

Kaukab Stewart
Convenor
Equalities, Human Rights and Civil Justice
Committee

ehrcj.committee@parliament.scot

8 September 2023

Dear Kaukab,

RECONSIDERATION OF THE UNCRC (INCORPORATION) (SCOTLAND) BILL

In my statement in Parliament on 27 June, I stated that I would be writing to the Secretary of State for Scotland, to confirm how we will amend the UNCRC (Incorporation) (Scotland) Bill and to urge the UK Government to bring forward its own legislation to incorporate the UNCRC.

I wrote to the Secretary of Scotland on 29 June to: provide an update on the Scottish Government's plans for returning a revised UNCRC Bill to the Scottish Parliament; highlight the loss of coverage for children's rights that are a consequence of how we need to amend the compatibility duty in the Bill; and underline the need for the UK Government to incorporate the UNCRC into UK law to give children and young people the protection they deserve. My letter is attached.

I received a response on 14 August, which is also attached. You will see that Mr Jack has stated that the UK Government will consider the Bill in the usual way once it has completed its Parliamentary passage. It is disappointing that the UK Government cannot give us reassurance that would guarantee there will not be another referral to the Supreme Court. However, I am confident that our amendments are within legislative competence and address the Supreme Court judgment and intend to share amendments to the Bill and bring a motion to Parliament to start the Reconsideration Stage as soon as possible after summer recess.

Mr Jack has confirmed in his letter that the UK Government is currently giving careful consideration to the Concluding Observations from the UK State Party's Constructive Dialogue with the UN Committee but has given no indication of the UK Government's willingness to incorporate the UNCRC into UK law.

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There is no agreed protocol for sharing amendments with the Parliamentary Clerks ahead of Reconsideration Stage, however, given the scope of the amendments to this Bill, my officials agreed with Parliamentary Clerks, on this occasion, that draft amendments would be shared for a preliminary view on admissibility. Draft amendments have been shared with the Parliamentary Clerks and I will share the amendments with you following receipt of their response.

Yours sincerely,

SHIRLEY-ANNE SOMERVILLE

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The Rt Hon Alister Jack MP
Secretary of State for Scotland
Dover House
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29 June 2023

Dear Alister,

I write to provide you with an update on the Scottish Government's plans for returning a revised UNCRC (Incorporation) (Scotland) Bill to the Scottish Parliament; highlight the loss of coverage for children's rights that are a consequence of how we need to amend the compatibility duty in the Bill; and underline the need for the UK Government to incorporate the UNCRC into UK law to give children and young people the protection they deserve.

As you know, the UNCRC Bill was passed unanimously by the Scottish Parliament in March 2021 but could not receive Royal Assent because of a referral by UK Law Officers to the Supreme Court. In October 2021 the Supreme Court judged that certain of the provisions in the Bill were outwith the legislative competence of the Scottish Parliament. As we have said many times before, we fully respect the Supreme Court's judgment.

The Scottish Government proposed various options to increase the effectiveness of incorporation beyond those currently available to the Scottish Parliament, including using powers under section 30 of the Scotland Act which can amend the legislative competence of the Scotland Parliament. You made clear that the UK Government's position is that amendments to the Bill and any other proposals would need to be within the parameters of the devolution settlement as it stands.

Following this, we have tried to balance three important considerations in drafting amendments:

- achieving as much coverage as possible for the compatibility duty so that we protect children's rights to the maximum effective extent possible;
- minimising the risk of another Supreme Court referral on a revised Bill; and
- making the compatibility duty as accessible as possible for users.

In seeking this balance, there is an inevitable and deeply disappointing loss to the coverage of children's rights.

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

and the Act requires them to act incompatibly. Our objective has however been to ensure that the compatibility duty should apply when public authorities are delivering duties under a UK Act in a devolved area and the Act either requires them to act compatibly or gives them some discretion about whether or not to act compatibly with the UNCRC.

Our assessment has been that amendments to the Bill could achieve this, and remain consistent with Supreme Court judgment, by differentiating between existing and future UK Acts in devolved areas, so that the compatibility duty applies to existing legislation in these categories, but not to future legislation. We also believe that we could bring into scope provisions in future UK Acts in devolved areas by adding to the Bill a regulation making power under which Scottish Ministers could, with the approval of the Scottish Parliament, extend the compatibility duty to devolved functions created under UK Acts in the future, even if just on a case by case basis. (The use of the power would be subject to scrutiny by the Scottish Parliament, and as such be distinct from the duty applying to future UK Acts in devolved areas on a wholesale basis.)

To minimise the risk of another referral to the Supreme Court, there has been engagement, since September last year, between the Scottish Government Legal Directorate and UK Government lawyers in the Office of the Advocate General on our proposals for amending the Bill. However, it has not been possible to guarantee against the possibility of another referral to the Supreme Court.

