Enhancing the Status of UN Treaty Rights in Domestic Settings

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ABBREVIATIONS

Human rights law instruments
CAT UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment
CEDAW UN Convention on the Elimination of All Forms of Discrimination against Women
CEDR UN Convention on the Elimination of All Forms of Racial Discrimination
CRC UN Convention on the Rights of the Child
CRPD UN Convention on the Rights of Persons with Disabilities
ECHR European Convention on Human Rights
HRA Human Rights Act 1998
ICCR UN International Covenant on Civil and Political Rights
ICESCR UN International Covenant on Economic, Social and Cultural Rights

Organisations and processes
EHRC Equality and Human Rights Commission (UK)
JCHR Joint Committee on Human Rights (Westminster)
NGO Non-Governmental Organisation
NHRI National Human Rights Institution
UN United Nations
UPR Universal Periodic Review

GLOSSARY

Adaptation – the constitutional or statutory incorporation of a treaty with substantive modifications to the treaty text
Civil society – non-governmental organisations which seek to represent and manifest the will of citizens
Concluding Observations – conclusions and recommendations of UN Treaty bodies on states’ periodic reports
Directive principles of social policy – requirements placed on particular bodies (e.g. on parliament in the Republic of Ireland) to consider various aspects of social justice in the making of laws
Duasism – a constitutional system (contrasting with monism) in which enacting legislation is required in order for international treaties to become part of domestic law
Extra-legal – (of an action or situation) outside the province of the law
General comments – a document produced by a UN treaty body which gives further explanation of a state’s obligations in relation to a particular treaty right
Implementation – an action that gives domestic effect to an international law standard in some way
Incorporation – the inclusion of an international law standard within domestic law such that it is potentially enforceable in domestic courts
Monism – a constitutional system (contrasting with duasism) in which international treaties automatically become part of domestic law on ratification
National Human Rights Institution – an independent publicly-funded institution, accredited by the United Nations, with the responsibility to protect, monitor and promote human rights in a particular country
Transformation – the literal and direct incorporation of the text of a treaty into a country’s constitution or as a statute
UN treaty body – a committee of independent experts responsible for monitoring implementation of a treaty (including by reviewing reports) by governments, NHRI’s and civil society on a member state’s performance against an international human rights treaty

EXECUTIVE SUMMARY

Background
UN treaties are binding in international law on the states that have ratified them, but states have significant latitude in how they implement treaties in domestic law, policy and practice. Although the process can be framed in different ways, three basic methods of implementing and enhancing UN treaty rights in domestic frameworks can be identified:

- ‘Hard’ methods of legal incorporation, characterised by reliance on the possibility of legal enforcement of rights through the courts;
- ‘Intermediate’ means of implementation, characterised by less forceful public sector obligations, and;
- ‘Soft’ extra-legal measures, characterised by more direct involvement of civil society and the building of a societal human rights culture.

This research examines international and domestic case studies in order to identify the most effective means of enhancing the status of UN treaty rights in the UK’s domestic framework. We gathered evidence through a combination of desk research and field research (questionnaires and interviews).

Our Main Findings

A smart mix of methods works best: Our research concur with other literature, which argues that sound implementation requires a smart mix of methods, from ‘hard’ (legal) incorporation, ensuring that rights are legally enforceable, to ‘soft’ means, such as human rights education and budgeting.

Concrete cause and effect and hard to identify: Where incorporation has taken place there is some evidence of benefits as outlined below. It is often difficult however to identify clear instances where treaty implementation has led to concrete human rights outcomes (beyond ‘on paper’). Conversely, it is difficult to know what would have happened had the treaties not been implemented. This could be because complex interactions of legal, social, cultural and other factors means it can be difficult to establish a clear causal link. Additionally, it may take time for changes to become apparent. Nevertheless, there are some lessons to be learned from the individual instances of implementation considered in this research.

Legal (‘hard’) Incorporation of UN treaty rights

- Incorporation is best: Our research supports consensus in the literature that incorporation through domestic law remains the most effective means of ensuring compliance with human rights treaty obligations. States may incorporate treaties, in whole or in part, into domestic law. Incorporation in full has led to strong reliance by the courts, for example on the CRC in Norway.

- Constitutional incorporation is the strongest approach: Constitutional incorporation, where possible, is preferable because of the message it sends about the position of rights in the legal hierarchy. It should be accompanied by statutory instruments that give legal effect to those rights.

- Socio-economic rights should be a priority for incorporation: The research indicates that incorporation of ICESCR rights is both possible and desirable. Although politically challenging, there is evidence of popular support in the UK for the incorporation of socio-economic rights and this could be developed further as occurred in New Zealand.

- The HRA works well: The design of the HRA, although it constitutes partial incorporation of the ECHR, performs well compared to bills of rights in other jurisdictions in terms of striking a balance between the relative roles and powers of the courts, legislature and executive while also providing robust protection of rights. The HRA could serve as a model for implementation of other instruments.

- Incremental incorporation can yield success: There are means of incorporation (for example securing legislation on a specific right) which are less holistic than incorporating an entire treaty, but can enhance the legal status of a treaty nevertheless. Strategic litigation is an important part of these efforts.

Implementation of UN treaty rights through ‘intermediate’ measures

Intermediate measures generally seek to raise the status of rights through defined duties on the public sector, for example a duty to take a human rights treaty into account when assessing new legislation or carrying out public functions. Our research found that due regard duties, such as those in Wales and Scotland regarding the CRC, are yielding results in terms of enhancing knowledge about rights and bringing about concrete change in particular in terms of ensuring regard is given to rights in policy development processes. A public sector duty can be successful, but it should be clear where the responsibility for a given duty lies, and exactly what it requires.

‘Soft’ (or ‘extra-legal’) measures of implementation of UN treaty rights

The research indicates that ‘soft’ measures are a crucial part of the picture of implementing treaty rights. They may derive from obligations enshrined in law, such as due regard duties. They can include action plans, benchmarking exercises, impact assessments, sector-specific initiatives and human rights budgeting. Public human rights education and awareness-raising campaigns can be crucial for ensuring social, cultural and political will for enhancing treaty rights.

