

# Summary

## Introduction

The report contains proposals for an act on incorporating the UN Convention on the Rights of the Child (CRC) and presents a number of measures that need to be taken upon incorporation, and a number of other legislative proposals.

It is proposed that the legislation enter into force on 1 January 2018.

## Remit

The Inquiry on the rights of the child was tasked with surveying, within particularly important areas, how the application of laws and other regulations complies with the rights of the child under the CRC and the two Optional Protocols to which Sweden has acceded. In the event of clear deviations, the Inquiry's remit includes presenting proposals for measures and, if necessary, proposing legislative supplements and clarifications to strengthen the rights of the child.

In addition, the remit includes analysing the advantages and disadvantages of incorporating the CRC and the two Optional Protocols into Swedish law.

In view of the Government's express wish to give the CRC the status of Swedish law, alongside continued transformation the Inquiry has also been tasked with presenting proposals for an act on incorporating the CRC, and highlighting certain legal and practical issues that may arise in the event of incorporation.

## Surveying how application of the law complies with the rights of the child under the CRC

### Survey areas

The Inquiry's survey included reviewing the *application of the law* and how it complies with the rights of the child under the CRC and the Optional Protocols to which Sweden has acceded. Areas that lack legislative provisions in relation to the rights contained in the CRC thus fell outside the remit.

The starting point for the survey was the rights of the child under the CRC. The rights perspective, with a focus on the general principles, has permeated the survey with regard to the selection of survey areas and questions and analysis of the survey results.

The following are areas that the Inquiry, after an identification process, found to be particularly important to survey:

- children in the migration process;
- support and service to children with impairments;
- children who have witnessed domestic violence; and
- children who are victims of domestic violence.

The areas selected are ones where children find themselves in a vulnerable situation and where authority decisions can have major consequences. Areas that, at the time of the survey were, or had recently been, subject to other review were not included in the survey.

The survey was conducted on behalf of the Inquiry by researchers working at universities and higher education institutions. It reflects various types of decisions – court judgments and administrative decisions – the latter taken by both central and local government. The aim of the survey was to provide a picture of the impact of the CRC – and particularly the general principles – in the application of the law.

The researchers presented their survey results and conclusions in individual reports<sup>1</sup>, after which the Inquiry analysed the reported

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<sup>1</sup> These reports are available from the Ministry of Health and Social Affairs and via the Inquiry on the rights of the child. Once the Inquiry's work is completed, its archive documents will be submitted to the National Archives.

results. The Inquiry based its analysis on the UN Committee on the Rights of the Child's interpretations expressed in the Committee's general comments.

### **Observations regarding the surveyed areas**

The survey demonstrates a number of shortcomings when it comes to the impact of the rights of the child under the CRC. The shortcomings are most obvious with regard to the principle of the best interests of the child and the child's right to express his or her views.

Despite explicit provisions on the best interests of the child in Swedish legislation in three of the surveyed areas, assessments are often not based on the situation of the individual child. Instead, the best interests of the child are assessed on the basis of general statements in the legislative history, policy documents and other guidelines. In addition, it is not possible to interpret considerations and assessments made by authorities in cases where the interests of the child must be weighed against other interests.

With respect to children's opportunities to be heard, the survey shows that often no discussions are held with children, and in many cases no motivation is given for this decision. In cases where children are heard, in many cases the discussions are about something other than what is relevant for producing complete background material for a decision.

The survey also shows that the perception of children and how children are treated by authorities is not based on children as holders of rights. This can sometimes present itself as discrimination in relation to adults. It applies in the area of children who are victims of domestic violence, for instance; actions that would have been punishable if perpetrated against an adult can be exempt from punishment with reference to the parents' position with regard to their children. Another example is the migration area, where a child's own grounds for asylum are only examined to a very limited extent in residence permit decisions.

## **Advantages and difficulties of incorporating the CRC**

### **A strengthened standing for the rights of the child and a sharper legal tool**

As a state, Sweden is already bound by the CRC within the meaning of international law. An obligation follows from this to live up to the requirements imposed by the Convention. Courts and other authorities are obliged to, as far as possible, interpret Swedish domestic legislative provisions in conformity with the Convention.

Incorporation would mean that officials and decision-makers would have to relate to the CRC differently than today, as the Convention would become applicable as law and could be used as the sole basis for authorities' decisions in cases and matters.

