initially, the Belgian Constitution did not contain any references to children. Following the case of Marc Dutroux,¹³³ there was a proposal to amend the Constitution *inter alia* to take account of the fact that Belgian jurisdictions did not recognise the direct applicability of most of the CRC's provisions. In 2000, Article 22bis was introduced to provide for the moral, physical, psychological and sexual integrity of children. The remaining three general principles of the CRC (that is to say Articles 3, 6 and 12 – the principle of right to non-discrimination had already been made an integral part of the Constitution) were also given constitutional expression.¹³⁴ Both the Constitutional Court and the Court de Cassation have jurisdiction to determine whether provisions of the CRC as part of national law, are self-executing. This requires an article-by-article approach and appears to have led to some confusion as to which provisions are justiciable and in what context. As a general rule, treaty articles that are formulated clearly, like Article 12, are often considered to be self-executing, whereas Articles that are more vague are unlikely to be used directly in court. But in fact there is a reluctance to consider the CRC to be self-executing, even for clearly formulated articles. In *WN v DMJ*¹³⁵, for example, the Court de Cassation ruled that Article 7 did not have direct effect in the Belgian legal order. Similarly, in *DD v HDP Compensation Fund for Family Allowances*, the Court ruled that Articles 2(1) and 26(1) did not have direct effect.¹³⁶ However, it is notable that the Constitutional Court uses the CRC as an interpretive tool and, in general, the legal status of the CRC means that it is regularly invoked and used in litigation.

Integration into domestic legislation

There is no single consolidated children's act and, instead, provisions are to be found amongst federal and community legislation with different approaches evident at regional levels. The CRC is considered within the framework for children's issues and numerous Acts explicitly refer to the CRC. The *Flemish Youth Care Act 2004* that deals with youth care and the legal position of minors in such care, was noted by interviewees as a good example of legislation that has incorporated the rights of the child. In practice, however, the decree on the legal position of minors is highly debated and sometimes considered to be inapplicable. According to interviewees,

129 OECD, 2010.

130 OECD, 2011.

131 United Nations Children's Fund, 2012a; United Nations Children's Fund, 2012b.

132 Coordination des ONG pour les droits de l'enfant (CODE) and the Kinderrechtencoalitie Vlaanderen, Belgium - Coalitions of NGOs working in the field of Children's Rights submission to the UN Universal Periodic Review 11th session of the UPR Working Group of the Human Rights Council, 2011, p. 2.

133 In June 2004, Marc Dutroux was convicted for the abduction and rape of six girls, and the subsequent death of four of them.

134 Luedeke, A. et al., 'A comparative study between national constitutions and children's rights', in *Awareness-raising on children's rights in Nepal: Dialogue about children's rights*, Institut International Des Droits De L'Enfant, Sion, Switzerland, 2010.

135 Court of Cassation of Belgium, *WN v. DMJ*, appeal in cassation, C.09.0236.F, 2010.

136 Court of Cassation of Belgium, *DD v. HDP*, appeal in cassation, S.06.0105.F, 2008.

the status of the CRC in domestic law has resulted in it being integrated into law and policy and approaches to children's issues in many areas. Inconsistencies between legislation and the CRC are regularly challenged in the courts and by other means.

While the UN Committee on the Rights of the Child has been generally positive with regard to Belgian progress in achieving harmonisation between the CRC and domestic law, there is concern that legislative developments vary among the three Communities. This was substantiated by interviewees who generally reported varying and very distinct approaches with respect to the implementation of the CRC. They noted that the fact that competences are divided over several competence levels makes it very difficult to ensure accountability for children's rights in practice. For example, according to interviewees, care for unaccompanied asylum-seeking minors is a community competence within youth care, whilst their status is defined within the federal law. Similarly, measures taken by the juvenile judge are a matter of federal law, but the execution has to be carried out by the Communities, with one of the practical consequences being that children may end up in prison or closed settings when a Community does not invest enough in youth institutions or residential care.

There is also disparity between the three Communities in the progress achieved on children's rights implementation in law. In 2010, the Committee specifically singled out the German Community, noting "that legislative development ... has not kept pace with development in the other two Communities." This disparity has also been highlighted in alternative reports.¹³⁷ While respect for the views of the child is enshrined across legislation, implementation of this principle and subsequent evaluation remains an issue.

Most interviewees highlighted that, from a legal perspective, Belgium has achieved much in the incorporation of the CRC into domestic law. Ratification has been instrumental in this regard and the CRC's status means that it is an influential advocacy tool. Both the constitutional amendment (Article 22bis) and the status of the CRC in national law mean that the CRC is frequently invoked in litigation and some judges and lawyers are very familiar with children's rights principles. Most interviewees accepted that Belgium has achieved a very good legal framework that is largely compliant with the CRC. Having established a children's rights legal framework, the focus has now shifted onto how to ensure the development of a children's rights culture in practice. At the same time, interviewees remarked on the existence of political complacency that so much has been achieved for children's rights and agreed that Belgium had reached a plateau. Efforts are now focused on ensuring that the many gains made in recent years are not undone.

4.2.3 Non-legal measures of implementation

Different approaches and strengths in the implementation of children's rights are evident in each of the Communities. The Flemish Community appears to have a strong legal framework for children's rights, whilst funding for youth and education is strong in the French Community. In the Flemish Community, policy on children's rights is coordinated by the Minister for Education and Youth, and in the

¹³⁷ Coordination des ONG pour les droits de l'enfant (CODE) and the Kinderrechtencoalitie Vlaanderen, Alternative Report by the NGOs on the Implementation of the UN Convention on the Rights of the Child in Belgium, 2010; Délégué Général aux droits de l'enfant and the Kinderrechtencommissariaat, Report of the Children's Rights Commissioners of the Flemish and the French Communities regarding the third and fourth reports from Belgium, 2010.



A system of child impact assessment was introduced in the Flemish Community in 1997.

French Community by the Minister-President. However, there is no designated minister at federal level with respect to the coordination of policy on children's rights. Both the Flemish and French Communities have Commissioners for Children and in May 2010 an Ombudsperson was established in the German Community.

In April 2004, the Flemish Government approved an *Action Plan for the Rights of the Child* and this was subsequently incorporated into the *Belgian National Action Plan for Children (2005–2012)*. In June 2010, they adopted a second action plan following the recommendations of the UN Committee on the Rights of the Child, in November 2011, the French Community followed suit. Interviewees noted that the Federal Government did not follow this initiative and has no intention to do so, thus highlighting the gap between the Federal and the Regional Governments in this regard. The Committee expressed concern that the *National Action Plan for Children (2005–2012)*:

- does not contain clear goals, targets, indicators and timetables, or any monitoring mechanism¹³⁸
- target training at all professionals working with and for children and does not cover all aspects of the CRC;
- has inconsistent human rights education that is still not an explicit element of school curricula.¹³⁹

Interviewees highlighted the extent to which legal education delivered to all disciplines has improved and the results of this are now apparent from a well-informed community of children's rights professionals.

A system of child impact assessment was introduced in the Flemish Community in 1997. This decree requires all proposed legislation on matters that have a "direct" impact on children to be assessed, and all measures to mitigate or avoid likely damaging effects to children to be identified. A further decree in 2008 extended this to a *Youth and Child Impact Assessment* and increased the target group to 25

¹³⁸ UN Committee on the Rights of the Child, Concluding observations: Belgium, CRC/C/BEL/CO/3–4, 2010, paragraph 15.

¹³⁹ UN Committee on the Rights of the Child, 2010, paragraph 25.

years. The Assessment, known under the acronym JOKER, was evaluated in 2012.¹⁴⁰ The evaluation found that those working with the JOKER do not have the resources needed to fully understand the impact of measures on children and the impact assessment comes too late in the law-making process. Plus, many of the assessment reports are not much more than a formality check, it is restricted to draft acts that are perceived to have a direct impact on children, and there is no obligation on the Government of the Flemish Community to take account of the child impact reports when finalising legislation.¹⁴¹ Consideration is being given to integrating the JOKER into the Regulatory Impact Assessment (RIA) in order to maintain the child and youth's perspective in RIA mainstreaming. However, there is some evidence that developments in the Flemish Community are having an impact on the other communities, with child impact assessment currently being considered in the French Community.¹⁴² The latter has also followed the former in appointing a Coordinating Minister in Children's Affairs.

In the French Community, a decree of 4 March 1991 provided for the participation of children and young people. Under this decree, "no assistance measures can be taken unless the views of the child are heard in advance."¹⁴³ In the area of education, a mission decree of 24 July 1997 provided for the creation of "participation councils" in schools, although interviewees expressed concern that education law in the French Community is out of line with the CRC. In addition, a decree of 28 January 2004 requires a report on the application of the principles of the CRC to be produced by the Government in the French Community to Parliament every three years.¹⁴⁴ At the federal level, the *Act of 4 September 2002* requires an annual report on the CRC to be submitted to the Federal Parliament. The annual federal report is divided into two parts: the first is a general report setting out measures adopted during the year, whilst the second covers the federal action plan for children and sets out future priorities.¹⁴⁵

In response to criticism from the Committee about poor coordination between the various Regions and Communities in Belgium, the Belgian National Commission on the Rights of the Child was set up in 2007 with representatives from government departments, NGOs and each of the Communities. In addition to drafting the State Party report, the Commission is tasked with monitoring and reviewing measures to implement the CRC throughout Belgium, facilitating an exchange of information on children's rights, and responding to the recommendations of the Committee. Although the Commission has helped to improve communication between the various parties, the fact that it has no power to implement decisions or to compel action has diluted its effectiveness.¹⁴⁶ Interviewees expressed concern about its efficacy in this regard.

The Flemish Community appears to have led the way in the implementation of children's rights in Belgium and has a particularly well developed infrastructure. The complexity of Belgium's political structures – its six parliaments and varying jurisdictions between the federal, community and regional levels – undoubtedly means that progress can be slow, difficult and with varying results. At the same time, interviewees noted that the Communities observe each other's progress with interest, making for a dynamic and, to some extent, competitive relationship. Coordination and data collection are



140 See Desmet, E., Op de Beeck, H. and Vandenhoele, W., *Evaluation of the Child and Youth Impact Assessment (JoKER)*, Kenniscentrum Kinderrechten, Gent, 2012, p. 1.

141 Corrigan, C., 'Child impact statements: protecting children's interests in policy and provision', *Journal of Children's Services*, vol. 2, no. 4, 2006b, pp. 30–43; Corrigan, C., 2006a.

142 Belgium, Third and fourth State Party reports to the UN Committee on the Rights of the Child, CRC/C/BEL/3–4, 2010.

143 Belgium, Second State Party report to the UN Committee on the Rights of the Child, CRC/C/83/Add.2, 2000.

144 Belgium, 2010.

145 Belgium, 2010.

146 Coordination des ONG pour les droits de l'enfant (CODE) and the Kinderrechtencoalitie Vlaanderen, 2011.



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very challenging, although, according to interviewees, the gains are sometimes easier to achieve at community rather than at federal level. Interviewees commented that this was due partly to the fact that the federal level has had little interest in children's issues over the years and has instead considered it an issue for the Regions and Communities. Belgian's vibrant NGO community and academic expertise have clearly played an important role, frequently together, in the advancement of children's rights at all levels. Interviewees noted that a variety of innovative approaches have been used to advance and implement CRC rights by informing the public and the media, invoking the legal process and engaging with the political system, sometimes simultaneously.

Concerns about children's rights implementation that were shared by all interviewees included poverty and the impact of the recession on children's lives. NGOs have commented on the lack of will on the part of government to analyse and identify the financial means spent on children.¹⁴⁷ Interviewees highlighted that the treatment of children at the margins of society (notably, separated asylum-seeking children, children belonging to minorities, and children in the juvenile justice system) cause particular concern. They also commented that advocacy based on the CRC was not always effective in these areas where competing concerns, namely the public interest, were strong factors.

4.2.4 Summary

Belgium is a good example of a country that has sought to address children's rights in a variety of ways. It has clearly achieved a strong legal framework that is compliant with the CRC, and the CRC is considered a strong and persuasive legal and political tool. At the same time, Belgium is a particularly interesting case study of a country where there have been differences in approaches across the federated communities, although the complexity of its systems cannot be underestimated. Of particular note is the status of the CRC at a sub-constitutional level, the incorporation of children's rights into the Constitution, the presence of Commissioners for Children (with complaints functions), and the development of a Child and Youth Impact Assessment in Flanders. Focus now is based on the further development of a children's rights community and on maintaining efforts to ensure progress in the advancement of children's rights.

¹⁴⁷ Coordination des ONG pour les droits de l'enfant (CODE) and the Kinderrechtencoalitie Vlaanderen, 2011, p. 2.

4.3 Germany



4.3.1 Context

In 2010, the population of children (0–18 years) in Germany was 13,522,000, approximately 16.6 per cent of the total population.¹⁴⁸ Germany is a federal parliamentary republic, with the President as head of State and the Chancellor as head of the German Federal Government. Executive power rests with the Federal Cabinet, the Bundesregierung. The Bundestag is the primary legislature and is elected every four years by a form of proportional representation. The Bundesrat, on the other hand, plays the role of an upper house with representatives from the 16 Länder.

Angela Merkel was re-elected as Chancellor in 2009 and formed a Coalition Government consisting of the Christian Democratic Union (Christlich Demokratische Union Deutschland or CDU), the Christian Social Union (Christlich Soziale Union in Bayern or CSU) and the Free Democratic Party (Freie Demokratische Partei or FDP). Joachim Gauck became President in 2012. Germany has a civil law system.

PISA 2009 data indicate that Germany's performance in reading increased by 13 per cent between 2000 and 2009, and performance in mathematics increased by 10 per cent between 2003 and 2009. The number of students who felt that their teachers listened to what they had to say increased by 17.9 per cent between 2000 and 2009.¹⁴⁹

The percentage of young people (15–19) not in education or employment decreased from 15.6 per cent in 2003 to 13.7 per cent in 2009.¹⁵⁰ The number of children living in relative poverty fell from 10.7 per cent in 2000, to 8.5 per cent in 2009.¹⁵¹ Public expenditure on education appears to have remained fairly stagnant at 4.46 per cent GDP in 2000 and 4.49 per cent of GDP in 2007, whilst total health expenditure increased from 10.29 per cent in 2000 to 11.33 per cent in 2009.¹⁵²

4.3.2 Implementation in law

Application of the CRC in German law

Upon ratifying the CRC, Germany entered a declaration stating that it would not apply it directly. Germany's current State Party report asserts that "the Länder only consented to the ratification of the CRC subject to the proviso that the declaration was submitted in order to counter the risk of misinterpretations or overinterpretations of the CRC."¹⁵³ This position was reaffirmed in discussions with interviewees. Following appeal from the Federal Parliament to the Länder, Germany withdrew this declaration on 15 July 2010.¹⁵⁴ One interviewee highlighted how the process of withdrawing the reservation was drawn out and complicated by the relationship between the CRC and Länder law, as well as the associated concern about the implications of removing the reservation. Interviewees suggested that withdrawal of the reservation acted as an important political signal, since prior to this there was a perception that the CRC did not fully apply in practice.

KEY POINTS

- Germany has not incorporated the CRC
- Germany withdrew its reservations and declarations to the CRC in 2010, including its reservation on the direct applicability of the CRC in national law
- Debate on the adequacy of the Basic Law for the Federal Republic of Germany and the need for greater constitutional protection for children in light of the country's federal structure, is ongoing
- Children's rights are enshrined in the majority of Länder (Federal Region) constitutions
- There has been a particular focus on the best interests principle, child protection and on children's participation rights.

¹⁴⁸ United Nations Children's Fund, 2012a.

¹⁵⁰ OECD, 2011.

¹⁵² World Bank, 2012. There is no disaggregated childhood data available on health expenditure.

¹⁵³ Germany, Third and fourth State Party reports to the UN Committee on the Rights of the Child, 2010a, paragraph 18. Whilst the State Party report was submitted in 2010, this has not yet been examined by the Committee on the Rights of the Child. As examination has not yet been formally scheduled, availability of alternative reports is also limited.

¹⁵⁴ Germany, Withdrawal of reservations in respect of articles 40 (2) (B) (II) and (V) of the CRC, 2010b, available at <http://bit.ly/WT2i57>, accessed on 14 October 2012. See pp. 8–9 for details of other reservations/declarations that have been withdrawn.



The Constitution

Article 6(2) of the Basic Law for the Federal Republic of Germany recognises the duties of parents in bringing up their children and Article 6(3) states that children can only be separated from their families in accordance with the law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect. Article 7 permits parents to decide whether children should receive religious instruction.

The remainder of the Basic Law extends to children, albeit not explicitly so.¹⁵⁵ NGOs and interviewees, however, express concern that this is insufficient.¹⁵⁶ In 2004, the UN Committee on the Rights of the Child noted that the CRC had not been incorporated into the Basic Law and called upon Germany to ensure that all national and Länder laws fully conform through an appropriate mechanism.¹⁵⁷

¹⁵⁵ Federal Constitutional Court of Germany, Decisions of the Federal Constitutional Court, 24, 119 (144), 1968. This states that the child is “a being with his/her own human dignity and an independent right to development of its personality within the meaning of article 1 (1) and article 2 (1) of the Basic Law”.

¹⁵⁶ National Coalition for the Implementation of the UN Convention on the Rights of the Child in Germany, Supplementary report of the National Coalition, 2004.

¹⁵⁷ UN Committee on the Rights of the Child, Concluding observations: Germany, CRC/C/15/Add.226, 2004.

¹⁵⁸ Williams, J., 2011.

¹⁵⁹ Germany, 2010a.

Indeed, Williams suggests that, despite Article 72 of the Basic Law permitting federal law-making where necessary to secure “equivalent living conditions” throughout the country, the level of influence that can be exercised by Länder Parliaments and executives can leave considerable scope for detailed provisions to be decided upon by the Länder.¹⁵⁸

Debate on the adequacy of the Basic Law and the need for greater constitutional protection for children in light of Germany’s federal structure has been ongoing,¹⁵⁹ most notably by the Action Alliance on Child Rights (Aktionsbündnis Kinderrechte, which comprises UNICEF Germany, Deutscher Kinderschutzbund and Deutsches



Kinderhilfswerk), the National Coalition, Germany's Social Democratic Party and the Children's Commission. Interviewees suggested that there is a need to include children's rights in the Constitution so that the CRC is applied across the country more systematically. They feel that its current absence makes it difficult to implement in practice.

One interviewee highlighted how the Bundesrat is keen to grant constitutional protection for children's rights and had asked the Federal Government to present draft legislation. In July 2012, however, in what some interviewees said was a very unusual move, the Minister of Justice publicly stated that it is not necessary to incorporate the CRC into Basic Law as children are already recognised as rights holders,¹⁶⁰ even though the Federal Government had explicitly stated in the Coalition Contract that they wanted to strengthen child rights. A number of interviewees pointed to a recent unsuccessful attempt to ban circumcision as evidence that parents' rights were still given priority over children's rights and that constitutional reform was needed to address this.

Germany's State Party report notes that, as of March 2010, child rights in Germany have been explicitly included in all Länder constitutions with the exception of Hamburg and Hesse. Williams notes that 11 out of the 16 Länder enshrine one or more rights from the CRC.¹⁶¹ Article 4a of the Lower Saxony Constitution, for example, enshrines the right of children to have their dignity

¹⁶⁰ Discussion with interviewees. See also Germany, 2010a.

¹⁶¹ Williams, J., 2011.

¹⁶² *Constitution of Lower Saxony*, 1993; *Constitution of the Land of Brandenburg*, 1992; *Constitution of Berlin*, 1995; *Constitution of North Rhine-Westphalia*, 1950.



respected, to be brought up without violence, live in conditions appropriate to their age, and be protected against physical or mental neglect and maltreatment, whereas Article 4 enshrines the right to education. Article 27 of the Brandenburg Constitution demonstrates the rights of children in relative detail, and, in addition to the above rights, grants children “legal status by law that does justice to their growing capacity to reason by recognising their increasing independence”. Brandenburg also sets out the aims and right to education similarly to Articles 28 and 29 of the CRC. The Berlin Constitution establishes the right of the child to an upbringing free from violence in Article 13, and for the State to “respect, protect and promote the rights of children as individual personalities.” Similar provisions are contained in Article 6 of the North Rhine-Westphalia Constitution.¹⁶² One interviewee questioned the legal significance of these, suggesting that they were statements of aspiration that gave a “tailwind” for advocacy. Another said that, whilst it was good that the Länder were taking the initiative, the lead should come from Federal Government in the form of constitutional change.

Integration into domestic legislation and supplementary measures

The best interests of the child are highlighted as a guiding principle of the German legal order, although the extent to which this has been explicitly integrated in legislation varies. Recently, the Federal Government has focused on child protection and on 1 January 2012, a new child protection law came into force. Interviewees highlighted this legislation as an exemplar of child protection and indicated that this had emerged in the face of cases relating to child deaths and child neglect. One interviewee suggested, however, that concepts of “need”, well-being and best interests continue to be granted greater priority on the political agenda than child rights.

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Growing attention appears to have been paid to participation rights. Several interviewees suggested that this was an area in which the CRC had direct influence. The right of children to participate in decision-making processes regarding child and youth services at federal level is enshrined in *Book VIII of the Social Code (Child and Youth Services) (Section 8(1)) (1990)*, alongside the right to assistance for his or her development and the right to education. The guidelines to the *Child and Youth plan of the Federation (2009)* also highlight the participation of children in developing children’s services. Section 159 of the *Act on Proceedings in Family Cases and in Matters of Non-contentious Litigation* obliges judges to listen to the child in family court proceedings where this may have implications for the decision, and each child who has reached 14 years may exercise a right of complaint in all matters affecting them without the participation of his/her legal representative (Section 60). Interviewees did express concern, however, that, whilst children were increasingly being given opportunities to participate in a variety of decisions and settings, the extent to which their views were being given due weight was questionable, as was the participation of vulnerable groups of children such as children with disabilities and refugee children.

Book VIII of the Social Code (Child and Youth Services) (Section 8(1)) (1990) places an obligation on the Federal Government, the Bundestag and the Bundesrat to report on the situation of, and

developments relating to, children during each legislative period. However, the extent to which these reports are based on child rights is not clear.¹⁶³ Elsewhere, Article 9(3) of the CRC is cited as one of the reasons behind changes to the enforcement of custody and access rulings in family court proceedings,¹⁶⁴ while an amendment to the Civil Code (Article 1631) in 2000 enshrines children's right to a non-violent upbringing by, *inter alia*, banning corporal punishment in the home. Interviewees consistently highlighted the latter as one of the most significant legal developments in recent years, and one that was influenced by the CRC. One interviewee also noted that whilst this legislation gave rise to concern among politicians that judges would intervene in family life, these fears had not materialised. Interviewees also expressed concern that, despite the withdrawal of the reservation concerning "the entry of aliens and the conditions of their stay,"¹⁶⁵ national law does not comply with the CRC. In particular, the best interests principle is not enshrined in the *Asylum Procedure Act* and, in some laws, refugee children are treated as adults from 16 or 17 years.

The legal age for voting in Bundestag or Landtag (Land Parliament) elections is 18 years across all Federal Länder. In Bremen, the *Electoral Act* was amended in 2009 to allow young people to vote in the District Parliament Elections from 16 years. Young people can now vote at 16 years in local elections in Lower Saxony, Berlin, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Saxony-Anhalt and Schleswig-Holstein.

At Länder level, the right to participation is also contained in individual municipal codes. Section 47 of the Schleswig-Holstein municipal code, for example, stipulates that the municipality must "suitably involve children and juveniles in plans and projects affecting their interests" and that "in the implementation of plans and projects affecting the interests of children and juveniles, the municipality must suitably explain how it has taken these interests into consideration and implemented participation in accordance with Section 1 of the Schleswig-Holstein Municipal Code."¹⁶⁶ Similar provisions are contained in the Municipal Codes of Rhineland-Palatinate and Lower Saxony. In Hessen, a provision for the participation of children and young people in local government planning and projects has been introduced in the course of a reform of the Hessian local by-laws and rural district regulation.¹⁶⁷

In its ruling of 1 April 2008,¹⁶⁸ the Federal Constitutional Court emphasised that the fundamental parental right contained in Article 6(2) of the Basic Law also entails a fundamental right for children. The Federal Constitutional Court has also ruled that, in case of a clash of interests between children and parents, the best interests of the child must "have the last word".¹⁶⁹ In addition, case law of the Federal Constitutional Court, of the Federal Court of Justice and of the Higher Regional Courts presumes that the courts are obliged to hear children in person from the age of three to four onwards.¹⁷⁰ Whilst the UN Committee on the Rights of the Child was complimentary about the legislative developments relating to participation rights and the ban on corporal punishment, it expressed concern that the former principle was not fully applied and duly integrated in practice and that there was a lack of comprehensive data and information on the impact of the latter.¹⁷¹

163 These reports are only available in German.

164 Germany, 2010a, paragraph 134.

165 See Germany, Third and fourth State Party reports to the UN Committee on the Rights of the Child, CRC/C/DEU/3–4, 2010c.

166 Germany, 2010a, paragraph 90.

167 Germany, 2010a.

168 1 BvR 1620/04 – see Germany, 2010a, paragraph 20.

169 Federal Constitutional Court of Germany, 1968; cited in Germany, 2010a, paragraph 19.

170 Federal Constitutional Court of Germany, 1st Chamber of the 1st Senate, 1 BvR 156/07, 2007; FamRZ 2007, 2007, p. 1078.

171 National Coalition for the Implementation of the UN Convention on the Rights of the Child in Germany, 2004, paragraphs 29 and 40.

4.3.3 Non-legal measures of implementation

The implementation of the CRC is coordinated within the Federal Government by the Ministry for Family Affairs, Senior Citizens, Women and Youth, whilst the Länder are linked by the Association of Supreme Land Youth Authorities and the Land Youth Ministers. Within the Bundestag, the Commission to Safeguard the Interests of Children (the Children's Commission), a parliamentary body established in 1988, is a subcommittee of the Committee for Family Affairs, Senior Citizens, Women and Youth, which aims to represent children's interests. Each of the parties represented in the Bundestag appoints one member to the Commission. The Chair of the Children's Commission rotates between the parties. One interviewee suggested that the establishment of the Children's Commission was a compromise in the absence of an independent monitoring mechanism. The Children's Commission has called for powers to allow it to initiate legislation in its own right. Germany does not have an independent children's rights institution. Interviewees called for the establishment of an independent ombudsperson at federal level and suggested that this was crucial in furthering effective implementation of the CRC in Germany.

The Federal Government adopted a *National Action Plan for a Child Friendly Germany 2005–2010*, in 2005. The six themes include "participation" and "international obligations". The Action Plan required "cooperation between different stakeholders at federal, Land and local authority level", however, this did not appear to be underpinned by legislation or a statutory duty to cooperate. Implementation of the Action Plan was coordinated by a steering group made up of Federation, Länder and local authorities, as well as other key stakeholders (academics and non governmental organisations). Germany's current State Party report notes that children and young people played an active role in the development of the Action Plan and that they were involved in its implementation Plan through activities under the auspices of the German Federal Youth Council and the Youth Participation Service Agency. However, interviewees suggested that the Plan had not been well



implemented and stated that it was not being continued. One interviewee suggested this was because the objectives of the Action Plan had been perceived to have been met and so a child protection action plan had been put in place from 2011 instead.