1 See e.g. respondents 9, 13, 17, 26, 27 and 28 (listed in the Appendix below) who
3 See Section 2.1 -
4 See e.g. Case 2 below on Norway’s incorporation of the CRC.
5 See Section 3 (and below)
6 See e.g. Case 11 -
7 See Section 5.3.5
8 See Case 17 -
9 See e.g. Case 7 -
10 See e.g. Case 14 of CRC Article 12 in Ireland and Case 7 of the Irish Sign Language Act 2007
11 See e.g. Case 2 and 10 -
12 See e.g. Case 12 on the duty in Wales and Case 16 on the CRC duty in Scotland
1. INTRODUCTION

1.1. Aims of the research

This research report examines international and domestic approaches to treaty implementation in order to fill knowledge gaps and create evidence-based policies and strategies for improving human rights law and practice.1

The principal objectives of the research were to:

- Explore the different models used (both in the UK and in other countries) to enhance the status of UN treaty rights in domestic systems, and to assess the effectiveness of these models;
- Understand the full range of opportunities for enhancing the status of treaties and treaty rights in the UK, and;
- Establish best practice for enhancing the status of treaty rights and identify lessons applicable in the context of the non-devolved UK legislative framework.2

The research team was led by Dr. Aisle Dalry, Senior Lecturer at the School of Law and Social Justice, University of Liverpool, working together with Dr. Joshua Curtis, Postdoctoral Research Associate at the School of Law and Social Justice, University of Liverpool, and Dr. Yvonne McDermott Rees, Associate Professor of Law at the Hillary Rodham Clinton School of Law, Swansea University.

1.2. Context

Human rights treaties are legally binding instruments of international law. When states become party to a human rights treaty, they agree to take all appropriate legislative, administrative, and other measures that are necessary to implement that treaty, and to ensure the rights therein are realised for all people within their jurisdictions.3 With regard to economic, social, and cultural rights, states parties are required to undertake such measures progressively and to the maximum extent of their available resources.4 Each human rights treaty establishes a treaty body, which monitors States Parties’ implementation of the treaty through regular reporting cycles.5 Treaty bodies also issue treaty-specific general comments and recommendations, which provide guidance to states on the measures necessary to ensure compliance with their treaty obligations.6 In addition, in a process led by the UN Human Rights Council, known as the Universal Periodic Review (UPR), the human rights context of each UN state is peer-reviewed by other member states in a four and a half yearly cycle.7

Each state party has discretion as to what measures it will take to ensure full implementation of its obligations under the human rights treaties.8 How treaties are given legal effect is very much dependent on the legal and constitutional systems of specific states. In ‘monist’ states, such as France and Germany, once a treaty has been ratified it becomes part of national law automatically.9 In ‘dualist’ states, such as the UK and other common law jurisdictions, however, primary legislation is necessary to give the treaty direct effect in national law.10 In some jurisdictions, treaties are equivalent to national statute law, but in others they may have constitutional status, which is generally superior to national statute law.11 There is also variation as to whether treaty rights can be invoked in court, and whether they will be considered enforceable in domestic courts.12

There are different ways in which one can categorise and describe these different methods of implementing international human rights law treaties.13 On the basis of our findings, we have opted to categorise them as follows: legal (‘hard’) incorporation, intermediate measures (such as ‘due regard’ duties), and ‘soft’ (extra-legal) measures. The scope and structure of this report reflects this variety of measures, as illustrated in Fig. 1 right.

This research takes place at an important constitutional moment for the UK. It has been conducted as the exit from the European Union begins. This period of change presents an opportunity to build public support and strengthen commitments to implementing international human rights treaties through measures that reflect international best practice.

1.3. Methodology

This research examined the implementation of the seven core UN human rights treaties that the UK has signed and ratified, and which are monitored by the EHRC. These seven treaties are:14 ICCPR, ICESCR, CESCR, CEDAW, CRC, and CRPD. Our methodology comprised three strands: a desk-based literature review; identification of case studies of high relevance to the UK literature; and field research (questionnaires and interviews).

This period of change presents an opportunity to build public support and strengthen commitments to implementing international human rights treaties through measures that reflect international best practice.

1 See, for example, Committee on the Rights of the Child, General Comment No. 20, On the Implementation of the Rights of the Child During Adolescence, CRC/C/GC/20, 3 December 2009; and Committee on the Rights of Migrant Workers, General Comment No. 23, on the Rights of Migrant Workers, CESCR/C/GC/23, 18 December 2011.
2 See, for example, Committee on Economic, Social and Cultural Rights, General Comment No. 14, on the Right to the Highest Attainable Standard of Health, and General Comment No. 20, on the Right to Development.
3 See, for example, Committee on the Rights of the Child, General Comment No. 20, On the Implementation of the Rights of the Child During Adolescence, CRC/C/GC/20, 3 December 2009.4 See, for example, Committee on the Rights of the Child, General Comment No. 20, On the Implementation of the Rights of the Child During Adolescence, CRC/C/GC/20, 3 December 2009.
5 See, for example, Committee on the Rights of the Child, General Comment No. 20, On the Implementation of the Rights of the Child During Adolescence, CRC/C/GC/20, 3 December 2009.
6 See, for example, Committee on the Rights of the Child, General Comment No. 20, On the Implementation of the Rights of the Child During Adolescence, CRC/C/GC/20, 3 December 2009.
7 See, for example, Committee on the Rights of the Child, General Comment No. 20, On the Implementation of the Rights of the Child During Adolescence, CRC/C/GC/20, 3 December 2009.
8 See, for example, Committee on the Rights of the Child, General Comment No. 20, On the Implementation of the Rights of the Child During Adolescence, CRC/C/GC/20, 3 December 2009.
9 See, for example, Committee on the Rights of the Child, General Comment No. 20, On the Implementation of the Rights of the Child During Adolescence, CRC/C/GC/20, 3 December 2009.
10 See, for example, Committee on the Rights of the Child, General Comment No. 20, On the Implementation of the Rights of the Child During Adolescence, CRC/C/GC/20, 3 December 2009.
11 See, for example, Committee on the Rights of the Child, General Comment No. 20, On the Implementation of the Rights of the Child During Adolescence, CRC/C/GC/20, 3 December 2009.
12 See, for example, Committee on the Rights of the Child, General Comment No. 20, On the Implementation of the Rights of the Child During Adolescence, CRC/C/GC/20, 3 December 2009.
13 These treaties also have a number of Optional Protocols, which either provide for procedures in relation to the treaty or address a substantive area related to the treaty.
1. Effectiveness – we considered demonstrable success of methods and means, reasons for failure or poor performance, and gave attention to interactions between models.

2. Relevance to UK context – we considered the feasibility of introducing the model/practice in the UK, bearing in mind specific legal, social, cultural and institutional factors.

3. Variety – we considered examples across the range of human rights, reflecting national and local level methods.

4. Efficiency of research – we considered possible language, distance, time and other barriers.

**Questionnaires and interviews**

We sought and obtained ethics approval from the University of Liverpool Ethics Committee for our field research. We identified key stakeholders (NGO and government personnel, academics, legal professionals) from countries where various means of implementation have been adopted, to gather their insights on the effectiveness of those means in practice.

