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Dear Convener,

Thank you for your letter and for the opportunity to address the concerns raised by the witnesses at the Committee's evidence sessions regarding the Children (Withdrawal from Religious Education and Amendment of UNCRC Compatibility Duty) (Scotland) Bill. Whilst not wishing to pre-empt the Committee's Stage 1 report or my response to it, I acknowledge the concerns raised by witnesses, and therefore welcome the opportunity to set out my response to these concerns in some detail in advance of our discussion on 28 October.

The Scottish Government remains firmly committed to strengthening children's rights in Scotland. The Bill aims to strengthen children's rights in decisions about religious observance (RO) and religious and moral education (RME, also called RE in Roman Catholic schools) and in the operation of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 (the UNCRC Act), in situations where a public authority is compelled to act incompatibly with UNCRC requirements in fulfilment of another Act of the Scottish Parliament.

Part 1 of the Bill is necessary to address the questions which have been raised about the current legislation on RO and RME and the Scottish Government's UNCRC obligations, and will put beyond doubt the position in Scotland in this context by introducing a legal requirement to consider the pupil's views as part of the withdrawal process. Part 2 of the Bill is a proportionate and necessary step to ensure that the UNCRC framework operates clearly, coherently and in a way that safeguards both legal certainty and the continuity of essential public services.

In relation to the specific concerns raised by the witnesses, I have provided a detailed response in relation to Part 1 of the Bill in **Annex A**, and Part 2 of the Bill in **Annex B**. I hope the Committee will find this helpful.

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Please be assured that the Scottish Government recognises the broad range of views on both parts of the Bill and will continue to listen openly to points made by Members and stakeholders as consideration of the Bill continues.

Finally, and importantly, members will observe that this legislation is deliberately focused in nature – this is because it is intended to address priority concerns within the current parliamentary session.

I look forward to discussing these matters further with the Committee during the upcoming evidence session.

JENNY GILRUTH

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Part 1**Policy Rationale**

Part 1 of the Bill has been brought forward in light of the questions raised about the current legislation on RO and RME in connection with the Scottish Government's obligations under the UNCRC, and echoed by the majority of the witnesses who supported the intent to introduce a Bill in this area. Specifically, the current legislation raises questions in relation to article 12 of the UNCRC, which gives children the right to have their views considered in matters which affect them, with due weight being given in accordance with the age and maturity of the child. It also raises questions in relation to article 14, which details the right to freedom of thought, conscience and religion.

This part of the Bill will therefore put beyond doubt the position in Scotland in relation to UNCRC obligations in this context, by amending the current legislation to require that the child's views are considered, regardless of their age, when parents/carers are exercising their existing statutory right to withdraw their child from RO or RME. This will provide clarity and align legislation with existing non-statutory guidance on RO, which notes that "schools should include children and young people in any discussions about aspects of their school experience, ensuring their views are taken into account".

Balance between parental and children's rights and adherence to UNCRC principles

I recognise the real concerns raised before the Committee regarding how the proposed changes will impact parental rights while ensuring that children's rights under UNCRC articles 12, 14 and 29 (purposes of education) are upheld. Nevertheless, there has also been clear support for the intent of the Bill to improve consideration of children and young people's views from a number of stakeholders, including Humanist Society Scotland, EIS and ADES. I am also aware of concerns raised by some witnesses that the Scottish Government's proposals are incompatible with the UNCRC in its international form. The Scottish Government's position is that the proposed changes are compatible with the UNCRC and will strengthen children's rights in this context, ensuring that where a withdrawal request has been made every child experiences a consistent, rights based approach.

The approach presented by this Bill aims to support alignment with the UNCRC while balancing the three key considerations of: parental rights; views from key stakeholders and the wider public; and the practicality of implementing the changes for schools.

By providing children and young people with a right to object to their withdrawal, but requiring that a discussion of that objection is sought between school, parent and pupil, these changes uphold children's rights, while recognising the rights of parents to provide direction and guidance to their children in line with the child's evolving capacity. I understand that particular concerns have been raised about the risk of conflict between school, parent and pupil as a result of these changes, and this is something I am keen to reduce as far as possible. The requirement in the Bill to seek discussion between school, parent and pupil aims to reduce this risk by providing an opportunity for all views to be heard with the aim of reaching mutual agreement.

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It is also important to recognise, as noted by the Committee witnesses, that the potential for conflict between school, parent and pupil already exists under the current legislation, but with no legal requirement to consider the child's views. These changes would guarantee the role of the child in the process and respect for their rights under UNCRC articles 12, 14 and 29, and ensure their right to participate in RO and RME where they object to being withdrawn. Every child, regardless of their age or educational setting, should have the opportunity to experience the benefits of community, spiritual development and learning offered by these aspects of school education. Schools and teachers are experienced in having complex and sensitive discussions with parents and pupils, but to provide further support, statutory guidance on the withdrawal process would also accompany the implementation of any changes.

Administrative and resource implications

Given these changes effectively align legislation with existing guidance, the Scottish Government does not expect increased workload for schools where the current guidance is already being implemented. It may also be helpful to note that the proposed changes introduce the opportunity for a child to object to their withdrawal (but not to initiate a withdrawal request themselves).