In general, data collection relating to children was not perceived to be a problem. The German Institute of Youth Studies produces a series of research reports on children and youth, including longitudinal studies.¹⁷² Interviewees suggested that knowledge of the issues that need to be addressed is not a problem in Germany, but that addressing some of the known issues was. In its 2004 Concluding Observations, the UN Committee on the Rights of the Child recommended that Germany develop a system of data collection and indicators to be consistent with the CRC and disaggregated by gender, age, and urban and rural area. They called for specific emphasis on those who are particularly vulnerable, such as foreign children, and encouraged Germany to use these indicators and data in formulating policies and programmes for the effective implementation of the CRC.¹⁷³

The Committee has previously expressed concern that most children and adults, notably those belonging to vulnerable groups, were not aware of the rights contained in the CRC.¹⁷⁴ In a national survey, only one out of seven children between 6 and 15 years old knew of the CRC.¹⁷⁵ These concerns continue to be reiterated and levels of awareness are perceived to be a key barrier to further progress. One interviewee expressed concern that members of the judiciary may not be aware that Germany had withdrawn its reservation, whilst others were of the view that despite increasing awareness of child rights, there was much less knowledge and awareness of the CRC's content and how it operated in practice.

In addition to translated publications on the CRC, an interactive dedicated website targeted at children and parents has been developed by the Ministry for Family Affairs.¹⁷⁶ Similar websites have also been developed by some Länder, such as Rhineland-Palatinate¹⁷⁷ and Berlin.¹⁷⁸ Interviewees continued to emphasise the need for more systematic training on child rights at all levels, including federal, Länder and local, so that child rights did not turn into an abstract concept.

4.3.4 Summary

There has been considerable progress in Germany with respect to the integration of the best interests principle and child protection legislation. The withdrawing of the declaration on the applicability of the CRC and legislative measures taken with respect to participation at both federal and Länder levels are also noteworthy. However, interviewees did highlight the need for better coordination and monitoring, particularly in light of Germany's federal structure. Political support for the inclusion of the CRC in Basic Law is increasing, but it does not yet have the two-thirds majority required. Interviewees suggested that the as yet unscheduled examination of Germany's periodic report, to be carried out by the UN Committee on the Rights of the Child and the 2013 Federal Elections, will present opportunities for more in-depth discussion and debate on the issue.

172 Deutsches Jugendinstitut, 'Research on children and families at the interface between science, policy and practice', 2012, available at www.dji.de, accessed on 14 October, 2012.

173 National Coalition for the Implementation of the UN Convention on the Rights of the Child in Germany, 2004, paragraph 19.

174 National Coalition for the Implementation of the UN Convention on the Rights of the Child in Germany, 2004, paragraph 19.

175 National Coalition for the Implementation of the UN Convention on the Rights of the Child in Germany, Supplementary report of the National Coalition, 2010, p. 7.

176 Available at www.kinder-ministerium.de

177 Available at www.kinderrechte.rlp.de

178 Available at www.jugendnetz-berlin.de

KEY POINTS

- The CRC has not been incorporated into domestic law
- The Irish Constitution contains a small number of provisions that relate to the rights of children and families
- On 10 November 2012, Ireland voted to amend its constitution to protect and improve children's rights
- Ireland has a National Children's Strategy and a longitudinal study on child development, and is currently developing a new national participation policy.

4.4 Ireland

4.4.1 Context



In 2010, the population of children (0–18 years) in Ireland was 1,114,000, about 25 per cent of the total population.¹⁷⁹

The Republic of Ireland has a parliamentary government with a five-year term and a directly elected President with a largely ceremonial role. Enda Kenny of Fine Gael has been Prime Minister (Taoiseach) since 2011. The Government of Ireland is currently led by Fine Gael in coalition with the Labour Party.

Ireland has a common law system. Under Article 15.2.1 of the Irish Constitution, “the sole and exclusive power of making laws for the State is vested in the Oireachtas” (Parliament) meaning that Ireland operates a dualist system whereby only those international treaties incorporated into Irish law by the Oireachtas have effect in Irish law.

The *European Convention on Human Rights Act* (ECHR, 2003) gave further effect to the ECHR in Irish law by way of sub-constitutional interpretive incorporation, meaning that the courts are required to interpret the rights incorporated into the legislation in light of the Irish Constitution and “organs of the State” are bound to act in compliance with the ECHR.¹⁸⁰ No other human rights treaties have been incorporated into national law and, as one interviewee noted, Irish legal culture is not instinctively inclined to support the incorporation of international instruments or the justiciability of economic and social rights. Accordingly, the CRC has no legal force in Irish law.¹⁸¹ Ireland has reported to the UN Committee on the Rights of the Child in both 1998 and 2006.

Ireland's 2010 submission to the Universal Periodic Review indicates that gross expenditure on education increased by 121 per cent from 2000 to 2009: from €4.23bn to €9.36bn (although public sector salaries increased significantly during this period). The proportion of children living in relative poverty decreased from 16.8 per cent in 2000, to 15.7 per cent in 2005,¹⁸² but more recent data suggest that these gains have been completely eradicated by the impact of the recession; in 2010, the figure stood at 19.5 per cent.¹⁸³ Educational data suggest that Ireland's performance in reading declined by 31

179 United Nations Children's Fund, 2012a.

180 See further Kilkelly, U., *ECHR and Irish Law*, 2nd ed., Jordan Publishing, Bristol, 2008a.

181 See Kilkelly, U., *Children's Rights in Ireland: Law, policy and practice*, Tottel Publishing, Haywards Heath, 2008b.

182 United Nations Children's Fund, 2005.

183 Central Statistics Office, 'Survey on income and living conditions', 2011, available at <http://bit.ly/SOaRaE>, accessed on 14 October 2012. For more information see End Child Poverty Coalition, *Child Poverty: Ireland in Recession*, End Child Poverty Coalition, Dublin 2011.





per cent between 2000 and 2009, and performance in mathematics declined by 16 per cent between 2003 and 2009.¹⁸⁴ The proportion of students who felt that teachers listened to what they had to say increased by 4.2 per cent between 2000 and 2009.¹⁸⁵ The percentage of 15–19 year olds not in education or employment increased from 11.5 per cent in 2003 to 20.8 per cent in 2009.¹⁸⁶

4.4.2. Implementation in law

Constitutional reform

The Irish Constitution dates from 1937. It contains a Bill of Rights and provides for the separation of powers and judicial review of legislation and administrative acts. Articles 40 to 44 contain a number of personal rights provisions and a small number of these relate specifically to children. In particular, Article 42 contains provisions relating to education that have been litigated successfully to advance the rights of children with disabilities.¹⁸⁷ Under Article 40(3), the State guarantees to protect and vindicate the personal rights of the citizen. Although this has shown potential to be interpreted positively in respect of children's rights,¹⁸⁸ it has not been fully realised. Article 41 concerns the family, interpreted by the courts as the family based on marriage, and recognises that the rights of parents are inalienable and imprescriptible (cannot be given or taken away).¹⁸⁹ According to interviewees, this places the family at the top of the constitutional rights hierarchy, meaning that the best interests of the child will always defer to the rights of parents.¹⁹⁰ Article 42(5) provides that "in exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child". The result of this is to set the threshold for State intervention in the family at a very high level and, in its application, means that decisions to intervene in the family focus on parental failure rather than the autonomous interests or rights of children.¹⁹¹ This has had

¹⁸⁴ OECD, 2010.

¹⁸⁵ OECD, 2010.

¹⁸⁶ OECD, 2011.

¹⁸⁷ See for example High Court of Ireland, *O'Donoghue v. Minister for Health and Others*, IEHC 2, 1993; Supreme Court of Ireland, *Sinnott v. Minister for Education*, IESC 63, 2001.

¹⁸⁸ See for example High Court of Ireland, *FN and EB v. CO*, 4 IR 305, 2004.

¹⁸⁹ See Supreme Court of Ireland, *The State (Nicolaou) v. An Bord Uchtála*, IR 567, 1966. Reviews of constitutional provision were undertaken by the Constitution Review Group in 1996, and by the All-Party Oireachtas Committee on the Constitution in 2006. Both recommended reform of these provisions.

¹⁹⁰ See Supreme Court of Ireland, *re JH* (an infant), IR 375, 1985; High Court of Ireland, *North Western Health Board v. HW and CW*, 3 IR 622, 2001; Supreme Court of Ireland, *N and Others v. Health Services Executive*, IESC 60, 2006.

¹⁹¹ Kilkelly, U. and O'Mahony, C., 'The proposed Children's Rights Amendment: running to stand still?', *Irish Journal of Family Law*, vol. 2, 2007.

In 2010, a cross-parliamentary report proposed a wording that sought to give constitutional expression to the best interests of the child and the child's right to be heard.

very serious consequences for the State's ability to intervene in an effective manner to protect the rights of children.¹⁹² It has also frustrated the adoption of children in certain circumstances.¹⁹³

National and international bodies, including national inquiries, children's organisations, the Ombudsman for Children, the Council of Europe Commissioner for Human Rights and the UN Committee on the Rights of the Child have highlighted the need for constitutional reform to give expression in the Irish Constitution to the autonomous rights of the child.¹⁹⁴ In 2010, a cross-parliamentary report proposed a wording that sought to give constitutional expression to the best interests of the child and the child's right to be heard, whilst also amending Article 42(5) to provide for proportionate interference in the family to protect the child's interests. It was also proposed to recognise the right of the child to protection from harm and to education.¹⁹⁵ Interviewees noted that the Minister for Children and Youth Affairs is currently taking advice from the Attorney General as to the precise wording to put to the people in a Children's Referendum, which is due to take place in November 2012. Some interviewees expressed hope that meaningful reform would finally be forthcoming in this area and noted its potentially transformative effect on law and practice. They were not overly optimistic, however, that these would be based on the CRC. The poor level of public awareness about children's rights was cited by several interviewees as a particular concern, especially in contrast to child protection about which there is a high level of public awareness and sympathy.

On 19 September 2012 (subsequent to the study visit), the Government published the wording of a constitutional amendment, which was passed by a majority of voters on 10 November 2012. The wording requires legislation to be enacted for provisions for the best interests of the child to be paramount and for the views of the child to be heard in proceedings that are concerned with their safety and welfare in terms of guardianship, custody or access. It also makes provision for children to be adopted or placed voluntarily for adoption, and adjusts the threshold for intervention by the State in the family to protect the rights of the child. The proposal intends that the State will recognise and affirm "the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights."

Integration into domestic legislation

Ireland's progress in integrating the CRC into domestic legislation has been limited. Interviewees noted that Irish child law omits significant aspects of children's rights or falls short of the CRC, for example:

- The *Adoption Act 2010* does not include provisions for information and tracing
- some legislation has been diminished or diluted by amendment, such as the *Children Act 2001*, which was amended in 2006 to lower the age of criminal responsibility
- some laws have important provisions that have never been commenced, like the *Education for Persons with Special Needs Act 2004* and the *Children Act 1997* that was designed to enable children to be heard in private family law cases, whereas the provisions of others could be enhanced to give greater protection to children.

¹⁹² See Gibbons, N. and Shannon, G., *Report of the Independent Child Death Review Group*, Department of Children and Youth Affairs, Dublin, 2012.

¹⁹³ Kilkelly, U. and O'Mahony, C., 2007.

¹⁹⁴ Ombudsman for Children, Submission to the All-Party Oireachtas Committee on the Constitution, 2005; Ombudsman for Children, Report of the Ombudsman for Children to the UN Committee on the Rights of the Child on the occasion of the examination of Ireland's Second Report to the Committee, 2006; Ombudsman for Children, Submission to the All-Party Oireachtas Committee on the Constitution, 2008.

¹⁹⁵ Joint Committee on the Constitutional Amendment on Children, Final Report, 2010.

Interviewees linked the lack of progress in this area to the weak constitutional position of children.¹⁹⁶ An example of this is the *Child Care Act 1991* (the child protection framework). This requires that the child's welfare must be the first and paramount consideration, but that it must happen with due deference to the constitutional rights of parents. On a positive note, one interviewee noted that reform of Ireland's adoption law, including the incorporation of the Hague Convention on Inter-Country Adoption, finally took place via the *Adoption Act 2010*. This has provided a strengthened regulatory framework that aims to ensure that the best interests of children are protected and that their views are taken into account in the adoption process. The *Children Act 2001* was also amended in 2006 to require judges to take the best interests of the child into account during criminal sentencing. Another interviewee noted that second-level (secondary) schools are now obliged by the *Education Act 1998* to encourage the establishment of a student council. These are now commonplace, although there are not yet models of good practice. Legislation is currently being drafted on mandatory reporting, which places the existing national child protection guidelines on a statutory footing, and creates a legislative framework for the vetting of individuals in contact with children. However, physical punishment has not yet been abolished and, overall, the CRC carries little weight in the legal system. Furthermore, there are scant references to the CRC in litigation or jurisprudence.¹⁹⁷ Overall, as one interviewee noted, the approach of the legislature has been inconsistent, with the result that Ireland has only witnessed partial and imperfect transposition of CRC principles into primary legislation.

Overall, Irish child law does not compare favourably with the CRC and, although there has been some integration of the principles of Articles 3 and 12, the Constitution has impeded progressive reform. In 1998, having examined Ireland's first report, the UN Committee on the Rights of the Child recommended that Ireland act further to incorporate the CRC into Irish law, taking due account of its general principles, and that it implement national proposals to make children a subject of rights under the Constitution.¹⁹⁸

In 2012, Ireland's Special Rapporteur on Child Protection, Dr Geoffrey Shannon, recommended the full incorporation of the CRC.¹⁹⁹

4.4.3 . Non-legal measures of implementation

Since 2011, Ireland has had a full ministry for Children and Youth Affairs (although there had been a junior ministry in this area and a departmental unit responsible for developing and implementing national policy since 2000). In 2000, *The National Children's Strategy 2000–2010: Our Children – Their Lives*, was adopted, and in 2004, the Ombudsman for Children was established.²⁰⁰ (The former is currently being revised).²⁰¹ One interviewee noted that successive governments have been keen to stress the strong connection between these developments and Ireland's obligations under the CRC.

The Ombudsman for Children, in place since 2004, can, *inter alia*, investigate complaints from children against public authorities, including schools, hospitals, and child protection services, but not prisons or the asylum system. Unlike the Irish Human Rights Commission, which can intervene as *amicus curiae*,²⁰²

196 See also Kilkelly, U., *Barriers to the Realisation of Children's Rights in Ireland*. Ombudsman for Children, Cork, 2007; Kilkelly, 2008b.

197 For a rare example see High Court of Ireland, *Nwole v. Minister for Justice*, unreported, 2003.

198 UN Committee on the Rights of the Child, Concluding observations: Ireland CRC/C/15/Add.85, 1998.

199 Shannon, G., Fifth Report of the Special Rapporteur on Child Protection, report submitted to the Oireachtas, 2012, p. 6, available at <http://bit.ly/W1XAfi>, accessed on 14 October 2012.

200 *Ombudsman for Children Act*, 2002. Details of the office are available at www.oco.ie, accessed 14 October, 2012.

201 Department of Children and Youth Affairs, *The National Children's Strategy: Our Children – Their Lives 2000–2010*, Stationery Office, Dublin, 2000.

202 Plans to merge the Human Rights Commission with the Equality Commission are well advanced, and the draft legislation proposes to limit the new body's legal work to human rights instruments that are justiciable. If enacted, this will exclude the CRC. See Irish Human Rights Commission, IHRC observations on Irish Human Rights and Equality Commission Bill 2012, 2012, pp. 38–39, available at <http://www.ihrc.ie/publications/list/ihrc-observations-on-irish-human-rights-and-equali/>, accessed 15 October 2012.



**A whole range
of innovative and
ambitious participation
initiatives have
been taken.**

the Ombudsman has no authority to intervene in legal action. Nonetheless, interviewees made clear their view that the Ombudsman, which has a mandate to protect and promote the rights of children, has a strong record at holding the Government to account on child rights issues. The Ombudsman has various powers, including:

- the provision of advice to the Government on legislation and other matters concerning children
- the conduct of investigations
- the handling of complaints against public authorities and undertaking research
- education and raising awareness in the advancement of children's rights.

Interviewees were strongly supportive of the Ombudsman's work, especially in relation to separated children, children in detention and children in care/child protection. One interviewee noted that a stronger culture of monitoring and evaluation of policy and practice in light of CRC obligations would also assist in this regard, although it is clear that the Office already undertakes important work in this area.²⁰³ Another interviewee highlighted the Ombudsman's ability to withstand cutbacks and mergers that have affected other parts of the human rights sector as a major success in the implementation of child rights in Ireland.

The *National Children's Strategy 2000–2010* states as its goals that:

1. children will be heard
2. their lives will be better understood
3. children will receive quality support and services.

All three goals have been followed through with more precise initiatives, and interviewees made it clear that stating these goals in national policy had a significant and positive effect on the realisation of children's rights in practice. Although clearly an ambitious policy

²⁰³ Kilkelly, U., *A Children's Rights Analysis of Investigations*, Ombudsman for Children, Cork, 2011b.

instrument for its time, the *Strategy*, which is thin on detailed plans, timescales and resourcing, could not be considered to be a blueprint for the implementation of the CRC.²⁰⁴

With respect to the first goal of the *National Children's Strategy 2000–2010*, a whole range of innovative and ambitious participation initiatives have been taken, including the development of structures for children to feed into local decision making. The initiatives also incorporate children's views in policymaking for mental health, play, leisure, hospital design, education and alternative care. These are now starting to be documented and evaluated. Independent evaluation has been built into most initiatives, particularly Comhairle na nOg (Ireland's Youth Parliament) and the Children and Young People's Forum. The independent evaluation will attempt to investigate impact further, as opposed to just output and process. A new participation policy is being developed to drive this goal in the period covered by the next strategy (2012–17). The next strategy will not be completed in 2012, however, wide-scale consultation with children, stakeholders and the public, has now taken place and this will be combined to inform the strategy, which is more likely to be a 2013 strategy. Interviewees noted that more progress has been made with respect to children's participation in collective decision making, such as the Comhairle na nOg or community policing fora, than in individual decision making, like health-care or family law matters. Success in the former was linked directly to the clear policy imperative provided by the *National Children's Strategy 2000–2010*, putting the infrastructure in place to help embed participation in government decision-making, as well as the work of participation champions in government departments. Those who have been exposed to the benefits of participation for children and for the decision-making process support it, but progress in the wider development of a children's rights culture is slow.

Regarding the second goal of the *National Children's Strategy 2000–2010*, a research agenda has ensured significant investment in academic research, graduate education (PhD scholarships) and the national longitudinal study (called *Growing up in Ireland*). The latter is gathering qualitative and quantitative data about almost 20,000 children in two age-cohorts (from age nine months and nine years). One interviewee explained that this research is focused on outcomes and concerns health and development, well-being, educational achievement and intellectual capacity. The quantitative data are being supplemented by interviews with caregivers, teachers and with the children themselves in the older cohort. The research is producing a wealth of information and a clear evidence base for policymakers. Interviewees considered this to be its significant strength. Although it is not yet possible to see whether policy development is being informed by the data due to the slow iterative process of policy formation, it was noted by interviewees that the study is well supported by the Government (evidenced by the recent financial commitment to continue with another data sweep), which is promoting its wide use among researchers. This approach to research, policy and practice is incorporated into the Department of Children and Youth Affairs' *National Strategy for Research and Data on Children's Lives*.²⁰⁵



²⁰⁴ Kilkelly, U., 2008.

²⁰⁵ Department of Children and Youth Affairs, *National Strategy for Research and Data on Children's Lives 2011–2016*, Government Publications, Dublin, 2011.



Finally, with regard to the third goal, the Government published the *Agenda for Children's Services* in 2007 to set priorities in this area and to provide an impetus for the reform of social and health services. A new Child and Family Agency is being established to ensure that the needs and interest of children and families are secured more effectively. This confirms a commitment to ensure that infrastructure is in place to drive reform. This would involve a dedicated Ministry for Children and Youth Affairs and an agency that is separate from the Health Service Executive, where children arguably get lost amongst bigger health priorities.

Although visibility and emphasis to date has been on child protection, it is hoped that the constitutional referendum will shift emphasis onto children's rights. Public and political awareness and understanding of children's rights remains a barrier to this, however, as does the extent of political commitment to rights as opposed to protection principles.

Progress has undoubtedly been achieved in relation to a whole range of children's issues through the enactment of policy and practice initiatives in Ireland within the last decade, and in coupling new policy with investment (for example, *READY, STEADY, PLAY! A National Play Policy* came with a budget, *inter alia*, that funded the provision of playgrounds).²⁰⁶ The creation of a full Minister for Children and Youth Affairs has raised the profile of children's issues at a political level and has ensured that the issues remain high on the public agenda in the area of child protection (if not in children's rights).²⁰⁷ The Minister's presence at the cabinet table means that there is specific budget provision for children's services. This is likely to increase with the establishment of the new Child and Family Agency.²⁰⁸ The Ombudsman for Children has also been very effective on particular issues, such as separated children, children in detention, and child protection services. The Ombudsman has successfully effected change by engaging directly with service providers and employing a range of other innovative approaches; for example auditing the investigation function from a children's rights perspective to broaden awareness among administrative decision-makers about children's rights.²⁰⁹

There has been significantly less achieved in addressing the status of the child in Irish law and in giving expression to children's rights in statute or constitutional form. Interviewees noted the gap between understanding and supporting the need to protect children, and the awareness that, under the CRC, children have rights. The treatment of children in the court system, whether in the child care, family law or criminal law proceedings, remains lamentable.²¹⁰ Children are rarely party to family law proceedings, are only appointed a guardian *ad litem* in rare cases, and are unable to sue without a "next friend", meaning that they do not have direct access to court.²¹¹

A recent independent review of the deaths of children in care found that the majority of children whose files were reviewed did not receive adequate child protection service.²¹² The current constitutional provision means that the determination of disputes between families and the State are not, as a matter of law, focused on what is in the best interest of the child and interviewees noted that this remains a significant problem. This was raised by

206 Kil Kelly, U., 2007. See also Children's Rights Alliance, *From rhetoric to rights*, second shadow report to the UN Committee on the Rights of the Child, 2006.

207 Children's Rights Alliance, 'Is the Government keeping its promises to children?', *Report Card Series*, Children's Rights Alliance, Dublin, 2012.

208 Children's Rights Alliance, 2012. See also Department of Children and Youth Affairs, *Report of the Task Force on the Child and Family Support Agency*,

209 Kil Kelly, U., 2011b.

210 Kil Kelly, U., 2007; Mullally, S., 'Citizen Children, 'Impossible Subjects' and the Limits of Migrant Family Rights in Ireland', *European Human Rights Law Review*, vol. 1, 2011, pp. 43-54.

211 Kil Kelly, U., 2007.

212 Gibbons, N and Shannon, G., 2012.

all interviewees as a significant “roadblock” to the realisation of children’s rights in Ireland.

Kilkelly has identified a number of barriers to the implementation of children’s rights in Ireland, including: a lack of awareness on children’s rights among children, parents and those working with and for children; failure to listen to children’s views, lack of a complaint mechanism or remedies; and a lack of significant and sustained investment in children’s services. These barriers were identified by interviewees also, who pointed to a lack of political awareness of the importance of children’s rights as a key issue across all areas of the child’s life – education, health, family life – and not just in the area of child protection.²¹³

Interviewees highlighted that cutbacks in services affecting children caused by Ireland’s national debt and involvement with the IMF/ EU loan programme – notably in education support services and in health care – were already having a serious impact on the extent to which children enjoy their rights.²¹⁴ Key children’s organisations have seen the effect of this on the most vulnerable children and families, many of whom are struggling to cope and they have seen their services stretched beyond capacity.²¹⁵ Even though there is no impact assessment mechanism in place, interviewees noted that the necessary independent evidence is available to inform decision-making with regard to their consequences for children. According to interviewees, however, the imperative to save money and reduce Ireland’s debt dominates the discussion with little consideration given to the long-term effects on children of these decisions.

4.4.4 Summary

Ireland is an example of a country where progress has been made in policy rather than legislative terms. The *National Children’s Strategy* has led to the establishment of structures that enable child participation in decision-making and it has supported enhanced research capacity on children’s issues, including a longitudinal study. Ireland has an Ombudsman for Children with a strong mandate, but there is little litigation involving children’s rights. Although there has been some legislative reform to bring Irish law into line with the CRC, certain gaps remain. The Constitution is considered to present a roadblock to greater implementation of the CRC.

On 10 November 2012, Ireland voted to amend its constitution to protect and improve children’s rights. Taoiseach Enda Kenny described the result as a “historic day” for the children of Ireland. “It is the first time the constitution of this Republic will recognise them as citizens in their own right,” he said. The constitutional amendment will lead to the development of legislation that makes the best interests of the child the paramount consideration in any legal proceedings, and allow for the child’s views to be heard in child protection and welfare cases.

213 Kilkelly, U., 2007.

214 See also Children’s Rights Alliance,

215 For example, in August 2012, Barnardo’s, a key provider of support services for children and families, closed its services for one week to save costs.

216 United Nations Children’s Fund, 2012a.

217 Jørgensen, P. Leth, I. and Montgomery, E., ‘The Children’s Rights Convention in Denmark: a status report on implementation’, *Early Education and Development*, vol. 25, no. 2, 2011, pp. 839–862.



KEY POINTS

- The CRC was incorporated into domestic law in 2003
- Proposals to incorporate some child rights into the Constitution are currently under consideration
- From 2003, the CRC's general principles (notably Article 3, the best interests principle, and Article 12, the right to be heard) were integrated into legislation in a range of areas
- There remain gaps in available mechanisms to enforce, supervise and monitor implementation.

Norway has been a pioneer in the field of children's rights.

4.5 Norway



4.5.1 Context

In 2010, the population of children (0–18 years) in Norway was 1,114,000, about 23 per cent of the total population.²¹⁶ Norway is a constitutional monarchy and a parliamentary democracy with the King as head of State. The Storting is the Norwegian Parliament and elections for this are held every four years. The Prime Minister of Norway is Jens Stoltenberg of the Norwegian Labour Party Arbeiderpartiet or AP and Government takes the form of a coalition between the Labour Party, the Socialist Left Party (Sosialistisk Venstreparti or SV) and the Centre Party (Senterpartiet or Sp) – the Red–Green coalition. Norway has a civil law system and the CRC was incorporated into domestic law in 2003. Norway has an Ombudsman for Children under *Act 5 of 6 March 1981*, and a Minister for Children, Equality and Social Inclusion.