We contacted them either through our own professional contacts, publicly available email addresses or via the front desks of their respective institutions. They were invited to participate either via questionnaire or phone/Skype interview. They were provided in advance with participant information and consent forms. We sent approximately 200 email invitations. Most email invitations included a bespoke questionnaire which contained questions specific to the context of the case study under examination and to the expertise of the individual. There was a relatively low rate of take-up of invitations to participate. We ultimately had 18 written questionnaire responses5 and conducted 13 interviews.

The semi-structured questionnaire provided scope for the respondents to provide qualitative information on their experiences and opinions in either oral or written form. We ensured confidentiality for participants and we refer to them in this report by job title and national context.

This mixed-methods approach (desk research, case study focus and field research) has revealed some distinct examples of good practice, which are included in boxed and/or within the narrative throughout the following chapters.6

We used these sources to build a picture of differing methods of implementation and their effectiveness. Our strongest conclusions were reached when the views of the respondents were corroborated with the views of the field research. This helped to build a picture in ways that would be difficult to establish in any other way.

Given that the UK is a dualist State, formal incorporation is generally required before the State’s international treaty obligations become enforceable in domestic courts. In this chapter various forms of legal incorporation into the national legal system are considered. In the process of ‘transformation’ the text of a treaty is literally and directly incorporated as a part of a constitution or a statute. In the process of ‘adaptation’, constitutional or statutory incorporation of a treaty involves substantive modifications to the treaty text. Incorporation may be done via constitutional amendment, through statute or via a bill of rights. In some jurisdictions it is also possible to incorporate international human rights provisions via statute or case law.7

**2. LEGAL (‘HARD’) INCORPORATION OF UN TREATY RIGHTS**

In this chapter we will consider the legal incorporation of UN human rights by governments: specifically whether human rights are incorporated through the process of constitutional incorporation, or whether they are incorporated through statute, case law or international treaty. We will also consider the legal and political implications of these different forms of incorporation.

**2.1 Constitutional Incorporation**

In some domestic settings with ‘written’ or formal constitutions there is now a long tradition of constitutional incorporation of rights, either through transformation or adaptation. The main purpose of a written constitution is to codify the fundamental legal, political and social values that apply to the domestic setting, protect the rights of individuals and serve as a reference point for the courts. This research was conducted between December 2017 and March 2018, with ethics approval obtained January 2018. There was therefore a short timeframe in which to conduct the field research which limited the availability of participants.

1.4 Challenges of the Research

This research was conducted between December 2017 and March 2018, with ethics approval obtained January 2018. There was therefore a short timeframe in which to conduct the field research which limited the availability of participants.

It has proven difficult to identify best practice for strengthening the status of UN human rights treaties in domestic law. There is much material available on what does not work well. There are some useful advisory documents on what may work in the future. There are some examples of incorporation yielding very positive results (see e.g. cases 3 and 4 below). Yet greater consideration should be given to establishing links between legal incorporation of particular instruments and success in progressing human rights in this way. In terms of impact, in some cases the developments are quite recent (such as CBC duties in Scotland and Wales), so time is needed to monitor progress and gather evidence of impact. Generally, we can say that complex interactions of legal, social, cultural and institutional factors will shape the effectiveness of human rights in reality. These interactions create difficulties in drawing a clear line between a specific implementation measure and a particular outcome. For example, Norway rates among the top five countries globally for gender equality,8 yet it also incorporated CEDAW. However, the relationship between these two facts (and whether one precipitated the other) is unclear. It is hoped that this report will go some way towards addressing this gap in the literature for future studies, and we strongly encourage that further research works to draw what are likely clear links between legal incorporation and human rights improvements over time.

CASE 1: Constitutional incorporation of socio-economic rights in South Africa

In post-apartheid South Africa there was a strong impetus to tackle inequality and widespread support for this goal. Socio-economic rights were incorporated in 1996 directly into Articles 26-29 of its new constitution as justiciable rights. These individual entitlements are enforceable by the courts, on a par with civil and political rights. These rights correspond to those in ICESCR and, like ICESCR rights, they are subject to available resources and progressive realisation, striking a balance between constitutional commitments and political and economic realities. Commentaries and local reports indicate moderate success in terms of human rights protection. Early judicial enforcement of these rights (in cases such as Khehla vs Minister of...)

5. The response rate was poor, so in order to maximise the data we did not pose a question in advance of coding content but instead of interviewing participants a questionnaire was circulated only if a positive response was received from the invitee.

6. Some respondents were too busy to be of use for the research (e.g. where only ‘yes’ or ‘no’ answers were given). They are excluded from this figure.

7. The list of case studies and respondents in the Appendix below. See the list of case studies and respondents in the Appendix below. We distinguished between two types of case studies and respondents.

8. There was a relatively low rate of take-up of invitations to participate either via questionnaire or phone/Skype interview. They were provided in advance with participant information and consent forms. We sent approximately 200 email invitations. Most email invitations included a bespoke questionnaire which contained questions specific to the context of the case study under examination and to the expertise of the individual. There was a relatively low rate of take-up of invitations to participate. We ultimately had 18 written questionnaire responses and conducted 13 interviews.

9. The semi-structured questionnaire provided scope for the respondents to provide qualitative information on their experiences and opinions in either oral or written form. We ensured confidentiality for participants and we refer to them in this report by job title and national context.

10. There was a relatively low rate of take-up of invitations to participate either via questionnaire or phone/Skype interview. They were provided in advance with participant information and consent forms. We sent approximately 200 email invitations. Most email invitations included a bespoke questionnaire which contained questions specific to the context of the case study under examination and to the expertise of the individual. There was a relatively low rate of take-up of invitations to participate. We ultimately had 18 written questionnaire responses and conducted 13 interviews.

11. The semi-structured questionnaire provided scope for the respondents to provide qualitative information on their experiences and opinions in either oral or written form. We ensured confidentiality for participants and we refer to them in this report by job title and national context.
2.2 Incorporation through statute and precedent

In implementing human rights treaties through domestic law, a state may decide to incorporate the text of an international treaty directly into a statute. This process of transformation is relatively common and may decide to incorporate the text of an international treaty directly into a statute. This process of transformation is relatively common and may be seen, for example, in several states’ direct incorporation of the CRC into their domestic legislation. It has been argued that the greatest strength of direct CRC incorporation has been the heightened awareness of children’s rights. It has also been shown to provide opportunities for strategic litigation. 12

2.2.1 Direct and whole incorporation

CASE 3: Norway’s direct incorporation of the CRC

Norway’s Human Rights Act (No. 30, 21 May 1999) initially incorporated the ICCPR, the ECHR and the CRC into domestic law. Following representations from NGOs and the UN Committee on the Rights of the Child, this legislation was amended in 2003 to incorporate the CRC. In 2007, the Norwegian Government commissioned a study to examine whether Norway’s legislation satisfies the requirements of the CRC in the relevant areas. This in turn led to legislation being amended in order to better conform to CRC standards. Research has shown that direct incorporation has resulted in children’s rights and interests being taken into account to a greater extent in the drafting of legislation and in case law. 13

The CRC was the basis for the amended Children’s Act 2005, which relates to private law arrangements for children. 14 Incorporation has had a notable effect on case law, with the Supreme Court applying the CRC ‘almost always in cases concerning children.’ 15 Recently the courts in Norway held for example that detention of a child for 20 days during deportation proceedings was in violation of their rights. 16 The CRC was amongst standards relied upon by the courts in their judgment.