We have also considered the complexity for users of the proposed amended compatibility duty, and balancing the extent of coverage for children's rights with the clarity of the duties imposed by the Bill. Our assessment is that complexity increases as we seek to achieve greater coverage, given the legislative landscape within which we operate as a devolved administration, and the implications of the Supreme Court judgment.

Our analysis of the option set out above is that, although it would give the greatest coverage, it would be extremely complex for users. This could arise for example because of the need to establish the legal source of the public authority's function, and, if it is a UK Act in a devolved area, whether this is a function from an Act that was passed before the commencement of the UNCRC Bill, and has been unmodified by a UK enactment which was commenced post-UNCRC commencement. If the original Act or modification was passed *after* the commencement of the UNCRC Bill, the user would have to establish whether the legislation had been brought into the scope of the compatibility duties by the use of the regulation making power. Complexities could become even more challenging where an Act has been amended by an Act of the Scottish Parliament.

The impact of the provisions in the Bill will be undermined if they are too complex or uncertain to follow for children and young people and their representatives, and for public authorities. Having discussed with stakeholders we have therefore reached the conclusion that we should progress with an option that will give the greatest effective coverage for children's rights. Our assessment is that this option would be for the compatibility duty to apply only when public authorities are delivering duties under powers in an Act of the Scottish Parliament.

To be clear, this will entail a substantial loss of coverage for children's rights compared with our preferred option. There are many existing Acts of the UK Parliament in devolved areas that impact on children's rights. The extent of that loss will become apparent over time as we explore the legal sources of duties under which rights issues are encountered. This loss is a direct consequence of the complexity of drafting to address the Supreme Court judgment

within a legislative landscape in which public authorities are still acting under powers within Acts of the UK Parliament in devolved areas.

It remains true that the simplest way to secure protection for children's rights, in Scotland and across the UK, and to do so as fully as possible, is for the UK Government to incorporate the UNCRC into UK law. The [Concluding Observations](#) from the UK State Party's recent examination by the UN Committee on the Rights of the Child, published this month, included a recommendation that the UNCRC should be incorporated into national legislation across the whole of the UK as well as in the overseas territories and Crown dependencies.

While Scotland was commended by the Committee for its efforts to incorporate the UNCRC into its domestic law, we have learned over the last few years how difficult that is to achieve without a similar legislative incorporation at the UK level. I therefore urge the UK Government to bring forward its own legislation to incorporate the UNCRC and I offer to work with you to share the learning from our journey towards respecting, protecting and fulfilling children's rights in Scotland.

In the meantime, we remain fully committed to incorporating the UNCRC to the maximum effective extent possible within devolved competence. We are now making arrangements to begin the process of Parliamentary consideration of a revised UNCRC (Incorporation) (Scotland) Bill. We are confident our proposals for amending the Bill will be within legislative competence, and will provide valuable protections for the rights of children in Scotland. However, we remain deeply disappointed that these protections, and the original aspirations of the Scottish Parliament, have been restricted when existing statutory provisions, in matters on which the Scottish Parliament could and does legislate, happen to be in Acts of the Westminster Parliament

Yours sincerely,

SHIRLEY-ANNE SOMERVILLE



Shirley-Anne Somerville MSP
Cabinet Secretary for Social Justice
Scottish Government
St. Andrew's House
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By Email

14 August 2023

Dear Shirley-Anne,

I am writing in response to your letter dated 29 June, regarding the Scottish Government's proposals to bring the UNCRC (Incorporation) (Scotland) Bill back to the Scottish Parliament with amendments for reconsideration.

As your letter noted, the original Bill considered by the Scottish Parliament was ruled by the Supreme Court in 2021 to contain provisions outwith the legislative competence of the Parliament. It is the responsibility of the Scottish Government to determine how to comply with the judgment of the Supreme Court.

As I set out to the then Deputy First Minister in my letter of 8 February 2022 it is the UK Government's position that the current devolution settlement strikes the right balance, and that amendments to the Bill to address the judgment need to be within the parameters of the settlement as it stands. Thank you for setting out the proposals to achieve this, and confirming that the Scottish Government now has a full set of proposals that you believe will bring the Bill within legislative competence. Consideration will be given in the usual way once it has completed its Parliamentary passage.

The UK has a strong track record on the protection of children's rights and is a proud signatory of the UN Convention on the Rights of the Child. As I set out to the UK Parliament in my written statement on the Bill (20 October 2021), the Government is committed to protecting children's rights. The Government is currently giving careful consideration to the Concluding Observations from the UK State Party's Constructive Dialogue with the UN Committee, with the Department for Education actively coordinating follow-up activities relating to the UNCRC.

I am copying this letter to the Secretary of State for Education, the Lord Chancellor and Secretary of State for Justice and the Secretary of State for Levelling Up, Housing and Communities and Minister for Intergovernmental Relations.

**THE RT HON. ALISTER JACK MP
SECRETARY OF STATE FOR SCOTLAND**