

Cabinet Secretary for Social Justice
Shirley-Anne Somerville MSP



F/T: 0300 244 4000
E scottish.ministers@gov.scot

Kaukab Stewart MSP
Convener
Equalities, Human Rights and Civil Justice
Committee
ehrcj.committee@parliament.scot

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Dear Convener,

UNCRC (Incorporation) (Scotland) Bill reconsideration

Thank you for the Committee's careful scrutiny of the amendments to the UNCRC (Incorporation) (Scotland) Bill and for your letter of 17 November in which you set out the Committee's conclusions and recommendations.

I very much welcome the Committee's strong support for the principle of UNCRC incorporation, its recognition of the challenges the Scottish Government faced in amending the Bill to address the Supreme Court judgment and the Committee's confirmation that it is content that we explored all realistic alternatives and, under the circumstances, arrived at the best possible resolution.

For the purpose of my response, I summarise the Committee's recommendations and conclusions under seven themes listed below and which I address in turn in Annex A:

1. Support for public authorities
2. Support for children, young people and their representatives
3. Extending the scope of the compatibility duty by enacting more legislation in Acts of the Scottish Parliament
4. Identifying any legal UNCRC incompatibilities through an audit of legislation
5. Clear public communication about the provisions in the Bill
6. Continuation of the UNCRC implementation programme
7. Implications for the Human Rights Bill

I hope that Parliament will now feel ready to proceed to voting on the amendments.

Yours sincerely,

SHIRLEY-ANNE SOMERVILLE

ANNEX A: SCOTTISH GOVERNMENT RESPONSE TO THE COMMITTEE'S CONCLUSIONS AND RECOMMENDATIONS

1. Support for public authorities

While we have tried to minimise complexity in the approach we have taken to amending the Bill, the Committee's conclusions and recommendations recognise that the Supreme Court judgment means that the duties in the amended Bill will not be as straightforward to understand as they were in the original Bill.

The Committee's recommendations highlighted the concerns that some public authorities have raised about interpreting, implementing and applying the legal duties in practice. The Committee has pointed to the need for more support and guidance, in particular the need for:

- guidance to help public authorities to understand the nature of the statutory duties in the Bill;
- a list of public authority functions which will be in and out of scope of the compatibility duty; and
- detailed sector-specific guidance.

Guidance to help public authorities to understand the nature of the statutory duties in the Bill

The Bill requires Scottish Ministers to issue guidance to support public authorities to comply with the compatibility duty and promote child rights-respecting practice. It also requires Scottish Ministers to issue guidance on how specific public authorities fulfil their duty under the Bill to report on how they are complying with these duties. A group was convened in March 2022 and has met regularly since then to support the development of this statutory guidance. Among the members are: COSLA; SOLAR; the Improvement Service; and Police Scotland.

This draft statutory guidance, which currently includes a framework public authorities may find useful for reviewing compatibility, will be subject to wider consultation before it is finalised. The consultation cannot begin before the Bill receives Royal Assent but we are preparing to do that as quickly as we can after we reach that milestone.

As well as supporting public authorities to understand the statutory duties in the Bill, we are also supporting duty bearers to take a children's human rights approach in general. We will have non-statutory guidance on taking a children's rights approach available by the end of the year for those involved in public service delivery in Scotland. In addition, we are delivering a national improvement programme that includes:

- funding the Improvement Service to assist local authorities and their partners to successfully implement the UNCRC at a local level by providing advice and guidance, including through targeted training for Elected Members and a self-evaluation framework. Some of the tools developed by the Improvement Service have also been adapted for, and will be available to, a wider audience);

- working with public authority regulators to embed child rights considerations into the practice of the organisations they reach and embedding children's rights within regulatory frameworks and inspection regimes;
- updating external child rights and wellbeing impact assessment templates and external guidance for those who wish to use them;
- providing financial support for eight local authorities and their partners to develop a children's human rights approach and embed children's rights into culture, policy and practice through our UNCRC Innovation Fund; and
- development of a national Child Rights Skills and Knowledge Framework, which we will have in place by Summer 2024, to provide a single point through which to access new and existing resources and training on children's rights for a wide range of sectors.