13 ‘Enormous in number and in breadth’ by authority: H.R. and J. Enderby, ibid at 64.
14 Respondents 3, 18, 19.
15 ‘Enormous in number and in breadth’ by authority: H.R. and J. Enderby, ibid at 64.
16 Note for example the JCHR’s report ‘The Human Rights Act: Protecting Rights’ (2001) vol 7, 287. Other states have chosen to incorporate the CRC into their domestic laws through interpretation in hospitals where previously there was none and in its interpretation in line with the CRC (see e.g. the Irish Sign Language Act).

2.2.2 Adaptation

In contrast to transformation, adaptation involves incorporation that modifies the text of the international treaty. Adaptation may nevertheless provide a pragmatic, albeit incremental, means of bringing specific treaty rights into national law.

CASE 4: CRC Article 12: Israel

Article 12 of the CRC states that children should be heard, and their views accorded due weight in line with age and maturity, in all matters affecting them, and in particular in judicial and administrative proceedings. In Israel, a pilot project was introduced in 2010 whereby judges consider in every case whether children should be heard in family law proceedings affecting them. 17 It was considered very important that national and specific legislative provisions in this effect were subsequently introduced. 18 A review found that there had been concrete change. Children are now involved in some way in most cases and positive experiences are reported by the vast majority of children, parents and legal professionals. 19 It is noted that some of the latter group had been initially reluctant about the change. 20 Adaptation may in fact be related to treaty rights in a relatively loose way. For example, in Ireland, a new Irish Sign Language (SL) Act was passed in December 2017, which enshrines Article 29 of the CRPD (which provides that State Parties should recognize and promote the use of sign language).

CASE 5: Irish Sign Language Act 2017

In Ireland legislation for an Irish Sign Language (SL) Act was adopted in 2007. The law places a duty on public bodies to provide SL interpretation at no cost to the user when access to statutory entitlements is sought by the person. Experts in ISL matters describe the practical benefits deriving from this law, such as provision for interpretation in hospital settings where family members are in attendance and a greater positivity amongst the general public about sign language. 21 Ireland had not yet ratified the CRPD at the time of this legislation, and the SL Act does not expressly refer to that instrument, nor was it to our knowledge mentioned in the legislative procedure, although it was certainly raised in the course of campaigning around the Act according to our interviewees. However the Act had the practical effect of meeting one requirement of the CRPD.

2.2.3 Legal precedent

Judges are capable of interpreting laws in a progressively way in light of human rights principles where there is a will to do so. 22 It seems that this can be done without significant variation in interpretation of these standards between jurisdictions. A study of 55 countries’ judicial interpretations of CEDAW demonstrated a remarkable absence of divergence across jurisdictions as to the substantive meaning of CEDAW. 23 CRC Article 3 (the principle of the best interests of the child) and Article 12 (the right to be heard) have also been applied with some frequency by courts in countries that have not incorporated that instrument.

CASE 6: The Principle of the Best Interests of the child in England and Wales

Article 3 of the CRC stipulates that in all matters affecting the child, the best interests of the child will be a primary consideration. Judges in the UK have proven capable of and willing to elaborate significantly on this principle in the CRC and what it means in contexts such as immigration (see Yvonne Tzonvaro v Secretary of State for the Home Department) 24 and economic policy (R and Others v Secretary of State for Work and Pensions) 25 in the UK, significantly broadening the legal scope at national level of the right of children to have their best interests considered in matters concerning them. 26 In Yvonne Tzonvaro (para. 33), for example, the court stated that in considering whether deportation of a child’s primary carer was proportionate, ‘the best interests of the child must be a primary concern. This means that they must be considered first.’

2.3 Bills of rights

In some states the set of civil and political rights enumerated in the ICCPR are interpreted in law as a ‘bill of rights’, in the case of the UK the HRA which effectively incorporates much of the ICCPR through adaptation of the ECHR, an instrument which protects essentially the same rights as the ICCPR (in addition to other rights). Though they involve ‘adaptation’ rather than ‘transformation’, such bills of rights provide much more extensive implementation of international human rights standards than the ‘incremental’ adaptation approach noted in section 2.2 above.

New Zealand, Canada and the UK have incorporated bills of civil and political rights utilising what is known as a ‘weak form’ of judicial review, as opposed to a ‘strong form’ of bill of rights, in the case of the UK the HRA which effectively incorporates much of the ICCPR through adaptation of the ECHR, an instrument which protects essentially the same rights as the ICCPR (in addition to other rights). Though they involve ‘adaptation’ rather than ‘transformation’, such bills of rights provide much more extensive implementation of international human rights standards than the ‘incremental’ adaptation approach noted in section 2.2 above. In New Zealand, this resulted in the enactment of the Human Rights Act 1993. The law places a duty on public bodies to provide SL interpretation at no cost to the user when access to statutory entitlements is sought by the person. Experts in ISL matters describe the practical benefits deriving from this law, such as provision for interpretation in hospital settings where family members are in attendance and a greater positivity amongst the general public about sign language.

Under the ‘weak form’, rights are legally protected by the judiciary against infringement by all public bodies. Ultimately authority is vested however in the legislature to determine whether certain rights infringements are justifiable. 27 Depending on its specific design and the relevant domestic context, and despite its name, this ‘weak’ model can sometimes result in quite strong protection of rights in practice. 28 In general, legal design in Canada and the UK has resulted in robust protection. 29

CASE 7: Incorporating civil and political rights: The UK HRA

The UK HRA states that courts must interpret all UK law, as far as possible in a way that is compatible with rights in the ECHR, and in doing so must take account of the decisions of the European Court of Human Rights. UK courts may make declarations of incompatibility if they find that legislation breaches rights, which does not invalidate the law but places strong expectations on Parliament to amend the legislation. Where courts have found incompatibilities in legislation with the HRA, Parliament has almost always changed the legislation in response. 30 Ministers in charge of parliamentary bills must make a statement of compatibility of the bill with the HRA, or they must explain why the government wishes to proceed with the bill if it is inconsistent with rights. The context of strong supra-national oversight of rights in the UK is an essential factor contributing to the relative success of the HRA. Positive results are also in part due to significant initial training given to judges and civil servants, the considerable level of cross-party support enjoyed by the HRA at its inception, and the warranting role of the Parliamentary Joint Committee on Human Rights (ICH). The HRA has nevertheless been criticised for not incorporating socio-economic rights and for failing to adequately protect civil and political rights in several contexts, such as immigration policy and the interests of prisoners. 31