Norway has been a pioneer in the field of children's rights.²¹⁷ Interviewees indicated that concern for its international reputation has played a significant role in this regard. Norway's media pay significant attention to the reporting process before the UN Committee on the Rights of the Child, which has had a positive effect. Norway has had two members on the Committee, Lucy Smith and Kirsten Sandberg, a current member. Interviewees noted that the relationship between the Government and civil society is very constructive. They expressed concern, however, that Norway's failure to sign or ratify the Third Optional Protocol illustrates the Government's wavering commitment to children's rights, although most interviewees conceded that ratification would eventually take place.

In 2009, Norway was ranked second out of 24 countries with respect to health well-being,²¹⁸ while the number of children living in relative poverty decreased from 3.9 per cent in 2000, to 3.4 per cent in 2005²¹⁹ but increased to 6.1 per cent in 2009.²²⁰ The percentage of 15–19 year olds not in education or employment fell from 10.6 per cent in 2003

218 United Nations Children's Fund, *Report Card 9: The Children Left Behind: A league table of inequality in child well-being in the world's rich countries*, UNICEF Innocenti Research Centre, Florence, 2010.

219 United Nations Children's Fund, 2000; United Nations Children's Fund, 2005.

220 United Nations Children's Fund, 2012b.

to 9.4 per cent in 2009,²²¹ but along with bullying in schools was cited as a serious ongoing concern by interviewees. Public expenditure on education has decreased from 7.5 per cent of GDP in 1998, to 6.4 per cent of GDP in 2008.²²² Norway's performance in science improved by 13 per cent from 2006–2009, and the variation in student performance decreased by 23 per cent from 2000–2009.²²³ The number of students who felt that their teachers listened to what they had to say did not change significantly.²²⁴

4.5.2 . Implementation in law

Incorporation of the CRC into the Constitution

Norway has a written constitution with human rights protection, however there is currently no reference to children's rights. In 2009, the Presidium of the Storting set up a Human Rights Commission to prepare and propose recommendations for a revision of the Constitution to strengthen the position of human rights. In 2011, the Storting's Human Rights Commission reported general dissatisfaction with the extent of human rights protections in the Norwegian Constitution.²²⁵ It concluded that "the protection of rights in the Constitution should cover, at minimum, those central human rights that form the basis of the international human rights CRCs endorsed by Norway".²²⁶ The proposals include an acknowledgement that the family is the fundamental unit of society (§ 103) and make provision for the right to education (§ 109). In addition, the Commission proposed giving express protection to children's rights (§ 104), including the right to be heard, the right to have best interests as a fundamental consideration, and protection for the child's right to personal integrity.²²⁷

221 OECD, 2011.

222 World Bank, 2012.

223 OECD, 2010.

224 OECD, 2010.

225 Human Rights Commission, Report to the Presidium of the Storting by the Human Rights Commission concerning human rights in the Constitution, 2011, p. 3, available at <http://bit.ly/Xw2Rkp>, accessed on 16 October 2012.

226 Its view was that these human rights protections should be collated in a new section of the Constitution, with the aim of raising the profile of human rights in the Constitution, while also contributing to increased public understanding of (and interest in) the Constitution. Human Rights Commission, 2011, pp. 4–5.

227 The full proposal is as follows: "Children have the right to respect for their human dignity. They have the right to be heard in questions that concern themselves, and due weight shall be attached to their views in accordance with their age and development. For decisions that affect children, the best interests of the child shall be a fundamental consideration. Children have the right to protection of their personal integrity. It is the responsibility of the authorities of the State to create conditions that facilitate the child's development, including ensuring that the child is provided with the necessary economic, social and health security, preferably within their own family." Human Rights Commission, 2011, pp. 4–5.



Improved professional competence in children's rights has resulted from the training provided to lawyers and judges.

Incorporation of the CRC into statute

The *Human Rights Act of 21 May 1999 No. 30* incorporated the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention of Human Rights (ECHR) into Norwegian law. The CRC was not initially part of this Act, but was added in 2003 following recommendations from non governmental organisations and the UN Committee on the Rights of the Child in 2000.²²⁸ The CRC has been directly applicable and has taken precedence over conflicting national statutes since October 2003. Giving the CRC the force of domestic law has meant that it is now a key tool used to advance children's rights in both political and legal contexts. For non governmental organisations, it frames their discussion with the Government and Parliament. For lawyers, it means that the CRC can be used in litigation, where it is a persuasive force in attempts to advance the rights and interests of children. Several interviewees identified incorporation as a critical point in the development of children's rights culture in Norway and explained that it has had a knock-on effect on the development and application of Norwegian law.

Transposing the CRC into legislation

According to interviewees, Parliament's decision to incorporate the CRC was accompanied by an accord to transpose it into relevant sectoral laws. Norway has continued to make changes to its legislation across a variety of areas. In particular, it has integrated the general principles of the CRC (mainly Article 3, the best interests principle and Article 12, the right to be heard) into legislation within a range of areas, including laws on pre-school education, parental responsibility and notably immigration. Section 3 of the *Kindergarten Act*,²²⁹ for example, enshrines children's right to:

- express their views on the day-to-day activities of the kindergarten
- be given the opportunity to take active part in planning and assessing the activities of the kindergarten on a regular basis
- have their views to be given due weight according to their age and maturity.

Norway has indicated that the CRC was used as the "point of departure" for the amended *Children's Act 2005*,²³⁰ which relates to parental responsibilities, paternity, access and custody arrangements.²³¹ Attention is to be paid to the child's opinion, in accordance with their age and maturity. At seven years, children have the right to express their views before any decisions are made about their family situation. At 12, the child's opinion carries significant weight.

The *Children's Act 2005* also integrates the best interests principle, whilst Section 33 recognises the evolving capacities of the child. The *Patient's Rights Act 1999* states that a child's parents or others with parental responsibility must hear the child's views before consent is given. It also says that children from 12 years onwards are entitled to give their opinion on all matters affecting their health. Significantly, the best interests of the child is also integrated in the *Immigration Act 2008* (Section 38). Interviewees considered this a particularly important achievement given that competing public interest considerations make it difficult to advocate for children's rights in the area of immigration. Amendments in public administration law, civil

228 The Norwegian NGO Coalition on the CRC, Supplementary report to the UN Committee on the Rights of the Child, 1999; UN Committee on the Rights of the Child, Concluding Observations: Norway, CRC/C/15/Add.126, 2000a.

229 *Kindergarten Act*, 2005.

230 *Children's Act*, 1981, amended 2010.

231 Norway, Fourth State Party report, CRC/C/NOR/4, 2009. Section 30 of the Act states that the child must not be subjected to violence or in any other way be treated so as to harm or endanger his or her mental or physical health, while Section 31 requires parents and others involved in the child's life to listen to the child's opinion before making a decision on matters affecting them.

case law, child welfare law and adoption law also give children the right to express themselves in cases that concern them.²³² In 1989, the Government adopted national policy guidelines pursuant to the *Planning and Building Act*, giving municipalities the responsibility to give children the opportunity to express their views. This has been made statutory by an amendment of the *Planning and Building Act* (as amended 2008), which obliges municipalities to give children and young people the opportunity to participate in all planning processes. Students' participation is anchored in the *Education Act*, which provides for student councils and school environment committees.

In 2007, the Norwegian Government commissioned a study, called the *Søvig Report*, to examine whether Norwegian legislation satisfies the requirements of the CRC in the relevant areas.²³³ Interviewees indicated that the *Søvig Report* has been influential in bringing Norwegian law closer to the requirements of the CRC. Kjørholt argues that, since ratifying the CRC, discourses on children's participation have had a particular impact on the development of legislation and policy.²³⁴ Many interviewees confirmed that the incorporation of Article 12, particularly in sectoral laws in areas of child protection and welfare and parental responsibility/separation, had resulted in greater visibility of children in legal proceedings in these areas. No doubt the frequency with which children's views in these areas are heard has increased. Similarly, Article 3 has been incorporated into many sectoral laws, including in sensitive areas like immigration law, and has resulted in children's interests now being increasingly taken into account. Articles 3 and 12 are now well represented in Norwegian's sectoral laws, a process that has stemmed directly from the decision in 2003 to incorporate the CRC.

Some interviewees were critical about the extent to which Norwegian child law is genuinely focused on and informed by the rights of the child. Concern was expressed at the absence of a rights basis in the *Child Welfare Act*, for example. More generally, although the CRC's general principles are well represented in Norwegian law, some interviewees noted that less attention has been paid to the remainder of the CRC's provisions.

4.5.3 Non-legal measures of implementation

Norway's most recent State Party report indicates that a number of actions were taken to improve coordination and monitoring of the CRC, including: quarterly ministerial meetings; a dialogue forum between youth representatives and the Minister for Children, Equality and Social Inclusion; and "information and competence-development activities" on children's rights.²³⁵ Interviewees also recalled that government departments take note of the CRC in revising the relevant law and policy, although nothing systematic is in place to ensure that this happens. Interviewees also expressed concern at the lack of measures available to ensure the enforcement of children's rights and to ensure that the good laws now in place are effectively translated into practice. The absence of child-specific complaints mechanisms was highlighted by some interviewees as a particular concern. Few avenues are available to children seeking to complain about breaches of rights. The Ombudsman for Children cannot receive complaints from children and, although there is a

²³² Norway, 2009.

²³³ Not available in English.

²³⁴ Kjørholt, A. T., 'Rethinking young children's rights to participation in diverse cultural contexts', in Kernan, M., Singer, E. and Swinnen, R. (eds.), *Peer relationships in early childhood education and care*, Routledge, Oxon, 2010.

²³⁵ Norway, 2009.

remedy available (for all) at local level, this is not easily accessed by children. Although interviewees highlighted the Ombudsman for Children as an excellent watchdog, they considered that Norway had inadequate supervisory mechanisms to ensure that practice (as opposed to law) was compliant with the CRC. Overall, the view expressed was that whilst incorporation and transformation had achieved good laws that were compliant with the CRC, (or at least with Articles 3 and 12), enforcement remains weak in the absence of effective monitoring, supervision and complaints mechanisms.

Interviewees noted that improved professional competence in children's rights has resulted from the training provided to lawyers and judges and, in turn, has led to increased use of the CRC in the courts in terms of both the quality and quantity of cases taken on behalf of children. At the same time, most litigation concerns Article 3, rather than the remainder of the CRC's provisions. Some interviewees noted that the view of the Supreme Court in a judgment in 2009 that regard should be given to the General Comments of the UN Committee on the Rights of the Child had a positive effect on the potential for using the CRC in litigation.



The Committee has called upon Norway to strengthen its training activities with professionals and has recommended that comprehensive information about children's rights forms part of the college and university curricula of professionals who work with children, and on all levels of the school curricula.²³⁶ Interviewees noted that there had been good progress in the training of professionals, although few lawyers and no judges have specialised in children's rights. Interviewees commented that professionals working with and for children sometimes struggled to translate the CRC's broad principles into practice. Interviewees noted the absence of guidance and support for decision makers. It was also highlighted that systems need to be put in place to ensure that the weight attached to children's interests and views is more transparent.

Norway has indicated that the CRC is included in the curriculum through Christianity and Religious and Ethical Education (CREE)²³⁷ and Social Studies in primary and lower secondary education, and that training on the CRC for professional groups is ensured through the framework plans for pre-school teachers, generalist teachers and child welfare educationists. It is up to colleges and universities, however, to decide how training is carried out. Nonetheless, there continues to be concern that children do not have sufficient knowledge of the CRC and that government policy documents, reports and judicial decisions do not refer to the CRC's provisions consistently.²³⁸ This was confirmed by interviewees. A survey conducted in 2008 revealed that approximately 56 per cent of children in Norway had heard of the CRC, with variation between municipalities from 43 per cent to 67 per cent.²³⁹ However, many knew little about the subject matter. The knowledge they had often came across as fragmentary. Interviewees expressed different views about children's awareness of their rights, with most of the opinion that awareness of the CRC was low. Around 84 per cent of children felt they had a say in decision-making processes in the home, whilst around 71 per cent felt they had a say in school (varying across municipalities from 50 per cent to 88.2 per cent).

It is clear that Norway has a reasonably good legal framework to implement children's rights, in particular under Articles 3 and 12 of the CRC. A Norwegian study of high court decisions on residence for children found that the wishes of children age 12 and over are considered important in the decisions. Half of children age seven to 11 years expressed their wishes in the judicial decisions. The wishes of children below seven years are seldom expressed in the judicial decisions. However, in only 17 out of a total of 129 cases were the child's wishes the main reason or one of a number of reasons for the outcome. In cases where the child's wishes were the main reason for the decision, the child was age nine years or older.²⁴⁰ Similarly, Skjorten's and Barlindhaug's research on children's participation in decisions relating to shared residence found that the age of the child was critical for the degree of influence both in court decisions and private agreements on residence.²⁴¹ Interviewees confirmed that children are heard more frequently in both custody and child protection cases as a result of the CRC's incorporation and transformation into domestic law.

236 UN Committee on the Rights of the Child, 2000a, paragraph 15.

237 The area of religious education in Norway has attracted particular criticism from NGOs and international human rights bodies. This was also the subject of a case before the European Court of Human Rights (*European Court of Human Rights, Folgerø and others v. Norway*, 15472/02, 2007), which found that religious education in Norwegian schools was in violation of Article 2 of Protocol No. 1 of the European Convention on Human Rights.

238 Ombudsman for Children, Supplementary report to the UN Committee on the Rights of the Child, 2009; UN Committee on the Rights of the Child, 2000.

239 Sandbaek, M. and Einarsson, J.H., *Children and young people report to the UN on their rights*, annexe to Norway's fourth report on the Convention on the Rights of the Child, Norwegian Social Research NOVA Report 2b/2008, 2008.

240 Skjorten, K., *Samlivsbrudd og barnefordeling*, Gyldendal Akademisk, Oslo, 2005; cited in Skjorten, K. and Barlindhaug, R., 'The involvement of children in decisions about shared residence', *International Journal of Law, Policy and the Family*, vol. 21, 2007, pp. 373–385.

241 Skjorten, K. and Barlindhaug, R., 2007. See also Lidén, H. and Rusten, H., 'Asylum, participation and the best interests of the child: new lessons from Norway', *Children and Society*, vol. 21, 2007, pp. 273–283; Larsen, E., 'Help or formality? Children's experiences of participation in home-based child welfare cases: A Norwegian example', *Nordic Social Work Research*, vol. 1, no. 1, 2011, pp. 43–60.



However, some interviewees noted complacency about implementation, in light of the fact that, comparative to many other countries, the rights of children in Norway are well protected. Others distinguished between the rights of the general child population (rights concerning child protection and welfare, parental responsibility and education, for example), which they considered to be well protected, and rights that are particularly crucial to children at the margins of society, which are more difficult to advocate in light of competing public interest concerns. Examples of the latter include the rights of children in the juvenile justice system, especially the absence of separate detention from adults, and children in the asylum process, particularly separated children and those born in Norway to non-national parents.²⁴²

The Norwegian Forum for the Rights of the Child has expressed concern at the practical implementation of children's rights, including interpretations of the best interests of the child and the right of the child to express views.²⁴³ Non governmental organisations have highlighted shortcomings in legislation relating to non discrimination, the child's right to care and protection, and with regard to the stipulations in the *Guardianship Act*.²⁴⁴ An evaluation of the national policy guidelines relating to planning highlighted that, whilst children's needs and interests are on the agenda in many municipalities, they often lose out when in conflict with other interests.²⁴⁵ Interviewees also highlighted the failure to implement children's rights at local level, thus drawing attention to regional and urban/rural variations. The Committee has recommended that Norway monitors implementation across the country.²⁴⁶

4.5.4 Summary

Norway is a good example of a country that appears to have taken a proactive approach to complying with its obligations under the CRC, both through its incorporation and through transformation of the CRC into domestic law by way of legislative developments and amendments to sectoral laws. Proposals to incorporate some children's rights into the Constitution are under consideration. From a legal perspective, therefore, Norway has made considerable advances, especially in the integration of Articles 3 and 12 of the CRC into national law. Interviewees noted that this has had a clear impact on the treatment of children in practice, notably in the areas of child protection and family. Progress has also been made in the involvement of children in municipal decision making, and in the incorporation of Article 3 into immigration decision making. Incorporation and training for lawyers has led to increased use of the CRC in litigation.

Gaps in available mechanisms to enforce, supervise and monitor implementation remain, however. Concerns exist for the treatment of children at the margins of society, particularly in juvenile justice and in the asylum process. More generally, there remains some concern at the extent to which the CRC (as opposed to its general principles) and a child-rights approach has been incorporated into domestic law and practice.

²⁴² Progress in the latter area was associated with the judgment in European Court of Human Rights, *Nunez v. Norway*, 55597/09, 2011, where the Court addressed compliance with Article 3 of the CRC.

²⁴³ Norwegian Forum for the Convention on the Rights of the Child, Supplementary Report 2009 to Norway's fourth Report to the UN Committee on the Rights of the Child, 2009.

²⁴⁴ Norwegian Forum for the Convention on the Rights of the Child, 2009.

²⁴⁵ Norway, 2009.

²⁴⁶ UN Committee on the Rights of the Child, 2000, paragraph 11.

4.6 Spain



4.6.1 Context

In 2010, the population of children (0–18 years) in Spain was 8,189,000, about 18 per cent of the total population.²⁴⁷ The number of newcomer children in 2010 was 971,479, approximately 13.5 per cent of the total children's population.²⁴⁸ Spain is a constitutional monarchy with the King as head of State, an appointed Prime Minister as head of Government, and a Council of Ministers. Mariano Rajoy of the People's Party (Partido Popular or PP) became Prime Minister following the 2011 General Election. The 1978 Constitution recognises the right of the regions of Spain to self-govern. As a result, Spain is highly decentralised and each of its 17 autonomous communities elects its own parliament and government. Health and education systems are also managed regionally. Spain has a civil law system.

The CRC has formed part of domestic law since its ratification in 1990, and prevails over other legislation. The CRC can also be invoked directly before the Constitutional and Supreme Courts. Whilst civil and criminal law are largely subject to national jurisdiction, autonomous communities of Spain are able to legislate in certain matters and, as such, provisions concerning children can vary.

Spain's most recent State Party report notes that there has been a growth in expenditure across all policy areas relating to children. Between 2002 and 2006, budgetary allocation increased by 72.3 per cent in education and by 23.2 per cent in health.²⁴⁹ In spite of this, Spain's performance in reading declined during this period.²⁵⁰ Moreover, the number of children living in relative poverty increased from 12.3 per cent in 2000, to 17.1 per cent in 2009.^{251 252}

4.6.2 Implementation in law

The Constitution

Significantly, Article 39(4) of the 1978 Constitution establishes that "children shall enjoy the protection provided for in the international agreements safeguarding their rights." This provision, which preceded the ratification of the CRC, was identified by several interviewees as an indication of Spain's recognition of the role and importance of children in building the new democracy after 1975. One interviewee suggested that the provision foresaw the introduction of the CRC and thus established a prior commitment to its incorporation. Elsewhere in the Constitution, Article 20, which establishes freedom of expression, stipulates the protection of children as a limit to the exercise of this right. Article 39 establishes protection for the child within the family, while Article 27 recognises the right of all children to education. Interviewees identified the constitutional provisions (and subsequent domestic law discussed below) as having an impact on how children are viewed in Spain and, in particular, on encouraging greater recognition of children as the subject of rights. Whilst most interviewees queried the extent to which the CRC is implemented in practice (it was summarised by one as having "high consensus but low commitment"), all identified the incorporation of the CRC through Article 39(4) as important for a variety of reasons, one of which was that it sent an important message about the status of children and provided a "red line" that could not be overstepped.

KEY POINTS

- The commitment to children in Article 39(4) of the Spanish Constitution paved the way for future incorporation of the CRC
- The CRC forms part of domestic law
- The Organic Law on the Legal Protection of Children and Young People 1996 establishes the legal rights of children and young people in national law in accordance with the CRC, and has been identified as a landmark piece of legislation
- The *Protection of Minors Act* enshrines the right of children to submit complaints to the Office of the Ombudsman
- The CRC has been increasingly applied by the Spanish Constitutional and Supreme Courts
- An ongoing issue remains in ensuring consistency in law and practice across the 17 autonomous communities.

247 United Nations Children's Fund, 2012a.

248 UNICEF Spain, *Childhood in Spain 2010–2011*, UNICEF Spain, Madrid, 2011.

249 UNICEF Spain, 2011, paragraph 18.

250 OECD, 2010.

251 United Nations Children's Fund, 2012b.

252 United Nations Children's Fund, 2012b.

Article 39(4) of the 1978 Constitution establishes that “children shall enjoy the protection provided for in the international agreements safeguarding their rights”.

Integration into domestic legislation

The Organic Law on the Legal Protection of Children and Young People, adopted by Spain in 1996, establishes the legal rights of children in national law in accordance with the CRC. Part 2 of the Act enshrines a number of civil rights for children including:

- the right to freedom of thought, conscience and religion (Article 4)
- the right to information (Article 5)
- the right to freedom of assembly (Article 7)
- the right to freedom of expression (Article 8)
- the right to be heard within the family and in administrative and judicial proceedings (Article 9).

Among the guiding principles of the public authorities, the Act also includes “primacy of the best interests of the child” (Article 11), and addresses the rights of children at risk or in need of protection, as well as regulating adoption procedures (Article 12–25).

Although the preceding legislation in 1987 had included aspects of child rights, such as a best interests principle, the 1996 Organic Law was identified as a landmark piece of legislation in terms of implementation and was one in which there was obvious pride from politicians and others. Most interviewees, however, questioned the extent to which this framework for child rights was, firstly, understood and secondly, implemented further in legislation and in practice in the 17 autonomous regions. One interviewee suggested that there was a need for a further “*reglamento*” that would enable the Organic Law to be enforced by individuals centrally and would not be dependent on implementation within the autonomous communities. However, others accepted that the Organic Law provides a framework of child rights that the autonomous communities are expected to implement in their areas of competence, which include health, education and social care.

Organic Law No. 5/2000, *Organic Law on Minors’ Criminal Responsibility*, outlines Spain’s juvenile justice procedures and regulations and, for instance, gives primacy to the best interests principle.²⁵³ Several interviewees identified this law as another

²⁵³ Organic Law on Minors’ Criminal Responsibility, 5/2000, 2000, available at <http://bit.ly/POfgwR>, accessed 16 October 2012.





example of an area whereby law had been influenced by the CRC and one in which Spain was doing well in terms of children's rights. Some suggested that, for instance, youth detention facilities were generally focused on rehabilitation and education, and that there was a low rate of recidivism as a result. One suggested that the contrast between these and the provision for others, such as migrants and unaccompanied minors, meant that there was a perverse incentive to commit crime to access the superior provision.²⁵⁴ Concern was, however, expressed that there had been a retreat from the child-centred approach in a more recent amendment to the law (Organic Law no. 8/2006) and that this has enabled more punitive measures, as well as the trial of children along with adults using adult procedures when crimes have been committed jointly.

Spain has a number of other examples of the integration of the CRC into more recent domestic legislation. Organic Law No. 2/2006 on education, for example, enshrines Article 29 of the CRC, and Law No. 54/2007 of International Adoption modified Article 154 of the Civil Code to abolish the possibility of physical punishment of children. Organic Law 2/2009 (amending Organic Law 5/2000 of the Rights of Immigrants) and Royal Decree 557/2011 introduce the best interests principle for non-accompanied immigrant children and guarantee the right to be informed and heard. The UN Committee on the Rights of the Child has welcomed these legislative developments, but it has also expressed concern at the variations in legislation between autonomous communities and the

254 A 2010 complaint to the Ombudsman for Spain was supportive of this, requiring an administrative authority to ensure that the provision made for a boy whose criminal activity had stemmed from behavioural difficulties was appropriate to his needs. It was considered unacceptable that he had been assigned to inappropriate courses on drug use etc. See Spanish Ombudsman, Annual report, 2011, available at www.theioi.org/n/3cdhj, accessed 16 October 2012.

central Government (UN Committee, 2010). Likewise, a key issue identified by interviewees was the extent to which the provisions in the organic laws were then implemented in the law of the 17 autonomous communities. Interviewees identified several examples of areas where provisions in the CRC did not align, for example, several instances were cited where children's protection stopped before 18 years, with culture sometimes being cited as a justification for differential protection. Several interviewees pointed out that the implementation of children's participation rights in Article 12 is particularly poor. However, there does not appear to be a systematic mapping of the implementation of the CRC in the legislation of the autonomous communities and it was thought that practice varies widely. It was suggested that some communities were more likely than others to adopt a child rights-based approach. The new Catalan Law 14/2010 of children's and adolescents' rights and opportunities, for example, is grounded in the CRC and outlines the best interests principle and the right to be heard.²⁵⁵

The UN Committee on the Rights of the Child has commended the integration of CRC principles in legislative reforms in its last two sets of concluding observations.²⁵⁶ These developments have been supplemented by a *National Strategic Plan for Children and Adolescents 2006–2009*, the first of which was developed in 2006. The aim of this Plan was to promote joint working between public and private agencies as a means of enhancing children's rights. The Plan itself is based explicitly on the CRC and was a direct response to the Committee's 2002 Concluding Observations. However, the plan finished in 2009, and its successor is still under discussion. Moreover, it is not clear whether or not children and young people were directly involved in these developments. Most of the 17 autonomous regions also have strategic plans for children, but interviewees suggested that these varied considerably between regions in terms of their scope, depth and attention to child rights. Interviewees also highlighted the value of various events (such as cross-regional seminars and a visit by three members of the Committee on the Rights of the Child) as having a valuable role in increasing awareness of the CRC and in reinforcing the responsibility to implement at all levels of government.

The CRC has been increasingly applied by the Spanish Constitutional and Supreme Courts directly and/or through the interpretation of regional or national legislation.²⁵⁷ Interviewees suggested that judges were likely to refer to the CRC, but do so as an afterthought, therefore justifying the approach taken in the case in domestic law rather than employing CRC principles as an integral part of the decision. This was linked to a lack of awareness of the CRC. In a similar vein, non governmental organisations have previously expressed concern that knowledge of the CRC at judicial level is not sufficient, and that, even where there is awareness, it is not always recognised as legally binding.²⁵⁸

255 *Law on the Rights and Opportunities of Childhood and Adolescence*, 14/2010, 2010. Available at <http://bit.ly/POgb0y>, accessed 16 October, 2012.

256 UN Committee on the Rights of the Child, Concluding Observations: Spain, CRC/C/ESP/CO/3–4, 2010; UN Committee on the Rights of the Child, Concluding Observations: Spain, CRC/C/15/Add.185, 2002.

257 The 2010 State Party report detail the decisions of the Supreme Court that have used the CRC. For example, in the Supreme Court, Sentence 670/2004 of 12 July expressly mentions the CRC, stipulating that in the case of parental custody the best interests of the child need to be protected. In Sentence 653/2004 of 12 July, the Court drew on Article 9 (3) of the CRC to argue in favour of the right of the parents that do not exercise parental custody to continue maintaining relations with their children. In Sentence 903/2005 of 21 November, the Court argued that visitation rights should be subordinate to the interest and benefit of the young person, which is clearly expressed in Articles 3 (1) and 9 of the CRC. In Sentence 601/2004 of 25 June, in a case concerning the scientific testing of paternity, it was noted that the right of personal identity is proclaimed in Articles 7 and 8, and argued that the determination of affiliation/paternity is an element of the identity of the child. In Sentence 153/2005 of 6 June, the Constitutional Court explicitly refers to Article 40 (2) (b) (iii) of the CRC, citing its text as a norm recognising the fundamental right of all children accused of breaking the law to have a process without undue delay, ensuring that "the matter [will be] determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law."