A list of public authority functions that will be in and out of scope for the compatibility duty

The Scottish Government will continue to encourage public authorities to take a children's rights approach in the delivery of all of their services, regardless of the source of their powers. The UK has been a signatory to the UNCRC for over 30 years and the UNCRC is already at the heart of GIRFEC, The Promise and the Scottish Government's commitment to ensuring that all children and young people have the best possible start in life. Public authorities should not have to consider if the compatibility duty applies before deciding whether to take a children's human rights approach.

As I said in my evidence to Committee, I would be deeply concerned if public authorities stopped taking a children's human rights approach when they are delivering duties that are not in scope for the compatibility duty as provided for by the Bill. I therefore have some concerns about the unintended consequences of providing a list of public authority powers that are in and out of scope of the compatibility duty.

The question of what is in the scope of the compatibility duty should only become relevant if and when a rights issue cannot be addressed without the need to consider bringing proceedings in a court or tribunal. In those, hopefully limited circumstances, we would expect public authorities, using support and guidance from their legal advisers and the statutory guidance, to reasonably be able to identify the legal source of their own powers and establish if the compatibility duty applies, and hence whether there is a justiciable route (and potential remedy) through the courts.

Sector-specific guidance

From the evidence provided by COSLA and Police Scotland to Committee, I understand the request for detailed sector-specific guidance to be a request for the Scottish Government to set out how policy and practice in particular areas needs to change to become compliant with the UNCRC requirements in the Bill.

As Dr Andrew Tickell explained in his evidence to Committee, the articles in the UNCRC [and hence the UNCRC requirements in the Bill] do not lend themselves to a list of rules. Instead they are a list of principles that need to be interpreted in a

national context. As I set out above, we believe that public authorities should be doing that already by applying a children's human rights approach to delivery of all their services. It will then be for the Scottish courts to decide, if and when cases are brought to them, what does and does not constitute a rights breach in the context in which services are being delivered.

The Scottish Government will consider how to ensure that public authorities are aware of judgments made by the courts that could be relevant to their service delivery.

2. Support for children, young people and their representatives

We recognise, as the Committee has, that there will be a challenge for children, young people and their representatives in establishing if they can use powers in the Bill to seek remedy if and when they experience a rights breach. However, this question should only arise when rights issues cannot be resolved when concerns are communicated directly or raised through internal complaints processes. Irrespective of whether or not the compatibility duty applies, children should be empowered to raise concerns about any aspect of service delivery by public authorities and have access to a child friendly complaints process.

To make it as easy as possible to resolve a rights issue without the need to consider using the legal remedies in the Bill, the Scottish Government has provided funding to the Scottish Public Services Ombudsman to develop a child-friendly complaints process for public authorities over which they have jurisdiction. This model process will also be shared more widely so that other public authorities are encouraged to adopt it too.

The Scottish Government is also providing funding to Clan Childlaw and the Scottish Child Law Centre so that children and young people and their representatives will have access to free legal advice about whether they may have a route to remedy through the courts.

Your conclusions highlight that 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 mentions Together's suggestion that we develop a flowchart setting out the mechanisms and options. We are grateful for that suggestion and my officials are now considering how to take that forward.

3. Extending the scope of the compatibility duty by enacting more legislation in Acts of the Scottish Parliament

The Committee notes calls by the Children's Commissioner and Together Scotland for a legislative review 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. The Committee has encouraged the Scottish Government to give consideration to Together's request for commitments about bringing more provisions into the scope of the compatibility duty by enacting them in Acts of the Scottish Parliament.