Through incorporation, the CRC would become applicable in all legal areas. It would also be clear that the Convention is to be seen as a whole and that the articles in the Convention are to be interpreted in relation to each other, which can be expected to lay the foundations for a more rights-based approach.

Incorporation can also be expected to impact other regulation, mainly as incorporation will probably hasten the transformation of CRC provisions. Through incorporation, the rights of the child may be expected to have a more prominent place in public debate and legislative matters. Shortcomings in Swedish legislation can be identified and addressed. Convention provisions can also be expected to influence the design of other legislation more directly than has been the case up to now.

Further, a substantial advantage of incorporating the CRC is that it can serve as a supplement when other legislation does not fully protect the rights of the child under the Convention. When given status as a law, the Convention will also take precedence in any conflict between the Convention provisions and legislation of lower rank.

All in all, incorporation would mean that Convention rights would have a strong standing, not only formally but also in real terms. The rights of the child would be taken into account to a greater extent than at present.

## **A political signal**

Incorporation of the CRC marks a political will to safeguard the rights of the child. It shows that the rights of the child are a priority issue. However, in practice, the political signal will need to be accompanied by concrete measures. Incorporation in itself is insufficient for the rights of the child to have an impact.

## **A pedagogical tool**

Incorporation can be said to have a pedagogical significance. On incorporation, the particular human rights of children will be contained in one act. The Convention as a whole will be more visible and it will be clear that the rights in the Convention are linked to and presuppose each other.

## **Difficulties in the application of the law**

Incorporation of the CRC will lead to a number of benefits. However, there are also some difficulties and challenges to take account of.

Incorporation is an effective way of enhancing the visibility of these rights. However, some Convention articles are generally framed and contain vague wording that can offer considerable scope for interpretation. Vague and generally framed wording naturally leads to difficulties in practical application. However, the Convention as a whole and the UN Committee on the Rights of the Child's general comments may provide some interpretive guidance.

The legal scheme in the Convention also differs from the one that applies to domestic legislation. However, the influence of EU law and the European Convention on Human Rights (ECHR) means that, for the past several decades, legal practitioners have been accustomed to dealing with regulatory frameworks written differently than the traditional Swedish system of relatively detailed regulation. EU law has also led to the use of principles, such as the principle of proportionality, taking on greater importance. In other words, the fact that the CRC design differs from Swedish legal tradition would not necessarily lead to any extensive problems regarding application of the law.

One difficulty in applying the CRC may be that it lacks legislative history, equivalent to the Swedish documents, which can give interpretive guidance. However, this does not mean that there is no guidance for interpreting the Convention. The Committee on the Rights of the Child has, for instance, drafted general comments with regard to a number of articles that can be of guidance in applying the law.

Another difficulty with the CRC is that certain articles can be said to be directly applicable – self-executing – while others are not. The problem is well-known in single-tier systems, but Swedish courts and other authorities responsible for the administration of justice do not have the same experience of deciding on this type of matter. It is important that this issue be given attention and be discussed in connection with the incorporation of the CRC.

Unlike what applies for EU law and the ECHR, there is no international court that can interpret the meaning of the Convention in more detail, which can lead to difficulties in domestic application of the law. However, experiences in Norway indicate that, in practice, this has not been perceived as a major problem. Domestic Norwegian case-law developed relatively soon after incorporation, thereby satisfying lower courts' need for guidance. A similar development could probably be expected in Sweden.

In so far as interpretation of the Convention's articles and thereby how the articles will be applied is uncertain, there may be a risk that the basic prerequisite of legal certainty – predictability – will not be satisfied in the event of incorporation. Transformation increases predictability and provisions can be adapted to areas of activity. Transformation therefore provides better support for authorities responsible for the administration of justice. However, incorporation does not rule out future transformation. On the contrary, the Inquiry's view and also a starting point for the Inquiry's work is that transformation should continue also after the CRC has been given the status of law.

In the event of incorporation, courts and other authorities responsible for the administration of justice (mainly the highest instances), will interpret the provisions and thereby also take decisions that, according to Swedish legal tradition, are normally carried out by the legislators. Incorporation can be seen to some extent as a power shift. However, this is not a viable objection to incorporating

the CRC. Even if the interpretation of an incorporated Convention is different to the interpretation of national law – where the situation can be addressed through an amendment of an act – the legislator will continue to have certain possibilities to influence interpretation of the rights in the Convention through continued transformation. It should also be stressed that judicial examination is itself a protection to ensure that the rights of the individual are respected.

