

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

**PART 2**

DUTIES ON PUBLIC AUTHORITIES

*Acts of public authorities to be compatible with UNCRC requirements*

**6 Acts of public authorities to be compatible with UNCRC requirements**

- (1) It is unlawful (subject to subsection (1C)) for a public authority to act, or fail to act, in connection with a relevant function in a way which is incompatible with the UNCRC requirements.
- (1A) In subsection (1), a “relevant function” means a function that—
- (a) it is within the legislative competence of the Scottish Parliament to confer on the authority, and
  - (b) is conferred by—
    - (i) an Act of the Scottish Parliament,
    - (ii) a Scottish statutory instrument originally made wholly under a relevant enabling power,
    - (iii) a provision in a Scottish statutory instrument originally made partly under a relevant enabling power, provided that the provision itself was either—
      - (A) originally made under the relevant enabling power, or
      - (B) inserted into the instrument by an Act of the Scottish Parliament or subordinate legislation made under a relevant enabling power, or
    - (iv) a rule of law not created by an enactment.
- (1B) In subsection (1A), “relevant enabling power” means a power to make subordinate legislation conferred by a provision in an enactment of a kind mentioned in that subsection, unless the provision was inserted by an enactment of a kind that is not mentioned in that subsection.
- (1C) But subsection (1) does not make unlawful doing or failing to do something if the authority was required or entitled to act in that way by words that—
- (a) are not contained in an enactment of a kind mentioned in subsection (1A)(b), or
  - (b) are contained in such an enactment having been inserted into it by an enactment of a kind that is not mentioned in subsection (1A)(b).
- (3) In this section, “public authority”—
- (a) includes, in particular—
    - (i) the Scottish Ministers,
    - (ii) a court or tribunal,
    - (iii) any person certain of whose functions are functions of a public nature (but see subsection (4)),
  - (b) does not include the Scottish Parliament or a person carrying out functions in connection with proceedings in the Scottish Parliament.

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- (3A) For the purposes of subsection (3)(a)(iii), “functions of a public nature” includes, in particular, functions carried out under a contract or other arrangement with a public authority.
- (3B) Functions are not excluded from being functions of a public nature for the purposes of subsection (3)(a)(iii) solely because they are not publicly funded.
- (4) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(a)(iii) if the nature of the act is private.

**PART 4**

LEGISLATION AND THE UNCRC REQUIREMENTS

**19 Interpretation of legislation**

- (1) So far as it is possible to do so, the following must be read and given effect in a way which is compatible with the UNCRC requirements—
  - (a) words in an Act of the Scottish Parliament to which section 23A applies,
  - (b) words in subordinate legislation to which section 23B applies.
- (4) Subsection (1) does not affect—
  - (a) the validity, continuing operation or enforcement of any incompatible Act of the Scottish Parliament,
  - (b) the validity, continuing operation or enforcement of any incompatible subordinate legislation made by virtue of an Act of the Scottish Parliament if (disregarding any possibility of revocation) the Act or words in another enactment to which neither section 23A nor 23B apply prevents removal of the incompatibility.

**20 Strike down declarators**

- (1) Subsection (2) applies in any proceedings in which a court determines whether any of the following give rise to an incompatibility with the UNCRC requirements—
  - (a) words—
    - (i) that are in a pre-commencement Act of the Scottish Parliament, and
    - (ii) to which section 23A applies, or
  - (b) words—
    - (i) that are in subordinate legislation made by virtue of a pre-commencement Act of the Scottish Parliament, and
    - (ii) to which section 23B applies.
- (2) If the court is satisfied that the words give rise to an incompatibility with the UNCRC requirements, it may make a declarator stating that they cease to be law to the extent that they give rise to the incompatibility (a “strike down declarator”).
- (3) Where the incompatible words are in subordinate legislation made by virtue of a pre-commencement Act of the Scottish Parliament, the court—