The Canadian Charter of Rights and Freedoms incorporates a set of civil and political rights into the Canadian Constitution that are fully justiciable and binding on the Parliament and government of Canada, and is described in similar terms as being strongly enforced by the judiciary. 32

The New Zealand Bill of Rights Act 1990 (NZBORA) incorporates a set of civil and political rights into the New Zealand Constitution. In contrast to the UK’s HRA 33 in NZBORA there is no legislated ability for courts to make statements of incompatibility. Also, there is

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22 Article 3(1) Interpretation of Human Rights Act 2000 (UK) gives the courts the power to make declarations of incompatibility.
24 Article 3(1) Interpretation of Human Rights Act 2000 (UK) gives the courts the power to make declarations of incompatibility.
25 Article 3(1) Interpretation of Human Rights Act 2000 (UK) gives the courts the power to make declarations of incompatibility.

2\no clause stating that courts must take international jurisprudence into account. In the UK courts have gone as far as to read the wording and interpret the original legislative intention of some statutes in order to ensure compatibility with the HRA, while New Zealand courts have been unable to do the same.46

2.4. Federal/municipal/devolved incorporation

International human rights treaty obligations may also be implemented at a local level, through federal or municipal structures.47 It has been observed that devolved jurisdictions may be more willing to adopt ‘hard’ language than the UK Government.48 Welsh and Scottish legislatures have for example given domestic effect to the CRC49 ahead of the UK Government.

Incorporation may even begin at the city level and is indeed now becoming more common in the form of ‘human rights cities’ – where governments have for example given domestic effect to the CRC50 ahead of the UK Government. Local level initiatives can become beacons of good practice and may raise the status of UN treaty rights.51 Whilst we have not found information on concrete change (beyond rights on paper), there is much evidence that the profile of women’s rights has been raised as a result of this activity.52 The US has not yet ratified CEDAW and it is believed that as the number of cities adopting CEDAW grows it will encourage the Federal Government to ratify. This is one of the long-term goals of the ‘Cities for CEDAW Campaign’ as a which was introduced in 2015.53

Local level initiatives can become beacons of good practice and may have a knock-on effect in other areas, as indicated by the CEDAW example above. They can also potentially place significant pressure on the national legislature to incorporate specific rights or treaties. Conversely, legal incorporation at the national level can have the effect of encouraging treaty enhancement measures at municipal level as case 9 demonstrates.

CASE 9: ‘The Giant Leap’: Norway’s Municipal CRC Assessment Mechanism

Legal incorporation of the CRC in Norway has led to an assessment mechanism for local government. Since 2009, a project known as Sjumilsteget (The Giant Leap), based in the office of the County Governor of Troms (Norway) has provided an assessment mechanism for municipalities to examine the compatibility of their services with the CRC.54 By 2016, 232 of 442 municipalities/city districts in Norway had introduced a variant of the method55 in Troms it has resulted in interdisciplinary meetings (i.e. between different government entities) on children’s issues which are described as ‘an internal quality control system’ anchored in the CRC.56

2.5. Analysis

2.5.1 Incorporation is key

Academic experts in the area argue that incorporation is the single most important means of enhancing the status of UN treaty rights.57 Human rights treaty bodies continually express the primary need for strong domestic law incorporation.58 There are significant efforts by civil society and others to incorporate, in particular around the CRC.59

Our research strongly indicates that incorporation is crucial for optimal implementation. There was a strong sense amongst our respondents (experts from a diverse range of disciplines and organisations) that incorporation was the superior means of implementation.60 Our case studies also point to this impression bearing out in practice. This finding is unseparating as incorporation means that treaty rights can be directly invoked and enforced in court, as highlighted in particular by cases 2, 3 and 7 on incorporation through constitutions and statute.

CASE 6: US local city ordinances incorporating CEDAW

Many local city ordinances have adopted CEDAW in the US. In 1999 San Francisco became the first city in the US to adopt CEDAW as a city ordinance, ensuring that the underlying principles of the convention took effect as a matter of local government policy.61 In 2003, the city of Los Angeles did the same and, as of January 2017, six local jurisdictions in the US had enacted similar ordinances.62

Whilst we have not found information on concrete change (beyond rights on paper), there is much evidence that the profile of women’s rights has been raised as a result of this activity.63 The US has not yet ratified CEDAW and it is believed that as the number of cities adopting CEDAW grows it will encourage the Federal Government to ratify. This is one of the long-term goals of the ‘Cities for CEDAW Campaign’ as a which was introduced in 2015.64

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3. IMPLEMENTATION OF UN TREATY RIGHTS THROUGH ‘INTERMEDIATE’ MEASURES

The measures identified in this Chapter are grouped together as ‘intermediate measures’, because they fall somewhere on the spectrum between ‘hard’ incorporation (through legislation) and ‘soft’, non-binding, measures of implementation. Intermediate measures include statements of legislative compatibility, national inquiries by NHRIs, due regard duties and impact assessments.

3.1. Statements of legislative compatibility

Treaty bodies have emphasised the need for state parties to review both existing and any proposed new legislation, to ensure it is fully compatible with their treaty obligations. To this end, some states have created specialised human rights units or committees that scrutinise the compatibility of national legislation with the human rights conventions ratified by the state. This is performed by the JCHR in the UK for example.

CASE 10: Australia’s statements of compatibility

In Australia, the Human Rights (Parliamentary Scrutiny) Act 2011 introduced a requirement that all new federal legislation be assessed for compatibility with human rights. The Act defines ‘human rights’ as the rights contained in the ICCPR, ICESCR, CERD, CEDAW, CAT, CRC and CRPD treaties. As such, it is broader than the assessment carried out under s. 19 of the Human Rights Act 1998, which is limited to Conventions rights enshrined in the ECHR. Our respondent welcomed the creation of Australia’s Parliamentary Joint Committee on Human Rights, and recognised the benefit of focusing legislators’ minds on ‘rights issues’ when passing legislation.

The UK’s HRA enshrines a strong judicial role in ensuring legislative compatibility with the ECHR, whereas Australia’s Human Rights (Parliamentary Scrutiny) Act does not. However, the extension of compatibility assessments to the full range of treaty rights in the UK, combined with a judicial power to Make Decisions of Incompatibility with treaty rights, would strengthen the status of UN treaty rights in the UK.

3.2 National Inquiries

The EHMRC can and does at present conduct inquiries (underpinned by statute) into particular matters in the UK in any matter that relates to human rights. These inquiries are typically referred to by the UK government as ‘intermediate’ measures.