## The Inquiry's proposals

### Convention on the Rights of the Child as Swedish law

#### *Incorporation through a special act*

The Inquiry's remit includes submitting proposals for an act on the incorporation of the CRC. However, the remit does not include submitting proposals for an act on the incorporation of the two Optional Protocols to the Convention to which Sweden has acceded.

The report proposes that Articles 1–43.1 and 44.6 of the CRC, in the wording of the original text, apply as Swedish law. The original texts are to have the same validity.

Alongside incorporation, continued transformation is required for the rights of the child to have the desired impact. In addition, a combination of various measures is required, such as legislation, information, education and coordination between various actors at different levels in society.

#### *Principles in the event of a conflict between the provisions of the CRC and domestic legislation*

The basic premise for the Inquiry's work is that the CRC should be given the status of an ordinary law.

With the aim of facilitating for various actors, the report gives an account of the principles that may arise in the event of a conflict between the provisions of the incorporated CRC and other Swedish legislation.

The Inquiry's assessment is that actual conflicts, in the sense of incompatibility or contradiction, between the CRC and other Swedish legislation would probably seldom arise. The Inquiry considers that

conflicts that may arise could be resolved using various methods of applying the law. Any conflicts should also, if necessary, be integrated into subsequent transformation.

When evaluating incorporation of the CRC into Swedish law, there is reason to highlight the question of how possible conflicts between the CRC and other legislation have been dealt with.

### *Interpretation and guidance*

With the aim of facilitating application of the law and legislation for various actors, the report gives an account of legal and practical issues that relate to CRC interpretation.

Incorporating the CRC presupposes that legal practitioners are familiar with the Convention and how it should be interpreted and applied. This is why education and training and professional development regarding the practical application of the Convention in relation to their own activities is important.

The Inquiry has been in contact with a number of government agencies and the Swedish Association of Local Authorities and Regions to learn what needs they see in their activities for support and written guidance when interpreting the CRC. In this context, a need was expressed for written guidance that may provide support for interpreting and applying the incorporated CRC. Such guidance should be based on Swedish conditions. It should be gathered in one place and made easily accessible.

### *Measures that may need to be taken in view of incorporation*

Even though only the wording of the original text will have the force of law, as a rule, acts on incorporation contain an annex with a Swedish language translation of the Convention. The Inquiry has identified certain shortcomings in the Swedish translation of the CRC and therefore proposes that a review be carried out of the Swedish translation of the Convention.

Incorporation of the CRC will probably raise questions that authorities and decision-makers have not previously had reason to consider. For this reason, it is important that situations that may arise in practical application, once the CRC has become law, are

discussed as early as possible in courts and other authorities. The Inquiry therefore proposes that, in their appropriation directions, the Swedish National Courts Administration and other central authorities be instructed to discuss which challenges and issues they may face following incorporation, based on the mandate and activities of each authority. If there are legislation needs, it is important that these be addressed and communicated to the Government Offices.

In applying the law, the question of whether a certain provision in the Convention is self-executing may arise. Ultimately, it will be the responsibility of courts and other authorities with responsibility for the administration of justice to assess, based on the specific situation, whether or not a provision is self-executing. To increase knowledge and reach a consensus as far as possible, the Inquiry proposes that this type of issue also be subject to discussion in the courts and other authorities with responsibility for the administration of justice.

Examining the issue of effective legal remedies in the event of a violation of the Convention was not part of the remit of the Inquiry on the rights of the child. Effective legal remedies encompass various aspects, one of which is financial compensation. Given the importance of the damages issue and the uncertain legal situation, the issue of damages in the event of violation of rights under the CRC should be highlighted in the Government Offices' future work. However, uncertainty regarding the consequences of the reform in the area of right to damages should not prevent incorporation of the Convention.

### **Assessments and proposals for the surveyed areas**

The survey commissioned by the Inquiry has included the areas of children in the migration process, support and service to children with impairments, children who have witnessed domestic violence and children who are victims of domestic violence. Based on the survey results, it can be noted that the CRC has not had sufficient impact on the application of the law in the four selected areas, and there are clear shortcomings in relation to the rights of the child under the Convention.

In three of the four surveyed areas, there are special provisions based on Article 3 regarding the best interests of the child and

Article 12 regarding the rights of the child to express his or her own views and to be heard. Despite this, the principles in the CRC have not had a real impact.

