

**United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill –
explanatory material to accompany sections 6 and 19 to 21 as proposed to be amended by
Scottish Government draft Reconsideration Stage amendments (12 September 2023)**

Introduction

1. This explanatory material has been prepared by the Scottish Government in order to assist those reading the list of draft Reconsideration Stage amendments and the “as proposed to be amended” version of sections 6 and 19 to 21 (also including new sections 23A and 23B) provided to the Scottish Parliament by the Scottish Government on 12 September 2023, and to help inform debate on the draft Reconsideration Stage amendments. This material will not form part of the Bill (should the Parliament agree to reconsider the Bill, and then agree to the draft amendments) and has not been endorsed by the Parliament.

2. This material should be read in conjunction with the list of draft Reconsideration Stage amendments and the “as proposed to be amended” version of sections 6 and 19 to 21 (also including new sections 23A and 23B). The material is not, and is not meant to be, a fully comprehensive description of the amendments. So where a provision does not seem to require any explanation or comment, or is not changed by the list of draft Reconsideration Stage amendments, none is given.

Overview

3. The proposed amendments to the Bill address the Supreme Court’s findings in relation to sections 6 and 19 to 21 of the Bill. In summary:

- the amendments to section 6 address the Court’s finding 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.
- the 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.
- the 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.

4. Minor consequential changes are made in sections 24, 25 and 35 as a result of the amendments to sections 20 and 21.

**United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill –
explanatory material to accompany sections 6 and 19 to 21 as proposed to be amended by
Scottish Government draft Reconsideration Stage amendments (12 September 2023)**

An overarching point of information

5. Legislation may amend other enactments. Where this happens, text inserted into one enactment by another enactment is, for most legal purposes, considered to form part of the enactment into which it is inserted rather than being considered to be part of the enactment which inserted the text. The Bill proceeds on this basis (albeit with special provision being made in sections 20 and 21 in relation to pre- and post-commencement Acts of the Scottish Parliament).

6. A consequence of this is that sections 6 and 19 to 21 do not apply to text inserted by Acts of the Scottish Parliament (or subordinate legislation made under such Acts) into other enactments (such as Acts of Parliament or subordinate legislation made under such Acts). Similarly, text inserted into Acts of the Scottish Parliament (or subordinate legislation made under such Acts) by other enactments (such as Acts of Parliament or subordinate legislation made under such Acts) is considered to be part of the enactment into which it is inserted. In principle, therefore, sections 6 and 19 to 21 would apply to such text. However, the draft amendments include provision to restrict the application of these sections to such text – further detail on these restrictions is provided in the discussion of each section.

Section 6: Acts of public authorities to be compatible with UNCRC requirements

7. As in the Bill as passed, subsection (1) provides that public authorities act unlawfully if they act incompatibly with the UNCRC requirements. But the circumstances in which public authorities can be found to have acted unlawfully on this basis are more limited than was the case in the Bill as passed: an action or failure to act which is incompatible with the UNCRC requirements now needs to occur in the context of a “relevant function” in order to be unlawful.

8. New subsection (1A) defines “relevant function”. It sets out two tests, both of which need to be satisfied in order for a function to be a “relevant function”.

9. The first test is that the function could competently be conferred on the public authority in question by the Scottish Parliament (subsection (1A)(a)).

10. The second test is that the function needs to be conferred by the common law or, if (more usually) it is conferred by an enactment, that enactment must be of a type listed in subsection (1A)(b). Essentially, the types of enactment listed in sub-paragraphs (i) to (iii) are those enacted by the Scottish Parliament, or enacted by virtue of the Scottish Parliament delegating its power to make legislation – so Acts of the Scottish Parliament, Scottish statutory instruments made entirely under a power conferred by an Act of the Scottish Parliament, and Scottish statutory instruments made partly under a power conferred by an Act of the Scottish Parliament and partly under a power conferred by an Act of Parliament. In the latter case, only functions conferred by provisions in the instrument which were enacted solely by virtue of the power conferred by the Act of the Scottish Parliament, plus provisions subsequently inserted directly into the instrument by an Act of the Scottish Parliament (or other subordinate legislation made under a power conferred by an Act of the Scottish Parliament), are subject to the subsection (1) duty. This means that functions conferred by Acts of Parliament, statutory instruments made under powers conferred by Acts of Parliament and provisions of Scottish statutory instruments made under a power conferred by an Act of Parliament are not subject to the subsection (1) duty. As functions in reserved areas are