CASE 11: National inquiries on human rights issues in New Zealand

In New Zealand, there have been three statute-based human rights inquiries by the Human Rights Commission. These have been on the treatment of transgender people, accessibility for disabled people, and the payment of care workers. Our respondents stated that these national inquiries were very effective in enhancing human rights. Such inquiries result in a wealth of evidential material and have prompted follow-up. After the inquiry into equal pay for care workers, for example, litigation was successfully taken to the courts and a financial settlement was made. In these proceedings the body of evidence gathered in the course of the inquiry was relied upon. Our respondent also indicated that it was the NHRC inquiry which resulted in policy change and government commitments to change.

3.3. Due regard duties and impact assessments

Some jurisdictions impose a duty on public servants to pay due regard to human rights treaties in the exercise of their functions. The UK has been at the forefront of developing due regard duties.

CASE 12: Due regard duties in the UK

A due regard duty exists with regard to equality legislation across the UK. The race equality duty was adapted for disability discrimination in 2006 and gender discrimination in 2007. Evidence from a UK Government review points to some concrete change. The duty has led, for example, to a better understanding of school exclusion and an increase in the provision of support for homeless women. The review also stated however that there should be clearer guidance on the minimum requirements placed on public bodies. In Wales and Scotland Ministers have duties in respect of the CRC and this is reportedly leading to concrete change (see case studies 13 and 15 below).

CASE 13: The CRC ‘due regard’ duty and impact assessments in Wales

The Children’s (Wales) Measure 2011 requires Welsh Ministers, whatever they exercise their functions, to have due regard to the requirements of the CRC. It also requires Welsh Ministers to establish a Children’s Rights Scheme, setting out the arrangements they have made, or propose to make, for the purpose of securing compliance with the due regard duty.

As a consequence of the due regard duty, under the Children’s Rights Scheme 2014, a ‘Children’s Rights Impact Assessment (CRIA)’ process was established. When decisions are taken that are relevant to children and young people, and that have the potential to impact upon their rights, Welsh Government staff are expected to carry out a CRIA, following a prescribed (six-step) template (see fig 2 below). CRAs are generally made publicly available, thereby enhancing transparency and encouraging scrutiny. Their use and development is generally seen as a positive means of ensuring full compliance with the CRC.

The impact assessment model, as operationalised in Wales, could be implemented on a national level, and could be expanded to other treaties to which the UK is a party. As in Wales, the non-legal measures that have been brought in to accompany the Children and Young People (Scotland) Act, such as children’s rights indicators and the children’s rights and well-being impact assessments, are also considered a very strong complement to the duty. Interviewees noted that impact assessments are being used at national government level, as well as by local authorities and health boards, as illustrated in Case 15 below. Thus, due regard duties and impact assessments can be a powerful tool to ensure human rights compliance (see case study 16, below). It is imperative however that the scope of a due regard duty be clear at the outset. Section 42 of the Irish Human Rights and Equality Commission Act 2014 places a positive duty on public sector bodies to have regard to the need to eliminate discrimination, promote equality and protect human rights, in their daily work. However this legislation is not particularly prescriptive, and two of our respondents emphasised that greater clarity is needed as to what the public sector equality and human rights duty actually requires in practice.

It is also very useful if there is broad acceptance of the duty by those who have to implement it in their work although the gender mainstreaming obligation is a ‘strategy’ in Sweden, it is more akin to a duty because of the level of acceptance of that obligation.

CASE 14: Swedish CEDAW implementation: Government mainstreaming strategy

Sweden is among the highest ranked countries in the world in terms of gender equality and the current Government has declared itself a ‘ Feminist Government’. There is strong civil society work in this area, e.g. the Swedish Women’s Lobby and the Swedish CEDAW network have lobbied for ‘systematic, structured, long term work’ by the Swedish Government. Amongst other targets for follow-up after the CEDAW Committee examination of the Swedish Government’s report was the establishment of a government authority dedicated to gender equality work and gender mainstreaming, which began work in 2018.

6 See Respondent 15. Committee on the Elimination of Racial Discrimination, CERD/C/JOR/CO/18-20, 26 December 2017, para. 3 (noting ‘The appointment of a race equality duty as being ‘to integrate consideration of equality and good relations into the day-to-day business of public authorities’.
7 Respondent 29. Australian legal practitioner (Q). He was of the opinion, however, that the statements of compatibility have been ‘ cursory ’ in nature.
10 16 Committee on the Rights of the Child, Concluding Observations on the UK’s 5th Report: paras 9
11 Respondent 28: a manager within the Scandinavian Women’s Lobby, an organisation which lobbies for women’s rights and gender equality.
This page discusses various measures of incorporation of UN treaty rights in practice, including:

3.4.1. ‘Statements of compatibility’ can raise the profile of human rights in parliaments, legislatures, and/or policymakers in ensuring that the status of human rights is normalised among public authorities to some extent

3.4.2. National Inquiries with a Statutory Basis can Bring Real Change for Human Rights

3.4.3. Due regard duties are of use where they are clear

3.4.4. Intermediate measures are not equal to legal incorporation

4. ‘SOFT’ (extra-legal) measures of implementation of UN treaty rights

The previous two chapters discussed measures of incorporation that are either directly enforced through national legislation or otherwise incorporated into public authorities. This chapter, by contrast, analyses ‘soft’ or ‘extra-legal’ means of enhancing the status of treaty rights domestically. In contrast to the measures identified in Chapters 2 and 3, which are generally taken by governments, parliaments, or public sector organisations, the steps identified in this chapter can be taken by civil society organisations or NHRs, although governments, local authorities, and other public sector bodies can and do undertake some of these activities. ‘Soft’ measures include action plans, benchmarking exercises, awareness-raising activities, sector-specific actions and human rights budgeting.

4.1. Action Plans and Benchmarking Exercises

Human rights treaties oblige States to reflect on their own progress in meeting their treaty obligations when reporting to the relevant treaty body. The CRCD expressly requires States to ‘collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention’ (Article 40). Over the past decade, there has been an increased emphasis on the importance of measurement and indicators in determining the extent to which human rights are realised.

In the context of measuring progress against hard data, the formulation of national action plans and other benchmarking exercises has gained increased traction in recent years.

4.2. ‘Soft’ (extra-legal) measures of implementation of UN treaty rights

Since 2017, the Institute has also published a ‘disability barometer’, which aims to raise awareness on the lack of equality of opportunities for persons with disabilities in Denmark. Our respondents noted the importance of statistical indicators and interactive tools like the disability barometer in highlighting the status of particular groups, and in calling the Danish Government to account in respect of its human rights obligations.

National Action Plans on human rights can also facilitate governments to operate more strategically, improving co-ordination of implementation of international human rights standards.

