



The Scottish Parliament  
Pàrlamaid na h-Alba

Ms Shirley Anne Somerville, MSP  
Cabinet Secretary for Social Justice

The Scottish Government

Via email only

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17 November 2023

Dear Cabinet Secretary

**UNCRC (Incorporation) (Scotland) Bill reconsideration**

Thank you for your attendance at our recent Committee meeting in relation to the reconsideration of the UNCRC (Incorporation) (Scotland) Bill.

I am pleased to set out the Equalities, Human Rights and Civil Justice Committee views following its scrutiny of the amendments lodged by the Scottish Government.

We look forward to receiving your response once you have had the opportunity to consider the Committee's conclusions.

Should you have any questions, please contact the Clerk to the Committee at [EHRCJ.committee@parliament.scot](mailto:EHRCJ.committee@parliament.scot).

With best wishes

Yours sincerely

Kaukab Stewart MSP  
Convener  
Equalities, Human Rights and Civil Justice Committee

# Reconsideration of the UNCRC (Incorporation) (Scotland) Bill

## Background

1. The [United Nations Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Bill](#) (UNCRC Bill) was passed unanimously on 16 March 2021.
2. The purpose of the Bill is to incorporate the [UN Convention on the Rights of the Child](#) (UNCRC) and two optional protocols into Scots law.
3. The UNCRC is an international treaty setting out the rights that children and young people are entitled to.
4. As it is an international treaty, the UNCRC does not give individuals legal rights in UK courts. The Bill changes this by incorporating these rights into Scots law. This means that public authorities, including Scottish Ministers, will be legally obliged to respect children's rights, and that individuals will be able to challenge public authorities in the courts for breaches of their rights.
5. However, the Bill did not receive Royal Assent because the UK Government referred the Bill to the Supreme Court over its legislative competence. The hearing took place on 28 and 29 June 2021.
6. The [Supreme Court judgment](#) was issued on 6 October 2021.
7. There was no dispute about the Scottish Parliament's decision to incorporate the UNCRC into Scots law. The Court unanimously agreed that four provisions of the Bill would be outside the legislative competence of the Scottish Parliament. This meant the Bill could not receive Royal Assent in its current form. The Scottish Government could propose that the Bill be reconsidered in amended form, which would need the agreement of the Scottish Parliament.

## The Scottish Government's Response

8. The Scottish Government [confirmed](#) on 6 October 2021 that it was committed to incorporating the UNCRC into Scots law.
9. On 24 May 2022, the former Deputy First Minister and Cabinet Secretary for Covid Recovery, John Swinney, made a [statement to the parliament](#) on the UNCRC Bill.
10. On [27 June 2023](#), and following a change in government leadership, the Cabinet Secretary for Social Justice, Shirley-Anne Somerville, said that changes to the Bill would be brought forward after the parliamentary recess. The changes will mean public authorities will only be required to comply with

the UNCRC requirements when delivering duties under powers in an Act of the Scottish Parliament.

11. The Cabinet Secretary wrote to the Equalities, Human Rights and Civil Justice Committee on [4 July 2023](#) to advise that the next steps would be to commence with a Parliamentary motion allowing a vote on whether to go ahead with the reconsideration process.

## Reconsideration Stage

12. This is the first time a Bill has been reintroduced after it has been passed. [Rule 9.9 of the Standing Orders](#) covers reconsideration of bills passed. For further information see [SPICe Briefing on the Reconsideration Stage](#) (27 January 2023).
13. It was the former Equalities and Human Rights Committee in session 5 which scrutinised the Bill at Stage 1.

## Correspondence

14. The Cabinet Secretary for Social Justice, Shirley-Anne Somerville wrote to the Equalities, Human Rights and Civil Justice Committee, and shared correspondence (8 September 2023) between herself and the Secretary of State for Scotland, Alister Jack MP.
15. The Cabinet Secretary [wrote](#) to the Committee with draft amendments on 13 September 2023. The correspondence included:
  - [A letter from the Cabinet Secretary for Social Justice](#)
  - [Draft amendments](#)
  - [Sections to which the draft amendments apply](#)
  - [Explanatory material on the draft amendments](#)

## Debate on UNCRC reconsideration

16. A motion for UNCRC reconsideration was [debated on 14 September 2023](#). The motion sought Parliament's agreement to the UNCRC Bill proceeding to the reconsideration stage.
17. The Parliament agreed to reconsider the UNCRC Bill.

## Draft amendments

18. The amendments were [lodged on 18 September 2023](#).
19. Explanatory material was submitted with the draft amendments on [13 September 2023](#) to help clarify the amendments. It summarised the amendments as follows:

Amendments to section 6 address the Court ruling in three ways:

“First, they ensure that public authorities can be found to have acted unlawfully by acting incompatibly with the UNCRC only if the function in connection with which an incompatible action, or failure to act, occurred could competently be conferred on the authority in question by the Scottish Parliament.

Second, functions which could competently be conferred by the Scottish Parliament, but which are conferred by legislation originating from the UK Parliament rather than the Scottish Parliament are not subject to the section 6 compatibility duty.

Third, even where a function is conferred by legislation originating from the Scottish Parliament, a public authority does not act unlawfully by acting incompatibly if it was required or entitled to do so by legislation originating from the UK Parliament.”

Amendments to section 19:

“provide that the duty to (so far as possible) read and give effect to legislation compatibly with the UNCRC requirements applies only in relation to legislation originating from the Scottish Parliament. The duty no longer applies to legislation originating from the UK Parliament.”

Amendments to sections 20 and 21:

“similarly provide that the powers to strike down legislation or to declare legislation incompatible apply only in relation to legislation originating from the Scottish Parliament. Legislation originating from the UK Parliament cannot be struck down or declared incompatible on the grounds that it is incompatible with the UNCRC requirements.”