Regarding children in the migration process, the Inquiry's opinion is that in cases where the applicant is a child, the child's grounds for application must be examined and noted in the Swedish Migration Agency's decision. The Swedish Migration Agency's assessment of the grounds for application must focus on the child.

The Inquiry proposes that the provision on the best interests of the child in Chapter 1, Section 10 of the Aliens Act (2005:716) be more clearly linked to Article 3 of the CRC, by expressly stating in the Act that the best interests of the child must be examined and be given particular consideration in cases involving a child. In assessing the best interests of the child, consideration is to be given to the child's views.

Furthermore, the Inquiry proposes that Chapter 1, Section 11 of the Aliens Act state that the child should be given relevant information about, for instance, their rights, the handling of the matter, decisions that may be taken and their consequences. The child must also be informed of decisions through which the case is decided and the grounds that determine the outcome. The information should be adapted to the child's age, maturity and other individual circumstances. The person providing the information must, as far as possible, ensure that the child has understood the content and meaning of the information.

The Inquiry proposes that the provision in the Aliens Act regarding the rights of the child to express his or her views, to better comply with Article 12 of the CRC, be rephrased and expanded to apply not only to permit matters but to all matters that concern the child. The Inquiry also proposes that the qualification of inappropriateness in the current provision be removed. A child must be provided the opportunity to express his or her views on matters that concern the child and the child's views must be given due weight in accordance with the age and maturity of the child.

The Inquiry proposes that current provisions concerning the best interests of the child and the child's opportunities to express his or her views contained in the Act concerning Support and Service for Persons with Certain Functional Impairments (1993:387) be more clearly linked to Articles 3 and 12 of the CRC. Furthermore,

the Inquiry proposes, in the same way as in the Aliens Act, that the child must receive relevant information adapted to the child's age, maturity and other individual circumstances, and that the person providing the information, as far as possible, should ensure that the child has understood the information. To obtain a national picture of how the rights of the child are satisfied with regard to measures for children under the Act concerning Support and Service for Persons with Certain Functional Impairments, the Inquiry proposes that the National Board of Health and Welfare be tasked with conducting a survey of this and, based on the survey results, submitting proposals for measures.

Regarding children who have witnessed domestic violence, the survey shows that there are shortcomings in the application of the law, in relation to both established law and rights under the CRC. Even when a child has a recognised need for support and assistance, measures were not granted, since social services did not receive consent from the custodians or, in certain cases, were not even able to establish contact with the family. The Inquiry's assessment is that it is necessary to ensure that children who have witnessed violence receive support and assistance from social services when they need it. The Inquiry shares the view that the Inquiry on the Care of Young Persons Act expressed in its final report about the possibility for the Social Welfare Committee to decide on open measures for children under 15, even if the custodian does not consent to them.

Regarding children who are victims of domestic violence, child protection provided by criminal law, both in the legislation and the application of provisions, in relation to the CRC is lacking. The survey states that in several cases charges were dismissed, as the pain was not deemed to be confirmed, or because the pain that the child experienced was insufficient for the act to be defined as abuse. The pain requirement and the demands it places on a child who is a victim of violence means that in practice, children are often not given protection under criminal law against violence equivalent to that provided to adults, which is not in line with the CRC.

The Inquiry proposes the introduction of a new special penal provision concerning abuse of children in Chapter 3, Section 5a of the Swedish Penal Code. The parent or person who is responsible for the upbringing, care or supervision of a child, and who inflicts bodily harm, sickness or pain upon that child, or subjects the child

to violence or renders the child powerless or in any other such condition, will be convicted for such an offence. Unlike for abuse, it is not necessary for the violence to have caused pain. The penalty for child abuse is imprisonment for at most two years or, if the offence is minor, a fine or imprisonment for at most six months. For gross child abuse, the sentence is imprisonment for at least one year and at most six years or, if it is an exceptionally gross offence, imprisonment for at least four and at most ten years. The offences are referred to as child abuse and gross child abuse.

A number of legal areas have special provisions in the special legislation regarding the best interests of the child and the child's right to express his or her views. Despite this, the survey has shown that the general principles of the CRC, which are particularly covered by the survey, have had a poor impact in practical application. Although the survey was limited to particularly important areas, the Inquiry proposes, following from the survey results, the introduction of a new provision in the Administrative Procedure Act (1986:223) and the Administrative Court Procedure Act (1971:291), under which the best interests of the child must be examined and be given particular consideration in matters and cases concerning children. Children must be given relevant information and the opportunity to express their views in matters that concern them. The child's views must be given due weight in accordance with the age and maturity of the child.