258 Platform of Children's Organisations, Complementary report to the III and IV report on the implementation of the Convention on the Rights of the Child in Spain, 2010; Platform of Children's Organisations, Additional report to the second report submitted by Spain to the UN Committee on the Rights of the Child about the implementation of the UN Convention on the Rights of the Child, 2002.

259 *Organic Law on the Legal Protection of Minors*, 1/1996, 1996.

260 *Organic Law on the Legal Protection of Minors*, 1996, Article 10 (2).

261 Spain, Second State Party report to the UN Committee on the Rights of the

4.6.3 Non-legal measures of implementation

The *Protection of Minors Act 1/1996*²⁵⁹ enshrines the right of children to submit complaints to the Office of the Ombudsman for Spain, which must provide an official in charge of children's issues.²⁶⁰ The Office does not approach its work on children as a distinct entity but will examine child rights issues under its core themes, which include, for example, discrimination. Many of the autonomous communities have established Offices of the Ombudsperson for Children, although some of these (such as the office in Madrid) risk closure as a result of the financial crisis.

With respect to awareness and training, Spain has recognised in previous State Party reports²⁶¹ the need to take further action, and indeed appears to have developed a range of initiatives to bolster awareness of the CRC amongst professionals, parents and children.²⁶² These include:

- incorporating children's rights in the curricula of initial training courses for professionals working with and for children
- providing the text of the CRC to all schools, including child-friendly versions
- raising awareness among families
- the development of web pages on children's rights and children's issues
- the development of educational tools.

A research study of two regions – one in Spain (Catalonia) and one in Italy (Il Molise) – found that 69 per cent of children age 10–13 years in Catalonia were aware of the rights of children, compared to 89 per cent of children in Il Molise.²⁶³ It is not clear the extent to which children's rights form an explicit part of the curriculum in schools. *Royal Decree No. 1513/2006* and *Royal Decree No. 1631/2006* provide that education for citizenship and human rights should ensure that students also learn about the CRC as part of a broader human rights programme. However, non governmental organisations continue to highlight insufficient knowledge about the CRC amongst the general population, professionals, and children and young people in particular.²⁶⁴ In a Spanish national representative survey of children in the first year of secondary compulsory education, which mainly involved children age 11–12 years, only 41.8 per cent reported that they had heard of the CRC.²⁶⁵ Educational data suggest that the number of students who felt that teachers listened to what they had to say increased by approximately 4 per cent between 2000 and 2009.²⁶⁶

Concern was expressed about the lack of systematic and reliable data on children across the 17 regions. The central Government publishes an annual review on the state of childhood,²⁶⁷ which provides general data on children in Spain, along with data concerning their physical environment, health, education, social protection and poverty, social participation, access to information, child protection, foreign children in Spain, and gender. The central Government collates basic aggregated data from the 17 communities: however, several interviewees suggested that there was a significant variation in practice across regions, which makes it difficult to assess truly what was happening in Spain as a whole. One interviewee also considered that there was a need for proper evaluation of the various interventions that had been put in place as a result of the increased social investment in children.

Child, CRC/C/70/Add.9, 2001; Spain, Initial State Party report to the UN Committee on the Rights of the Child, CRC/C/Add/8, 1993.

262 Spain, Third and fourth State Party report, CRC/C/ESP/3–4, 2010.

263 Casas, F., Saporiti, A. et al. 'Children's rights from the point of view of children, their parents and their teachers: a comparative study between Catalonia (Spain) and Il Molise (Italy)', *The International Journal of Children's Rights*, vol. 14, 2006 pp. 1–75.

264 Platform of Children's Organisations, 2002; Platform of Children's Organisations, 2010.

265 Casas, F. and Bello, A., *Quality of Life and Child Well-being in Spain*, UNICEF Spain, Madrid, 2012.

266 OECD, 2010.

267 Government of Spain, *Childhood in Figures 2009*, Universidad Complutense Madrid, Madrid, 2011, available at <http://bit.ly/UEltsy>, accessed 17 October 2011.



In its most recent State Party report to the UN Committee on the Rights of the Child, Spain highlighted that the central Government's total budget for children increased by 33.9 per cent between 2002 and 2006, and 15.5 per cent from 2006 to 2007, whilst the budget allocated to children and young people by the autonomous communities of Spain grew by 68.7 per cent between 2002 and 2006, and by 8.8 per cent from 2006 to 2007. Many interviewees accepted that there had been a recognisable increase in the level of investment for children, but several pointed out that:

- there was a very low base to start with
- it was difficult to track what was being spent on whom, especially across the 17 autonomous communities
- it was difficult to separate public and private provision
- the investment has been connected to a period of economic growth and is now under threat due to the financial crisis in Spain.

Non governmental organisations have also expressed concern at the decline in funding following 2006 and then the dramatic decline since 2010. After the 2010 crisis deepened, one of the first steps of reduction in public spending was the elimination of universal aid to families with children, adopted by *Law 35/2007*, which was known as "the 2,500 Euros".²⁶⁸ Furthermore, the autonomous communities have seen a reduction in public spending on education, social services, and aid to families and children.²⁶⁹ In addition, they have highlighted concerns at the disparities in levels of resourcing across the autonomous communities, and at the potential inequalities that can follow.²⁷⁰ Across the interviews, children from migrant communities and unaccompanied minors were identified as being particularly poorly served in law, policy and service provision.

4.6.4 Summary

Generally, Spain has achieved a great deal in terms of the implementation of the CRC in law. The foresighted commitment to children in Article 39(4) of the Constitution paved the way for ground-breaking Organic Laws and these, in turn, have provided a framework and key reference points for implementation at a regional level in the autonomous communities. Interviewees regularly identified the fact that children are now seen as the "subject of rights". However, a significant and on-going issue for Spain appears to be ensuring consistency in law and practice across the 17 autonomous communities. Whilst it was recognised that the freedom to respond to local issues and needs was valuable, interviewees identified a requirement for the central Government to take a more active role in ensuring that the State's commitments to the CRC were being implemented at the level of the autonomous communities. The need for greater coordination and communication across the autonomous communities was seen as important in order for this to happen. In addition, there was general recognition that it was essential to have improved data on childhood and greater awareness and understanding of the CRC among professionals who work with children.

²⁶⁸ UNICEF Spain, *Childhood in Spain 2012–2013: The impact of the crisis on children*, UNICEF Spain, Madrid, 2012.

²⁶⁹ UNICEF Spain, 2012.

²⁷⁰ Platform of Children's Organisations, 2010; Spain, 2010.

5. Secondary analysis of six countries

Here, the research team discusses the desk-based analysis of six countries as part of this research report: Canada, Denmark, Iceland, New Zealand, South Africa and Sweden.

Each country study is structured as such:

- Key points
- Context
- Implementation in law
- Non-legal measures of implementation
- Summary



KEY POINTS

- The CRC does not form part of domestic law
- There is no comprehensive law or policy for children, but some steps have been taken at federal and provincial level to bring particular laws into line with the CRC
- The Canadian Standing Senate Committee on Human Rights has made a number of proposals to enhance Canada's implementation of the CRC
- The CRC is increasingly, but selectively, being taken into account in Canadian jurisprudence.

5.1 Canada



5.1.1 Context

In 2010, the population of children (0–18 years) in Canada was 6,920,000, about 20 per cent of the total population.²⁷¹ Canada is a constitutional, parliamentary monarchy. The Prime Minister is head of Government, whilst the Parliament of Canada consists of the Senate and House of Commons, presided by the Governor-General, who represents the Monarch. The Federal State of Canada comprises 10 Provinces and three northern Territories. Canada has a common law system and the CRC is not incorporated into the Canadian legal framework. The respective competences of the Federal and Provincial/Territorial Governments are defined mainly by the *Constitution Acts of 1867 and 1982*. The Federal Government has jurisdiction in, amongst others, foreign affairs, defence, citizenship and immigration, criminal law, divorce, and Aboriginal persons. The Provinces are largely responsible for health care, education, child welfare, most family law, including adoption, and the administration of justice. Québec has been recognised by the Parliament as a nation within a nation, due to its unique culture and civil law tradition. In its first State Party report to the UN Committee on the Rights of the Child, Canada stated that “it is expected that the present CRC will be taken into account in determining the ambit of children’s rights in Canada, whether found in the Charter, the common law or relevant legislation.”²⁷² The current Prime Minister of Canada is Stephen Harper of the Conservative Party. The Conservative Party, the Liberal Party and the New Democratic Party are the dominant federal political parties.

The percentage of 15–19 year olds not in education or employment increased from 14.3 per cent in 2003 to 15.2 per cent in 2009.²⁷³ However, the number of children living in relative poverty decreased from 15.5 per cent in 2000 to 13.3 per cent in 2009.²⁷⁴ Nevertheless, Canada remained in the bottom half of the table for the 24 countries.²⁷⁵ Educational data suggest that the number of students who felt that teachers listened to what they had to say increased by approximately 3 per cent between 2000 and 2009.²⁷⁶

5.1.2. Implementation in law

The Constitution

Canada ratified the CRC on the basis that its implementation would be assisted by the *Canadian Charter of Rights and Freedoms*.²⁷⁷ However, the Constitution makes no explicit reference to children other than with respect to minority language education rights. The CRC is increasingly, albeit selectively, being taken into account in Canadian jurisprudence.²⁷⁸ In the landmark case of *Baker v Canada (Minister of Citizenship and Immigration)*,²⁷⁹ the Supreme Court considered whether international treaties ratified by Canada but not incorporated could be interpreted and applied in legal disputes. In its judgment, the Court held that the CRC was not binding in Canadian law but that the “values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review”.²⁸⁰ Application of the CRC, however, has not always resulted in positive gains for children. In *Canadian Foundation for Children, Youth and the Law v. Canada*²⁸¹,

271 United Nations Children’s Fund, 2012a.

272 Canada, Initial State Party report, CRC/C/11/Add.3, 1994, paragraph 28.

273 OECD, 2011.

274 United Nations Children’s Fund, 2012b.

275 United Nations Children’s Fund, 2012b.
276 OECD, 2010.

277 *Constitution Act*, 1982.

278 See for example Federal Court of Canada, *Munar v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180, 2006, paragraph 34; Federal Court of Canada, *Sahota v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 123, 2008 paragraph 21; *Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 189, 2010, paragraph 22; Supreme Court of Canada, *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, 2004.

279 Supreme Court of Canada, *Baker v. Canada (Minister of Citizenship and Immigration)*, 2 S.C.R. 817, 1999.

280 Supreme Court of Canada, 1999, paragraph 70.

281 Supreme Court of Canada, 2004.



for example, the Supreme Court of Canada (by a 6 to 3 margin) upheld the constitutionality of Section 43 of the *Criminal Code of Canada*, which provides parents with a defence for assaulting children, providing the force is applied for purposes of correction and is reasonable under the circumstances. The majority of the Supreme Court deemed the law to be in conformity with Canada's international legal obligations because "neither the [CRC] nor the International Covenant on Civil and Political Rights explicitly require States Parties to ban all corporal punishment of children."²⁸² The Court ruled that there were no violations of various provisions of the Canadian Charter of Rights and Freedoms.²⁸³ In particular, the Court rejected the argument under Section 7 of the Charter, stating that the "best interests of the child" is a principle of fundamental justice, as there is no "consensus that it is vital or fundamental to our societal notion of justice." In addition, in considering Section 15 of the Charter, which is the equality guarantee that protects individuals from various forms of discrimination including on the basis of age, the Court determined that any analysis must take place from the perspective of "a reasonable person acting on behalf of a child", rather than from the viewpoint of the child. On the other hand, in a recent non-binding decision of the British Columbia Supreme Court in reference to Section 293 of the *Criminal Code of Canada*²⁸⁴, the Court upheld the constitutionality of the polygamy offence and gave high priority to children's right to protection from harm, whilst drawing strong links between rights under the Charter and under the

282 Supreme Court of Canada, 2004, paragraph 33. See also Sykes, K, 'Bambi meets Godzilla: children's and parents' rights in Canadian Foundation for Children, Youth and the Law v. Canada', *McGill Law Journal*, vol. 51, 2006, p. 131; McGillivray, A., 'Children's rights, paternal power and fiduciary duty: from roman law to the Supreme Court of Canada', *International Journal of Children's Rights*, vol. 19, 2011, pp. 21–54.

283 Supreme Court of Canada, 2004, sections 7, 12 and 15.

284 British Columbia Supreme Court, BCSC 1588, 2011.

**At provincial level,
the CRC has been
integrated or taken
account of in legislation
to varying degrees.**

CRC. In his analysis of the claim that the polygamy offence provision breaches the Charter, Chief Justice Bauman specifically refers to the rights of women and children to be free from physical, psychological, economic, social and legal harms that are also enshrined in various Charter provisions.²⁸⁵

Integration into domestic legislation and supplementary measures

There is no comprehensive law or policy for children in federal or provincial jurisdictions, and Canada has not taken steps to make the CRC as a whole part of Canadian law. Some steps have been taken at both federal and provincial level to bring particular laws into line with the CRC. The CRC has, for example, been specifically considered in federal legislative developments in child prostitution, child sex tourism, criminal harassment and female genital mutilation, as well as youth justice.²⁸⁶ The general principles of non discrimination and best interests of the child have been integrated to varying degrees through specific legislation; for example, in refugee determination. At the same time, a resolution called Jordan's Principle, passed by Parliament in 2009, has not been fully implemented and has only been partially translated into policies in the various jurisdictions, which are intended to promote priority consideration to the best interests of Aboriginal children caught in federal/provincial jurisdictional disputes over funding services for Aboriginal children.²⁸⁷

Respect for children's rights has also been selectively enshrined in federal legislation relating to citizenship and immigration. At provincial level, the State Party reports indicate that the CRC has been integrated or has been taken account of in legislation to varying degrees. The principle of best interests, for example, has been integrated in legislation relating to *Child Protection Act* (Prince Edward Island) and *Child and Family Services Acts* (Newfoundland and Labrador, Manitoba, and Saskatchewan), whilst the right to appeal decisions has been included in the *Family Support for Children with Disabilities Act* in Alberta. In British Columbia, legislation requires that students are consulted when establishing Codes of Conduct in schools.²⁸⁸ In New Brunswick, the Preamble of the *Family Services Act* (as amended June 2011) acknowledges the rights of children, including the right to participate. While in Alberta, the local authority of Edmonton developed a child impact assessment tool for examining the impact of programmes and policies on children and young people. The latter is not driven by legislation. Canada's current State Party report to the UN Committee on the Rights of the Child highlights that when legislative measures are being developed in Québec, the memorandum accompanying a bill must include a section that outlines the projected impact of such measures on young people, including the best interests principle.²⁸⁹

4.1.3 Non-legal measures of implementation

In 2004, Canada produced a National Plan of Action entitled *A Canada Fit for Children*. This was developed in response to the 2002 UN Special Session on Children and is linked to *A World Fit for Children*. It affirms Canada's obligation to "promote and protect the human rights of all children" and is underpinned by the CRC. The

285 Supreme Court of Canada, 2004, Sections 7, 15 and 28.

286 Canada, Second State Party report to the UN Committee on the Rights of the Child, CRC/C/83/Add.6, 2003; UNICEF Canada and the UNICEF Innocenti Research Centre, *Not There Yet: Canada's implementation of the general measures of the Convention on the Rights of the Child*, UNICEF Innocenti Research Centre, Florence, 2009.

287 Canadian Coalition for the Rights of Children, 'Right in principle, rights in practice', Alternative report to the Committee on the Rights of the Child, 2011.

288 Canada, Third and fourth State Party reports to the UN Committee on the Rights of the Child, 2012.

289 Canada, 2012, paragraph 314.

Plan, however, did not have targets or implementation procedures, and is not currently used in any discernible way in order to guide policy or programmes. Whilst the National Plan of Action was generally welcomed, there has been concern that it has had little marked impact on federal and provincial policy and practice, and that it has not been accompanied by the necessary resources.²⁹⁰

There is no Commissioner or Ombudsperson for Children at federal level, but a number of Provinces, including Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Ontario, Saskatchewan, and the Yukon Territory have established Child and Youth Advocates.²⁹¹ Furthermore, the Province of Nova Scotia has set up the Youth Services Section of the Nova Scotia Office of the Ombudsman, and Québec has the Québec Commission des droits de la personne et des droits de la jeunesse. In 2009, a private members bill to establish a National Children's Commissioner was introduced in the House of Commons, but drew to a halt when the General Election was called.

Non governmental organisation reports to the UN Committee on the Rights of the Child indicate that there is a lack of systematic children's rights education in schools. The Canadian Coalition for the Rights of Children (CCRC) highlights a study, commissioned in 2006 by War Child Canada, that found that adults are more likely than children to report awareness of the CRC (55 per cent compared to 33 per cent).²⁹² There have been some positive developments at provincial level. Nova Scotia, for example, has integrated children's rights education into schools as part of the health and social studies curriculum from kindergarten up to Grade 6.²⁹³ The Children's Rights Centre at Cape Breton University and, more generally, the UNICEF Canada Rights Respecting Schools initiative have also developed children's rights education programmes in Nova Scotia. The CCRC alternative report also notes that there has been a decline in the use of the language of children's rights in government documents that have direct relation to the CRC.

The scale of the Canadian federal system has posed significant challenges in achieving cooperation and coherence between jurisdictions in the implementation of the CRC through legislative reform and the ongoing monitoring of such implementation. The UN Committee on the Rights of the Child has expressed concern that "this may lead, in some instances, to situations where the minimum standards of the CRC are not applied to all children owing to differences at the provincial and territorial level."²⁹⁴

Non governmental organisations and academics have expressed significant concerns about the inadequacy of Canada's current approach to implementing the CRC.²⁹⁵ The Canadian Standing Senate Committee on Human Rights is particularly concerned,²⁹⁶ concluding in 2007 that the CRC "is not solidly embedded in Canadian law, in policy, or in the national psyche ... Canadians are too often unaware of the rights enshrined in the CRC, while governments and courts use it only as a strongly-worded guiding principle with which they attempt to ensure that laws conform, rather than acting as if they are bound by it."²⁹⁷

The scale of the Canadian federal system has posed significant challenges in achieving cooperation and coherence between jurisdictions in the implementation of the CRC through legislative reform and the ongoing monitoring of such implementation.

290 Canadian Coalition for the Rights of Children, 2011.

291 The titles of such offices vary, including for example the Representative for Children and Youth in the province of British Columbia.

292 Canadian Coalition for the Rights of Children, 2011, p. 22.

293 Canada, 2003, paragraph 1338.

294 UN Committee on the Rights of the Child, Concluding Observations: Canada CRC/C/15/Add.215, 2003b, paragraph 8.

295 Canadian Coalition for the Rights of Children, 2011; World Vision Canada, 'Legislative measures for the implementation of the Convention on the Rights of the Child', Companion paper to World Vision Canada's second submission to the Standing Senate Committee on Human Rights, 2006; Denov, M., 'Children's rights or rhetoric? Assessing Canada's Youth Criminal Justice Act and its compliance with the UN Convention on the Rights of the Child', *International Journal of Children's Rights*, vol. 12, 2004, pp. 1–20; Covell, K. and Howe, B., *The Challenge of Children's Rights for Canada*, Wilfrid Laurier University Press, Waterloo, 2001; Covell, K. and Howe, B., *A Question of Commitment: Children's Rights in Canada*, Wilfrid Laurier University Press, Waterloo, 2007.

296 Standing Senate Committee on Human Rights 'Who's in charge here? Effective implementation of Canada's international obligations with respect to the rights of children', *Interim report of the Standing Senate Committee on Human Rights*, 2005; Standing Senate Committee on Human Rights, 'Children: The silenced citizens: Effective implementation of Canada's international obligations with respect to the rights of children', *Final report of the Standing Senate Committee on Human Rights*, 2007.

297 Standing Senate Committee on Human Rights, 2007.

The Canadian Standing Senate Committee on Human Rights outlined a number of proposals to enhance Canada's implementation of the CRC, including tabling of a *Declaration of Intent to Comply and developing transparent and inclusive consultative processes*. In 2009, UNICEF Canada recommended that Canada pass enabling legislation to make the CRC part of Canadian law and to ensure that all legislation complies with the CRC. It also recommended that:

- legislation be supplemented by Child Impact Assessments of proposed legislation, policies, budgets and programmes at federal and provincial levels
- a children's budget should be established
- implementation of the CRC be monitored by developing regular public report.



5.2 Denmark

5.2.1 Context



In 2010, the population of children (0–18 years) in Denmark was 1,214,000, approximately 22 per cent of the total population.²⁹⁸ The Kingdom of Denmark is a democratic, constitutional monarchy. Legislative power is vested in both the Government and the Folketinget (Parliament). Denmark has a multi-party structure and governments are often characterised by minority administrations, aided by one or more supporting parties. Since 1909, no single party has held a majority in Parliament. Helle Thorning-Schmidt of the Social Democrats became Prime Minister in the 2011 election. The current Coalition Government comprises the Social Democrats (Socialdemokraterne), the Social Liberal Party (Radikale Venstre) and the Socialist People's Party (Socialistisk Folkeparti), based on the support of the Red–Green Alliance (Enhedslisten), and a handful of independent members of Parliament. Denmark has a civil law system, however the CRC is not part of domestic law. Nonetheless, Danish courts must consider all binding international conventions, including the CRC, where there is an apparent conflict with relevant national law. When reviewing such conflicts, two unwritten principles apply. First the courts will adopt the interpretation of national law that is most consistent with Denmark's international obligations. Second judicial authorities will act on the assumption that Parliament did not intend to legislate against Denmark's international obligations.²⁹⁹

The number of children living in relative poverty fell from 5.1 per cent in 2000 (ranked 6 out of 23 countries) to 2.4 per cent in 2005 (ranked 1 out of 26 countries).³⁰⁰ The percentage of young people not in education, employment or training also fell from 11.8 per cent in 2003 to 9.8 per cent in 2009.³⁰¹ Inequality in Denmark is lower

KEY POINTS

- Denmark has not incorporated the CRC. Courts, however, are required to consider all binding international conventions, including the CRC, where there is an apparent conflict with relevant national law
- Article 3 and Article 12 of the CRC have been integrated into Danish legislation to varying degrees
- Denmark does not have a national plan or cross-sectoral strategy for children, nor does it have an Ombudsman for Children
- The CRC does not appear to be used systematically in Danish courts.

298 United Nations Children's Fund, 2012a.

299 Denmark, Fourth State Party report to the UN Committee on the Rights of the Child, CRC/C/DNK/4, 2010, paragraphs 14–16.

300 United Nations Children's Fund, 2000; United Nations Children's Fund, 2005.



than the Organisation for Economic Cooperation and Development (OECD) average with respect to both material and educational well-being.³⁰² However, public expenditure on education decreased slightly from 8.3 per cent gross of GDP in 2000, to 7.8 per cent of GDP in 2008.³⁰³ From 2003 to 2008, performance in mathematics declined by 11 per cent (but remained slightly above the OECD average).³⁰⁴ Between 2000 and 2009, there was no significant difference in the number of children who felt that teachers listened to what they had to say.³⁰⁵

5.2.2 Implementation in law

Constitution and incorporation

The Constitution of Denmark 1953 contains one specific reference to the rights of the child. Section 76 states that “all children of school age shall be entitled to free instruction in elementary (primary) schools. Where parents provide instruction equal to the elementary school standard, however, they shall not be obliged to have their children taught in such institutions.”

Following a review in 2001, the Danish Government elected not to incorporate the CRC into domestic law. A review of six treaties by the Inter-Ministerial Incorporation Committee, including the CRC, concluded that incorporation of the CRC was not necessary since Danish law was deemed to be in harmony and was already a relevant source of law applied by the Danish courts. Instead, the Inter-Ministerial Incorporation Committee stated that priority for incorporation should be given to the International Covenant on Civil and Political Rights (ICCPR), Convention on the Elimination of All Forms of Racial Discrimination (CERD) and Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) in the first instance.³⁰⁶ It was also stated that “the Incorporation Committee is aware that these circumstances may change over time, so that a sufficient basis for incorporating also this Convention may be established at a later time.”³⁰⁷ Despite continued calls from the National Council for Children and non governmental organisations, the Danish Government stipulated in its 2010 State Party report that incorporation is not necessary. The Ministry of Social Affairs and Integration, however, has informed the Coalition Government that an expert committee would be set up in April 2012 to consider the legal implications of incorporating core UN human rights conventions, such as the CRC. The Coalition is considering whether the Committee should also consider ratification of the Optional Protocol to the CRC on a communications procedure.

Integration into domestic legislation and supplementary measures

Denmark does not have consolidated children’s rights legislation. Rather, provisions are to be found throughout its legislation. The best interests principle is a general principle of Danish criminal justice law and a fundamental principle in family law. The best interests principle is integrated into the *Act on Parental Responsibility*.³⁰⁸ Section 5 of the Act also stipulates that the child’s views must be given due weight in accordance with the age and maturity of the child in all matters affecting them. The *Daycare Act* obliges day care facilities to prepare a “written child environmental impact assessment that

301 OECD, 2011.

302 United Nations Children’s Fund, 2010a.

303 World Bank, 2012.

304 OECD, 2010.

305 OECD, 2010.

306 Denmark, Third State Party report to the UN Committee on the Rights of the Child, CRC/C/129/Add.3, 2005, paragraph 16.

307 Denmark, 2005.

308 *Act on Parental Responsibility*, 499, 2007.



contains a mapping of the facility's physical, mental and aesthetic child environment" and to take children's perspectives into account in its development.³⁰⁹ The *Act on Care Placement Reform*³¹⁰ focuses on integrating the best interests principle and general standards with respect to children and young people in care. In 2002, the *Act on Custody and Access*, which provided for interviews with children over 12 years unless "assumed to be detrimental to the child or without any importance for the decision of the case", was amended to provide that children under 12 years should also be interviewed in proceedings of this kind "where the child's maturity and the general circumstances of the case warrant such an interview".³¹¹ Article 12 of the CRC was cited by the Government as the main reason for this amendment. In 2010, the Children's Reform legislation amended the *Act on Social Services* to provide support to children with "special needs". This included a duty to take children's views into account in the provision of such support, in accordance with their age and maturity. In addition, children covered under the Act are given the right to appeal against all decisions from 12 years. The extent to which Danish legislation explicitly refers to the CRC is less clear.

The CRC does not appear to be used in the courts systematically. The Danish Institute for Human Rights has highlighted that there have been only a limited number of cases in which the CRC has actually been used. The Institute was also only able to find five published court cases from 2005–2010 where the CRC is mentioned.³¹² The limited application of the CRC by judicial and administrative bodies has also been noted by the UN Committee on the Rights of the Child.³¹³

309 *Daycare Act*, 501, 2007, section 12.