20. Commenting on the approach taken by the Scottish Government, Dr Tickell, stated that the Bill can only achieve maximum coverage now by applying the UNCRC to:
  - Acts of the Scottish Parliament, and to
  - amendments Acts of the Scottish Parliament have made to legislation originating from Acts of the UK Parliament.
21. However, Dr Tickell noted that applying the compatibility duty to Scottish amendments to UK legislation would be “fraught with complexity”. UK legislation has routinely been amended in devolved areas, sometimes repealing whole sections of an Act, sometimes changing a word or two.
22. This is the legal context behind the Scottish Government’s approach, as indicated in the [Cabinet Secretary’s letter of 13 September](#). The aim is to reduce the complexity at the expense of the reach of UNCRC obligations. The Cabinet Secretary said in her letter:

“To try to reduce complexity, neither the compatibility nor the interpretative duties will apply to powers conferred by amendments to UK Acts made by Acts of the Scottish Parliament. To do so would be especially complex for users. This is because the Supreme Court judgment means that we cannot require a public authority to act compatibly when delivering functions under an Scottish Act of Parliament amendment if doing so would undermine the delivery of the policy intention in other aspects of the UK Act.

The compatibility duty would apply to functions conferred by amendments to Acts of the Scottish Parliament that have been made by Acts of the UK Parliament. However, so as not to fetter the UK Parliament’s powers, a public authority cannot be found to have acted unlawfully (by acting incompatibly) if it was required or entitled to do so by legislation originating from the UK Parliament.”

23. Therefore, in terms of coverage, the UNCRC Bill will apply only to Acts of the Scottish Parliament, excluding any amendments they may have made to UK Acts of Parliament that operate in devolved areas.

## The UNCRC Implementation Programme

24. The Scottish Government committed to a three year implementation plan.
25. The [UNCRC Strategic Implementation Board](#) (SIB), was established in July 2021 and meets monthly “to provide strategic vision and oversight of a comprehensive and joined-up implementation programme.” The last available published [Minutes are from July 2023](#).
26. Key implementation projects include:
  - To develop non-statutory guidance for public authorities on taking a children’s human rights approach.
  - The [Innovation Fund](#) which aims to support public authorities to develop new and creative children’s human rights approaches, closed to applications on 28 June. There is £500,000 available to support around 10-15 projects.
  - Work is underway with the Improvement Service to provide advice and guidance for local authorities in preparing for UNCRC incorporation and in taking a children’s human rights approach.
  - A Regulation and Improvement working group has been set up, to support regulators to embed child rights considerations into their practice and the practice of the organisations they reach.

## Approach taken by the EHRCJ Committee

27. The EHRCJ Committee considered its approach to reconsideration of the Bill at its meeting on [19 September 2023](#) as part of a work programme discussion. While there is no requirement in Standing Orders for any Committee to scrutinise a Bill at reconsideration stage, the Committee agreed it wished to hear evidence on the amendments and write to the Scottish Government with its findings.
28. Following consideration, the Committee agreed to invite two panels of witnesses comprising firstly, rights holders and secondly, duty bearers. It also agreed it would be helpful to hear from an independent commentator on the implementation of the amendments.
29. The Committee also agreed to hear from the Scottish Government.
30. The Committee wrote to invited stakeholders asking them to submit written evidence ahead of their scheduled session.
31. The Committee received five written responses.
  - [Law Society of Scotland](#)
  - [COSLA](#)
  - [Dr Andrew Tickell](#)
  - [Police Scotland](#)
  - [Social Work Scotland](#)
32. It also considered published statements on the reconsideration approach from:
  - [Children and Young People's Commissioner for Scotland](#) (27 June 2023)
  - [Together Scotland](#) (28 June 2023)
  - [Scottish Human Rights Commission](#) (13 September 2023)

and comments on the approach published in the [Minutes of a UNCRC Strategic Implementation Board meeting](#) (July 2023).

## Oral evidence

33. At its meeting on [31 October 2023](#), the Committee took oral evidence on the Bill from two panels. It heard from:
  - Nicola Killean, Children and Young People's Commissioner Scotland and Gina Wilson, Head of Strategy, Children and Young People's Commissioner Scotland;
  - Juliet Harris, Director, Together (Scottish Alliance for Children's Rights);
  - Jan Savage, Executive Director, Scottish Human Rights Commission;
  - Fiona Menzies, Policy Manager, Law Society of Scotland;

and then from

- Councillor Tony Buchanan, Children and Young People Board Spokesperson, COSLA;
  - Derek Frew, Temporary Chief Superintendent, Head of Partnerships, Prevention and Community Wellbeing, Police Scotland; and
  - Dr Andrew Tickell, Senior Lecturer in Law, Glasgow Caledonian University.
34. At its meeting on [7 November 2023](#), the Committee heard from the Cabinet Secretary for Social Justice, Shirley-Anne Somerville and Scottish Government officials.
35. The Committee was also keen to hear views from children and young people about the Bill. We are grateful to Together and to the Children and Young People’s Commissioner Scotland who were able to facilitate two sessions with children and young people. These were recorded and are published on our webpages:
- [Together, Children’s Parliament and the Scottish Youth Parliament evidence on the UNCRC \(Incorporation\) \(Scotland\) Bill](#)
  - [Children and Young People Commissioner Scotland: Young Advisors on the UNCRC \(Incorporation\) \(Scotland\) Bill Reconsideration](#)

## Key themes

36. The Committee identified key themes from its evidence and has structured its letter using these themes. Conclusions and recommendations are provided at the end for ease of reference.

### *Support for UNCRC incorporation*

37. There is continued strong support for the principle of UNCRC incorporation from human rights organisations and the public sector.
38. Nicola Killean, Children’s and Young People’s Commissioner Scotland said:
- “I support the Scottish Government’s proposed approach to amend the Bill. If passed, the Bill will provide greater protections for children’s rights now, and it will create the foundations on which we can build on those protections in the future. That long-term investment will be focused on the future, beyond parliamentary cycles, not just on immediate returns”<sup>1</sup>
39. Jan Savage of SHRC shared this view. She told us that children, young people and their families have waited a long time for this but it is important that the Supreme Court established that the Scottish Parliament can incorporate the UNCRC. She said:

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<sup>1</sup> Official Report 31 October 2023 col 2



“Is this where we thought we would be when this process started? No. Is this more complex than we envisaged at the start of this process? Yes. Is that a reason not to proceed? Absolutely not. Is this the best way to go forward with the bill? Yes. It is a messy and complex route, but it is the only route forward. Our view is that this is the only way to proceed; we do not have an alternative to propose to you”<sup>2</sup>