**United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill –
explanatory material to accompany sections 6 and 19 to 21 as proposed to be amended by
Scottish Government draft Reconsideration Stage amendments (12 September 2023)**

already excluded by subsection (1A)(a), subsection (1A)(b) mainly serves, in practice, to exclude devolved functions created by or under the authority of the UK Parliament.

11. In the Bill as passed, section 6 did not refer at all to legislation. It therefore covered both statutory and common-law functions. Subsection (1A)(b)(iv) ensures that common-law functions continue to be subject to subsection (1) (but now subject to the legislative competence test set out in subsection (1A)(a)).

12. It is not sufficient, however, for an incompatible action or failure to relate to a relevant function in order to be unlawful: subsection (1) is also subject to new subsection (1C). This subsection provides that the action or failure is not unlawful if the public authority was required or entitled to act in the way it did (that is, incompatibly) by words which are contained in an enactment of a type not listed in subsection (1A)(b) – that is, as noted above, enactments made by or under the authority of the UK Parliament rather than the Scottish Parliament (subsection (1C)(a)). Further, subsection (1C)(b) provides that the public authority does not act unlawfully if it was required or entitled to act incompatibly by words contained in an enactment that is made by or under the authority of the Scottish Parliament if the particular words in question were inserted by an enactment made by or under the authority of the UK Parliament. Any requirement or entitlement to act incompatibly which emanates from the UK Parliament will therefore result in a public authority which is acting in accordance with such a requirement or entitlement not acting unlawfully under subsection (1). It does not matter for this purpose whether the requirement or entitlement is inserted directly into (for example) an Act of the Scottish Parliament or whether the requirement or entitlement is given effect via an Act of Parliament (for example) making a non-textual modification (or “gloss”) of the Act of the Scottish Parliament.

13. This does not mean that any incompatible action or failure relating to a function conferred by (for example) an Act of the Scottish Parliament which includes words inserted by (for example) an Act of Parliament is lawful. The requirement or entitlement to act incompatibly must flow from the inserted words in order for subsection (1) not to apply. To illustrate, take a case where an Act of the Scottish Parliament requires a public authority to do something (which is not in itself incompatible with the UNCRC requirements) in relation to another person. If, in doing that thing, the public authority acts incompatibly, the public authority will have acted unlawfully under subsection (1). The Act of the Scottish Parliament is then amended (by an Act of Parliament) so that an additional public authority is required to also do the thing in relation to the other person. The mere addition of a reference to a second public authority does not create any requirement or entitlement to act incompatibly in doing the thing (given that the thing is, in itself, not incompatible). As a result, the second public authority will also act unlawfully if, in doing the thing, it acts incompatibly with the UNCRC requirements.

14. Subsections (3), (3A), (3B) and (4) elaborate on the meaning of “public authority” and are unchanged from the Bill as passed.

Section 19: Interpretation of legislation

15. As in the Bill as passed, subsection (1) requires certain legislation to be read and given effect (so far as it is possible to do so) in a way that is compatible with the UNCRC requirements. But the legislation in relation to which that duty applies has changed. Paragraphs (a) and (b) now

United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill – explanatory material to accompany sections 6 and 19 to 21 as proposed to be amended by Scottish Government draft Reconsideration Stage amendments (12 September 2023)

set out that the legislation in relation to which the duty applies are words in an Act of the Scottish Parliament to which section 23A applies, and words in subordinate legislation to which section 23B applies.