310 *Act on Care Placement Reform*, 1442, 2004.

311 UN Committee on the Rights of the Child, Concluding Observations: Denmark, CRC/C/DNK/CO/3, 2005a, paragraph 96.

312 Cases U2010.1599H, U.2010.1590H, U.2009.974H and U.2007.341H of the Supreme Court and case U.2006.2468V of the High Court – see Danish Institute for Human Rights, Parallel report July 2010 to the UN Committee on the Rights of the Child on the 4th Periodic Report by the Government of Denmark on the implementation of the rights of the child, 2010.

313 UN Committee on the Rights of the Child, Concluding Observations: Denmark, CRC/C/DNK/CO/4, 2011a, paragraph 10.

Denmark's National Council for Children is now a fully independent body tasked with monitoring the situation of children.

5.2.3 Non-legal measures of Implementation

Denmark's National Council for Children was first established in 1994, and is now a fully independent body tasked with monitoring the situation of children. The Council is, however, presently unable to receive individual complaints from children. Denmark does not have a national plan or cross-sectoral strategy for children. The Danish Government has decided not to establish an Ombudsman for Children at this present time, although the Ministry of Social Affairs and Integration has announced that an Ombudsman for Children in the future will operate under cooperation between the Parliamentary Ombudsman, the National Council for Children, the National Social Appeals Board, the Danish Institute for Human Rights and Children's Welfare, and other public and private institutions. A new office will be established under the Parliamentary Ombudsman to strengthen the rights of the child, which will have the capacity to consider individual complaints concerning children and public administration, inspect institutions with children, investigate cases, and implement the rights of the child in legislation and government practice.

The UN Committee on the Rights of the Child, whilst generally complimentary of Denmark's progress in implementing the CRC in respect of the aforementioned measures, has expressed continued concern that it has not yet been incorporated into domestic legislation.³¹⁴ The Committee has also noted that the CRC is not consistently used as a basis for legislative developments.³¹⁵ In 2011, the Committee recommended that Denmark consider drafting a rights-based child act encompassing all rights under the CRC.³¹⁶ The National Council for Children has called for the CRC to be systematically applied as a guideline for evaluating legislation and ensuring children's rights on a more general basis.³¹⁷ Moreover, "the formal rights and influence of children are either non-existent, poorly defined, or inapplicable in practice."³¹⁸ There appears to be concern that the right of the child to be consulted in decision-making processes is inconsistent and grounded in varying age limits, and that this right, along with the best interests principle, is not always implemented in practice.³¹⁹ Indeed, academic research suggests that the role of the CRC in Denmark is "weak and relatively invisible" with particularly serious consequences for vulnerable groups of children.³²⁰

The *Folkeskole (Primary and Secondary School) Act* stipulates that schools are responsible for "preparing pupils for participation, sharing responsibility and their rights and obligations in a society based on freedom and democracy." Denmark has recognised that the CRC is not incorporated expressly into the curriculum, but states that it forms part of human rights education more generally.³²¹ A study of 1,150 children in Grade 7, undertaken in 2008 by the Danish Council for Children, indicated that only 18 per cent of children had heard of the CRC, and only 15 per cent stated that they knew what the CRC was. The study also indicated that six out of 10 children would like more say in their schooling.³²² Concern has also been raised at the lack of systematic dissemination or awareness-raising of the CRC more generally.³²³

314 UN Committee on the Rights of the Child, 2011a.

315 UN Committee on the Rights of the Child, 2011a.

316 UN Committee on the Rights of the Child, 2011a, paragraph 13. Similar views have been expressed by the Danish Council for Children and the Danish Institute for Human Rights in their alternative reports.

317 National Council for Children, Supplementary report to Denmark's 4th periodic report to the UN Committee on the Rights of the Child, 2009.

318 National Council for Children, 2009.

319 National Council for Children, 2009; The NGO Reporting Group in Denmark, Supplementary NGO report to Denmark's 4th periodic report to the UN Committee on the Rights of the Child, 2010.

320 For example, Jorgenson, P., Leth, I. and Montgomery, E. (2011) 'The Children's Rights Convention in Denmark: A status report on implementation', *Early Education and Development*, vol. 22, no. 5, 2011. pp. 839–862

321 Denmark, 2010, paragraph 31.

322 National Council for Children, 2009.

323 Save the Children Denmark, Concerning the Second periodic report on the United Nations Convention on the Rights of the Child submitted by the Danish Government, Alternative report to the UN Committee on the Rights of the Child, 2000.

5.3 Iceland



5.3.1 Context

In 2010, the population of children (0–18 years) was 81,000, approximately 25 per cent of the total population.³²⁴ Iceland is a republic with a parliamentary Government (Althingi). The President, members of the Althingi and local authorities are elected in General Elections held every four years. Following the 2009 election, a coalition government of the Social Democratic Alliance (Samfylkingin) and the Left–Green Movement (Vinstrihreyfingin – grænt framboð or VG) was formed. Presidential elections took place in June 2012, and the independent candidate Ólafur Ragnar Grímsson was re-elected for a fifth time.

Iceland has a civil law system, although, under Iceland's Constitution, the CRC is only binding in international law. The CRC is not directly incorporated into national law and cannot be directly invoked in Icelandic courts. There is, however, a principle that, where possible, national law should be interpreted with reference to international law. Where international and national law is mutually exclusive, the latter generally takes precedence. The European Convention on Human Rights (ECHR) was incorporated into Icelandic law by *Act No. 62/1994*.

Public expenditure on education increased from 5.8 per cent of GDP in 2000 to 7.6 per cent in 2008, while total health expenditure³²⁵ decreased from a high of 10.6 per cent of GDP in 2003 to 8.2 per cent in 2009. A recent study indicated that approximately 42 per cent of children in Iceland were aware of children's rights, compared to 54 per cent in Norway and 58 per cent in Sweden.³²⁶ The study also highlighted that 60 per cent of children in Iceland learned about children's rights in school, compared to approximately 80 per cent in Norway and Sweden. Educational data also suggest that the number of students who felt that teachers listened to what they had to say increased by approximately 10 per cent between 2000 and 2009. Performance in reading, however, declined during this period.³²⁷

5.3.2 Implementation in law

Constitutional reform

The Constitution of Iceland contains one article that makes specific reference to the rights of children. Article 76(3) provides that “for children, the law shall guarantee the protection and care which is necessary for their well-being.” Demands for a revised Constitution emerged amidst the protests that followed the financial crisis in 2008. One of the demands made was that citizens of Iceland rewrite their own Constitution via a Constitutional Council made of up 25 citizens. During this process, UNICEF Iceland, the Ombudsman for Children and the City of Reykjavik launched a participation project to ensure that the opinions of children were heard and taken into account in the constitutional amendment process. The Young People's Constitution project involved two representatives from each of the 23 Youth Councils in Iceland. A draft Constitution was presented to Parliament by the Constitutional Council in July 2011. Article 12 deals specifically with the rights of children and includes two new provisions relating to best interests and the right to express

KEY POINTS

- The CRC has not been directly incorporated into national law
- Where possible, national law should be interpreted with reference to international law
- A revised Constitution has been drafted and includes two new provisions relating to best interests and the right to express views
- Children have actively participated in the constitutional amendment process
- The CRC has been integrated into some domestic legislation.

324 United Nations Children's Fund, 2012a.

325 There is no disaggregated data available on expenditure on children.

326 United Nations Children's Fund, *Nordic Study on Child Rights to Participate 2009–2010*, Innolink, Tampere, 2010b.

327 OECD, 2011.

328 More information available at <http://reut.rs/ROKZht>, last accessed 12 November 2012



views. A formal bill has been proposed and will be debated in Parliament in 2013, after Icelanders voted for a new constitution at a referendum in October 2012.³²⁸ The current opposition is opposed to the participatory and systematic approaches to the integration of the CRC in domestic legislation, as well as any constitutional reform not led by Parliament.

Integration into domestic legislation

The UN Committee on the Rights of the Child has been highly complimentary about the steps taken by Iceland since its 1996 and 2003 State Party reports to integrate children's rights into domestic legislation.³²⁹ The *Children's Act 76/2003*, for example, enshrines the right of the child to know both his/her parents, while both the *Children's Act* and the *Child Protection Act 80/2002* (as amended in 2011) give children the right to express their views on matters relating to custody and child protection. In 2011, a legislative bill with amendments to the *Children's Act* was submitted to Althingi, including provisions aimed at reflecting the fundamental principles in Articles 2, 3, 6 and 12 of the CRC.³³⁰ Iceland's 2010 State Party report notes that guidance on the development of legislation was produced in 2007 and this also addresses the need to ensure that Icelandic legislation is compliant with international treaties, including the CRC.³³¹ These actions have also been highlighted in a separate

329 UN Committee on the Rights of the Child, Concluding Observations: Iceland, CRC/C/ISL/CO/3-4, 2011b.

330 Iceland, Third and fourth State Party reports, CRC/C/ISL/3-4, 2011.

331 Iceland, 2011.

report submitted to the Committee by the Ombudsman for Children Iceland, and a further joint report by the Icelandic Human Rights Centre, Save the Children and the Icelandic National Committee for UNICEF Iceland. Both reports express concern at the lack of resources put in place to enable effective implementation. Both also highlight plans to incorporate the CRC into Icelandic legislation. A multi-partisan bill of direct CRC incorporation has been proposed and will be debated in parliament in late 2012 to early 2013.

5.3.3. Non-legal measures of implementation

Iceland's Ombudsman for Children operates under *Act No. 83/1994* with the role of "improving the children's lot, as well as safeguarding their interests, needs and rights." The Ombudsman does not, however, have the power to receive individual complaints. The UN Committee on the Rights of the Child has recommended that the Ombudsman be given the competence to handle individual complaints and the necessary resources to fulfil this role. The Committee has also recommended that Iceland develop a successor to its National Plan for Children and Young People that ended in 2011, and that it improves its data collection on children and young people.

A tracking of the State Party reports and related literature since 1996 suggests that there have been a growing number of initiatives and resources aimed at increasing awareness of the CRC amongst children and adults working with and for children. A website on the CRC has, for example, been developed by the Ombudsman for Children, Save the Children and UNICEF Iceland, and includes resources for children, teachers and other professionals. In its 2010 Concluding Observations, however, the Committee continued to express concern at the limited extent to which particular groups of professionals, including health professionals, teachers and social workers, receive specific training on the CRC and at the limited extent to which children's rights is included in the school curricula. These concerns have been reiterated in the shadow reports. A review of the existing school curriculum is ongoing and proposals indicate that human rights education (as opposed to children's rights education) will form part of this review.³³²

Given the current Icelandic economic climate, there is concern about the potential for further cutbacks. The Icelandic Government responded by appointing a steering committee, called Welfare Watch, to monitor welfare issues following the 2008 financial crisis. Amongst the specific task forces established, one is to monitor the impact of reduced resources on children and young people. Particular concern has been expressed by the Ombudsman for Children at the negative impact of cutbacks on education, including staffing and access and provision for children with special educational needs, and health care, including deterioration in the dental health of children and the negative impact of cutbacks on children's health in rural areas.³³³

The UN Committee on the Rights of the Child has been highly complimentary about the steps taken by Iceland since its 1996 and 2003 State Party reports to integrate children's rights into domestic legislation

³³² Iceland, 2011.

³³³ Ombudsman for Children, Report to the UN Committee on the Rights of the Child, 2011.

KEY POINTS

- The CRC is not part of domestic law
- Whilst there is no specific legislative duty to do so, government departments are encouraged to consider the implications of the CRC when developing policy
- New Zealand has integrated aspects of the CRC through its legislation, most notably the best interests principle
- New Zealand became the first Westminster-style government to ban the corporal punishment of children.

5.4 New Zealand



5.4.1 Context

In 2010, the population of children (0–18 years) in New Zealand was 1,096,000, about 25 per cent of the total population.³³⁴ New Zealand is a constitutional monarchy with Queen Elizabeth II as the head of State, and is represented nationally by the Governor General. Representative Government takes the form of a unitary House of Representatives. Since 1996, elections for the House of Representatives have been in the form of proportional representation, and coalitions are common. The Government is currently led by the National Party, with three minor parties in coalition (ACT, United Futures and Maori Parties). The leader of the National Party, John Key, is the current Prime Minister. New Zealand has a common law system and the CRC is not part of domestic law. The Ministry of Social Development is the department responsible for leading the implementation of the CRC. New Zealand has had an Office for the Commissioner of Children since 1989. It also has a *Bill of Rights Act 1990* and a *Human Rights Act 1993*, neither of these, however, address children's rights in any detail. New Zealand does not have an embedded Constitution, but a Parliamentary Committee is currently considering constitutional issues, including the advantage of having a formal written Constitution.³³⁵

The Government of New Zealand's spending on children is considerably less than the Organisation for Economic Co-operation and Development (OECD) average.³³⁶ The biggest shortfall is for spending on young children, where New Zealand spends less than half the OECD average. However, educational data suggest that the number of students who felt that teachers listened to what they had to say increased by almost 5 per cent between 2000 and 2009.³³⁷ The alternative report to the UN Committee on the Rights of the



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334 United Nations Children's Fund, 2012a.

335 UNICEF New Zealand correspondence, 2012.

336 OECD, 2010.

337 OECD, 2011.

Child indicates that in the 2007–08 financial year, after taking housing costs into account, 28 per cent of all children were below a poverty line set at 60 per cent of median income, up from 22 per cent the previous year.³³⁸

5.4.2. Implementation in law

Integration into domestic legislation and supplementary measures

In its 2003 State Party report, New Zealand noted that its government departments are “encouraged” to consider the implications of the CRC when developing policy so as to ensure that it conforms to its provisions.³³⁹ However, there is no specific legislative duty to do so. Indeed, in its written replies to the UN Committee on the Rights of the Child in December 2010, New Zealand stated that the approach it takes to “the implementation of the CRC means that comprehensive action is pursued through a collaborative work programme rather than through the development of a National Plan of Action.”³⁴⁰ The Minister of Foreign Affairs has confirmed that New Zealand’s international obligations apply to both central and local government. However, the Government’s formal response to this position has not been made clear. The view has been that only the State is bound by international covenants, although UNICEF NZ argues that local authorities derive their powers from, and act as, agents of the State.³⁴¹ Local government is not subject to New Zealand’s international treaty obligations, unless the treaty has been incorporated into New Zealand domestic law.

Steps have been taken by New Zealand to harmonise its legislation in accordance with the CRC, and it has integrated aspects of the CRC through its legislation. The *Care of Children Act 2004*, for example, requires that the welfare and best interests of the child must be a paramount consideration when the Family Court makes decisions and the Act elaborates upon this principle in some detail. It also provides a stronger statutory basis for the views of the child or young person to be heard in such proceedings.

Significantly, in 2007, New Zealand became the first Westminster-style Government to ban the corporal punishment of children, including in the home by repealing Section 59 of the *Crimes Act 1961* (*The Crimes (Substituted section 59) Amendment Act 2007*). Despite a non-binding referendum expressing public support for some use of physical discipline in the home, the Government has upheld the ban. Of particular note is the *Children, Young Persons and their Families Amendment Bill (No. 6)*, which seeks to amend the definition of young person in relation to the criminal justice and care and protections systems, by raising the upper age to 18 years to bring it into line with the CRC (Section 4). The Bill also proposes amendments to children’s participation in related proceedings under the *Children, Young Persons and Families Act*, and for views to be taken into account. The Bill, which was introduced in March 2008, was discontinued due to a change in Government, and has been superseded by reforms contained in the *Children, Young Persons and their Families (Youth Court Jurisdiction and Orders) Act 2010*. The current Government, which has been in power since 2008, has gone in a different direction on youth justice through the 2010 Act.³⁴²

**Steps have been
taken to harmonise
legislation with
the CRC.**

338 Action for Children and Youth in Aotearoa, New Zealand non-governmental organisations’ alternative periodic report to the United Nations Committee on the Rights of the Child, 2010. See also O’Brien, M. and Salonen, T., ‘Child poverty and child rights meet active citizenship: a New Zealand and Sweden case study’, *Childhood*, vol. 18, no. 2, 2011, pp. 211–226.

339 New Zealand, Second State Party report to the UN Committee on the Rights of the Child, CRC/C/93/Add.4, 2003, paragraph 107.

340 New Zealand, Written replies to the list of issues related to the consideration of the combined third and fourth periodic reports of New Zealand, CRC/C/NZL/Q/3–4/Add.1, 2010, paragraph 2.

341 The question of local authorities’ obligations to the CRC has been explored in Irving, A., *Local Government: Respecting the rights of our children*, UNICEF New Zealand, Wellington, 2010. Available at <http://bit.ly/SZNLBb>, accessed 17 October, 2012.

342 Lynch, N., ‘A change in the law for child offenders: The Children, Young Persons, and Their Families (Youth Courts Jurisdiction and Orders) Amendment Act 2010’, *New Zealand Family Law Journal*, vol. 6, p. 289, 2010.



Following New Zealand's examination by the UN Committee on the Rights of the Child in 2011, the Government announced the development of a *Green Paper for Vulnerable Children*, which involves: a public consultation process, a review of current policy and legislation, the release of a White Paper in 2012, and will result in the development of a National Action Plan.

The *Green Paper* is "underpinned" by the CRC, however, whilst it contains many of the protections covered by the CRC, it does not explicitly refer to or engage with the CRC standards. The *Green Paper* invites submissions on whether a National Action Plan should be underpinned by legislation and/or whether other actions or principles should be included in legislation. To date, over 9,000 submissions have been received. Whilst the *White Paper for Vulnerable Children* has not yet been released, there have been calls from stakeholders that:

- any National Action Plan should be underpinned by legislation such as a Children's Act
- it should be explicitly informed by the CRC
- it should include a mandate for cross-sectoral working, accountability and reporting, and child impact assessment for all legislation and policy.³⁴³

Children have been involved in the consultation process through the Office of the Children's Commissioner, the Human Rights Commission, and Save the Children.³⁴⁴

343 Auckland Regional Public Health Service, Feedback on the Green Paper for Vulnerable Children, 2012, available at <http://bit.ly/TB9J96>, accessed 17 October 2012; Every Child Counts, Submission on the Green Paper on Vulnerable Children, 2012; Action for Children and Youth Aotearoa, Green Paper for Children Submission, 2012; Human Rights Commission, Submission on the Green Paper on Vulnerable Children, 2012; Office of the Children's Commissioner, Green Paper on Vulnerable Children: Position of the Children's Commissioner, 2012.

344 Office of the Children's Commissioner, 'Collective youth voices', Submission on the Green Paper for Vulnerable Children, 2012; Human Rights Commission, Submission on the Green Paper for Vulnerable Children, 2012; Save the Children New Zealand, Submission on the Green Paper for Vulnerable Children, 2012.

Reference has been made to the CRC in New Zealand jurisprudence and particular attention has been paid to the best interests principle. In the Court of Appeal's ruling in *Hosking and Hosking v Runting and Pacific Magazines NZ Ltd* in March 2004 regarding children's right to privacy, Gault P stated that "the historical approach to the State's international obligations as having no part in the domestic law unless incorporated by statute is now recognised as too rigid. To ignore international obligations would be to exclude a vital source of relevant guidance."³⁴⁵ Furthermore, In *Re the W Children*, Judge Inglis QC described the CRC as "useful" and "legitimate, even essential to fall back on ... when the Court was required to ensure that the fundamental rights of the child were recognised and protected."³⁴⁶ Judge Thorburn, in *Police v H*, stated that "New Zealand's alignment with [the CRC] would ... be conveying the message to the community of nations that special protections and procedures for juveniles are in the public interest".³⁴⁷

The Committee has expressed concern that the *Children, Young Persons and their Families Amendment Bill (No.6)* has not yet been enacted. Moreover, it has called on New Zealand to ensure that all existing domestic legislation relating to children is consistent and is brought in compliance with the CRC and that it supersedes any existing customary law, including Maori customary law.³⁴⁸ Likewise, the alternative report to New Zealand's State Party report suggests that legislative developments have been inconsistent and fragmented.³⁴⁹



345 New Zealand Court of Appeal, *Hosking and Hosking v. Runting and Pacific Magazines NZ Ltd*, 7 HRNZ 301, 2004, paragraph 6. Reference is also made in the 2003 State Party report to, inter alia, *Re an Unborn Child*, *Re Adoption of PAT*, *Re the W Children* and *DGSW v. R* – see New Zealand, 2003.

346 *Re the W Children* [1994] 12 FRNZ 548 (FC) at 558.

347 Youth Court of New Zealand, *Police v. H (a young person)*, DCR 97, 2004, section 21.

348 UN Committee on the Rights of the Child, Concluding Observations: New Zealand, CRC/C/NZL/CO/3-4, 2011c, paragraph 11.

349 Action for Children and Youth in Aotearoa, 2010.

**The Children's
Commissioner
Act 2003 (No.121)
strengthened and
increased the resources
and powers available
to the Children's
Commissioner.**

5.4.3 Non-legal measures of implementation

The *Children's Commissioner Act 2003 (No.121)* strengthened and increased the resources and powers available to the Children's Commissioner. The Act sets out the Commissioner's responsibilities of raising awareness of children's interests, rights and welfare and monitoring the application of the CRC in Crown Agencies' actions. This is in addition to the Commissioner's previous statutory investigative and monitoring role regarding children, young people and families.

New Zealand's Agenda for Children, published in 2002, set "out a programme of action for government, which gives higher priority to their interests, rights and needs."³⁵⁰ The document noted that government policies would be consistent with the CRC. Over 7,500 children were involved in the consultation process for the Agenda. This was not underpinned, however, by any legislation. The UN Committee on the Rights of the Child has expressed concern that the CRC is not regularly used as a framework for the development of specific policies and strategies, and at the lack of a comprehensive plan of action for the implementation of the CRC.³⁵¹ Moreover, the alternative report suggests that the Agenda for Children has not been implemented in any sustained or systematic manner and that it has been "made obsolete through lack of implementation".³⁵²

There has been growing interest in New Zealand on the feasibility of child impact assessment. Child impact assessment is not statutory, however, pilot projects have been undertaken in a sample of local councils as part of a project commissioned by the Office of the Children's Commissioner and UNICEF New Zealand³⁵³ and a private member's bill has been prepared for consideration by Parliament.

In its 2003 Concluding Observations, the Committee noted concern at discrimination and comparatively low indicators for Maori, Pacific and Asian children. Reports from government agencies, non governmental organisations and academics show that Maori and Pacific children experience higher rates of disadvantage across a range of indicators, including child and infant mortality rates, youth suicide rates, reduced participation in early childhood education, leave school with no or low qualifications, higher school suspensions, and more children living in poor households.³⁵⁴ The Ministry of Social Development's 2008 report *Children and Young People in New Zealand: Indicators of Wellbeing 2008* reported that whilst some indicators for Maori and Pacific children have improved marginally, overall they continue to suffer disproportionately detrimental outcomes compared to other groups of children and young people.

350 Ministry of Social Development (2002), *The Agenda for Children 2002*, page 2

351 UN Committee on the Rights of the Child, 2011c, paragraph 14.

352 Action for Children and Youth in Aotearoa, 2010, p. 4.

353 Mason, N. and Hanna, K., *Undertaking Child Impact Assessments in Aotearoa New Zealand Local Authorities: Evidence, practice, ideas*, Office of the Children's Commissioner, Auckland, 2009; Hanna, K., Hassall, I. and Davies, E., (2006) 'Child Impact Reporting', *Social Policy Journal of New Zealand*, vol. 29, 2006; Every Child Counts, 'Assessing the impact of new legislation on children', Briefing sheet for MPs, no. 1, 2010.

354 Ministry of Social Development, *The Social Report 2008*, Ministry of Social Development, Wellington, 2008; Ministry of Social Development, *Children and Young People: Indicators of wellbeing in New Zealand 2008*, Ministry of Social Development, Wellington, 2008; Fletcher, M. and Dwyer, E., *A Fair Go for All Children*, Office of the Children's Commissioner and Barnardos, Wellington, 2008; Child Poverty Action Group (2008), *Left Behind: How social and income inequalities damage New Zealand children*, Child Poverty Action Group, Auckland, 2008.

5.5 South Africa



5.5.1 Context

In 2010, the population of children (0–18 years) in South Africa was 18,086,000, approximately 36 per cent of the total population.³⁵⁵ South Africa is a democratic republic with a written constitution. The President is both head of State and head of Government. Legislative power is vested in the Parliament, which is bicameral and is made up of the National Assembly (the lower house) whose members are elected for a five-year term by proportional representation, and the National Council of Provinces (the upper house), with 10 representatives from each Province.

The national, provincial and local levels of government all have legislative and executive authority in their own spheres. There are nine Provincial Governments and 279 Municipalities. The African National Congress has been the majority party since 1994 and its leader, Jacob Zuma, has been President of South Africa since May 2009.

South Africa has a mixed legal system influenced by civil law, common law and African customary law. The CRC has not been incorporated into domestic law, although key features have been incorporated into Section 28 of the South African Constitution. Section 39(1) of the Constitution requires a court or tribunal to consider international law when interpreting the Bill of Rights, while Section 233 requires courts to interpret statutory law in a way that is consistent with international law where reasonable.

Whilst outcomes for children in South Africa are not as high as those for other countries in this review, data suggest that there has been improvement. The number of children living in households with basic sanitation, for example, has increased from 47.4 per cent in 2002 to 63.2 per cent in 2009. The number of children living in households where there is reported child hunger decreased from 29.7 per cent in 2002 to 15.7 per cent in 2009.³⁵⁶ The number of children living in income poverty has decreased from 73.1 per cent in 2002 to 60.5 per cent in 2009. Further, while paediatric HIV prevalence is increasing, the rate at which it is doing so is decreasing.³⁵⁷

5.5.2 Implementation in law

Regional protections

The first Declaration on the Rights and Welfare of the African Child was adopted in 1979. The Declaration was not binding, but it did provide a 'moral compass' for legal reform.³⁵⁸ In 1990, the African Charter on the Rights and Welfare of the Child (ACRWC) was , and it entered into force in 1999.

The African Union had already displayed an interest in developing protection mechanisms for children prior to the ACRWC, but the rationale for its development only emerged out of the view that the CRC did not effectively address the socio-cultural and economic realities and peculiarities of the African Union.³⁵⁹ Civil society played a leading role in drafting the ACRWC,³⁶⁰ which was then ratified in 2000. Article 2 of the ACRWC states that a child is "every human being under 18 years."

KEY POINTS

- The CRC has not been incorporated into domestic law
- South Africa has been recognised for its comprehensive constitutional protections for children
- Innovative work has been undertaken on children's rights budgeting
- The Constitutional Court of South Africa has handed down a number of judgments that have directly or indirectly affirmed children's rights, particularly in relation to economic, social and cultural rights.

355 United Nations Children's Fund, 2012a.

356 Gore, R., *Influencing budgets for Children's Rights*, UNICEF Working Paper, 2004.

357 Proudlock, P., Dutschke, M. et al., (eds.), *South African Child Gauge 2007/2008*, Children's Institute, Cape Town, 2008.