40. Juliet Harris of Together used a spider’s web to represent protections of children’s rights, with flies representing breaches of children’s rights being caught by the web. Following the Supreme Court ruling, the web has weakened so it no longer catches all flies (breaches of rights). Although the web is weakened, it is still critical, and its very existence scares away the flies. Over time she said, the web can be strengthened by the Scottish Government, MSPs and the courts.
41. Reference was made to a [letter](#) (27 October 2023) Together sent to the Cabinet Secretary that has four asks:
  - Set out a clear timetable for legislative review
  - Commit to using specific legislative opportunities to expand the scope of the UNCRC Bill
  - Commit to minimising future Scottish Parliament amendments to UK Acts
  - Commit to the continuation of the UNCRC Implementation Programme
42. Witnesses representing rights holders also spoke of “frustration among children and young people” about the delay to the Bill and that there had been a “lack of understanding of what was happening in that period.” However, Gina Wilson from the Children and Young People’s Commissioner Scotland told us that there was also an understanding amongst young people that the Bill is complicated and has far reaching consequences but that “Children and young people really appreciate it when they hear directly from people in power and have updates”<sup>3</sup>.
43. Several witnesses identified concerns about how the UNCRC Bill as amended will work. This was a particular concern raised by public sector organisations who are the duty bearers.
44. Councillor Tony Buchanan from COSLA told us that local government is “fully supportive” of the Bill’s intentions but that local government concerns are about:

“the practical implications for councils of the proposed amendment to the UNRC compatibility duty”. Those concerns he said had been raised by his professional advisors representing social work, education and local authority solicitors.”<sup>4</sup>

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<sup>2</sup> Official Report 31 October 2023 col 4

<sup>3</sup> Official Report 31 October 2023 col 13

<sup>4</sup> Official Report 31 October 2023 col 27



45. Chief Superintendent Derek Frew of Police Scotland said upholding the UNCRC is aligned to Police Scotland's existing approaches but needs to understand how it can deliver to meet the UNCRC requirements and how this will impact on resource commitments in its revenue and capital budget.
46. Dr Tickell commented that the Cabinet Secretary had recognised and taken the most "rational and workable approach" but it still presents a range of "profound challenges" for public authorities and rights holders trying to enforce their rights through the courts.
47. The Cabinet Secretary acknowledged and shared frustration about the delay in bringing back the Bill to the Scottish Parliament. She said the Scottish Government had attempted a number of approaches to reach resolution. These included extensive engagement with the UK Government on whether it would be willing to alter the devolution settlement, stakeholder engagement to address highlighted concerns and close working between Scottish Government and UK Government legal teams.
48. That liaison she explained was "important to try to maximise coverage" and that the Scottish Government, although unable to share legal advice they had been given, recognised the importance in involving children and young people of the options available and in keeping stakeholders up to date.
49. While the amendments had resulted in a "disappointing loss of coverage for children's rights compared with what we had originally hoped to achieve", she emphasised that the Bill will "still provide legal protection for children's rights that is not currently available in Scotland or, indeed, in any other part of the UK".<sup>5</sup>

#### *Legal complexity for public authorities*

50. COSLA and Social Work Scotland (SWS) highlighted the legal complexities that local authorities (and by extension, public authorities) are likely to face, following the amendments to the UNCRC Bill.
51. As COSLA indicated, local authorities exercise a wide range of functions and powers which are based on a complex mix of Acts of the Scottish Parliament and UK Parliament in devolved areas. With the proposed approach, foundational pieces of legislation like the Education (Scotland) Act 1980 and Children (Scotland) Act 1995 would be outwith the scope of the Bill, whilst other aspects of educational provision and looked after children would be within scope. In their view, this leaves the legal position and nature of the statutory duty unclear.
52. To address these legal complexities, Councillor Tony Buchanan of COSLA told us:

"There are several things that the Scottish Government could do to address the issues. It could undertake an exercise to identify which public authority

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<sup>5</sup> Official Report 7 November 2023 col 27

functions will be either in or out of scope. It could provide detailed sector-specific guidance for public authorities, and it could ensure that there is clear public messaging about the limited covered and about the amended legislation itself”<sup>6</sup>

53. Fiona Menzies of the Law Society agreed. She said “The Scottish Government might look to provide some detailed guidance, taking into account each article of the UNCRC and identifying the relevant Scottish and UK legislation to aid duty bearers in their work..” She continued “There will be a need to ascertain the compatibility of the large mix of legislation in place that is used by duty bearers that covers children’s rights, which is a mix of acts of the Scottish Parliament and the UK Parliament”<sup>7</sup>
54. In written evidence, SWS echoed this view with reference to social work legislation. It described a complex and “potentially impossible legislative landscape for practitioners, children and those wider professionals supporting them, to navigate.” This would raise the risk of increased conflict and diminish the experience of children in having their rights upheld and supported.
55. SOLACE (membership network for public sector and local government professionals)<sup>8</sup> said there is some confusion around how duties will work in practice due to the possible difference in legal duties depending on the legal source of public authority powers. There are potential capacity issues if different scenarios need to be looked at on a case-by-case basis by legal teams.
56. The point has been raised that public authorities should all be acting compatibly with the UNCRC requirements regardless of the amendments to the Bill.
57. Nicola Killean said:

“Our clear message is that duty bearers should be focusing on acting compatibly across all elements of the UNCRC. Two years ago, that is what Scotland was preparing for an we would urgent everybody to continue to deliver and focus on that.” However, she told us that there are some “clear commitments that the Scottish Government can make to support duty bearers in relation to the legislative review and audit” and that there was a need for clear communication in order that everyone including children and young people are supported.
58. Some witnesses highlighted a risk that public authorities may only comply with areas that are vulnerable to litigation.
59. The Cabinet Secretary said she “would be concerned” if public bodies stopped taking a children’s rights approach but that the Scottish Government would

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<sup>6</sup> Official Report 31 October 2023 col 28

<sup>7</sup> Official Report 31 October 2023 col 9

<sup>8</sup> Minutes of Strategic Implementation Board

continue to work with them on all issues not just those which were identified as having potential to end up in court.