16. The words to which section 23A applies are words in an Act of the Scottish Parliament. But to ensure that words put there by an Act of Parliament, or subordinate legislation made under such an Act, are not affected by sections 19 to 21, section 23A applies only to words that are in an Act of the Scottish Parliament because:

- they are the Act's original words, that is they were not inserted later, they were in the Bill for the Act when it was passed by the Scottish Parliament,
- they are words inserted into the Act by another Act of the Scottish Parliament, or
- they are words inserted into the Act by subordinate legislation made under a power conferred by a provision which does not derive from an Act of Parliament (essentially, therefore, words inserted by subordinate legislation made under a power conferred by the Scottish Parliament).

17. The effect of this is that words inserted into an Act of the Scottish Parliament by an Act of Parliament or by subordinate legislation made (including by the Scottish Ministers) under a power conferred by an Act of Parliament do not require to be read and given effect in a way which is compatible with the UNCRC requirements under section 19(1).

18. Section 23B does for words in subordinate legislation what section 23A does for words in Acts. That is, for section 23B to apply to them, words must be contained in a Scottish statutory instrument originally made wholly or partly under a power conferred by a provision which does not derive from an Act of Parliament (essentially, therefore, an instrument made wholly or partly under a power conferred by the Scottish Parliament). In addition, the words must be contained in the instrument:

- as a result of the exercise of a power conferred by the Scottish Parliament – although it does not matter whether the words were contained in the instrument as originally made or subsequently inserted into the instrument by a subsequent exercise of the same or a different power conferred by the Scottish Parliament, or
- as a result of being inserted into the instrument by words to which section 23A applies (so words inserted into the instrument by words which, although contained in an Act of the Scottish Parliament, were inserted into that Act by an Act of Parliament would not count as words to which section 23B applies).

19. The effect of this is that words contained in a Scottish statutory instrument by virtue of the exercise of a power conferred by the UK Parliament (including where that power is exercised by the Scottish Ministers) or by virtue of being directly inserted by an Act of Parliament do not require to be read and given effect in a way which is compatible with the UNCRC requirements.

20. Overall, therefore, subsection (1) of section 19, as read with sections 23A and 23B, now essentially provides that only words enacted by the Scottish Parliament, or enacted by virtue of the Scottish Parliament delegating its power to make legislation, require (so far as it is possible to do so) to be read and given effect in a way that is compatible with the UNCRC requirements.

**United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill –
explanatory material to accompany sections 6 and 19 to 21 as proposed to be amended by
Scottish Government draft Reconsideration Stage amendments (12 September 2023)**

21. Subsections (2) and (3) are superseded by the new subsection (1) and so are removed.

22. Subsection (4) of section 19 is adjusted from the Bill as passed to reflect the changes in the legislation to which subsection (1) applies, but its broad effect is unchanged: it continues to clarify that the requirement to (so far as possible) read and give effect to legislation in a way that is compatible with the UNCRC requirements has no effect on the validity, continuing operation or enforcement of any incompatible Act of the Scottish Parliament or any incompatible subordinate legislation made by virtue of an Act of the Scottish Parliament (provided in the latter case that removal of the incompatibility is prevented by provision in that Act or in a UK enactment).

Section 20: Strike down declarators

23. As in the Bill as passed, subsection (1) allows certain legislation to be struck down if a court determines that it is incompatible with the UNCRC requirements. But, as in section 19, the legislation in question has changed. The legislation which can now be struck down is described in paragraphs (a) and (b) of subsection (1): to be susceptible to strike down, words must be words to which either section 23A or 23B applies (see discussion of those sections in paragraphs 16 to 19 above) and, in addition, must be in (or, in the case of words in subordinate legislation, made by virtue of) a pre-commencement Act of the Scottish Parliament. Subsection (9A) provides that to be a “pre-commencement Act of the Scottish Parliament”, the Bill for the Act must have received Royal Assent before the day on which section 20 comes into force. Amendments made to such an Act following commencement of section 20 are not caught by references to “pre-commencement Acts of the Scottish Parliament” – such amendments are subject to section 21 instead. In relation to subordinate legislation, the reference to a “pre-commencement Act of the Scottish Parliament” has the effect that subordinate legislation provisions made by virtue of a power inserted into an Act of the Scottish Parliament following commencement of section 20 cannot be struck down – again, such provisions are subject to section 21 instead.