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- (a) may make a strike down declarator in relation to them only if the court is satisfied that (disregarding any possibility of revocation) the Act prevents removal of the incompatibility,
  - (b) may not make a strike down declarator in relation to them if the court is satisfied that (disregarding any possibility of revocation) words in another enactment to which neither section 23A nor 23B apply prevent removal of the incompatibility.
- (4) A strike down declarator has effect only from the date of the declarator and does not affect anything previously done.
- (5) The court may make an order suspending the effect of a strike down declarator for any period and on any conditions to allow the incompatibility to be remedied.
- (6) In deciding whether to make an order under subsection (5), the court must (among other things) have regard to the extent to which persons who are not parties to the proceedings would be adversely affected.
- (7) Where a court is considering whether to make an order under subsection (5), intimation of that is to be given to the Lord Advocate (unless the Lord Advocate is a party to the proceedings).
- (8) The Lord Advocate may, on giving notice, take part as a party in the proceedings so far as the proceedings relate to the making of the order.
- (9) Where the determination mentioned in subsection (1) is a decision by the Supreme Court in relation to a UNCRC compatibility issue, the power to make an order under subsection (5) is exercisable by the High Court of Justiciary instead of the Supreme Court.
- (9A) In this section, a reference to a pre-commencement Act of the Scottish Parliament—
  - (a) means an Act of the Scottish Parliament the Bill for which received Royal Assent before the day on which this section comes into force, and
  - (b) refers to such an Act as at the day on which this section comes into force.
- (13) In this section and section 21, “court” means—
  - (a) the Supreme Court,
  - (b) the High Court of Justiciary sitting otherwise than as a trial court,
  - (c) the Court of Session.

**21 Incompatibility declarators**

- (1) Subsection (2) applies in any proceedings in which a court determines whether any of the following give rise to an incompatibility with the UNCRC requirements—
  - (a) words—
    - (i) that are in a post-commencement Act of the Scottish Parliament, and
    - (ii) to which section 23A applies,
  - (b) words—
    - (i) that are in a pre-commencement Act of the Scottish Parliament, having been inserted on or after the day section 20 comes into force, and
    - (ii) to which section 23A applies,

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- (c) words—
  - (i) that are in subordinate legislation made by virtue of a post-commencement Act of the Scottish Parliament, and
  - (ii) to which section 23B applies,
- (d) words—
  - (i) that are in subordinate legislation made by virtue of a provision that was inserted, on or after the day section 20 comes into force, into a pre-commencement Act of the Scottish Parliament, and
  - (ii) to which section 23B applies.
- (2) If the court is satisfied that the words give rise to an incompatibility with the UNCRC requirements, it may make a declarator stating that incompatibility (an “incompatibility declarator”).
- (3) Where the incompatible words are in subordinate legislation, the court—
  - (a) may make an incompatibility declarator in relation to the subordinate legislation only if the court is satisfied that (disregarding any possibility of revocation) the enactment by virtue of which the subordinate legislation is made prevents removal of the incompatibility,
  - (b) may not make an incompatibility declarator in relation to the subordinate legislation if the court is satisfied that (disregarding any possibility of revocation) words in another enactment to which neither section 23A nor 23B apply prevent removal of the incompatibility.
- (4) An incompatibility declarator—
  - (a) does not affect the validity, continuing operation or enforcement of the words in respect of which it is made, and
  - (b) is not binding on the parties to the proceedings in which it is made.
- (4A) In this section—
  - a “post-commencement Act of the Scottish Parliament” means an Act of the Scottish Parliament the Bill for which received Royal Assent on or after the day on which this section comes into force,
  - “pre-commencement Act of the Scottish Parliament” has the meaning given in section 20(9A)(a).

**23A Primary legislation words to which this Part applies**

The words to which this section applies are words that are—

- (a) in an Act of the Scottish Parliament, and
- (b) in the Act as a result of having been—
  - (i) contained in the Bill for the Act,
  - (ii) contained, as part of an amending provision, in the Bill for another Act of the Scottish Parliament, or
  - (iii) inserted by words in subordinate legislation to which section 23B applies.

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**23B Subordinate legislation words to which this Part applies**

- (1) The words to which this section applies are words that are—
  - (a) in a Scottish statutory instrument originally made, wholly or partly, by virtue of a relevant enabling power, and
  - (b) in the instrument as a result of—
    - (i) the exercise of a relevant enabling power (either to make the provision containing the words, or to make the amending provision that inserted them),  
or
    - (ii) having been inserted into the instrument by words in an Act of the Scottish Parliament to which section 23A applies.
- (2) In this section, “relevant enabling power” means a power conferred by a provision that is not in, or derived (directly or indirectly) from, an Act of Parliament.
- (3) For the purposes of subsection (2), a provision of an Act of the Scottish Parliament is not to be regarded as derived from section 28 of the Scotland Act 1998.