60. However, COSLA asked what it will mean if public authorities are required to act in a way that is incompatible with the UNCRC where the power derives from legislation outwith the scope of the Bill.

61. Juliet Harris emphasised the importance of relationship building and listening to children and young people when considering concerns raised by SWS and COSLA. She said:

“The most important thing for children and young people is not whether they can speak to a lawyer and go to the courts, it is whether they have a trusting relationship with adults around them, such as teachers and social workers so they can say “I am worried about my rights. I am worried that they might have been breached. The teacher or social worker should be able to deal with that straight away by saying “Let’s put this in place. Let’s deal with your concern, Let’s make this better. There is no legal complexity in that. It is simply about the relationships that social workers, teachers and public authorities have with children”<sup>9</sup>

62. In their written submission, Together Scotland also [identified](#) provisions in Acts of the UK Parliament that they argue are not compatible with the UNCRC:

- “The Education (Scotland) Act 1980 omits to provide children with the independent right to withdraw from religious observance.
- The Marriage (Scotland) Act 1977 falls short of the international standard that the minimum age of marriage should be no lower than 18 years old.
- The Criminal Procedure (Scotland) Act 1995 allows for children aged 12 and over to be given life imprisonment.”

63. In written evidence, Police Scotland stated that currently, “an arrested child must be taken to a Police Station, leaving no alternative to children attending current police custody facilities.” This is not in line with Article 37 of the UNCRC which requires separate facilities for children in custody. However, the current Police Scotland custody estate cannot facilitate this. Police Scotland continued:

“The amended Bill is not specific in its reference as to whether this will should apply to the existing custody estate post implementation or if it is applicable only to future estates projects. In the interim, Police Scotland commits to ensuring that children will not be placed within a police cell with another adult or child. They will also be separated from adults as best as practically possible when being processed through police custody. This will continue to be a focus for the future estates strategy relating to police buildings and custody suites.”

64. Chief Superintendent Derek Frew of Police Scotland told the Committee that they currently work in a complex landscape which includes cross border issues,

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<sup>9</sup> Official Report 31 October 2023 col 11

the different ages of children in different pieces of legislation but implied that the UNCRC would only add to this complex picture.

65. In oral evidence, the Cabinet Secretary told us she recognised the concerns from her own dialogue with public bodies and their call for sector specific guidance. She referred to evidence from Dr Tickell that the principles do not readily lend themselves to a set of rules and are more “a list of principles that need to be interpreted”. That, she said “makes sector specific guidance difficult”. She said it was for the courts to decide when cases are brought to them “what constitutes a breach in the context in which services are being delivered”.
66. However, she explained, there are a number of ways that public bodies will be supported and that the work will not stop when the Bill is passed. She said:
- “There will be non-statutory guidance on taking a children’s human rights approach, which will be available by the end of the year for those involved in public service delivery in Scotland. We are updating external child rights and wellbeing impact assessment templates and the external guidance, and the UNCRC innovation fund is available. By summer 2024 we will have a national child rights, skills and knowledge framework in place, which will provide a single point through which to access new and existing training resources on children’s rights for a wide range of sectors. There is also the statutory guidance that is contained in the bill. The Bill requires Scottish ministers to issue guidance to support public authorities to comply with the compatibility duty and to promote children’s rights and respect in practice.”<sup>10</sup>
67. She told us that a group has been convened to consider the development of the statutory guidance, and that will include a framework for reviewing compatibility.

#### *Gaps in coverage of children’s rights*

68. A key aim of the Bill at introduction alongside a framework of duties and requirements was that children could enforce their rights through the courts if necessary.
69. Several witnesses suggested that the legal complexity resulting from the amendments, will make it difficult to work out when children will be able to use powers in the Bill to seek remedy and redress. Social Work Scotland said:
- “Under the proposal, key pieces of legislation relevant for children’s rights in critical areas such as Children (Scotland) Act 1995 -, the core provision for looked after children - would be out with the scope of the Bill, leaving considerable gaps in rights protection. Whilst such foundation acts would be excluded, other aspects of support for looked-after children is covered within later Scottish legislation, thus creating a complex and unclear position for local authorities in key areas where children and young people would

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<sup>10</sup> Official Report 7 November 2023 col 33

reasonable expect the provisions of UNCRC (Incorporation) (Scotland) Bill to apply.”

70. COSLA stated there would be significant gaps in legal protection of children’s UNCRC rights, including areas where rights might be most at risk of infringement and where children would expect their rights to apply. This creates a significant gap between expectations and practical reality, and so the practical impact of the change will be more limited than originally intended.
71. Dr Tickell noted in his written submission:

“The Bill’s original approach would have meant that potential litigants with a children’s rights issue only had to ask themselves whether or not the legislation they were seeking to challenge or review fell within devolved competence, rather than worrying about which parliament passed the original legislation, or amended it, or how.”
72. In oral evidence, Dr Tickell emphasised the complex legal landscape to navigate as a result of the amendments. He said that children already have UNCRC rights but where it becomes complex is on enforceability.

“Imagine you are a child or more probably an advocate for a child, who thinks you have an issue with an act of the Scottish Parliament. You find the act and you think “Oh good, it’s in the legislation” but then you discover that it is an amendment to a Westminster Bill and is therefore outwith the scope of the UNCRC”<sup>11</sup>
73. In its opening statement, the SHRC said “Incorporation of children’s rights is essential for children and young people to secure accountability when the rights that they already have under the UN Convention on the Rights of the Child are not adequately considered by public bodies”<sup>12</sup>. The reconsidered approach has the potential to achieve this in relation to Acts of the Scottish parliament and provide “greater scope for Children’s Commissioner and SHRC to act when the system is not working well in those areas of devolved competence.”
74. Regarding preparation for the use of new strategic litigation powers for the SHRC and Children’s Commissioner, the Children’s Commissioner said it has been working on this and had already published a [strategic litigation toolkit](#).
75. In its submission, Together Scotland suggested<sup>13</sup> that it would be helpful to look at case studies and what remedies might be available, including those that do not rely on the issue being within the scope of the Bill.
76. In oral evidence, Juliet Harris of Together told us that the children she spoke to were very clear that they do not need to know which laws protect their rights at different times. She said, “The most important thing for them is that they know that they have the rights that are in the UNCRC, that they are able to recognise