358 Viljoen, F., *International Human Rights Law in Africa*, Oxford University Press, Oxford, 2007, p. 261.

359 Viljoen, F., 'The African Charter on the Rights and Welfare of the Child', in Davel, C.J. (ed.), *Introduction to Child Law in South Africa*; Juta Law Publishers, Cape Town, 2000; Olowu, D., 'The regional system of protection of human rights in Africa' in Sloth-Nielson, J., *Children's Rights in Africa*, Ashgate, Aldershot, 2008, pp. 13–32; Lloyd, A., 'The African regional system for the protection of children's rights', in Sloth-Nielson, J., *Children's Rights in Africa*, Ashgate, Aldershot, 2008, pp.33–52.

360 Lloyd, A., 2008.



Section 28 of the Constitution contains specific and additional children's rights.

The general principles of the ACRWC are non-discrimination, the best interests of the child, life, survival and development, and respect for views of the child. The substantive provisions include education, health care, child labour, harmful social and cultural practices, armed conflict, sexual exploitation and responsibilities of the child.³⁶¹ The ACRWC is monitored by the African Committee of Experts on the Rights and Welfare of the Child, which has the remit to receive state reports and individual communications, as well as conduct *ad hoc* visits to states. It also has standing before the African Court on Human and People's Rights.

Constitution

The whole of the South African Bill of Rights applies to children and safeguards their rights, whereas Section 28 of the South African Constitution 1996, the Bill of Child Rights, contains specific and additional children's rights, including the child's right, *inter alia*, to:

- a name and nationality from birth
- family or alternative care
- basic nutrition
- shelter
- health care and social services
- protection from maltreatment, neglect, abuse or degradation
- protection from exploitative labour practices
- rights relating to detention and work.

Section 28(2) stipulates that a child's best interests are of "paramount importance in every matter concerning the child", whilst Section 28(3) defines a child as a person under 18 years. Section 29 enshrines the right of everyone to education.

³⁶¹ For the full charter, see <http://bit.ly/Zf8gM4>, accessed 17 October 2012.

In 1992, the *Children's Rights Charter of South Africa* was adopted at the South African Children's Summit on the Rights of Children in Cape Town. The *Children's Rights Charter* was drafted by 200 children from 20 regions.

Integration into domestic legislation and supplementary measures

South Africa's first State Party report notes that "ratification of the Convention on the Rights of the Child committed South Africa to implementing a 'first call for children' whereby the needs of children are considered paramount throughout the Government's development strategies, policies, programmes and services".³⁶² The National Programme of Action for Children in South Africa 1996 was the primary mechanism through which South Africa sought to implement these commitments. The Programme had three aims:

- to advance the best interests of the child in all matters affecting them
- to promote and enable the realisation of child rights to survival, development, protection, and participation
- to mobilise resources at all levels.

The National Programme of Action Steering Committee (NPASC) monitored the implementation of the Programme and was responsible for the identification of plans, the coordination and evaluation of programmes, and the periodic submission of progress reports to Cabinet on the implementation, as well as obligations under the CRC.

South Africa has taken a number of steps to incorporate provisions of the CRC into national law. The *Child Justice Act 2009*³⁶³, for example, enshrines the rights of children in conflict with the law. The process in which the Child Justice Bill was developed is of particular

South Africa has taken a number of steps to incorporate provisions of the CRC into national law.

³⁶² South Africa, First State Party report, CRC/C/51/Add.2, 1998, paragraph 3.

³⁶³ *Child Justice Act*, No. 75 of 2008, 2008.



note. A committee that had been established by the South African Law Reform Commission (SALRC) to draft legislative proposals, engaged directly with children in developing of a report then used to form the basis of the legislation. In drafting the report, the SALRC made extensive use of children's views.³⁶⁴ Sloth-Nielsen notes that children were extensively engaged in the development process, but there is no evidence to show that feedback was provided to children on the value of their participation or on the extent to which their views were adopted. She continues to say that whilst the SALRC explained if and when these views influenced the drafting of the legislation in its report, no meaningful role was accorded to children in the long-term process of law reform. The draft *Child Justice Bill* was the first piece of draft legislation in South Africa for which the costs of implementation were explored in detail prior to it being tabled in Parliament.³⁶⁵

There has, however, been concern that the punitive, adult-based approach for older children and for children who are charged with more serious offences is contrary to its international obligations.³⁶⁶ The CRC also influenced the development of the *Children's Act 38 of 2005* (as amended by *Act 41 of 2007*), which addresses social services for children with the aim of bringing South Africa's law in line with the South African Bill of Rights and the CRC. One of the Act's general principles is that decisions should be made in the best interests of the child, and that children have a right to participate in all decisions affecting them and for these views to be given "due consideration". The Act gives powers to the Children's Courts, which are responsible for assessing whether a child is in need of care and protection so as to promote the best interests of the child.

Also covered, *inter alia*, is a child's capacity to consent (reduced from 14 to 12 years, and which must take into account the maturity and ability of the child to understand risks and benefits associated with medical treatment), adoption, trafficking, and child abduction. The *Children's Act 2005* requires anyone holding parental rights and responsibilities to consult children before taking major decisions that may affect the child's education, and obliges child and youth care centres to have a children's forum and children on the management board. Section 4(2) of the *Children's Act* obliges the Government to "take reasonable measures to the maximum extent of their available resources to achieve the realisation of the objects of this Act." A detailed costing analysis of the Act was also undertaken to inform the level of budgetary allocations. Elsewhere, the *South African Schools Act 84 of 1996* requires pupils to be consulted during the development of a code of conduct, and gives pupils who are facing suspension the right to express their views to the appropriate body. According to the *National Health Act 61 of 2003*, children must be included in local health planning. In addition, many Provinces and Municipalities have established children's forums that act as channels for children to engage with different legislative processes.³⁶⁷ The Children's Institute at the University of Cape Town and Save the Children have also carried out work on monitoring budgets from a child rights perspective.

The *Children's Act 2005* requires that a comprehensive range of social services be provided for children, and the Act places primary responsibility on the Government to ensure that these services are

364 Sloth-Nielsen, J. and Mezmur, B.D., '2+2=5? Exploring the domestication of the CRC in South African Jurisprudence (2002–2006)', *International Journal of Children's Rights*, vol. 16, no.1, 2008, p. 1–28.

365 Gore, R., *Influencing budgets for Children's Rights*, UNICEF Working Paper, 2004.

366 Proudlock, P., Dutschke, M. et al., 2008.

367 Jamieson, L., Bray, R. et al. (2011) *South African Child Gauge 2010–2011*, Children's Institute, Cape Town, 2011.

provided. The greatest responsibility is placed on the Department of Social Development, more than 80 per cent of which is to be covered by the Provincial Departments of Social Development. More than half of the provincial social welfare budgets are transferred to NGOs to deliver the services. However, the money paid to NGOs does not cover the full cost of providing these services³⁶⁸, and so NGOs need money from national and international donors.³⁶⁹ Section 4(2) of the Act necessitates that the Government prioritise budgetary allocations to the social services in order to realise its objectives. The Act provides the main legal basis for children's constitutional and international rights to care and protection in South Africa.³⁷⁰ Thus, monitoring the budget's changes over time demonstrates whether the Government is realising its obligations under the Act, and whether children's constitutional rights are being realised.³⁷¹ In 2010, the National Treasury hosted a discussion by the Children's Institute and Community Agency for Social Enquiry, and UNICEF presented research on the impact of government budgets on children's rights to stakeholders from national Government departments, Parliament's research unit, UNICEF and civil society. The aim was to recommend changes in the budget process to promote a child-centred approach to budgeting.³⁷² It is not clear, however, what the effect has been on implementing the *Children's Act* in actuality. It is also difficult to measure the Child Budget Unit's impact on the actual realisation of child rights in South Africa.³⁷³

The Constitutional Court of South Africa has handed down a number of judgments that have directly or indirectly affirmed children's rights.³⁷⁴ In *Minister for Welfare and Population Development v Fitzpatrick*,³⁷⁵ for example, the Constitutional Court held that best interests principle in Section 28(2) cannot be limited to the rights specifically enumerated in Section 28(1), and that it must be interpreted to extend beyond those specific rights. However, concerns have been raised over the apparent progressiveness of children's socio-economic rights in theory versus that in practice. This can be seen most notably in *Government of the Republic of South Africa v Grootboom*,³⁷⁶ which concerned whether the State could be ordered to provide shelter to a group of people, including children, who were living in intolerable conditions, by virtue of Section 26 (the general right of everyone to housing) or Section 28 (the child's right to basic shelter). The Constitutional Court took the view that Section 28 imposed a primary duty on parents to take care of their children and that the State only incurred a primary obligation where children were removed from, or lacked parental care. This was mitigated to a certain extent in *Minister of Health and Others v Treatment Action Campaign (TAC)*³⁷⁷ where it was held that "while the primary obligation to provide basic health care services rests on those parents who can afford to pay for such services ... this does not mean ... that the State incurs no obligation in relation to children who are being cared for by their parents or families."³⁷⁸ Thus, the State may have the primary obligation where parents cannot afford services. More recently in *Centre for Child Law and Others v MEC for Education and Others*,³⁷⁹ the Court recorded that "what is notable about children's rights in comparison to other socio-economic rights is that Section 28 contains no internal limitation subjecting them to the availability of resources and legislative measures for their progressive realisation. Like all rights, they remain subject to reasonable and proportional limitation, but the absence of any internal limitation entrenches the rights as

- 368 Budlender, D., Williams, L. et al., *Funding of Services Required by the Children's Act*, Community Agency for Social Enquiry, Johannesburg, 2011, available at <http://bit.ly/TEvwyM>, accessed 17 October 2012.
- 369 Proudlock, P., *Budgeting for Children's Care, Development and Protection*, Children's Institute, Cape Town, 2012.
- 370 Mahery P., 'The United Nations Convention on the Rights of the Child: Maintaining its value in international and South African child law', in Boezaart, T. (ed.), *Child Law in South Africa*, Juta Publishing, Cape Town, 2009.
- 371 Budlender, D. and Proudlock, P., *Funding the Children's Act: Assessing the adequacy of the 2011/12 budgets of the provincial departments of social development*, Children's Institute, Cape Town, 2011.
- 372 Budlender, D. and Proudlock, P., *Recommendations for Child-Centred Changes to the Budget*, Children's Institute and Community Agency for Social Enquiry, Cape Town, 2010, available at <http://bit.ly/TBdfjF>, accessed 17 October 2012.
- 373 The South African Children's Budget Unit (CBU) of Idasa, Presentation for the Exploratory Dialogue on Applied Budget Analysis for the Advancement of Economic, Social and Cultural Rights, 2001, available at <http://bit.ly/PPp8Xi>, accessed 17 October 2012. See also Bothale, E., 'The case for children's budgeting in Botswana', *International Journal of Children's Rights*, vol. 20, no. 3, 2012, pp. 440–456.
- 374 It is not possible here to review in comprehensive detail the range of jurisprudence. For further detail see Liebenberg, S., 'Socio-economic rights', in Woolman, S. et al. (eds.), *Constitutional Law of South Africa*, 2nd ed, Juta Publishing, Cape Town, 2005; Mbazira, C. and Sloth-Nielsen, J., 'Incy Wincy Spider went climbing up again: prospects for constitutional (re) interpretation of Section 28 (1) (c) of the South African Constitution in the next decade of democracy', *Speculum Juris*, vol. 2, 2007, pp. 147–67; Davis, D., 'Adjudicating the socio-economic rights in the South African Constitution: towards 'deference lite'', *South African Journal on Human Rights*, vol. 22, 2006, p. 301.; Sloth-Nielsen, J. and Mezmur, B.D., 2008.
- 375 Constitutional Court of South Africa, *Minister for Welfare and Population Development v. Fitzpatrick and Others*, BCLR 713 CC, 2000, paragraph 17.376 Constitutional Court of South Africa, *Government of the Republic of South Africa v. Grootboom*, BCLR 1169 (CC), 2001.
- 377 Constitutional Court of South Africa, *Minister of Health and Others v. Treatment Action Campaign and Others*, BCLR 1033 (CC), 2002.
- 378 Constitutional Court of South Africa, 2002, paragraph 77.
- 379 Eastern Cape High Court, *Centre for Child Law and Others v. Minister of Basic Education and Others*, ZAECGHC 60, 2006.
- 380 Eastern Cape High Court, 2006, p. 7.



Children's rights have made a measurable impact on the legal and policy environment in Africa.

unqualified and immediate".³⁸⁰ However, the Constitutional Court has yet to recognise Section 28 as giving rise to a directly enforceable immediate obligation against the state in any previous case. Sloth-Nielsen and Mezmur³⁸¹ note that between the periods 1996–2001 and 2002–06, the previous invisibility of children in civil proceedings, especially divorce proceedings, "altered significantly" and "entered the judicial sphere with a bang."³⁸² They suggest that one reason for this has been the maturing of the constitutional process and greater awareness and training amongst those involved in the judicial process of both the South African Constitution and the CRC. As such, the CRC has become "an essential frame of reference in the South African legal system."³⁸³

5.5.3 Non-legal measures of implementation

The UN Committee on the Rights of the Child was extremely complimentary with respect to the range of legal reforms in South Africa in response to its first report.³⁸⁴ It must be noted, however, that no subsequent reports to the Committee have been produced. South Africa's combined second and third periodic report, due to be submitted in 2007, has not yet been published. Sloth-Nielsen suggests that children's rights have made a "measurable impact on the legal and policy environment in Africa"³⁸⁵, but that implementation remains an ongoing project. Criticisms have been directed by non governmental organisations at the "stifling" of the National Prosecuting Authority (NPA) as a result of: limited delivery structures; inadequate resources; insufficient knowledge of the OAU Charter, Section 28 of the Constitution and the CRC and their implications for policy processes; and at the under-involvement of civil society.³⁸⁶ More recently, there have been on-going calls in respect of the *Children's Act 2005* to make sure that necessary budgets are allocated, that provincial departments' capacity for delivery is improved, the necessary personnel are allocated, and sustainable funding is provided to non governmental organisations, which provide the bulk of social services to vulnerable children.³⁸⁷ Budlender and Proudlock have expressed concern that the 2010–11 social development budgets of provincial governments are not adequate to ensure effective implementation of the Act.³⁸⁸ They also express concern at the limited indicators developed to monitor its progress.

381 Sloth-Nielsen, J. and Mezmur, B. D., 2008, p. 17.

382 For example *Rosen v. Havenga*; *Soller NO v. G and Another*, and *Centre for Child Law and Another, Ellis, v. Minister of Home Affairs and others* – see Sloth-Nielsen, J. and Mezmur, B. D., 2008.

383 Sloth-Nielsen, J. and Mezmur, B. D., 2008, p.27.

384 UN Committee on the Rights of the Child, Concluding Observations: South Africa, CRC/C/15/Add.122, 2000b.

385 Sloth-Nielsen, J., 'Domestication of children's rights in national legal systems in African context: progress and prospects', in Sloth-Nielsen, J. (ed.), *Children's Rights in Africa*, Ashgate, Aldershot, 2008, pp. 53–72, p.53.

386 South Africa, 1998.

387 Proudlock, P., 2012; Budlender, D. and Proudlock, P., 2011.

388 Budlender, D. and Proudlock, P., 2011

5.6 Sweden



5.6.1 Context

The childhood population of Sweden in 2010 (0–18 years) was 1,924,000, approximately 20 per cent of the total population.³⁸⁹ Sweden is a constitutional monarchy and a parliamentary democracy. The Prime Minister has been Fredrik Reinfeldt of the Moderate Party since 2006. Elections for the Swedish Parliament (*Riksdag*) are held every four years. The current Government is made up of the centre-right parties that for the Alliance. These are the Moderate Party (*Moderaterna*), Centre Party (*Centerpartiet*), Liberal People's Party (*Folkpartiet Liberalerna*) and the Christian Democrats (*Kristdemokraterna*). The 2010 General Election saw the nationalist movement of the Swedish Democrats (*Sverigedemokraterna*) enter Parliament for the first time.

Sweden has a civil law system. Treaties do not form part of national law unless they have been incorporated by an act of Parliament. The CRC has not been incorporated. It is a general principle of Swedish law, however, that legislation is to be interpreted in light of international obligations. In its 2009 examination, Sweden stated that “the Government does not see any need at present to transpose the CRC into Swedish law.”³⁹⁰ This is partly due to Sweden's strong welfare tradition. A division under the Minister for Health and Social Affairs, the CRC Coordination Office, is responsible for child rights policy and for ensuring that attention is given to CRC norms in all proposed legislation, policy documents, programmes or other measures adopted by the Government. Sweden has an Office of the Children's Ombudsman. However, the Ombudsman cannot receive individual complaints. The ECHR was incorporated into national law in 1995. Sweden prohibited corporal punishment in 1979.

Traditionally, Sweden has performed well across a number of outcomes. However, performance appears to have declined in some areas. In 2000, for example, Sweden had the lowest proportion of children living in relative poverty (2.6 per cent). This increased to 4.2 per cent in 2005, however, and Sweden had been overtaken by Denmark, Finland and Norway.³⁹¹ Educational data suggest that between 2000 and 2009, Sweden's performance in reading declined by 19 per cent, and between 2003 and 2009, performance in mathematics also declined by 15 per cent. In both areas of learning, Sweden is now performing around the Organisation for Economic Co-operation and Development (OECD) average. Between 2000 and 2009, the proportion of students who felt that teachers listened to what they had to say increased by 3.2 per cent.³⁹² The percentage of 15–19 year olds not in education or employment increased from 11.8 per cent in 2003 to 16.5 per cent in 2009.³⁹³

5.6.2 Implementation in law

Constitution

The Swedish Constitution consists of four fundamental laws: the Instrument of Government, the Act of Succession, the Press Act, and the Fundamental Law on Freedom of Expression. While the Instrument of Government contains a number of provisions that apply regardless of age, in Chapter 2 (Fundamental rights) there are

KEY POINTS

- The CRC has not been incorporated into domestic law
- In 2010, an amendment was made to the Swedish Constitution that requires public institutions to safeguard the rights of children
- Sweden has integrated aspect of the CRC's provisions throughout its legislation, including best interests, non discrimination, health and development, and the right of the child to be heard
- In December 2010, Parliament endorsed a new strategy to strengthen child rights in Sweden.

389 United Nations Children's Fund, 2012a.

390 Sweden, Written replies to the list of issues prepared by the UN Committee on the Rights of the Child in connection with the consideration of the fourth periodic report, CRC/C/SWE/Q/4/Add.1, 2009, paragraph 1.

391 United Nations Children's Fund, 2000; United Nations Children's Fund, 2005.

392 OECD, 2010.

393 OECD, 2011.

two that address the rights of children specifically: Article 7 contains a provision with respect to the determination of a child's nationality, and Article 18 stipulates that all children covered by compulsory schooling shall be entitled to a free basic education at a public school. As of January 2003, Article 2 of Chapter 1 (Basic principles of the form of Government), requires public institutions to combat discrimination on a number of grounds, including age. The Swedish Constitution was amended in 2010. Of particular significance is the amendment made to Article 2, Chapter 1 of the Instrument of Government, which now stipulates that "public institutions shall promote the opportunity for all to attain participation and equality in society *and for the rights of the child to be safeguarded.*"³⁹⁴

Integration into domestic legislation and supplementary measures

Sweden has integrated aspects of the CRC into its legislation. In 1998, for example, the *Social Services Act* was amended to recognise that the best interests of the child must be given "full consideration when adopting any measures affecting the child's life or status." The *Act Prohibiting Discrimination and Other Forms of Degrading Treatment of Children and School Students* (2006:67) required services under the *Education Act* to counter discrimination on the grounds of sex, ethnic membership, religion or other religious belief, sexual orientation or disability. This was, however, replaced by the *Anti-Discrimination Act* (2008:567), which seeks to combat discrimination and promote equal rights and opportunities across a range of grounds as well as age, and at all levels of education. An Equality Ombudsman was established in 2009 to monitor compliance with the Act. Elsewhere, Chapter 1, Section 10 of the *Aliens Act* (2005:716) requires particular attention to be given to the child's health and development and the best interests of the child, whilst Section 11 provides for the child to be heard "unless this is inappropriate ... Account must be taken of what the child has said to the extent warranted by the age and maturity of the child." In 2008, the *Care of Young Persons (Special Provisions) Act* (1990:52)

394 Amendment in italics





was amended, providing for the best interests of the child to be a deciding factor when making decisions under the Act. Whilst the *Children and Parents Code (1949:381)* already contained provisions relating to a child's best interests, this was strengthened in 2006 to ensure that the best interests of the child is "the determining factor in all decisions concerning custody, residence and access." Both the *Social Services Act (2001:453)* and the *Care of Young Persons (Special Provisions) Act (1990, as amended 2003)* contain provisions on the rights of children to express their views.

Whilst welcoming legislative developments and the 1999 strategy, the UN Committee on the Rights of the Child has expressed concern at the lack of formal recognition of the CRC in Swedish law and has recommended that it "should always prevail whenever domestic law provisions are in conflict with the law enshrined in the CRC".³⁹⁵ A report by Save the Children Sweden noted that, in 2010, the Government pledged to carry out a survey of how Swedish legislation complies with the CRC.³⁹⁶ Indeed, there appears to be increasing calls for the CRC to be incorporated into Swedish law. This has been largely driven by non governmental organisations and the matter being debated in Parliament and the media. The Liberal People's Party and the Christian Democratic Party have indicated that they would join those calling for incorporation, following the example of the Swedish Green Party and the Left Party.³⁹⁷

³⁹⁵ UN Committee on the Rights of the Child, Concluding Observations: Sweden, CRC/C/SWE/CO/4, 2009a, paragraph 10.

³⁹⁶ Save the Children Sweden, *Governance fit for children: to what extent have the general measures of implementation of the UNCRC been realised in Sweden*, Save the Children Sweden, Stockholm, 2011.

³⁹⁷ Save the Children Sweden, 2011.

In 1999, the Swedish Parliament passed a Bill endorsing a national strategy for implementing the CRC.

5.6.3 Non-legal measures of implementation

In 1999, the Swedish Parliament passed a Bill endorsing a national strategy for implementing the CRC (Bill 1997/98:182). This strategy included a requirement that:

- the CRC must inform all decision making affecting children
- government employees whose work impacts on children and young people must be offered training aimed at enhancing their knowledge of the CRC
- child impact assessments must be made in connection with all government decisions affecting children and that efforts must be made to promote the influence and participation of children and young people in community and traffic planning.³⁹⁸

The strategy formed the basis of Sweden's cross-sectoral child policy, later renamed Child Rights Policy. In 2007, a review of the policy carried out by the Swedish Agency for Public Management made a number of recommendations on ways that Sweden could implement children's rights more effectively, with particular emphasis placed on monitoring and evaluation.³⁹⁹ In December 2010, Parliament endorsed a new strategy to strengthen child rights in Sweden (Bill 2009/10:232). This strategy consists of nine principles, including that all legislation concerning children be formulated in accordance with the CRC.⁴⁰⁰ Other supplementary measures of interest include:

- the establishment of a Child Rights Forum (2005) to facilitate structured dialogue between the Government and non governmental organisations
- the appointment of contact persons for the CRC at all ministries
- the establishment of the municipal partnership for implementation
- the Child Reference Group set up by the Ministry of Health and Social Affairs, comprising 40–50 girls and boys age 13–18 years from various parts of Sweden.⁴⁰¹

Research suggests that the CRC has “become the most important tool for enhancing the status of (the) child”⁴⁰² and has acted as a driver for legal reform to date. Detailed work has also been carried out with respect to child impact assessment.⁴⁰³ Sylwander has noted, however, that in practice, this does not necessarily mean that children's rights are protected as intended by the legislature and gaps remain.⁴⁰⁴ In the context of the *Aliens Act*, for example, children are not heard to the extent that is expected by legislation. Moreover, there is a concern that the best interests principle is mainly used to make rejected asylum applications legitimate.⁴⁰⁵ Criticisms have also been leveled at national level. A 2004 review carried out by the Swedish National Audit Office, for example, concluded that whilst numerous measures had been taken to put the CRC and the approved strategy into effect, it had not fully complied with the requirements or achieved the goals set out in the strategy that was approved by the Riksdag.⁴⁰⁶ Non governmental organisations also expressed concerns at the lack of clearly defined and measurable targets, indicators and timescales therein, making assessment of the strategy's impact problematic. Similar concerns have been expressed with respect to the 2010 strategy. In addition, non governmental organisations have stated that they were not invited to consultations on the new strategy, and that there were no consultations with children and young people.⁴⁰⁷

398 Sweden, Third State Party report, CRC/C/125/Add.1, 2004.

399 Sweden, Fourth State Party report, CRC/C/SWE/4, 2007, paragraph 7.

400 The other principles are that: the physical and mental integrity of the child will be respected in all circumstances; children will be given the opportunity to express their views in matters affecting them; children will receive information about their rights; parents will receive information about the rights of the child and be offered support in their role as parents; decision-makers and relevant professional groups must be knowledgeable about the rights of the child and put this knowledge into practice in relevant activities; actors in different areas of activity that concern children are to strengthen the rights of the child through collaboration; current knowledge about children's living conditions will form the basis of decisions and priorities affecting children; and that decisions and actions affecting children will be followed up and evaluated from a perspective of the rights of the child.

401 Sweden, 2007.

402 Sylwander, L., *Child Impact Assessments: Swedish experience of Child Impact Analyses as a tool for implementing the UN Convention on the Rights of the Child*, Ministry of Health and Social Affairs and Ministry of Foreign Affairs, Stockholm, 2001, p. 9.

403 Sweden, 2007; Ombudsman for Children in Sweden, *Child Impact Analysis*, Ombudsman for Children in Sweden, Stockholm, 2006, available at <http://bit.ly/RUL7uh>, accessed 18 October, 2012.

404 Sylwander, L., 2001.

405 Lundberg, A., 'The best interests of the child principle in Swedish asylum cases: the marginalization of children's rights', *Journal of Human Rights Practice*, vol. 3, no. 1, 2011, pp. 49–70.

406 Sweden, 2007, paragraph 9.

407 Save the Children Sweden, 2011.

The issue of municipal autonomy and subsequent disparities in the implementation of children's rights is an issue that has been highlighted by the UN Committee on the Rights of the Child and Save the Children, not least the disparities regarding child poverty and social services' resources for children at risk.⁴⁰⁸ There appears to be an upsurge in activities undertaken to promote awareness of the CRC throughout Sweden, but the Committee has expressed concern that it may not be sufficiently known by children and other professionals working with and for children⁴⁰⁹ and non governmental organisations have called for children's rights to be a mandatory part of the school curriculum.⁴¹⁰ Indeed, a survey carried out by the Children's Ombudsman in 2009 to ascertain how much the CRC features in the education and training given to teachers, police officers, nurses and social workers, found that nearly all degree courses and training programmes investigated looked at the subject of children's rights. Shortage of time and insufficient competence among teachers/lecturers, however, meant that the students did not always acquire enough knowledge to be able to use the CRC as a practical tool in their chosen professions.⁴¹¹ Another survey by the Children's Ombudsman showed that only one in five Swedish children between 11–14 years had knowledge of the CRC.⁴¹²

**Research suggests
that the CRC has
become the most
important tool for
enhancing the
status of the child.**

408 UN Committee on the Rights of the Child, 2009a, paragraphs 10–11; Child Rights International Network, Sweden: child rights references in the Universal Periodic Review, 2010.