## **Assessments and proposals based on general observations**

### *Introduction*

Despite differences between the surveyed areas, the shortcomings are similar. This gives reason to assume that corresponding shortcomings in the application of the law with respect to the CRC also exist in areas other than those included in the survey. In addition to the legislative measures proposed in some of the surveyed areas, this report includes proposals for general measures to ensure that CRC rights have a better impact on the application of the law and on society in general.

*Legislative measures*

The Inquiry's assessment is that the principle regarding the best interests of the child as a method in decision-making processes should have greater impact on future transformation. Transformation needs to ensure the right of the child to express his or her views and have them taken into account. Furthermore, it should be clarified that the right of the child to express his or her views and have them taken into account constitutes an essential part of assessing the best interests of the child. Another important issue to highlight is how the custodian's right to decide relates to the child's right to be heard. Provisions that contain limitations or restrictions with regard to the right of the child to express his or her views should be reviewed.

The Inquiry also considers that the CRC should be given greater visibility in legislative history where the CRC may be relevant. Such legislative history should clearly refer to CRC provisions and how these should be interpreted with the support of the general comments of the Committee on the Rights of the Child. The report also proposes that when proposals in a report may be of significance to the rights of the child, the consequences in this regard must be reported. A provision on this should be included in Section 15 of the Committees Ordinance (1998:1474).

*Opportunities to demand rights*

According to the Committee on the Rights of the Child, for the rights in the CRC to have meaning for the child, effective legal remedies must be available in case of violations of these rights. There is a need to strengthen children's opportunities to demand their rights. This is why it is important to ensure that children have knowledge about and access to authorities that are central to ensuring these rights. The Inquiry proposes that government agencies central to ensuring the rights of the child be tasked with taking measures to make their agency's activities, or the activity that the agency is responsible for, known, accessible and adapted to children. The Ombudsman for Children in Sweden should be tasked with helping relevant agencies with this work.

In addition, the Inquiry has made the assessment that the Government should examine whether the Ombudsman for Children in Sweden should be given the possibility to bring action on behalf of individuals in cases where the issue is of particular importance for the application of the law or in any other way is of particular interest for the implementation of the CRC.

### *Administrative and other measures*

Sweden has come a long way in its strategic work, even in relation to countries that have incorporated the CRC. In spite of this, the CRC has not had the impact in the application of the law that could be expected.

The report proposes that the Government conduct an education initiative over a three-year period to increase knowledge of the CRC, the Optional Protocols to which Sweden has acceded and the rights of the child among various professional groups working in central government and local authorities. The education initiative should also include elected representatives at central and local level.

Initiatives should aim to provide knowledge and competence on the meaning of the CRC and a perspective of the rights of the child in practice in relation to their own activities. Spreading knowledge about methods for listening to children and seeking children's views and the meaning of the best interests of the child as a method should also be included. Knowledge about children's psychological development, memory functions and their ability to express themselves should also be included in the education initiative. Furthermore, the initiatives should aim to support an exchange of knowledge and experience and create a consensus on the interpretation of the rights of the child based on the general comments of the Committee on the Rights of the Child.

Below are measures that should be included in the education initiative.

- The Ombudsman for Children in Sweden should be tasked with conducting education initiatives and contributing to the dissemination and use of methods to strengthen the child rights perspective in agencies' application of the law. The framework of the task should also include the dissemination of general

comments of the Committee on the Rights of the Child as a support for interpreting the rights of the child in the application of the law.

- Central government agencies that are central for implementing the rights of the child under the CRC should be tasked with ensuring that there is appropriate competence within their activities regarding these rights and about children's development and needs. The authorities must report back concerning the measures that have been taken to achieve this goal.
- The Ombudsman for Children in Sweden should be given the opportunity to offer contract training programmes about the CRC.

Furthermore, the Inquiry considers that for competence to increase among relevant professional groups, it should be ensured that higher education programmes for these groups include knowledge about the rights of children.

In addition, all children should be provided with information in school concerning where they can turn for support and help if they find themselves in a vulnerable situation.

The Inquiry also considers that the Government should examine how independent, local children's rights agencies could be financially promoted. 'Children's rights agencies' refers to agencies to which children could turn for information and individual support to demand their rights. Children's rights agencies should be independent of the central or municipal structure and should supplement the support and measures offered by authorities and other organisations in civil society.