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<sup>11</sup> Official Report 31 October 2023 col 31

<sup>12</sup> Official Report 31 October 2023 col 3

<sup>13</sup> Minutes of SIB

when they are breached and that they know what they can do, who they can speak to and complain to”.<sup>14</sup>

77. It was important to recognise she said that children can be “scared” or “nervous” about complaining and do not want to get people in trouble. The important thing was that they had “lots of options” such as being able to complain anonymously or having a peer mentor at school they could speak to about their concerns or rights. She also suggested that flow charts that children and the adults around them could have would be useful as children said “sometimes adults do not know that they have to listen to complaints from children which means that when they make complaints they are not always taken into account”<sup>15</sup> The worst thing was that adults fail to react to a child’s complaint.
78. In relation to potential gaps in the Bill’s coverage, Juliet Harris told us it was crucial that we make sure there is full coverage of protections for children’s rights across the board. She said “Three of our asks to the Cabinet Secretary address that point. First, we need to know that the Cabinet Secretary has committed to conducting a legislative review to see what is covered by the Bill and what is not but we want a timescale for that. Our second ask is about continuing to use legislative opportunities to bring things within the Bill’s scope. The final ask is a commitment to minimise the use of amendments to UK acts in future legislation and instead to make those amendments on the face of acts of the Scottish Parliament.”
79. She said that it was important too that once a legislative review has been undertaken, children and young people should be involved so that their priorities could be identified “to make sure that the continual law reform is really informed by children and young people’s experiences of their rights”.<sup>16</sup>
80. Gina Wilson of the Children and Young People’s Commissioner told us that there is a need to adequately resource and support staff so that they understand how children can be supported.
81. In response, the Cabinet Secretary said that the Scottish Government will continue to work with stakeholders and involve children and young people to ensure their priorities are front and centre.
82. As to whether more legislation could be brought within the scope of the UNCRC Bill, she said that there would be an impact on what the Government thinks about as it plans legislation and whether the change in law should be expressed as a freestanding provision or as an amendment.
83. She told us they look to “parliamentary resource implications and accessibility to law” and that the Government will consider the implications of such decisions on UNCRC scope and that will be built in but that they “need to be careful” and

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<sup>14</sup> Official Report 31 October col 14

<sup>15</sup> Official Report 31 October 2023 col 14

<sup>16</sup> Official Report 31 October 2023 col 19-20

therefore would not give an overall commitment to that. They would look at issues on a “case by case” basis.

“We need to consider what provisions would benefit from being in an Act of the Scottish Parliament, what would happen to the scope and timetable for a Bill if it was already progressing and what level of consultation would have to be undertaken if we were to put something into a Bill as it goes through. Would that delay a bill? Would members feel that it was a reasonable way forward if the measure was not in the Bill at stage 1 and evidence had not been taken on it, for example? People might have concerns if we do not consult properly.”<sup>17</sup>

### *Practical implementation*

84. COSLA has concerns about the practical implementation of the Bill:

“...in terms of the need for staff to interpret, implement and apply public authorities’ legal duties in practice. Similarly, it is anticipated that children, young people, their families, and advocates will face significant challenges in understanding children’s legal rights – when they apply, and what they mean in practice, including remedies that can be sought.”

85. Social Work Scotland echoed these points and said:

“Clarity and accessibility for both practitioners and children and young people is crucial if the intentions of the Bill are to be achieved.”

86. And in terms of the social work workforce:

“Additional demands, and particularly additional challenge and potentially complaints from unclear UNCRC legislation would be a further significant demand in terms capacity and resource at a time when those resources and capacity are already stretched.”

87. In its written submission, Police Scotland stated that the financial implications of the amended Bill are undetermined and there will “undoubtedly be areas which require significant financial investment to ensure they are compliant.”

88. Chief Superintendent Frew said:

“If the issue is, our custody environments—if, say, we are expected to create a separate custody suite for children aged between 12 and 18—that will be a significant ask. Our current estate would certainly not facilitate that. We might find that we have to close our custody suite any time a child between 12 and 18 comes in so that they see no other adults other than the police officers who have to do the necessary processing, and then we might have to ensure that there is a room that can be allocated to them—not a cell but, in reality, it will probably still be an existing custody suite. Will that meet the expectations of the Government and partners? Will it meet the legislative

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<sup>17</sup> Official Report 7 November 2023 col 38



threshold? I am just giving that as an example of the sort of thing that we would need to work through”<sup>18</sup>

89. Witnesses also considered whether the six-month commencement following Royal Assent provides enough time to prepare given the amendments.
90. Together said that its members were happy and there had been a lot of time for the implementation programme to build up the capacity of public bodies to be ready. COSLA told us that colleagues at SOLACE, SOLAR, ADES and SWS have advised that they see significant practical challenges in the implementation which could result in capacity issues and would likely have financial implications.
91. The Cabinet Secretary advised that it would be mid 2024 before the Bill came into force and that by then duty bearers would have had two and a half years to get ready so she hoped the commencement date is not unreasonable. However, she reassured the Committee that the Scottish Government continued to liaise with duty bearers about their concerns and how they could best support them.

#### *Audits*

92. In written evidence, SWS recognised the limited options available to the Scottish Government, but stated that the solution proposed will not provide the necessary framework and context to fulfil the intent of UNCRC incorporation: to improve children’s rights across public bodies in Scotland. This is due to:
  - the restriction in scope which will result in insufficient coverage in children’s rights, and,
  - the complexities of the legislative landscape and interactions between the various pieces of policy and legislation which make it impractical.
93. There are calls for two types of audit.