As I explained in my evidence, the UNCRC Strategic Implementation Board has been informed that I have asked officials to commission a review of UK Acts in devolved areas. The purpose of that review is to identify provisions in UK Acts that may benefit from being re-enacting in Acts of the Scottish Parliament.

Together asked in their letter of 27 October 2023, to the Cabinet Secretary for Social Justice and copied to the Committee, for commitments about:

- a clear timetable for the legislative review;
- using specific legislative opportunities to expand the scope of the UNCRC; and
- minimising future Scottish Parliament amendments to UK Acts.

Timetable for review of UK Acts in devolved areas

Without more scoping work, it is not possible at this stage to estimate how long the review of provisions in UK Acts would take to complete but the Committee's conclusions acknowledge that such a review will take time.

To allow us to receive findings as quickly as possible, the review could prioritise provisions in key areas that are particularly relevant to strengthening children's rights (such as education) or for particular groups of children (such as those who are care experienced). It could also prioritise areas where there is a potential to reduce inequalities if we bring some provisions in to the scope of the compatibility duty.

As soon as practicable after the Bill receives Royal Assent, my officials will work with stakeholders, including children and young people, to agree how to commission and phase the review. As requested, I will provide an update to Committee in due course.

Using specific legislative opportunities to expand the scope of the UNCRC

It is not possible to commit to using specific legislation to re-enact UK Act provisions in Acts of the Scottish Parliament without first knowing what provisions would benefit from being legislated for in an Act of the Scottish Parliament and what impact that would have on the scope and timetable for specific bills.

To avoid any risk to the timetable for bills that the Government has already committed to, it may be more appropriate to use separate bespoke bills to expand the scope of the compatibility duty and we will consider this further in due course following the findings of the review.

Minimising future Scottish Parliament amendments to UK Acts

If the UNCRC Bill is passed, we acknowledge that it will be a priority to ensure wherever possible that new functions provided for by new legislation introduced by the Scottish Parliament fall within scope of the compatibility duty.

To ensure that as much future legislation as possible is in scope for the powers in the UNCRC Bill, we can try to minimise making amendments to UK Acts and instead make relevant provisions in standalone Acts of the Scottish Parliament. The Government's commitment to maximise the reach of the Bill's UNCRC protections,

and in time the Human Rights Bill protections, will be a factor weighing in favour of making freestanding provision in future Acts of the Scottish Parliament.

When deciding whether a change to the law should be expressed as a freestanding provision in an Act of the Scottish Parliament or as an amendment to Westminster legislation, the government would need to consider the most appropriate and accessible way to provide for this. Given that existing statutory frameworks in some key policy areas are contained within pre-devolution UK Acts, there may be some instances where avoiding amendment to an existing UK Act would prove complex, in the sense that it would be challenging to provide for a coherent change to the law without any reference to the existing provision. Each new legislative proposal would therefore need to be considered on its own merits.

4. Identifying any legal UNCRC incompatibilities through an audit of legislation

The Committee commented that it “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.”

I have given very careful consideration to the request for an audit of legislation to identify any UNCRC incompatibilities. My officials have already explained to the UNCRC Strategic Implementation Board that my assessment is that an audit of this sort would bring very little added value, for Ministers, children and young people, or to other stakeholders, beyond what is being or will be provided by other existing processes.

The UK has been a signatory to the UNCRC since 1991 and we already have a responsibility to ensure that our legislation is compliant with international treaties including the UNCRC. Rather than a one-off audit, we have an existing continuous process of reviewing our statute book, in light of evolving case law, policy development and societal change. We also have existing robust mechanisms through which children's rights concerns are identified and raised with the Scottish Government. We have these mechanisms through the work of Together, the Children's Commissioner and the regular engagement that children and young people have with both Cabinet and the Executive Team. This is an important part of an ongoing, sustainable approach to identifying and prioritising any legislation, policy or practice that may need to be changed. We also have a list of recommendations from the UN Committee on the Rights of the Child about how we should be seeking to strengthen legislation, policy and practice over the next few years to deliver on children's rights. These have been informed by issues that are important to children and young people and the children's rights community in Scotland.