409 UN Committee on the Rights of the Child, Concluding Observations: Sweden, CRC/C/15/Add.248, 2005b, paragraphs 12–13; UN Committee on the Rights of the Child, 2009a, paragraphs 21–22.

410 NGO Children's Rights Convention Network, Supplementary report by children, young people and adults in Sweden to the UN Committee on the Rights of the Child, 2008.

411 Save the Children Sweden, 2011.

412 Sweden, Submission to the Universal Periodic Review 2010.

6. Summary and conclusions



Successful implementation of the CRC is key to realising children's rights. Whilst all signatories to the CRC commit to implementing its principles in law and practice, there is no fixed approach prescribed in relation to implementation. The UN Committee on the Rights of the Child has provided detailed guidance on the measures that it considers necessary for effective implementation and many countries have chosen to implement some or all of these. The review of comparative practice in relation to the implementation of the CRC in the 12 countries included in this study indicates that:

- each of the countries in the study is taking the implementation of the CRC seriously, albeit in various ways and with varying degrees of commitment
- no one country has managed to fully implement the CRC
- there is no perfect, one-size-fits-all model for approaching implementation.

In regard to the latter point, it is very clear that the legal and policy responses to implementation will, by necessity, vary on a country by country basis and will be determined to a large extent by its legal and administrative structures, as well as political and public attitudes to international human rights law in general and children's rights in particular. Whilst recognising that these are often the determining factors, there were some overarching messages that can be drawn from across the country studies about the activities and factors which contribute to successful implementation of the CRC.

The impact of incorporation

In the countries where there has been incorporation of the CRC (Belgium, Norway, Spain), interviewees were more likely to say that children were perceived as rights holders and that there was a culture of respect for children's rights. Moreover, it was variously reported that it gave politicians, public officials and non governmental



The best interests principle in Article 3 was most likely to end up in domestic law.

organisations who wanted to advance the cause of children's rights a "hook" or "leverage" that was particularly influential when it came to ensuring integration of the principles in domestic law and policy. Whilst incorporation provided opportunities for strategic litigation and this had been successful in a number of instances, its main value was thought to be in the general message that it conveyed about the status of children and the knock-on effects for implementation of children's rights principles into domestic law and policy. It was suggested that a deliberate decision to incorporate (as in Norway) might have more impact than instances where the CRC has automatically become part of domestic law upon ratification (Belgium, Spain). This is difficult to determine, although the process of discussion and consultation around incorporation was recognised as having a positive role in advancing understanding and engaging with key stakeholders (for example, young people in Iceland), even where the outcome of that did not result in incorporation (Australia). Where it had taken place, incorporation clearly provided the springboard or basis from which a range of other measures and initiatives to implement the CRC were either launched or flowed naturally as a consequence

Value of the CRC being integrated in domestic law

Integration of the CRC principles in domestic law was being put into place in the case study countries and, on the basis of these countries, appears to be steadily increasing over time. The best interests principle in Article 3 was most likely to end up in domestic law, most commonly in areas of child protection, alternative care and family law, but sometimes in areas such as juvenile justice (such as in Ireland) and immigration (like in Norway). Whilst welcomed generally as a way of promoting a child focus in the particular area, interviewees differed as to how useful Article 3 was given its wide scope for interpretation. Article 12 was the next most likely to be included, and interviewees reported incorporation of Article 12 into domestic law as having had a strong impact in practice (for example, Belgium and Norway).

It was notable that there was little integration of other specific CRC provisions into domestic law. Incorporation of civil and political rights is less common (but see Spain's Organic Law) and socio-economic rights (as in the South African Final Constitution) are rarely protected explicitly in national laws. Moreover, there are interesting examples of the CRC being referred to generally (like Victoria State Law in Australia). Interviewees suggested that it is through domestic legislation that the CRC is likely to be most effective, as it is this that most influences how those who work directly with children treat children, that is to say teachers, social workers and lawyers.

Processes for review of legislation's compatibility with the CRC were thought to be an effective way of approaching integration systematically (as in Norway and Belgium) and were anticipated as useful in this regard in Australia. It was acknowledged through the country studies that the CRC principles needed to be incorporated into domestic legislation, but, for that to be effective, this process had to be supported by good awareness raising and training in the implications of children's rights-based approaches.

Relationship between central government and states in federated systems.

In many of the case study countries, the State Party had signed and ratified the CRC, but key responsibility for ensuring its implementation in law, policy and practice rested with devolved or federated regions, which had significant responsibility for areas like education, health and social care (such as Australia, Belgium, Germany and Spain). A recurring theme was the inconsistency of approaches or divergence in the commitment to the CRC across the different internal jurisdictions, with competence varying between regions leading to a lack of clear accountability for children's rights (like in Belgium). In some countries, it was apparent that this had positive consequences in enabling one region or jurisdiction to lead, prompting others to follow unconstrained by limitations existing at federal or national level. However, while it was accepted as important that these areas be allowed the flexibility to respond to their particular social and cultural contexts, this inevitably resulted in significant variations of approach, with the regional approach sometimes reflecting political interest at that level. In each country, areas were identified as being at the forefront of the implementation of the CRC (such as Victoria in Australia, Catalonia in Spain, Berlin in Germany and, in different respects, the Flemish- and French-speaking Communities in Belgium) and it was suggested that these regions played an important role in encouraging good practice elsewhere. Although, it was clear that some of the responsibility on the State Party to ensure implementation was diluted in the transfer of responsibility, with the central government sometimes limiting its role to monitoring and compiling the States Party's report. Many interviewees suggested that central government should explicitly retain overall responsibility for implementation, and take a more active role in ensuring that local regions and states are actively and consistently doing so. It was suggested that this would work best through national mechanisms to coordinate activity to develop national agreements on key issues that cross regional boundaries (for example, Australia has a system of cooperative agreements, known as Co-Ags, that have enabled government departments to collaborate in order to produce national level agreements on issues such as child care standards). Others suggested that greater consistency could be encouraged further by targeted national funding for particular policies and by having greater consistency in data collection.

All children's rights implementation is underpinned by awareness of the CRC

The need for training and awareness on the CRC was reiterated time and time again by interviewees who recognised that, at every level, from legislation to case law and policy development to service provision for children, effective implementation was contingent upon awareness of children's rights. This was not just about knowledge of the articles of the CRC or about children's issues, like child protection, but an understanding of children as the subject of rights, and of their entitlement to be treated with dignity and respect and to exert influence on their own lives. Whilst the best interest principle has been widely incorporated in legislation, for example, awareness of the CRC was perceived to be crucial in ensuring that it was applied in a way that was compliant. In spite of this, there were

The need for training and awareness was reiterated time and time again.



few examples of systematic training for duty bearers. An example of good practice is training for the legal profession and judiciary in Norway and Belgium, which has led to an increased number of cases where the CRC is cited. Whilst there was widespread recognition of the need to educate adults working with children and to increase sensitivity among the public, few interviewees (with Norway being the exception) identified children's rights education as important in the implementation strategy: it was seen as something that the CRC requires as a substantive right rather than as a means of implementation. However, some interviewees recognised that children's rights education would change culture over generations as children become future duty-bearers. Most countries had included aspects of human rights and child rights in the general curriculum, although these were rarely extensive and often optional elements. There were, however, interesting examples of child rights education in most jurisdictions, although many of these are organised by non governmental organisations.

Child rights monitoring bodies

Most of the countries had a Children's Commissioner or Ombudsman (Australia was a late exception, having only recently decided to appoint a national Children's Commissioner, although there were children's commissioner offices in each of the states). These bodies had very different powers and resources, often not as extensive as those invested in the four UK Children's Commissioners. However, where an Ombudsman approach had been adopted (as in Norway, Spain and Ireland), it was considered that the ability for children to make complaints directly to the office for investigation played an important role in the enforcement of the CRC. The Commissioners/Ombudsman offices were also perceived

It is clear that an ambitious national strategy can drive implementation in particular areas.

to be a fundamental aspect to monitoring implementation across time, to holding government to account, and to ensuring consistency in the implementation of the CRC at times of political change. They also have a key awareness-raising role.

National plans for children

Almost all of the countries had a national plan for children (Australia has not had one but is currently consulting on one), although these have not always been renewed (Germany's ended in 2009). It was suggested that for these to be most effective, there needed to be concrete action plans and targets. In rare instances these were linked to implementation of the CRC (for example the Flemish Community in Belgium), but even where this was not the case it is clear that an ambitious national strategy can drive implementation of the CRC in particular areas (like participation rights in Ireland). Where national plans are used to establish infrastructure and to embed children's rights into administrative decision making, they can have a clear impact on children's rights awareness and implementation.

Comprehensive data on children

There was general agreement that children's rights implementation is underpinned by comprehensive data, that this needed to be collected systematically in a way that identifies the most vulnerable categories of children, and that change needed to be tracked over time. Several countries (like Spain and Germany) publish official annual state of children's rights reports, which are identified as useful. Some have invested quite considerably in data collection (for example the Growing up in Ireland Study and Australia's Child Development Index), thus enabling an evidence base for policy development to be built up over time. However, in most instances, the focus was

Child participation was widely recognised as an important aspect of implementation.



There are good examples of child impact assessments being introduced in the legislative review process.

on key child development and well-being indicators, rather than the full range of children's rights. Attempts to develop and employ child rights indicators remain rare (South Africa is a notable exception). Across the country studies, interviewees highlighted that, without comprehensive, and up-to-date, disaggregated data, it was very difficult to understand or track the impact of government policy on children. Interviewees also referred to the need for effective ways of evaluating whether government policy on children's issues was having its desired effects.

Children's participation perceived as core, but often not systematic.

Child participation was widely recognised as an important aspect of the implementation of the CRC, although practice varied considerably. In Norway and Belgium, the principle has been implemented in domestic law and policy and there appears to be recognition that participation is required at all levels of decision making. In these instances, the legal requirements were perceived by some to have encouraged a culture of respect for children's views. These countries had relatively good examples of children's participation in individual decision-making in child protection and alternative care, and in private family law matters. Whilst child participation appeared to be less systematic elsewhere to Norway and Belgium, across the country studies, there were significant examples of it working effectively in many contexts, including children's involvement in city-planning decisions (for example in Melbourne, Australia), and embedding child participation in local authority decision making (for example, Ireland). In Ireland, the benefits of making an explicit commitment to listen to the views of children in national policy has clearly been instrumental in supporting a participation agenda across a whole range of governmental decision making. These examples aside, concerns were expressed about the extent to which the participation of children was meaningful in practice, and this was often linked to a view that children's protection rights were accepted more readily than their rights to autonomy in decision making (such as Spain and Australia).

Child-proofing legislation and policy through child impact assessment

There are good examples of child impact assessments being introduced in the legislative review process. Sweden, in particular, 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, known under the acronym JOKER, which must be conducted for every draft decree that directly impacts the interests of young people 25 years. More limited forms of child impact assessment are undertaken in a number of other places: for instance, many Ombudsman/Commissioner offices have an express function to comment on the compatibility of draft laws with the CRC (Ireland is an example of this).

Child budgeting remains rare in government and is still seen as fraught with difficulty

There was a large degree of interest in child-specific budgets, but few examples of it in practice. An exception is in South Africa where researchers have been collaborating with the Treasury to produce budgetary analysis of expenditure in relation to the implementation of child welfare legislation. Across the country studies, interviewees reported unsuccessful attempts to gain detailed information on child or youth expenditure. In many instances, this appeared to be thwarted by the fact that budgetary lines of expenditure in some areas (like health or transport) were not child specific and therefore made it very difficult to attribute expenditure dedicated to children.

Most countries struggle to protect the rights of the most vulnerable children

In all countries in the study, the most vulnerable groups of children (separated children, asylum seekers, indigenous children, and children in conflict with the law) continued to fare less well compared to their peers. This was linked to higher levels of poverty and social exclusion, concerns that have increased significantly in recent years. In several countries, interviewees suggested that separated children and asylum seekers were not seen as rights holders in the same way as other children, and this was linked, to an extent, to the weakness of the CRC in these areas. For this reason perhaps, some of the most effective forms of redress were perceived to lie in constitutional or domestic equality protections rather than specific child rights arguments, although it is clear that a variety of strategies were important in addressing these intractable issues. Interviewees also highlighted their concerns about the impact of the recession on children.

Ways of building a child rights culture

A recurrent theme across the interviews was whether the country had established a children's rights culture and what had been effective or otherwise. Public opinion, linked to the role of the media and their combined influence on the political system, was seen to be a key factor. Some interviewees reported a general culture of respect for rights (Norway, Belgium, Germany), while others suggested that one had developed in the wake of conflict and significant reconstruction (like in Spain and South Africa). For others, human and child rights were not considered to be the normal discourse, with values such as child-centredness or equity having more purchase (Australia). In several countries, child protection or the child as victim were more common public concerns (for example, Ireland) and in several instances, the tension between parents' rights and children's rights appeared to be part of the ongoing discussion, with adverse impact for the acceptance of children's rights (Australia, Germany, Ireland). In general terms, the following issues emerged as significant in terms of increasing levels of implementation by building a culture of respect for children's rights.

The first was a strong NGO sector. Across the country studies, there was evidence of significant advocacy work by non governmental organisations, which were often targeting legal and constitutional reform and regularly took the lead in the shadow/alternative reporting

Children's rights are better protected in countries that have given legal status to the CRC in some form.

In many countries, incorporation into domestic law provided a platform from which other legal and non-legal measures developed.

process to the UN Committee on the Rights of the Child. These organisations appeared to be most effective when they used a combination of strategies, such as public and media engagement, the pursuit of a strategic legal approach, and the persistent lobbying of government and decision-making bodies based on the CRC.

Second it was seen to be important to have key advocates or supporters in government or in public office. In many countries, many of the most significant changes regarding implementation can be traced to their support by a particular champion with influence, like a politician, a key government official, an experienced law professor or an non-governmental organisation leader. Interviewees identified a number of such champions working in different areas, including constitutional change, policy reform and participatory practices (for example Belgium, Germany, Norway, Ireland). Non governmental organisations were conscious of the need to identify and support such champions as part of their advocacy and lobbying strategies. However, whilst change often stems from a particular political champion, there is a danger that reliance on such individuals means that support for the CRC ebbs and flows. This is especially the case when the individual is in a political party that has lost power as the issue can be seen as being identified with that party. On the other hand, when the champion is a public official, there can be continuity and an opportunity to build support and ensure consistency over time. Reliance on key individuals to drive implementation also makes it difficult to sustain progress if the culture and the infrastructure to support it have not been sufficiently established.

Third the CRC reporting process was an important element of building a rights-respecting culture. Many of the interviewees had been involved in reporting to the Committee, either as a government representative or as part of the alternative reporting process. It was clear that constructive engagement in the reporting process can be a driver to greater implementation. Several government interviewees reported a greater level of awareness and personal commitment to the CRC in the wake of their experience, whilst others pointed to the potential of the reporting process to engage the public and media on children's rights issues. Equally, a risk was noted that some government officials are less engaged following attendance, if they felt they had not received a fair hearing before the Committee.

Concluding remarks – the path towards full implementation of the CRC

This report provides a wealth of information on the various legal and non-legal measures taken by the countries studied to advance implementation of the CRC into domestic law, policy and practice. It identifies many of the factors that serve to promote children's rights at national level and highlights those strategies that have been proven to be most effective in both implementing the CRC in law and policy, and in persuading decision makers and duty bearers about the importance and value of implementing at national level. Where possible, the effectiveness of those approaches has been clarified, although it remains difficult to establish, in any definitive or scientific way, the likely impact on children's lives of the approaches and measures taken. Nevertheless, what emerges from the research is an understanding that children's rights are better protected, at

least in law if not also in practice, in countries that have given legal status to the CRC in some form, and that have followed this up by establishing the necessary systems to effectively support, monitor and enforce the implementation.

It is thus a major finding of this research that all of the factors and mechanisms described above may play a role in the effective implementation of the CRC and that those countries that have adopted a range of approaches have been most successful in relation to implementation. That said, each country must find its own path towards full implementation. There is no single route to be taken and no single right way to proceed. What this research endeavours to do is to highlight some of the most effective approaches adopted to ensure that implementation is secured.

In summary, it is clear that in many countries the incorporation of the CRC into domestic law provided a platform from which other legal and non-legal measures developed. Although it is possible to argue that incorporation was dispensable to the measures that followed (that is, that measures short of incorporation might achieve the same results), the research shows that it is an important goal in itself to give the CRC the force of national law. In particular, both the process of incorporation (which raises awareness and can be accompanied by systematic training of decision makers) and the result (where the CRC becomes internalised in the national level system) have significant value in “bringing rights home” to children and to duty bearers.

The research shows that positive consequences of how children’s rights are perceived and implemented in practice, flow from this that would be difficult to achieve through other means. Related to this is the impact that incorporation can have on the content of domestic law and policy and, as those who are governed by the national law and policy framework (state officials and decision makers) work with the national law, the CRC starts to infuse the decisions they make and how they are made.

Of course, if its potential is to be fully realised, then all of this must be underpinned by systematic children’s rights training and a robust infrastructure designed to monitor, support and enforce implementation. Here several stakeholders, including UNICEF, national human rights institutions, non governmental organisations, academics and the media, have key roles. The work that they undertake as watchdogs – observing and documenting progress, auditing compliance, holding government to account, lobbying for change, and engaging and raising the awareness of the public – is critical to ensure that progress towards full implementation is sustained.

Those countries that have adopted a range of approaches have been most successful in implementation of the CRC.



7. Appendix 1: Project Advisory Board



Thank you to the following members of the Project Advisory Board

Aoife Nolan, Professor of International Human Rights Law,
University of Nottingham

Alex Tennant, Head of Research, Policy and Service Review,
NI Commissioner for Children and Young People (NICCY)

Harry Phinda, Youth Adviser, UNICEF UK Board

Jamie Burton, Barrister, Doughty Street Chambers

Kay Tisdall, Co Director of the Centre for Research on Families
and Relationships and Professor of Childhood Policy,
Edinburgh University

Dr Simon Hoffman, Lecturer in Law, Swansea University

Smita Shah, Barrister, Garden Court Chambers

Stephen Bowen, Director, British Institute of Human Rights

Tim Oxley-Longhurst, Youth Supporter, UNICEF UK and Student,
UNICEF UK Rights Respecting School initiative

Officials from the Welsh Government, Scottish Government, and
Department for Education in England had observer status.

8. Appendix 2: analytical framework



Analytical Frame	Country
A: Country context <ul style="list-style-type: none"> • What legal system is in place? 	
B: What is the legal reform? <ul style="list-style-type: none"> • What is the nature of the reform (including issues of redress and so on)? • What was the context/key drivers for the change (legal, political, social and cultural)? • What has been introduced to support implementation (training, awareness-raising, implementation group, resourcing and so on)? • What evaluation mechanism has been established (monitoring group, research, review, development of indicators)? • To what extent were children and other stakeholders engaged in the process of reform? 	
C: Is it making a difference? <ul style="list-style-type: none"> • Are there trackable changes in law and policy? • Have there been significant legal cases? (look especially for ESCR cases) • Is there child data showing improvements which can be attributed to this? • Is there evidence of increased awareness/ acceptance of child rights? • What are the barriers and obstacles? • What are the enablers? • What else is planned? • Are children and other stakeholders being engaged in implementation processes? 	

9. Appendix 3:

UK report England, Scotland, Wales and Northern Ireland*

* This summary was produced by UNICEF UK



9.1 Context

The United Kingdom (UK) of Great Britain and Northern Ireland comprises England, Wales, Scotland and Northern Ireland. It is a constitutional monarchy with no written constitution and relies on the principles of parliamentary sovereignty and the rule of law. There is a common law system in place in England and Wales, and Northern Ireland, and a mixed common and civil law system in Scotland. The UK also has sovereignty over a number of British Overseas Territories and Crown Dependencies. This section, however, will focus on the four jurisdictions of the UK.

The UK ratified the CRC on 16 December 1991. Originally, the UK had four reservations to the CRC relating to:

- the primacy of domestic immigration and nationality law
- child employment
- children's hearings in Scotland
- placing children in adult custodial establishments.

The reservations on child employment and children's hearings were withdrawn in 1997, and those on immigration and children in custody in 2008, shortly after the UK submitted its most recent report to the UN Committee on the Rights of the Child. The signatory to the CRC is the UK Government, based in Westminster, London.

Since the General Election in May 2010, a Coalition Government has been in power with David Cameron of the Conservative Party as the Prime Minister and Nick Clegg of the Liberal Democrats as Deputy Prime Minister. Responsibility for the reporting cycle falls to the Government department that has been given named responsibility for children and families, including children's rights. Currently, that responsibility lies with the Department for Education. Government ministers from each of the four jurisdictions have devolved responsibility for implementation of aspects of the CRC, and regularly keep in touch on rights-related issues. Government officials from each of the administrations meet quarterly to discuss progress with implementing the CRC.

9.1.2 Implementation in law

In the UK, international obligations have to be formally incorporated into domestic law before the courts are obliged to apply them. The European Convention on Human Rights (ECHR) has been incorporated through the *Human Rights Act 1998 (HRA)*, which came into force in 2000. The *HRA* gives people of any age in the UK the ability to protect their ECHR rights through the domestic courts and, if all other avenues have been exhausted, the European Court of Human Rights in Strasbourg.

The *HRA* applies to all public bodies, including the government and the courts. New legislation must include either a statement of compliance with the *HRA* or, where questions of compliance may arise, a section outlining the grounds upon which the Government has made its policy decisions. It has been applied in a series of legal cases affecting children and young people,⁴¹³ a growing number of which place considerable emphasis on articles in the CRC.⁴¹⁴ However, ECHR articles are not child-specific, can be weaker in

413 Human Rights Futures Project, 'Protection of children's rights under the Human Rights Act 1998', legal briefing, London School of Economics, London, 2011, available at <http://bit.ly/T06UDg>, accessed 18 October 2012.

414 For example, *Supreme Court of the United Kingdom, ZH (Tanzania) v. Secretary of State for the Home Department*, UKSC4, 2011.

articulation than CRC articles (for example, the right to education), and omit important areas such as social, economic and cultural rights. The CRC has not been incorporated into UK domestic law.

The Equality and Human Rights Commission (EHRC), established in 2007, works in England, Wales and Scotland. It has a statutory remit “to promote and monitor human rights and to protect, enforce and promote equality.” In addition, the *Equality Act 2010* protects people of all ages from direct and indirect discrimination across nine “protected” areas, including age, disability, gender, race, religion and belief, pregnancy and maternity, marriage and civil partnership, sexual orientation and gender reassignment.

The UK’s four Children’s Commissioners⁴¹⁵ and the Westminster Parliament’s Joint Committee on Human Rights⁴¹⁶ have recommended that the UK Government incorporate the CRC in domestic law. The Government has responded that the UK meets its obligations under the CRC “through a mixture of legislative and policy initiatives.”⁴¹⁷

In its 2008 concluding observations, the UN Committee on the Rights of the Child recommended strengthening children’s rights through a British Bill of Rights. In 2010, the Coalition Government set up a Commission to consider whether to create a UK Bill of Rights to complement or perhaps replace the existing Human Rights Act. In its most recent consultation paper,⁴¹⁸ the Commission asks whether the Bill should cover children’s rights which could include incorporation of the CRC in UK domestic law.

415 UK Children’s Commissioners, Report to the UN Committee on the Rights of the Child, 2008, paragraph 9.

416 Joint Committee on Human Rights, Children’s rights: 25th report of session 2008–09, 2009, paragraph 19.

417 House of Commons Hansard, vol. 532, col. 906W, 2011.

418 Commission on a Bill of Rights, Second consultation, 2012.



9.1.3 Non-legal measures of implementation

In its 2008 report to the UN Committee on the Rights of the Child, the UK Government confirmed its commitment to implementing the CRC⁴¹⁹ and evidenced this by:

- a demonstrable rise in the status of children's policy in Government
- the creation of Children's Commissioners in each of the four nations
- the passage of a substantial body of law
- the development of country-specific children's plans
- greater investment in children's services.

Although much of this remains in place, only Wales and Scotland publish national action plans. Investment in public services, including children's services has been significantly reduced as part of the Coalition Government's deficit reduction programme.⁴²⁰ In 2008, the Committee noted that the UK does not use the CRC as its overarching framework for the development of children's policy and, so has no clear strategy to ensure the full realisation of the principles, values and goals of the CRC, including in legislation.

In 2012, the EHRC published a set of human rights indicators that, whilst based on ECHR rights, also refers to rights drawn from international instruments including the CRC.⁴²¹

419 United Kingdom, Consolidated 3rd and 4th periodic report to the UN Committee on the Rights of the Child, 2008, paragraph 2.

420 HM Treasury, Spending Review, Cm 7942, 2010. This laid out departmental allocations until 2014–15.

421 Candler, J., Holdaer, H. et al., *Human Rights Measurement Framework: Prototype panels, indicator set and evidence base*, Equality and Human Rights Commission, London, 2012.

9.2 England



9.2.1 Context

In 2011, the population of children (0–17 years) was 11,336,600, approximately 21 per cent of the total population.⁴²² England is under the full jurisdiction of the UK Parliament in Westminster and has no separate devolved administration. The UK Parliament continues to legislate on matters that affect the UK as a whole, such as immigration and nationality, and national security. Since 1998 and the passage of devolution legislation in Scotland, Wales and Northern Ireland, there is an increasing tendency for Acts debated and passed in Westminster to relate to England, with specific sections devoted to the devolved nations. Edward Timpson, Under Secretary of State in the Department for Education, is responsible for children's rights policy in England and for coordinating work on the CRC across Government.

9.2.2 Implementation in law

Significant reform has taken place. For example, Section 1 of the *Children Act 1989* makes it clear that the child's welfare is paramount when the Family Court is making a decision about them. Section 55 of the *Borders, Citizenship and Immigration Act 2009* requires the UK Border Agency (through a duty placed on the Home Secretary) to promote and safeguard the welfare of children. In 2010, to deliver priorities in taking forward the Concluding Observations, the Government published a compendium of key legislation that underpinned the implementation of the CRC and committed to an annual review of progress.⁴²³ The last of the four UK Children's Commissioners was established in England by the *Children Act 2004*. The Children's Commissioner's function is to promote awareness of the views and interests of children in England. The same Act placed five child well-being indicators for children's services in law, none of which refer specifically to children's rights. Shortly after the General Election in 2010, the Children's Minister announced an independent review of the Office of the Children's Commissioner for England (OCCE), which reported in December 2010.⁴²⁴ The review recommended that England needs a Commissioner with adequate powers in order to meet its obligations under the CRC. In July 2012, the Department for Education published draft clauses⁴²⁵ to take this forward. Under the new legal framework, the Children's Commissioner for England will:

- promote and protect the rights of children in England in line with the CRC
- undertake child rights impact assessment on policy and legislative proposals
- look at complaints and advocacy services for children
- retain the powers to initiate inquiries, enter premises and conduct interviews.