#### *Legislative audit*

94. The first has been raised by, for example, the Children’s Commissioner and Together Scotland. This aims to consolidate Acts from the UK and Scottish Parliament in devolved areas, to bring them into scope of the UNCRC Bill. It is suggested the passage of the Bill does not need to be delayed by this and the process could continue after Royal Assent.
95. Together Scotland suggest a three-step approach:
  - Identify Acts of the UK Parliament (and amendments to Acts of the UK Parliament) that are within devolved powers and impact on children’s human

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<sup>18</sup> Official Report 31 October 2023 col 45

rights. Make necessary amendments to bring them into the scope of the UNCRC (Incorporation) (Scotland) Bill.

- Commission a comprehensive audit of the extent to which all devolved legislation complies with the UNCRC requirements (to include Acts of both the UK and Scottish Parliament). This could look like [a similar audit that took place in Jersey](#)
- Make amendments identified through the audit. Review and update the audit on an ongoing basis through the [Children's Rights Scheme](#) taking into account evolving international standards and [recommendations from the UN Committee on the Rights of the Child](#)

96. Juliet Harris of Together told us:

“We want the Scottish Government to set out the timescale. We want it to concentrate on the legislative review. After that we want it to look at the legislative opportunities that we have and see what we can bring in. We want the Government to speak to children and young people to look for other opportunities and bring in other bits of legislation that are particularly important to them. It will be for the Scottish Government, children and young people, our members, and the commissioner and SHRC to work together”<sup>19</sup>

97. In response to these calls, COSLA said it would be a “hugely complicated and time-consuming task, meaning that this cannot be seen as a straightforward solution.” It stated that councils already struggle with capacity to manage the level of legislative and policy change underway and on the horizon. Further demands in this area represent a huge undertaking.

98. In oral evidence, Dr Tickell agreed that this would be challenging. “If we are talking about an audit as a way of moving towards some kind of comprehensive consolidation of all these areas of law, that would be a huge demand on the Parliament’s time simply for the purposes of making it subject to the UNCRC. I think you would struggle with that. To that extent, such an approach would be unrealistic”<sup>20</sup> However, he commented that specific issues that arose could be addressed.

99. UNICEF UK<sup>21</sup> support an audit legislation and highlighted work done in Norway, Sweden and Iceland.

100. Dr Tickell observed that a ‘positive’ following from the Supreme Court ruling might be that the Scottish Parliament now has a stronger incentive not to amend existing UK legislation when it passes Scottish legislation, but instead, “re-legislate wholesale in a new Scottish Act”. This may also be a consideration in future legislative consent considerations where the UK Parliament propose to legislate in devolved areas with children’s rights implications.

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<sup>19</sup> Official Report 31 October 2023 col 22

<sup>20</sup> Official Report 31 October 2023 col 40

<sup>21</sup> Minutes of SIB

101. However, Dr Tickell also stated that this approach would make the law-making process longer and more time-consuming. This is because consolidating Bills involve re-enacting uncontroversial existing provisions which would still require parliamentary scrutiny.
102. Chief Superintendent Frew of Police Scotland said that police had been working with GIRFEC principles for a long time and continue to do work around trauma-informed practice but by “not having a clear legislative review or clear guidance will probably have the unintended consequence of putting us in a position of wanting to protect the organisation versus delivering the UNCRC principles”. Any legislative review or guidance he said would be really helpful.
103. The scope of the guidance he told us would have slightly narrower parameters than COSLA but from a policing perspective it would be useful “to know the expectations of the Scottish Government and of the partners we heard from in the first panel. What do they expect us to deliver, and can we meet those expectations”<sup>22</sup>

#### *Scoping audit*

104. The second approach is focused on a scoping exercise.
105. In response to probing amendments lodged at Stage 3 ([16 March 2021](#)), the former Deputy First Minister, John Swinney, listed the following UK Acts that might be affected:
- “To help members to understand the significance and scope of the proposal, it would put out of the scope of the Scottish Parliament acts such as the Children (Scotland) Act 1995, the Scottish parts of the Police Act 1997, the Rehabilitation of Offenders Act 1974, the Education (Scotland) Act 1980, the Education (Scotland) Act 1996, the National Health Service (Scotland) Act 1978, the Social Work (Scotland) Act 1968, the Family Law (Scotland) Act 1985, the Children and Young Persons (Scotland) Act 1937, the Registration of Births, Deaths and Marriages (Scotland) Act 1965, the Criminal Procedure (Scotland) Act 1995 and the Further and Higher Education (Scotland) Act 1992.”
106. COSLA proposed that, to help address complex issues, it is crucial that the Scottish Government identifies public authority functions that are now in scope and out of scope. It seeks “sector-specific guidance to support councils (and other public authorities) to understand when their legal duties will and will not apply, including in areas where particular complexity and risks are foreseen.”
107. SWS supports a scoping audit before a legislative audit and programme of re-legislation:

“We view this as critical to inform whether the current proposal can be implemented in a manner which meets the intent of the bill. As such Social

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<sup>22</sup> Official Report 31 October 2023 col 34

Work Scotland would support such an audit as essential to avoid future challenge and to ensuring a context for UNCRC incorporation which enhances rather than confuses the rights of our children.”

108. COSLA also suggested that in addition to an audit it might be helpful to consider scenarios of how the Bill would work in practice for duty bearers and rights holders.

109. Responding to the calls for audits, the Cabinet Secretary said she recognised that this was not just about the amendments but also how the Scottish Government deal with the implications of the Bill as it stands. She said:

“The UNCRC strategic implementation board was informed at its last meeting that I have asked officials to commission a review of UK acts in devolved areas. I make it clear that that review is not to identify whole UK acts that would be worth converting into Scottish Parliament acts but to identify provisions in UK acts that could be converted”.<sup>23</sup>

110. She explained that it was not possible to give a timescale because “we need to scope out exactly what it will entail” but was “keen to get it initiated as soon as is practically possible”. The Cabinet Secretary also recognised the importance of involving children, young people and others who are impacted in “how they generate findings in a phased way and how we can take them forward”.

#### *Public messaging*

111. A general theme is the need for clarity about the extent of coverage under the UNCRC Bill and what this will mean in practice. This is often mentioned following descriptions of the legal complexities of the proposed approach. Clear messaging would be helpful for children and their families, for practitioners, and for the public more widely.