24. Overall, therefore, the effect of subsection (1), as read with sections 23A and 23B, is that only words enacted by the Scottish Parliament, or enacted by virtue of the Scottish Parliament delegating its power to make legislation, can be struck down – subject also to the need for the Act of the Scottish Parliament involved to be “pre-commencement”. Words enacted by the UK Parliament, or by virtue of that Parliament delegating its power to make legislation, cannot be struck down.

25. Subsections (10) to (12) are superseded by the new material in subsection (1) and new subsection (9A) and so are removed. Minor changes are made in subsections (2) and (4) in consequence of the changes to subsection (1). The remaining subsections are unchanged from the Bill as passed, with the exception of subsection (3).

26. Subsection (3) includes minor adjustments to reflect the other changes now being made to section 20. But it has also been adjusted to include a second restriction on the strike down of subordinate legislation. The original restriction remains in what is now paragraph (a), with paragraph (b) adding a new restriction to the effect that an incompatibility in subordinate legislation cannot be struck down if the incompatibility requires to be included in order to ensure that provision in a UK enactment is given effect. Overall, therefore, an incompatibility contained in subordinate legislation can only be struck down if the Act of the Scottish Parliament by virtue

United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill – explanatory material to accompany sections 6 and 19 to 21 as proposed to be amended by Scottish Government draft Reconsideration Stage amendments (12 September 2023)

of which the subordinate legislation is made requires the subordinate legislation to include the incompatibility.

Section 21: Incompatibility declarators

27. As in the Bill as passed, subsection (1) allows certain legislation to be declared incompatible with the UNCRC requirements. But, as with sections 19 and 20, the legislation which may be declared incompatible has changed. The legislation which can now be declared incompatible is described in paragraphs (a) to (d) of subsection (1): to be susceptible to declaration of incompatibility, words must be words to which section 23A or section 23B applies (see discussion of those sections in paragraphs 16 to 19 above). In addition, the words must be:

- in, or made by virtue of, a post-commencement Act of the Scottish Parliament (paragraphs (a) and (c)) (“post-commencement Act of the Scottish Parliament” is defined in subsection (4A)(a) for the purposes of those paragraphs as an Act of the Scottish Parliament made on or after the day on which section 21 comes into force), or
- inserted into a pre-commencement Act of the Scottish Parliament on or after the day on which section 20 comes into force (paragraph (b)) (with “pre-commencement Act of the Scottish Parliament” having the same meaning as in section 20), or
- in subordinate legislation made by virtue of a provision described in the bullet-point above (paragraph (d)).

28. Overall, therefore, the effect of subsection (1), as read with sections 23A and 23B, is that only words enacted by the Scottish Parliament, or enacted by virtue of the Scottish Parliament delegating its power to make legislation, can be declared incompatible – subject also to the need for enactment to have taken place “post-commencement”. Words enacted by the UK Parliament, or by virtue of that Parliament delegating its power to make legislation, cannot be declared incompatible.

29. Subsections (5) to (7) are superseded by the new material in subsection (1) and new subsection (4A) and so are removed. Minor changes are made in subsections (2) and (4) in consequence of the changes to subsection (1).

30. Subsection (3), as well as including minor adjustments to reflect other changes to section 20, is adjusted to include a second restriction on the ability to make an incompatibility declarator in relation to incompatible subordinate legislation. As in section 20(3), the original restriction is now contained in paragraph (a), with paragraph (b) adding a new restriction to the effect that an incompatibility in subordinate legislation cannot be subjected to an incompatibility declarator if the incompatibility requires to be included in order to ensure that provision in a UK enactment is given effect. Again, the overall effect is that an incompatibility declarator can only be made in relation to subordinate legislation if the Act of the Scottish Parliament by virtue of which the subordinate legislation is made requires the subordinate legislation to include the incompatibility.