Although there have been a number of positive changes to law and policy in England that have led to improved services for children and young people, not all have been implemented. In the CRC Action Plan, for example, the UK Government committed to considering how to increase opportunities for participation in schools, colleges and community settings. However, regulations to an existing duty on school governing bodies to invite and consider the views of pupils

422 Office for National Statistics, 2011 Census unrounded population and household estimates for England and Wales, 2012, available at <http://bit.ly/Q8BdZ0>, accessed 18 October, 2012.

423 Zaman, S., *The United Nations Convention on the Rights of the Child: How legislation underpins implementation in England*, report to the Joint Committee on Human Rights, Department for Children, Schools and Families, London, 2010.

424 Dunford, J., *Review of the Office of the Children's Commissioner (England)*, Department for Education, London, 2010.

425 Department for Education, *Reform of the Office of Children's Commissioner, draft legislation*, Cm 8390, 2012.



(Section 157 *Education and Skills Act 2008*) have never been issued. Section 2(11) of the *Children Act 2004* places a duty on the Children's Commissioner to regard the CRC when exercising his/her functions, a duty that will continue in the new legislation. In general, that duty does not extend to other public bodies that deliver a service to children and young people. However, statutory guidance requires Local Authority Directors of Children's Services and Lead Members with responsibility for Children's Services to have due regard to the CRC.⁴²⁶

9.2.3 Non-legal measures of implementation

Overall, implementation of the CRC in England has been sectoral and piecemeal, with no clear strategy for implementation. In 2009, the Government published an Action Plan, but that has not been updated.⁴²⁷ In her response to the Dunford Review of the Office of the Children's Commissioner, the then-Minister for Children and Families made a commitment "that the Government will give due consideration to the CRC Articles when making new policy and legislation."⁴²⁸ Although work has taken place within different Government departments, there is no overall strategy in place for disseminating or raising awareness of the CRC within civil society. Long-standing recommendations from the UN Committee on the Rights of the Child to ensure that Article 3 of the CRC is adequately integrated in all relevant legislation and policies or that Article 12 participation rights are mainstreamed, remain unaddressed.⁴²⁹ With the exception of the education budget and some welfare benefits (such as child benefit), it is not possible to identify how much is being spent on children and young people.

⁴²⁶ Department for Education, Statutory guidance on the roles and responsibilities of the Director of Children's Services and the Lead Member for Children's Services, 2012.

⁴²⁷ Department for Children, Schools and Families, *United Nations Convention on the Rights of the Child: Priorities for action*, Department for Children, Schools and Families Publications, Nottingham, 2009.

⁴²⁸ Department for Education, Publication of the independent review of the Children's Commissioner, written ministerial statement, 2010.

⁴²⁹ UK Children's Commissioners, Midterm report to the UK State Party on the UN Convention on the Rights of the Child, 2011.



9.3 Scotland



9.3.1 Context

In 2010, the population of children (0–18 years) was estimated to be 1,037,839, just under 20 per cent of the total population.⁴³⁰ Although Scotland has been part of Great Britain since the Acts of Union in 1707, the Scottish legal, social care and education systems are separate from those of England, Wales and Northern Ireland. The devolution settlement is laid out in the *Scotland Act 1998* and amended by the *Scotland Act 2012*. That legislation established both the Scottish Parliament and the Scottish Government. Paragraph 7(2)(a) of Schedule 5 of the *Scotland Act 1998* puts it within the legislative competence of the Scottish Parliament to “observe and implement international obligations.” On 5 May 2011, in the fourth General Election to take place since devolution, the Scottish National Party (SNP), which has campaigned for a Scotland independent of the United Kingdom, won 69 seats and was able to form a majority government. Its leader, Alex Salmond, is First Minister of Scotland. Aileen Campbell is the Minister for Children and Young People. A referendum on Scottish independence is due to take place in autumn 2014. The *Scotland Act 1998* lists “reserved matters” over which the UK Government retains power. These include asylum and immigration, social security/welfare benefits, the armed forces and national security. The same Act protects certain statutes from amendment or repeal by the Scottish Parliament, including the *Human Rights Act 1998*, which applies to both children and adults. In 2006, the Scottish Commission for Human Rights was established, with the overall objective to promote understanding and awareness of, and respect for, human rights.

9.3.2 Implementation in law

Scotland was the third nation in the UK to create an independent Commissioner for Children and Young People. The Commissioner’s functions are set out in the *Commissioner for Children and Young People (Scotland) Act 2003*. The role promotes and safeguards the rights of children with particular emphasis on the rights set out in the CRC, and to:

⁴³⁰ General Register Office for Scotland, Mid-2010 population estimates Scotland, 2010, available at <http://bit.ly/TEQsFY>, accessed 18 October 2012.

- promote awareness and understanding of the rights of children
- review the adequacy and effectiveness of any law, policy and practice as it relates to the rights of children
- promote best practice by service providers
- commission and undertake research on matters relating to the rights of children.

In carrying out his work, the Commissioner must involve and consult both children and organisations working with and for them, paying particular attention to children who do not have other adequate means by which they can make their views known. S/he also has the power to carry out formal investigations into rights issues that affect groups of children and young people in Scotland.

Of the four nations of the UK, Scots law combines features of both civil and common law, and so has most in common with other European countries. For example, Scotland has long had a social welfare rather than criminal justice-based approach to youth justice through the children's hearings system. This was established in the *Social Work (Scotland) Act 1968*, amended and then more broadly supported by the *Children (Scotland) Act 1995* and *Children's Hearings (Scotland) Act 2011*.

A number of separate measures have helped to take forward implementation of the CRC in Scotland, but progress has been inconsistent. Section 16 of the *Children (Scotland) Act 1995*, for example, makes the welfare of the child paramount in any children's or court hearing (Article 3 of the CRC), and gives children age 12 years and over the opportunity to express and have his/her views taken into account during these proceedings (Article 12 of the CRC). Section 1 of the *Standards in Scotland's Schools Act 2002* gives every school-age child the right to an education, and Section 2 places a duty on local authorities to secure that education, whilst having regard to the views of the child. The CRC has been cited in a number of court cases in support of ECHR articles in criminal cases, and on its own in civil cases relating to contact and residency following parental separation.⁴³¹

In September 2011, the First Minister announced legislation that would require all Scottish Ministers to give due regard to the CRC. Following a public consultation⁴³², those proposals were amended and a further consultation paper issued on a *Children and Young People Bill*⁴³³, due to be introduced in early 2013. The proposed Bill will place a duty on Scottish Ministers "to take appropriate steps to further the rights set out in the CRC" together with a duty "to promote and raise awareness of the rights of children and young people."

Subject to consultation, the Bill may also place a duty on both Ministers and relevant public bodies "to report on the steps they have taken" to further CRC rights, with reports published and laid before the Scottish Parliament every three years. Additionally, the powers of Scotland's Commissioner for Children and Young People (SCYPP) will be extended to enable it to undertake investigations on behalf of individual children and young people. The Bill will also place core elements of *Getting it Right for Every Child*⁴³⁴, a children's well-being, outcomes-based approach to service delivery, on a statutory basis.

431 Scottish Executive, *A Report on the Implementation of the UN Convention on the Rights of the Child in Scotland 1999–2007*, Scottish Executive, Edinburgh, 2007, paragraphs 23–31.

432 Scottish Government, 'A Scotland for children', consultation on the Children and Young People Bill, 2012.

433 Scottish Government, 2012.

434 Scottish Government, *Getting it right for children and families: a guide to getting it right for every child*, 2012, available at <http://bit.ly/SQyWO6>, accessed 18 October.

9.3.3 Non-legal measures of implementation

Scotland has a CRC action plan called *Do the Right Thing*, which sets out priority actions to improve children's rights in 21 areas of work between 2009 and 2013.⁴³⁵ A progress report was published in 2012.⁴³⁶ Key policies such as *Getting it Right for Children* and the *Early Years Framework*⁴³⁷ cite the CRC as a core principle, whilst the Scottish Government's common core of skills, knowledge and values for the children's workforce is founded on the CRC's general principles. The Scottish Government is part of a Scottish Children's Rights Implementation Monitoring Group with SCYPP and Together, the Scottish Alliance for Children's Rights. The children's NGO sector report better awareness of the CRC among practitioners, as a result of the Scottish Government's commitment to improve implementation of the CRC.⁴³⁸

435 Scottish Government, *Do the right thing*, a report for children and young people of SG action in response to the UN Committee Concluding Observations 2008, 2009.

436 Scottish Government, *Do the right thing*, progress report, 2012.

437 Scottish Government, *The early years framework*, 2008.

438 Together, *State of Children's Rights in Scotland*, Together, Edinburgh, 2011.



9.4 Wales



9.4.1 Context

In 2011, the population of children (0–17 years) was 633,400, around 20 per cent of the total population.⁴³⁹ The *Government of Wales Act 1998* created the National Assembly for Wales (NAW). This had no powers to commence primary legislation until after the passage of the *Government of Wales Act 2006*, which established the Welsh Assembly Government. The Welsh Government (WG)⁴⁴⁰ governs Wales, while the NAW makes laws. The WG has devolved law-making powers in a number of key areas, including education and training, social welfare, public health and health services. Part 3 of the 2006 Act gave the NAW the power to make measures based on the Legislative Competence Order process, which is a means of inserting matters into the original list of devolved areas. England and Wales is one jurisdiction in the UK (the others being Northern Ireland, and Scotland). This means that decisions regarding the police, criminal justice, youth justice and the courts remain with Westminster, as do reserved matters such as immigration and welfare benefits. Following the election on 5 May 2011, the Welsh Labour Party won 30 out of the available 60 seats. The First Minister is Carwyn Jones. Gwenda Thomas is Deputy Minister for Children and Social Services and leads on children's policy, including children's rights. The WG has been consulting on creating a separate Welsh jurisdiction in the UK, and the Silk Commission is looking at expanding the fiscal powers of NAW from autumn 2012.

9.4.2 Implementation in law

Wales was the first UK legislature to refer to the CRC in legislation in regulations setting out the powers of the Children's Commissioner for Wales in 2001. This office built on the post originally established in the *Care Standards Act 2000*, with a focus on safeguarding children using early years services and children living away from home. The main aim of the Children's Commissioner for Wales is to safeguard and promote the rights and welfare of all children in Wales. The Welsh Commissioner has the power to provide advice and support to children, review and monitor complaints and advocacy systems, and examine individual cases. At a plenary debate in January 2004, NAW formally adopted the CRC as the basis for policy-making relating to children and young people up to the age of 25. In 2009 Rhodri Morgan, then First Minister, announced that the Welsh Ministers intended to explore ways of legislating to "embed the [CRC] in law." In March 2011, the *Rights of Children and Young Persons (Wales) Measure* became part of Welsh law. Since May 2012, Welsh Ministers are required to have due regard to the requirements of the CRC and its Optional Protocols when making decisions about a provision to be included in an enactment, or the formulation of a new policy and/or legislation, or a review of or change to an existing policy and/or legislation. This requirement will be extended to cover all ministerial functions from May 2014. Whilst a "duty to have due regard" will produce effects in administrative law, it was formulated in a non-justiciable way⁴⁴¹ and so is unlikely to produce radically different approaches to judicial remedies in the courts in Wales compared to the courts in England.

439 Office for National Statistics, 2012.

440 As of 13 May 2011, the Welsh Assembly Government was renamed the Welsh Government.

441 Williams, J., 2012.



Ministers are also required to issue a Children's Rights Scheme⁴⁴² to set out how they intend to meet the "due regard" duty. Welsh Ministers will have to pay regard to reports and recommendations made by the UN Committee on the Rights of the Child when preparing the Children's Rights Scheme. They will have to report on the progress of the measure by 31 January 2013 and then every five years. The measure gives Ministers the power to amend legislation that does not comply with the CRC and its Optional Protocols, although the power is limited to devolved matters. Welsh Ministers are required to promote knowledge and understanding of the CRC amongst the public, including children. Continuing its 2004 move to formally adopt the CRC, Ministers are required to consider the relevance of the CRC and its Optional Protocols to young people age 18–25 and to apply any of the provisions to this age group as they determine necessary.

⁴⁴² Welsh Government, Children's Rights Scheme: arrangements for having due regard to the United Nations Convention on the Rights of the Child (UNCRC) in the Welsh Government's work on policy and legislation, 2012.

9.4.3 Non-legal measures of implementation

The Measure is designed to promote proactive behaviour by the Government rather than to confer a reactive individual remedy for a rights violation. Compliance with the duty will involve ensuring adequate internal controls, education, training (in particular of civil servants), data collection and monitoring, impact assessments – of precisely the kind urged by the UN Committee on the Rights of the Child. It will also require the development of a comprehensive strategy to promote knowledge and understanding of the CRC in Wales for Government officials and all practitioners working with and for children and young people.

In 2009, the Welsh Assembly Government published a five-year rolling action plan called *Getting it Right* (GIR).⁴⁴³ Wales has a GIR Implementation Support Group with representation from Government, the NGO and academic sectors to support the monitoring process, measuring performance and outcomes as well as ensuring that the action plan remains relevant. In 2006, work was undertaken to identify the proportion of the Welsh Assembly Government budget spent on children.⁴⁴⁴ This showed that, in 2006–07 an estimated 28 per cent, or £4.4 billion, of Welsh Government expenditure was allocated to children. Expenditure per child was expected to rise from £5,600 in 2005–06, to £7,100 by 2010–11, although it is likely that the anticipated increase was hit by the cuts in public spending that began in 2010. This child budgeting exercise has not been repeated.

In June 2012, the Wales Observatory on Human Rights of Children and Young People was launched at Swansea University as part of the *Taking the Rights Steps: Children's Rights Wales* and the World conference. The Observatory is a collaborative project committed to building capacity to support children and young people's access to their rights, conducting research, and lobbying for change in law and practice. It includes universities and children's organisations in the United States, Ireland, Norway, Spain and Wales.

443 Welsh Assembly Government, 'Getting it Right 2009: a 5-year rolling Action Plan for Wales setting out key priorities and actions to be undertaken by the Welsh Assembly Government in response to the Concluding Observations of the UN Committee on the Rights of the Child 2008', 2009.

444 Dolman, R., 'Financial provision for children within the Welsh Assembly Government budget', statistical article, 2009.

9.5 Northern Ireland



9.5.1 Context

In 2011, the population of children (0–17 years) Northern Ireland was 430,800, about 24 per cent of the total population. The Northern Ireland Assembly is the devolved legislature for Northern Ireland. It was established as a result of the Belfast (or ‘Good Friday’) Agreement of 10 April 1998. The Agreement was endorsed through a referendum held on 22 May 1998 and subsequently given legal force through the *Northern Ireland Act 1998*. This led to the creation of a series of interrelated bodies, in particular the Northern Ireland Assembly that has full legislative and executive authority for all matters that are the responsibility of Northern Ireland Government departments. Matters that are not the responsibility of Northern Ireland Government departments and remain the responsibility of the Westminster Parliament include nationality, immigration or asylum. Reserved matters are also dealt with by Westminster, unless it is decided by the Secretary of State for Northern Ireland that some of these should be devolved to the Assembly. On 12 April 2010, the Department of Justice was established as part of the devolution of policing and justice matters to the Northern Ireland Assembly. Following the March 2007 election, the Democratic Unionist Party (DUP) and Sinn Féin won the largest number of seats respectively. Peter Robinson (DUP) is currently First Minister, while Martin McGuinness (Sinn Féin) is Deputy First Minister. Northern Ireland’s first Minister for Children and Young People was appointed in August 2005 under Direct Rule. Following restoration of devolution in May 2007, responsibility for children’s issues were accorded to the junior ministerial portfolio under the auspices of the Office of the First Minister and Deputy First Minister (OFMDFM).



9.5.2 Implementation in law

In 2003, a Northern Ireland Commissioner for Children and Young People (NICCY) was established in accordance with the provisions of the Commissioner for Children and Young People (NI) Order 2003. The Commissioner's main aim is to "safeguard and promote the rights and best interests of children and young persons." Whilst the detailed powers are set out in the legislation, these include the powers to advise Government, promote children's rights, conduct formal investigations, issue guidance on best practice, and to bring, intervene or assist in legal proceedings concerning the rights of children and young people.

The Bill of Rights process in Northern Ireland emerged as a component of the peace process independently of, and separate to, human rights discussions across the UK. A commitment to a Northern Ireland Bill of Rights was included in the 1998 Good Friday Agreement and responsibility given to the Northern Ireland Human Rights Commission (NIHRC), to advise the Secretary of State for Northern Ireland on the scope for "defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights" and which would "reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience." Following a stop/start process spanning a period of almost 10 years, the NIHRC submitted its advice in December 2008. In its response, however, the Northern Ireland Office did not propose any new rights for children, stating that "the Government does not consider that the ... proposals made by the NIHRC [in respect of children] meet the criterion set out in the Agreement that the provisions in a Bill of Rights should 'reflect the particular circumstances of Northern Ireland ...'. While the protection and welfare of children are of the highest importance in Northern Ireland, they are of equal importance across the rest of the UK."⁴⁴⁵ This is in spite of research that demonstrated the negative impact of the conflict on many children and young people in Northern Ireland.⁴⁴⁶ Following the UK General Election in 2010, progress on a Northern Ireland Bill of Rights has stalled and attention has shifted to a potential UK-wide Bill of Rights.

The Green Party NI has developed proposals for a Private Members Bill on a statutory duty to cooperate. The key objective of the Bill is to introduce a statutory legal duty on the Northern Ireland Executive to collaborate in the achievement of the outcomes under the 10-year Children and Young People's Strategy and for relevant Government departments and agencies to collaborate in the planning, commissioning and delivering of children's services. It remains to be seen whether and to what extent these proposals will attract support from other political parties in the Northern Ireland Assembly. Elsewhere progress has been more limited. Section 3(1) of the Children (NI) Order 1995 makes it clear that the child's welfare is paramount when the court is making a decision about them, while under the Education NI (Order) 2003 schools are required to consult pupils on discipline and bullying policies and as part of the school development plan process.⁴⁴⁷ In 2011, following successful lobbying by NICCY and non governmental organisations, Article 3(7) of the Safeguarding Board Bill was strengthened and requires the Safeguarding Board to promote communication between it and children and young people. The CRC has been referred to directly in

445 Northern Ireland Office, 'A Bill of Rights for Northern Ireland: Next Steps', consultation paper, 2009, p. 62.

446 See for example, Horgan, G. and Kilkelly, U., *Protecting children and young people's rights in the Bill of Rights for Northern Ireland: Why? How?, Save the Children and the Children's Law Centre*, Belfast, 2005; Leitch, R. and Kilpatrick, R. (1999) *Inside the Gates: Schools and the troubles*, Save the Children, Belfast, 1999; Leonard, M., 'Trapped in space? Children's accounts of risky environments', *Children and Society*, vol. 21, no. 6, 2007, pp. 432–445; Smyth, M., Fay, M.T. et al., *The Impact of Conflict on Children in Northern Ireland*, ICR, Belfast, 2004.

447 *Education and Libraries (Northern Ireland) Order*, 2003.

448 For example *Re C (No Contact Order: Representation of Children)*, in which Article 3 is considered, and *Re C (A Minor) (Custody: Jurisdiction)* (unreported), in which Article 12 is considered – see Children's Law Centre and Save the Children Northern Ireland, Additional information from Northern Ireland in response to the list of issues relating to implementation of the UN Convention on the Rights of the Child in the UK, 2008.

449 For example *Re S, N & C* (Non-Hague Convention Abduction: Habitual Residence: Child's Views) – see Children's Law Centre and Save the Children Northern Ireland, 2008.

450 Court of Appeal in Northern Ireland, Application for judicial review by the Northern Ireland Commissioner for Children and Young People, NIQB 115, 2007.

451 House of Lords, *Re E (a child)*, UKHL 66, 2008.

452 High Court of Justice in Northern Ireland, An application by JR1 by her mother and next friend for judicial review, NIQB 125, 2009.

domestic courts: for example, in judgments in the Family Division of the High Court in Northern Ireland in the context of contact, residence and care proceedings,⁴⁴⁸ and non Hague Convention abduction.⁴⁴⁹ More recently, NICCY has used its powers to intervene in a number of cases from a children's rights perspective: for example, physical punishment,⁴⁵⁰ the right to be protected from inhumane and degrading treatment under Article 3 of the ECHR,⁴⁵¹ and the use of tasers.⁴⁵²

9.5.3 Non-legal measures of implementation

One of the most significant developments in Northern Ireland to date has been at policy level in the form of the 10-year Strategy for Children and Young People. In October 2003, Government published its working paper on the Emerging Strategy that became *Making it R Wld 2* and set the strategy as its "implementation plan for the CRC." A wide range of stakeholders were involved in the development of the strategy, including children and young people. However, the final strategy, launched in 2006, replaced that approach with one that will instead help drive Northern Ireland "towards a culture which respects and progresses the rights of the child."⁴⁵³ More recently however, there is some evidence that increasing reference is being made to children's rights across a number of strategies, policies and action plans.⁴⁵⁴ However, research carried out on behalf of NICCY in 2011, highlighted a number of significant barriers to the effective implementation of children's rights in Northern Ireland.⁴⁵⁵ In particular, while there is increasing reference to children's rights within Government strategies, practice remains inconsistent and understanding of the CRC and its implications lacking. There is no formal or statutory system of child impact assessment in place to predict the impact of strategies, policies or budgetary allocations on children and the enjoyment of their rights. Nor is there a statutory requirement for Government departments to work together to undertake specific actions under the 10-year Children and Young People's Strategy. While the recognition accorded to children's rights within the strategy was broadly welcomed, there has been general disappointment that the Strategy has not provided the vehicle for full implementation of the CRC within Northern Ireland as had originally been envisaged.⁴⁵⁶ Indeed, the research uncovered concern among some community and voluntary sector organisations and statutory bodies that children's rights were in fact being deprioritised in spite of the 10-year Strategy. The research ultimately highlighted a need for action in implementing children's rights in Northern Ireland more effectively. It recommended a more consistent application of a children's rights framework to policy development and implementation and that consideration be given to a statutory duty to co-operate at both central government and intra agency level. Research commissioned by NICCY, the Department of Finance and personnel (DFP) and OFMDFM highlighted that Northern Ireland has the lowest spend per child on children's services of all regions in the UK,⁴⁵⁷ while in 2008 the UN Committee on the Rights of the Child expressed concern at the levels of persistent poverty experienced by children and young people in Northern Ireland.⁴⁵⁸

453 Office of the First Minister and deputy First Minister, *Our children and young people – our pledge*, A ten year strategy for children and young people in Northern Ireland 2006–2016, 2006, p.13

454 For example, the Care Matters Strategy, the Families Matter Strategy, the Play and Leisure Policy and Implementation Plan.

455 Byrne, B. and Lundy, L., *Barriers to Effective Government Delivery for Children and Young People in Northern Ireland*, Northern Ireland Commissioner for Children and Young People, Belfast, 2011.

456 Northern Ireland Commissioner for Children and Young People, *Children's rights: rhetoric or reality*, review of children's rights in Northern Ireland 2007/08, 2008.

457 Economic Research Institute for Northern Ireland/Institute of Fiscal Studies, *An Analysis of Public Expenditure on Children in Northern Ireland*, Northern Ireland Commissioner for Children and Young People/ Department of Finance and Personnel/ Office of the First Minister and the Deputy First Minister, Belfast, 2007.

458 UN Committee on the Rights of the Child, Concluding Observations: United Kingdom, CRC/C/GBR/CO/4, 2008, paragraph 64.



10. Appendix 4: glossary of key terms



civil law

A legal system that derives mainly from Roman law and emphasises the arrangement of laws into comprehensive national codes. Civil law relies heavily on written law.

UN Committee on the Rights of the Child

The body of experts responsible for monitoring the implementation of the UN Convention on the Rights of the Child. The Committee on the Rights of the Child is serviced by the United Nations Human Rights Council in Geneva and holds three sessions a year, each lasting four weeks. Members are elected for a term of four years by States Parties in accordance with Article 43 of the UN Convention on the Rights of the Child. Members serve in their personal capacity and may be re-elected if nominated.

common law

Law that has been built up over the course of time on the basis of decisions taken by judges (sometimes called 'precedents'). It can be contrasted with legislation, which is law made by Parliament.

Concluding Observations

The observations and recommendations issued by a treaty body after consideration of a State Party's report. Concluding Observations are meant to be widely publicised in the State Party and to serve as the basis for a national debate on how to improve the enforcement of the provisions of the CRC. Governments are expected to implement the recommendations contained therein.

Constitution

The fundamental law of a State, typically outlining the structure of Government and the means by which the Government will operate; may also include the principles of human rights which are intended to guide all Government action, including legislation.

Declaration

A form of 'soft' law. This means it is morally rather than legally binding upon States and represents international consensus on a particular issue. Examples include the Universal Declaration on Human Rights and the 1959 Declaration on the Rights of the Child.

dualism

For States with a 'dualist system', international law is not directly applicable until it is first translated into national legislation.

European Convention on Human Rights (ECHR)

Formally known as the Convention for the Protection of Human Rights and Fundamental Freedoms, ECHR is an international treaty to protect human rights and fundamental freedoms in Europe. It entered into force on 3 September 1953.

General Comment

A treaty body's interpretation of the content of human rights provisions. General Comments often seek to clarify the reporting duties of State Parties with respect to certain provisions and suggest approaches to implementing treaty provisions.

monism

In a pure monist state, international law does not need to be translated into national law. The act of ratifying an international treaty immediately incorporates the law into national law, giving it direct effect.

ratification

The act whereby a State establishes its consent to be bound by a treaty. Most treaties allow for States to express their consent to be bound first by signature subject to ratification. Signing a treaty allows States time to seek approval for the treaty at the domestic level and to enact any legislation necessary to implement the treaty domestically, prior to undertaking the legal obligations under the treaty at the international level, and which it will do through the act of 'ratification'. For example, the UK signed the CRC on 19 April 1990 and ratified it on 16 December 1991.

reservation

A reservation is a statement made by a State by which it purports to exclude or alter the legal effect of certain provisions of a treaty in their application to that State. A reservation may enable a State to participate in a treaty that it would otherwise be unable or unwilling to participate in. States can make reservations to a treaty when they sign, ratify, accept, approve or accede to it. However, reservations cannot be contrary to the object and purpose of the treaty

State Party

A State that has expressed its consent to be bound by a particular treaty, normally through an act of ratification or accession. This means that the State is bound by the treaty under international law.

Treaty

An international agreement concluded between States and that is governed by international law, Treaties can also be known as a Convention or a Covenant. A treaty is a form of "hard" law. Examples include the UN Convention on the Rights of the Child, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Racial Discrimination.

Universal Declaration on Human Rights

Adopted by the UN General Assembly in 1948, the Declaration for the first time in human history spells out basic civil, political, economic, social and cultural rights that all human beings should enjoy. It was further elaborated in the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

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