112. Dr Tickell told us that rights holders, duty bearers and public authorities were looking for accessibility and simplicity but that he did not think that was possible. He said:

“All we can do is try to minimise complexity in a way that makes it possible for those cases that can be articulated and where legal advice is available to reach the courts” He went on “I do not know how you explain a simple version for the wider public. I do not think that is a failure on you, it is a failure of the situation in which we find ourselves. In my view, and it is just my view, the extent of the UK Supreme Court Judgement is fundamentally impractical in terms of the kind of legislative proposal you are looking at”.

113. The result he said may be something that overpromises but underdelivers. “Enshrining is easy and cheap and it is unenforceable” but what matters in the end is what people can do with it. There is a risk that we are “not being entirely candid about what the Bill will actually achieve”.<sup>24</sup>

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<sup>23</sup> Official Report 7 November 2023 col 40

<sup>24</sup> Official Report 31 October 2023 col 39

114. Juliet Harris of Together presented a summary of how the Bill might work using a child friendly approach, developed in discussion with children.
115. The Cabinet Secretary said there is a “real need to work with children and young people and ensure that communication is child friendly”. She said there is a communication group set up to develop the Scottish Government’s approach and signposted the Committee to an open letter published on [18 October 2023](#) to children and young people explaining why the Bill has had to be amended.
116. In addition, she said:

“We have Young Scot working on a social media campaign for young people, and we are grant funding the Children’s Parliament to help raise awareness of children’s rights among children and young people. We also have a guide for parents, carers and family members that will be updated when, with the will of Parliament, the Bill is passed and, as I mentioned, there is the Clan Childlaw funding. The Children and Young People’s Commissioner Scotland will play a central role, too, but it will be very much up to the commissioner to decide how to take that forward”<sup>25</sup>

### *Human Rights Bill*

117. In his written submission, Dr Tickell stated that the real effect of the Supreme Court judgment “has been to make it extremely difficult to incorporate *any* new human rights framework under devolution which is coherent, accessible or easily workable.”
118. He warned that issues with this Bill will have wider application when the Human Rights Bill is introduced. This aims to incorporate four international human rights treaties:

“Everything said about the difficulties facing this Bill in the wake of the Supreme Court’s Reference judgement applies just as powerfully to incorporating any further international rights frameworks into Scots law.”

119. He reiterated this in oral evidence:

“I flag right now that, if you want any rights to be enforceable in court, everything that we are talking about now will echo profoundly for all the other types of rights that might be set out in a human rights bill. Given the technicality and the difficulty of explaining such distinctions, I am not sure whether campaigners, third sector groups and the wider public have fully anticipated or appreciated how dramatic the consequences of such a proposal are”<sup>26</sup>

120. He spoke about a range of ways this could be addressed. He said:

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<sup>25</sup> Official Report 7 November 2023 col 41

<sup>26</sup> Official Report 31 October 2023 col 44

“The UNCRC could be easily incorporated into UK law. If that echoed the structures of the Human Rights Act 1998, it would be straightforward. However, as a matter of policy, that is not the UK Government’s position and is not likely to be for the foreseeable future. If the UK Government decided that the Scotland Act 1998 could be amended to make the process easier, that would be a potential solution. Unsurprisingly, it has not decided to do that; Alister Jack pursued the reference procedure and rejected the approach that the UNCRC Bill articulated at stage 3 of applying to Westminster legislation. It is not surprising that that is not really a practical solution.” He continued:

“If Westminster amended the Scotland Act 1998 to say that the Scottish Parliament had legislative competence to introduce human rights provisions that could apply to UK legislation in devolved areas, that would be the neatest solution, from a legalistic point of view, for a range of the issues that the Parliament faces and would face with a Human Rights Bill. Neither of those solutions is likely to materialise or be practically possible, so we are left with what is proposed, which is not an insignificant achievement. Many campaigners and colleagues, from children onwards, feel deeply committed to that. I do not minimise that significant impact, but there is a reluctance among human rights campaigners to own the difficulties of this. No one really wants to talk about that because that agenda suits no one politically” <sup>27</sup>

121. The SHRC said in its statement that it is essential to that the Scottish Government and MSPs “reflect seriously on the learning from this process so far”, particularly ahead of the introduction of the Human Rights Bill.
122. Fiona Menzies of the Law Society of Scotland told us that there were lessons to be learned “Some people have picked up on the potential for a new approach to be taken to drafting, in which existing legislation is not amended but instead a decision is taken to re-legislate with a new Scottish act. We would have to look at that approach in more detail”.
123. However, she noted that the Law Society of Scotland had responded to the Scottish Government consultation and when they talked about the proposed models had highlighted that to ensure the Bill is within the competence of the Scottish Parliament “the text of the Treaties would need to be amended to remove anything which could relate to any of the reserved matters in the Scotland Act 1998” <sup>28</sup>
124. Jan Savage of SHRC agreed. She said “We really need the UNCRC bill process to conclude successfully and without further delay so we can fully learn all the lessons from this process before we can apply them to the Human Rights Bill” but it was difficult to comment more as they had not yet seen a proposed draft Bill. However, she advised that “It is possible to look at alternative models of incorporation. We are not in the position to specify which particular approach might be best, but we need to signal that there are

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<sup>27</sup> Official Report 31 October 2023 col 44

<sup>28</sup> Official Report 31 October 2023 col 23

alternative approaches that could better achieve the human rights Bill’s policy intent”<sup>29</sup>

125. The Cabinet Secretary described the forthcoming Human Rights Bill as some of the “most complex legislation that the Parliament will have had to consider since being reconvened”. She reassured the Committee that the Scottish Government would learn lessons from the UNCRC process and that she would encourage stakeholders to come forward with any alternative suggestions as to how this could proceed.
126. She told us that the process of reconsideration had shown “the limitations of the devolved settlement” and that the Scottish Government “did not want to be in the same situation”. Some of the discussions for example around legislative competence would need to be revisited.

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<sup>29</sup> Official Report 31 October 2023 col 25



# Conclusions and recommendations

## Support for UNCRC incorporation

The Committee notes that both rights organisations and duty bearers are strongly supportive of the principle of UNCRC incorporation. It echoes that support and recognises that, in light of the Supreme Court's judgment, the Scottish Government has been unable to fully implement the Bill as passed and faced challenges in finding a way forward.

