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13 September 2023

Dear Kaukab,

RECONSIDERATION OF THE UNCRC (INCORPORATION) (SCOTLAND) BILL

In my letter to you of 8 September, I said that I would share draft amendments to the UNCRC Bill with you following a response from the Parliamentary authorities. A formal decision on whether the amendments are admissible under Standing Orders for Reconsideration Stage cannot be made until the motion to reconsider the Bill has been passed and the amendments are formally lodged. The motion to reconsider will be debated in Parliament on Thursday and, if passed, amendments will be formally lodged on Monday. However Parliament and stakeholders have urged me to share the amendments as quickly as possible. I am therefore sharing draft amendments with you now, which you may wish to share on your webpage. The explanatory material on the effect of the new provisions is also attached.

Background

As you are aware certain provisions in the Bill as originally passed in March 2021 were referred to the Supreme Court by the UK Law Officers. The Supreme Court judged in October 2021 that section 6 (relating to the compatibility duty) and sections 19, 20 and 21 (relating to the interpretative obligation, strike down power and incompatibility declarator power) were outwith the legislative competence of the Scottish Parliament. This was an area of the devolution settlement that had not previously been tested in the courts.

We have always been clear about our commitment to this Bill and our intentions to bring it back to Parliament using the Reconsideration Stage. Legal issues around the Bill are complex, and consideration of these issues has taken longer than hoped. In response to the

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Supreme Court judgment, our motivation has always been to provide the best possible protection for children's rights.

Effect of the draft amendments

The attached amendments to the compatibility duty in section 6 address the Supreme Court's finding in three ways:

- by restricting the compatibility duty to the delivery of functions that could competently be conferred by the Scottish Parliament;
- by ensuring that functions conferred by legislation originating from the UK Parliament are not subject to the compatibility duty; and
- by ensuring that, even where a function is conferred by legislation originating from the Scottish Parliament but amended by legislation originating from the UK Parliament, a public authority cannot be found to have acted unlawfully (by acting incompatibly) if it was required or entitled to do so by that amendment.

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.

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

The effect of these amendments mean that the compatibility duty would apply only when a public authority is delivering devolved functions conferred by or under Acts of the Scottish Parliament or common law powers. This means that the duty will not apply when powers are delivered under Acts of the UK Parliament, even in devolved areas and even where the legislation requires or gives discretion to a public authority to act compatibly.

As in the original Bill, the compatibility duty would also apply when these functions are 'contracted out' to non-State actors such as private or third-sector bodies.

As I explained in my statement to Parliament in June, in drafting amendments to the compatibility duty, we have tried to balance three important considerations:

- minimising the risk of another Supreme Court referral;
- making the law as accessible as possible for users; and
- protecting children's rights to the maximum effective extent possible.

Minimising the risk of another Supreme Court referral

As you are aware from previous correspondence, we have given careful consideration to whether the compatibility duty can apply when public authorities are delivering relevant functions under an Act of the UK Parliament in devolved areas.

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It is clear from the Supreme Court judgment that the Bill cannot require public authorities to act compatibly with the UNCRC when they are delivering duties under powers in a UK Act in devolved areas and that Act requires them to act incompatibly.

We had hoped that the duty could apply to relevant functions being delivered under Acts of the UK Parliament in devolved areas that require or give discretion to a public authority to act compatibly. The Scottish Government is of the view it would be possible for the compatibility duty to be applied this way but there have been no assurances from the UK Government that this would not result in another referral to the Supreme Court.

Having discussed this with key stakeholders, the preference is not to risk a further referral which would inevitably lead to further delays in bringing legal protections for children's rights.

Making the law as accessible as possible for users

As we explored how we could achieve greatest coverage for the compatibility duty, the provisions became more complex, uncertain and challenging for children and young people and their representatives and for public authorities to work with. This complexity is a result of the legislative landscape within which we operate as a devolved government, and the implications of the Supreme Court judgment. Limiting the compatibility duty in the way explained above, would help to reduce this complexity.

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. Establishing if that is the case would require an understanding of the current policy intention of the whole Act and how acting compatibly under the Scottish Act of Parliament amendment would impact on that. If the legislation had been amended over time, the policy intention behind all amendments would also need to be checked. Not only would this be very onerous for users but it might also be open to differences in assessment.

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.

Protecting children's rights to the maximum effective extent possible

Our approach means the legislation will be more accessible for users, and less at risk of legal challenge, and so will provide the maximum effective coverage for children's rights that can be delivered by this Parliament in the current devolved context. Although some services are therefore excluded, this is because the limits of maximalism are constrained by the complexities of what is needed to meet the Supreme Court judgment and by the potential risks of a further reference.

This will inevitably result in far less coverage for the compatibility duty than we originally hoped to achieve. There are many existing Acts of the UK Parliament in devolved areas that impact on children's rights. The full extent of the loss of coverage will continue to be

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discovered as the legal sources of functions under which rights issues are encountered come to the fore. However, the Bill will still provide valuable protections for children rights, in a way that is legally sound and is clear for users. The Bill, and the supports we are already putting in place for its implementation, will also help to drive forward a cultural change by signaling very clearly our commitment to respecting, protecting and fulfilling children's rights, and provide a solid foundation on which to build, including via the Human Rights Bill.

This will be the first Bill to be presented for reconsideration in the Scottish Parliament and, whilst the process to be followed is novel, I would be happy to assist with any scrutiny that is considered necessary in the Parliamentary process.

Yours sincerely,

SHIRLEY-ANNE SOMERVILLE

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