5. Clear public communication about the provisions in the Bill

The Committee's recommendations underline the need for clarity about what the UNCRC will mean in practice and for clear messaging for children, their families, their representatives and the public more widely.

The Committee mentioned the [open letter](#) to children and young people that I issued on 18 October. This week, to mark World Children's Day on 20 November, we invited young people from the Scottish Youth Parliament to ask the Minister for Children and Young People and Keeping the Promise their questions about the work to embed children's rights into Scots law. The Minister's [response](#) was posted on the Scottish Government Participation Blog.

Our strategy for communicating to children and young people has been, and will continue to be, to make clear that children and young people should expect to have their rights respected regardless of the legal scope of the compatibility duty in the Bill, to ensure that they understand their rights under the UNCRC and encourage them to raise their concerns with the adults around them if they think their rights have not been respected.

To try to ensure that children and young people are aware of their rights we are providing three years of national funding to UNICEF UK to offer their Rights Respecting School Award to all state schools in Scotland. Prior to this, participation in the programme was funded locally by schools and local authorities.

We have a UNCRC Communications Group that has been supporting the development of a coherent approach to communication with children, young people and their representatives. I am pleased that the Committee has welcomed the role that will be played by a range of partners to communicating to children and young people, including the role of the Children's Commissioner, Young Scot, the Scottish Youth Parliament and the Children's Parliament.

6. Continuation of the UNCRC implementation programme

The Committee encouraged the Scottish Government to consider Together's request for a continuation of the UNCRC implementation programme.

When the UNCRC Bill was passed in March 2021 it was accompanied by a three year Implementation Programme. Although the duties in the Bill could not be commenced, due to the Supreme Court referral and subsequent judgment, the Children's Rights Unit have been delivering the implementation programme, working with a wide range of stakeholders.

Together highlighted a range of support that they say should be provided as part of a new phase of the implementation programme. Much of the support is already in train through, for example: national funding for the Rights Respecting School Award; funding for Clan Childlaw; funding for the Improvement Service to support local authorities and their partners; and funding for the Scottish Public Services Ombudsman to develop and promote a model child-friendly complaints process. In addition, we are providing financial support for testing and implementing approaches to embedding children's rights through the Innovation Fund and funding the development of a national Child Rights Skills and Knowledge Framework that will provide a single point to easily access new and existing resources and training on children's rights.

There is some crucial work still underway as part of the UNCRC implementation programme that will need to continue as the provisions in the Bill commence, hopefully next year. Decisions about levels of future funding are of course a matter for the budget process and future parliamentary approval of the Scottish Government's budget proposals. However, the Scottish Government will continue to work closely with public authorities, children, young people and their representatives to build on the comprehensive support already provided so far.

7. Implications for the Human Rights Bill

Finally, the Committee emphasised the need to apply learning from the UNCRC Bill to the development of the Human Rights Bill, particularly in relation to legislative competence and the limitations of the devolution settlement. As I explained in my evidence to Committee, I fully recognise the need for this and for the provisions in the Human Rights Bill to be within the Scottish Parliament's legislative competence.

The proposals we have consulted on are ambitious, and seek to deliver a real step change in wider human rights protections in Scotland, building on the important work of the Human Rights Taskforce I co-chaired with Professor Alan Miller in the last Parliament, and before that the former First Minister's Advisory Group on Human Rights Leadership.

Ensuring that the Bill is within competence will be an important factor in decisions about the scope of provisions, along with ensuring that the Bill is accessible, coherent and consistent in terms of drafting and operability, bearing in mind the complexity of incorporating 4 international human rights treaties. The Scottish Government continues to engage with stakeholders, including the Scottish Human Rights Commission, on potential models of incorporation, and we are of course reflecting the lessons from the UNCRC (Incorporation) Bill as we move forward.