As noted in the Financial Memorandum for the Bill, while this may result in additional demands on schools to process requests in a minority of cases, this could conceivably result in a reduced rate of withdrawal from RO and/or RME, and reduced overall resource expended by schools on the on-going supervision and management of withdrawn pupils. In advance of any changes, work would also be undertaken with schools to identify any implementation support which may be helpful alongside the updated guidance, for example professional learning.

Distinction between RO and RME

The accompanying documents for the Bill are clear that RO and RME are two distinct aspects of school education, with RO supporting pupils' spiritual development and building a sense of community, and RME helping pupils learn about and from different religions and belief groups, as well as exploring ethical questions and promoting understanding of different beliefs. Both play a vital role in a pupils' education. However, as you are aware, there is also a longstanding parental right to withdraw a pupil from both RO and RME, and therefore the questions raised in relation to the current legislation and the Scottish Government's UNCRC obligations (in particular article 12) require addressing in relation to both RO and RME.

Drafting of Part 1

I understand that a number of concerns were raised with the Committee in relation to Part 1 of the Bill being outwith the scope of the compatibility duty in the UNCRC (Incorporation) (Scotland) Act 2024.

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I would like to highlight to the Committee that in the Scottish Government's Children's Rights Scheme, which we aim to lay before the Parliament in November, we have said that we will progress engagement with the UK Government to explore the removal of any legislative restrictions that currently limit the Scottish Parliament's ability to enhance human rights protections across all areas devolved to Scotland. And that if, by November 2026, the Scottish Government considers that progress in finding a more straightforward and effective route to extending protection for children's rights has not yet been sufficient, we will commission a review of provisions in UK Acts in devolved areas to identify any key provisions that interact with children's rights to such an extent that it may be worth re-enacting them in Acts of the Scottish Parliament to bring them into scope of the compatibility duty.

In the meantime, when developing new legislation, we will consider whether to draft new provisions in a way that means they fall within the scope of the compatibility duty in the UNCRC Act. However, we have been clear that application of the compatibility duty is only one of a number of factors to be considered in developing legislation which is effective, workable and clear, and that re-enacting provisions as Acts of the Scottish Parliament may not always be the most appropriate and accessible way of making law. Each new legislative proposal therefore needs to be considered on its own merits.

Having considered how to make the changes in Part 1 of the Bill, the Scottish Government concluded that amending the Education (Scotland) Act 1980 (the 1980 Act) is the most appropriate and pragmatic course of action. This is because the provisions on RO and RME sit within the wider legislative framework of the 1980 Act, but this specific change relates to only one particular aspect of one section of the Act (section 9) rather than making more widespread changes.

If we were to try to make only the change required by standalone provision, it would be very difficult to make this possible to interpret outside the overall context of the 1980 Act. It would also cause practical issues for children, young people, parents and schools as they would have to try to read the standalone provision in parallel with their broader rights and duties under the 1980 Act. However, trying to replicate the context of the 1980 Act by moving multiple sections would involve a very significant amount of restatement of its provisions. Not only would this be disproportionate given the targeted and technical nature of the proposed change, but it would also risk creating conflict between those restated provisions and the 1980 Act when considering other duties. For example, if we fully restate the provisions relating to RO and RME, we would need to consider updating language which would then be inconsistent with other parts of the 1980 Act. This would have become a much bigger restatement project than the change requires.

If we made standalone provision each time a similarly small scale change was required, then there could very quickly be a significant number of different Acts of the Scottish Parliament each dealing with one small aspect of education, making it more challenging for users of the legislation, including children, young people, parents and their representatives to read and understand their rights, and schools to read and understand their obligations, overall. As the Committee may be aware, where more substantial legislative changes are being proposed, such as in the recent Education (Scotland) Act 2025, we have made these provisions in standalone Acts of the Scottish Parliament.

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I understand that concerns were also raised about what the drafting of Part 1 outside the scope of the UNCRC Act compatibility duty will mean for children and their representatives' ability to access justice in relation to the functions in the Bill. Please be assured that the Scottish Government recognises the importance of having both judicial and non-judicial remedies that are accessible for children, young people and their representatives who consider that their rights may not have been respected.

Even where relevant functions do not fall within the scope of the compatibility duty, the Scottish Government is working with a number of partners to ensure that appropriate support and remedies are available including the Scottish Public Services Ombudsman (SPSO), specialist child law centres, children's advocacy services and relevant tribunals. It is also important that children, young people, and their representatives feel empowered to raise concerns about rights breaches directly with public authorities, to ensure that where there are concerns these can be resolved as soon as possible.

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Part 2

Purpose of Part 2

As the Committee is aware, Part 2 makes a necessary, technical amendment to the UNCRC (Incorporation) (Scotland) Act 2024. It introduces an exemption to the compatibility duty in very limited circumstances - specifically, where a public authority is required under, another Act of the Scottish Parliament, to act in a way that is incompatible with the UNCRC requirements.