CASE 15: The CRC duty in Scotland

Public authorities are provided in Scotland with significant guidance and resources to help them prepare reports on how they have considered the CRC in their activities. There is a sense that the greatest success of the CRC duty in Scotland is that it has normalised children’s rights amongst public authorities to some degree. As one of our respondents reported: ‘Everyone is now talking about children’s rights because the Act, that is laying the ground work...’ Civil society actors report some positive results, such as a perceived impact on the CRC on consultation around raising the age of criminal responsibility in Scotland.

CASE 16: Measuring compliance with the CRPD in Denmark

In 2013, the Danish Government devised a ‘Disability Policy Action Plan’, noting the need to comply with the CRPD. The Danish Institute for Human Rights (Denmark’s NHRI) sought to move the plan beyond existing initiatives and established a set of statistical outcome indicators to measure the progress of the implementation of the CRPD in Denmark. These ‘Gold Indicators’ compare the situation of persons with and without disabilities using 10 thematic areas of the CRPD, including accessibility, employment, and independent living. The indicators were developed through an iterative process with stakeholders, and their main purpose is to generate structural change and stimulate action to ensure enhanced CRPD compliance. As such, indicators are a means through which NHRs can hold governments to account in exercising their human rights treaty obligations.

CASE 17: Human Rights National Action Plans in New Zealand

The Government of New Zealand committed in 2014 to work with New Zealand’s Human Rights Commission and civil society to develop its second National Plan of Action for the Promotion and Protection of Human Rights. This plan is focused on the recommendations received by the state through the UPR.

For the initial National Action Plan developed in the 2000s, the New Zealand Human Rights Commission undertook a comprehensive and innovative consultation process – with people across New Zealand – about their human rights priorities, and what human rights mean to them. Our respondents noted that this consultative process created a much more positive perception of human rights as being about economic situations and about communities. One perceived that the focus of the NHRI on civil and political rights had previously created a sense amongst the public that human rights were for ‘criminals.’

Respondents report that the willingness of New Zealand’s Government to adopt the Action Plan was significantly enhanced by a perception of a democratic mandate, as a consequence of the consultation.

New Zealand’s Action Plan includes an interactive online tool on the Human Rights Commission’s website. Through this tool, viewers can see an extensive list of the UPR recommendations, a description of government responses, and an analysis of the extent to which the recommendations have been implemented.

6 The EHRC has recommended that the UK Government adopt a National Action Plan for human rights. See EHRC, Children’s Rights in the UK: Updated Submission to the UN Committee on the Rights of the Child in Advance of the Public Examination of the UK’s Implementation of the Convention on the Rights of the Child (EHRC, April 2014).

7 Respondents A & B (Staff member and Director of Research, respectively) at the Danish Institute for Human Rights.

8 Respondents C & D (Director of research, respectively) at the Danish Institute for Human Rights.

9 Respondents E & F (Staff member and Director of Research, respectively) at the Scottish Children’s Commissioner’s Office.

10 Respondents G & H (Staff member and Director of research, respectively) at the Scottish Children’s Commissioner’s Office.

11 Respondents I & J (Staff member and Director of research, respectively) at the Scottish Children’s Commissioner’s Office.

12 Respondents K & L (Staff member and Director of research, respectively) at the Scottish Children’s Commissioner’s Office.

13 Respondents M & N (Staff member and Director of research, respectively) at the Scottish Children’s Commissioner’s Office.
4.2. Public education, awareness campaigns and training

Many of our respondents emphasised the importance of training, capacity-building, working closely with civil society, and human rights education in enhancing the status of UN treaty rights in domestic settings.14 Of course, NHRI’s have a significant role to play in this and BHRC conducts many activities in this regard.15

CASE 18: Australia: Awareness-raising about experiences of asylum seekers in detention

Australia’s Human Rights Commission conducted a national inquiry into the impact of immigration detention on children released in 2015.16 The NHRI has a number of CAT-based Torture Prevention Ambassadors who sought to build on the findings of the report to raise awareness and contribute to change in law and policy.17 They called for changes to be made to the policy of detaining asylum seekers offshore (with indefinite detention) to bring it line with CAT obligations. The report was disseminated through media releases, media interviews and numerous public presentations by the Commission President, staff and medical professional consultants. The initiative increased awareness amongst the public about the harmful impact of Australia’s immigration detention practices, particularly on children (as evidenced by extensive media coverage of the issue), and increased the engagement of medical professionals in documenting the health impacts of detention.18 It therefore was felt by the NHRI to have brought an added perspective to the policy debate around immigration detention, and laid the groundwork for potential political reform to limit the impact of detention by introducing a time limit for detention of children. A sharp reduction in the number of children detained on Nauru was detected in 2016.19

Recognising the importance of a strong civil society presence in realising UN treaty rights domestically, our research has revealed a number of instances where the attention of governments has been drawn to particular rights deficiencies, and specific measures have been taken to address those issues. As outlined in Chapter 3, this is seen in the work of gender equality NGOs in building compliance with CEDAW in Sweden through gender mainstreaming. It is also seen in the work of women’s NGOs in Latin America in relation to tackling gender-based violence.

CASE 20: Norway: Training has improved the use of CRC in the courts

Lawyers and judges in Norway have received training about the CRC and how it can be used. Evidence indicates that this training has led to increased use of the CRC in the courts and increased both the quality and quantity of cases taken on behalf of children.20

Such initiatives have been acknowledged by UN treaty bodies. The Committee against Torture noted for example the steps taken by Canada in response to the issue of overrepresentation of indigenous offenders in the criminal justice system, praising Canada’s innovative and culturally sensitive alternative criminal justice mechanisms, such as the use of ‘healing lodges’ in addressing the problem.21 Similarly, the Committee on the Elimination of Racial Discrimination welcomed New Zealand’s ring-fencing of NZ$10 million of the Justice Sector Fund with the specific aim of addressing Maori overrepresentation in its correctional system.22 The CERD Committee has also welcomed, for example, Cyprus’s adoption of a Code of Conduct against Racism in Schools to address the issues of racial violence and racial incidents in schools.23

4.3. Human rights budgeting

Human rights budgeting is a system of budgeting which has human rights needs as its starting point, and in which resources are allocated first and foremost to ensure those needs are fulfilled.24 This is an aspect of a broader, human rights-based approach to public spending, which is increasingly being adopted by governments around the world. While the theory and practice of human rights budgeting is relatively new, there is potential for UK civil society to encourage a more rights-based approach to budgeting, and could take lessons from the successes of rights-based budgeting analyses in other countries.