The Committee is satisfied that the Scottish Government has explored all realistic alternatives and, in the circumstances, is content with the resolution reached. However, it is clear that rights holders and duty bearers now face a complex landscape to navigate and ask that the Scottish Government make available all resources necessary to ensure they are adequately supported.

## Legal complexity for public authorities

Local authorities (and by extension public authorities) exercise a wide range of functions and powers based on a mix of Acts of the Scottish Parliament and UK Parliament in devolved areas.

Key legislation such as the Education (Scotland) Act 1980 and the Children (Scotland) Act 1995 are outwith the scope of the Bill while other aspects of educational provision and looked after children are within scope. COSLA, Social Work Scotland and SOLACE expressed concerns that this could leave the legal position and nature of the statutory duties unclear. The Committee shares those concerns. Police Scotland highlighted that the UNCRC Bill may add to the already complex picture they work with. They also highlighted potential financial implications and that financial investment may be required to ensure they are compliant.

The Committee notes suggestions of ways in which the Scottish Government may attempt to support public authorities and alleviate concerns. COSLA has asked the Scottish Government to undertake an exercise to identify which public authority functions will be either in or out of scope and has requested detailed sector-specific guidance. The Law Society suggests that detailed guidance would be helpful, taking into account each article of the UNCRC and identifying the relevant Scottish and UK legislation.

Together Scotland has four asks of the Scottish Government – to set out a clear timetable for legislative review, commit to using specific legislative opportunities to expand the scope of the UNCRC, commit to minimising future Scottish Parliament amendments to UK Acts and commit to the continuation of the UNCRC implementation programme.

The Committee considers it vital that public authorities have the necessary information to ensure they are able to comply with the Bill. That will require them to have clarity on what is and what is not within scope. The Committee welcomes the Scottish Government's commitment to continue to work with public authorities and

the range of support it intends to provide in the form of statutory guidance and non-statutory guidance and the UNCRC innovation fund and that the national child rights skills and knowledge framework will be available as a training resource in 2024.

### **Gaps in coverage of children's rights**

One aim of the Bill at introduction was that children would have the ability to enforce their rights through the courts. As key pieces of legislation are now outwith the scope of the Bill, the Committee heard there will be gaps in rights protection. Some of these are in areas where children would expect their rights to apply creating a gap between expectations and reality. There will be an additional challenge for children and their representatives to work out if they can use powers in the Bill to seek remedy for breach.

The Committee notes positive comments from the Children's Commissioner that the Bill will give children and young people additional protection and powers and introduce the Children's Rights Scheme and child friendly complaints mechanisms.

The Committee considers it is vital that rights holders are clear in what they can and cannot do in the event of a breach and that the framework being introduced can be strengthened over time. It welcomes the Cabinet Secretary's commitment both to continue to work with children and their representatives and to involve them to ensure their priorities are front and centre. As part of that work the Committee encourages the Scottish Government to give consideration to each of the four asks from Together's letter of 27 October 2023 to ensure the gaps in rights protection are addressed. The Committee also notes Together's suggestions that children need different options available to them for reporting breaches such as anonymous complaining or a peer mentor scheme in school. They also suggested that flow charts setting out mechanisms for complaints would be helpful for both teachers and young people.

### **Practical implementation**

The Committee heard that COSLA has concerns about the practical implementation of the Bill and its staff's requirement to interpret, implement and apply public authorities' legal duties in practice. Police Scotland highlighted that the financial implications of the Bill are undetermined but there may be areas which require significant financial investment for compliance, for example, if separate custody suites are required. Social Work Scotland highlighted that for the social work workforce, the UNCRC legislation would be a further significant demand in terms of capacity and resource at a time when those are stretched.

The Committee notes that, for many duty bearers and rights holders, there is trepidation as to how they can effectively implement and comply with the Bill. More support and guidance is undoubtedly required. The Committee welcomes the Cabinet Secretary's commitment to continue to work with duty bearers and rights holders to ensure they are adequately supported.

## **Audits**

The Committee notes calls by the Children's Commissioner and Together Scotland for a legislative audit to be undertaken by the Scottish Government to consolidate Acts from the UK and Scottish Parliament in devolved areas to bring them into scope of the UNCRC bill. It also notes COSLA's call for a scoping exercise to identify public authority functions that are now in scope and out of scope.

The Committee considers it vital that the Scottish Government identify areas where legislation is not compliant with the UNCRC, and that this is made clear to rights holders and public bodies as soon as possible. It welcomes that the Cabinet Secretary has made a commitment to look at children's priorities and has commissioned a review of UK Acts in devolved areas along with what provisions in those acts could be converted in the future. While it acknowledges that such a review will take time it would welcome an update on progress as soon as it is available.

## **Public messaging**

The Committee heard that there is a need for clarity about what the UNCRC will mean in practice and that clear messaging would be helpful for children, their families, their representatives and the public more widely. Evidence suggests that the public are currently not clear on what the UNCRC as amended will deliver.

The Committee notes the letter published by the Cabinet Secretary on 18 October and welcomes her commitment to continue to work closely with stakeholders and young people with the Children's Commissioner also taking a central role. It also welcomes the Scottish Government's intention to work with Young Scot on a social media campaign, its grant funding of the Children's Parliament and Clan Childlaw and the production of a guide for parents and carers.

## **Human Rights Bill**

The Committee is aware that the Scottish Government intends to introduce a Human Rights Bill before the end of the current parliamentary session which will incorporate four international human rights treaties into Scots law.

The Committee notes concerns from stakeholders that the issues faced by the Scottish Government and the Scottish Parliament in relation to the UNCRC Bill may be applied to incorporation of these treaties.

It is essential that the Scottish Government reflect on the learning from the UNCRC process particularly in relation to legislative competence and the limitations of the devolution settlement. The Committee also notes suggestions from SHRC that alternative models of incorporation may better achieve the human rights bill policy intent. The Committee welcomes the Cabinet Secretary's response that lessons will be learned and a willingness to consider alternative suggestions from stakeholders on the approach.