New Zealand’s National Action Plan involved a comprehensive consultation process which raised the profile of human rights in a positive way (case 17). In the UK, where the HRA has similarly been portrayed as a ‘villain’s charter’ that serves ‘undeserving’ claimants more than ordinary people, it is a similarly broad consultation process which may have the result of creating more positive perceptions of human rights. Some efforts around this, of course, already been made in the UK for example in defence of the HRA.25 However the New Zealand example indicates that a more holistic approach with greater emphasis on socio-economic rights is desirable.26

4.4. A vibrant civil society is crucial

A key lesson to be drawn from this research is that a strong civil society sector is vital in enhancing treaty rights domestically. Note the Swedish CEDAW experience (case 14), and the work on gender violence in Latin America (case 19). Building the capacity of civil society organisations devoted to promoting and protecting human rights is therefore crucial.

4.4.3. Other tools such as online resources, specific measures and budgeting can also be valuable

The other case studies highlighted here are of relevance to the UK context. The interactive online tool that used in New Zealand’s Action Plan could be suitable for the UK context, not just in response to UKR recommendations, but also in publicising human rights treaty bodies’ recommendations to the UK and monitoring the State’s progress in implementing those recommendations. Such a tool is at present being developed in the UK.27 It is clear that, on occasion, specific issues related to treaty obligations may call for bespoke solutions. While the theory and practice of human rights budgeting is relatively new, there is potential for UK civil society to encourage a more rights-based approach to budgeting, and could take lessons from the successes of rights-based budgeting analyses in other countries such as South Africa (case 19) in enhancing the realisation of human rights and calling States to account. It is important to note that these benchmarking and awareness-raising activities should be part of a concerted effort to enhance treaty rights, together with efforts to legally incorporate instruments and standards.

5. FINAL CONCLUSIONS

5.1 Legal Incorporation

- This research concurs with previous studies which indicate that full legal incorporation for all seven instruments is highly desirable in order to ensure maximal human rights implementation.
- The research also concurs with previous studies which indicate that direct incorporation of entire treaties is preferable. As the Norwegian example demonstrates (case 3), this method appears to have the best results in terms of the effective realisation of rights and in raising the consciousness of rights-holders and duty bearers.
- There is evidence that a statutory framework incorporating socio-economic rights can be designed in the same way as the HRA (case 7), to provide fully justiciable socio-economic rights (subject to progressive realisation and proven resource constraints as in the South African example, case 1) and preserve all of the major features of the HRA as described above.
- Strategic litigation parallel to seeking incorporation of those instruments is crucial for progressing UN human rights treaties.
- The US experience of CEDAW ordinances (case 8) highlights that local level incorporation can be successful also.

5.2 Intermediate Measures

- This research highlights the effectiveness of statements of compatibility’ in the context of the ECHR. Broading them out to encompass all UN human rights treaties in the UK context would provide strong human rights implementation.
- Public inquiries are important as part of a broader strategy on a particular human rights issue (see case 1).
- This research indicates that due regard duties (in relation to UN treaties) are an important means of implementation, to accompany incorporation (see Section 3.3). Such duties should be accompanied by strong guidance on what they actually require and who is responsible.
- It is important for government departments to report regularly to Parliament and specialised human rights committees on their efforts to comply with international human rights standards. This raises awareness and intensifies a human rights culture.

5.3 ‘Soft’ (Extra-Legal) Measures

- In conjunction with legal incorporation of UN treaties, ‘soft’ measures are a crucial part of human rights implementation.
- Educational and promotional activities which build public support for rights are important (see in particular cases 1, 3, 5, 13 and 17 for successes in this regard). This must be adequately funded from the appropriate bodies.
- National action plans for human rights and individual plans, for example around disability and gender violence, are useful means of implementation. These initiatives can, in turn, provide supporting evidence and act as a precursor to incorporation efforts. Such plans include targets, processes, goals, and sufficient resource allocation.
- Supporting civil society in particular areas in need of work is also very important, considering the key role played with civil society in human rights implementation.
- Online tools, such as those used in New Zealand’s Action Plan (see cases 16 and 17) permit interactive engagement with government’s human rights progress.
- Our research points to the importance of a more rights-based approach to governmental budgeting.
- Considering the relative lack of evidence and prior research in the area, we conclude that a more extensive piece of research is needed on the different means of implementation of UN treaty rights and the success (or otherwise) which can be attributed to them.

REFERENCES

Academic Literature


Broughan Byrne and Laura Lundy, Legal Measures for Implementing Children’s Rights: Options for Northern Ireland (Queens University Belfast, 2013).


Aofe Daly, Children, Autonomy and the Courts: Beyond the Right to Be Heard (Brill/Nijhoff, 2018).


Alice Donald and Elizabeth Mottershaw, ‘Limits and Achievements of the Human Rights Act from the Socio-economic Point of View’ in Nicolas Kang-Rou et al. (eds), Confronting the Human Rights Act: Contemporary Themes and Perspectives (Routledge, 2012).


Henrietta Hill, The Legal Basis of a Duty to Investigate (Doughty Chambers, 2016).


APPENDIX: CASE STUDY RESPONDENTS

1. Irish constitutional law academic 1 (Q)
2. Irish constitutional law academic 2 (Q)
3. Indian human rights non-governmental organisation staff member (Q)
4. New Zealand human rights and constitutional law academic 1 (Q)
5. New Zealand human rights and constitutional law academic 2 (Q)
6. Staff member at the Danish Institute for Human Rights (Q)
7. Staff member at the Norwegian Ombudsman for Children (Q)
8. Norwegian Professor specialising in children’s rights (Q)
9. The Director of a leading Scottish children’s rights organisation
10. A researcher at a Scottish children’s law centre (Q)
11. A manager at the Scottish Children’s Commissioner (Q)
12. A manager at the Office of the Ombudsmen, New Zealand (Q)
13. New Zealand human rights expert and former Human Rights Commissioner
14. New Zealand human rights expert and academic 1
15. New Zealand human rights expert and academic 2
16. New Zealand human rights expert and academic 3
17. A manager with the Swedish Women’s Lobby, an organisation which lobbies for women’s rights and gender equality
18. A civil servant at Swedish government offices (Q)
19. A member of the board of UN Women national committee in Sweden (Q)
20. An official from the Irish Office for the Promotion of Migrant Integration (Q)
21. The Director of a prominent anti-racism organisation in Ireland
22. An interviewee from the Irish Human Rights and Equality Commission
23. An Israeli academic involved with the piloting of a CRC-related measure in the family law courts (Q)
24. An independent Northern Ireland lawyer with experience consulting on equality duties across the UK
25. A Swedish academic specialising in public law and children’s rights
26. An academic and member of the deaf community who campaigned for the Irish Sign Language Act
27. A manager at a leading Irish deaf organisation
28. A UN Official in the Latin American Region
29. Australian legal practitioner (Q)
30. A Former Commissioner who led on OPCAT for the New Zealand Human Rights Commission (Q)
31. A Member of the Australian Human Rights Commission (Q)
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