I welcome the broad understanding shown by many stakeholders of the rationale for this approach, including Together, the Children and Young People's Commissioner Scotland (CYPCS) and UNICEF UK. I note in particular the recognition that legal clarity is essential where public authorities may face conflicting statutory duties, and the support expressed for the narrow scope of the exemption. Together's evidence also reflected broad support from its membership, and from the children and young people it consulted, for the principle of the amendment.

In addition to the evidence the Committee received during Stage 1, I would also highlight the engagement my officials carried out with public authorities on this issue. Officials discussed the proposed amendment with the UNCRC Strategic Implementation Board, the Embedding Children's Rights in Public Services Group, the Convention of Scottish Local Authorities, the Society of Local Authority Lawyers and Administrators in Scotland, the UNCRC Peer Support Network, and other relevant bodies. The public authorities consulted through these channels all supported the rationale for the amendment and welcomed the legal clarity it would provide.

Policy Rationale

To offer reassurance, I would like to remind the Committee why we think this exemption is necessary.

Without this exemption, public authorities could face a legal dilemma - forced to choose between breaching the compatibility duty or breaching another statutory duty. In practice, this could mean stopping a service altogether to avoid acting incompatibly. That kind of disruption could have serious consequences, especially where the service is essential to a child's safety, wellbeing or development.

The exemption is therefore about ensuring legal clarity while protecting children from avoidable harm. The approach taken reflects a safeguard in the Human Rights Act 1998, which has long been recognised as necessary to avoid penalising public authorities for following the law. But the exemption I am proposing to add is narrower in scope. It applies only where a public authority has no discretion to act compatibly, and where the legislation cannot be read or given effect in a way that is compatible with the UNCRC requirements, under section 24 of the UNCRC Act. This exemption strikes the necessary balance between strengthening legal coherence, maximising rights protections, and minimising the operational complexity for public authorities in the Scottish context.

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At present, we are not aware of any Acts of the Scottish Parliament that require incompatible action. However, this change will future-proof the framework to ensure that crucial services can continue. As courts and tribunals determine compatibility questions that are brought to them, our understanding of what does and does not constitute compatibility with the UNCRC requirements will change. We should therefore be ready for the possibility that public authorities will be faced with having to choose between applying conflicting statutory duties in the future, which could put public services at risk. This proposed change will ensure that, should such a conflict arise, essential public services can continue while the issue is addressed at the legislative level.

Importantly, the amendment does not alter the requirement for Ministers to make a statement of compatibility when introducing a Bill. In the unlikely event that any future Bill were to contain provisions that would require incompatible action, that must still be declared. The exemption provides a limited defence for public authorities when they are legally required to act in an incompatible way – and even if a court or tribunal accepts the defence, it can still make a determination on whether the words in the legislation give rise to an incompatibility. A court or tribunal can also refer a compatibility question to the Inner House for determination under the UNCRC Act. Sections 25(5) and 26(4) of the Act already allow for a carefully managed transition while an incompatibility is being remedied where a court has the ability to make an incompatibility or strike down declarator in relation to the legislation. The amendment will ensure fairness and clarity for public authorities, in alignment with the existing approach in the UNCRC Act which preserves the Parliament's role in remedying incompatible legislation through the parliamentary process.

Transparency and Safeguards

I recognise the calls from stakeholders for additional safeguards and greater transparency around how the exemption will operate.

I would like to highlight that in our Children's Rights Scheme, the Scottish Government is committing to seeking information from relevant public authorities at least annually on:

- whether they are aware of any legislation that may be incompatible with the UNCRC requirements, and
- whether they have relied, or expect to rely, on the exemption in Part 2.

The Scottish Government has also committed to updating the statutory guidance to advise public authorities to notify both the Scottish Government and the CYPSC if they become aware of potential legislative incompatibilities. We are also open to including the Scottish Human Rights Commission in that process, if they wish.

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Having considered the calls for a statutory reporting duty carefully, I do not believe that introducing a new legal duty of this kind would be either practical or effective. It would be difficult to enforce a statutory requirement for public authorities to notify Ministers of potential legislative incompatibilities, as it would not be clear if and when they became aware of a potential legislative incompatibility. I note that no similar legal requirement exists under the Human Rights Act.

Furthermore, as set out above, we have established a stronger notification process where the Scottish Government has committed to actively engaging with public authorities to identify potential legislative incompatibilities through the Children's Rights Scheme, and updating the statutory guidance. For these reasons, we consider that strengthening notification mechanisms through guidance and the Children's Rights Scheme is the most proportionate and workable way to ensure transparency and accountability, and means that a statutory requirement is not needed.

Access to Justice

The exemption will not prevent children or their representatives from challenging the actions of a public authority in a court or tribunal. If a public authority raises the exemption in legal proceedings, the court or tribunal will assess whether the exemption does apply, in addition to considering whether the legislation at issue can be read and given effect to in a way which is compatible with UNCRC requirements, wherever possible. It can also refer the compatibility question to the Inner House of the Court of Session for determination. If the court finds that the exemption does not apply, and the public authority has acted unlawfully, then the usual remedies will be available. If the court finds that the exemption does apply, the focus rightly shifts to the legislation - where the problem lies. The court can provide for the legislative remedies set out in the Act, if these are available to it, (for example in situations where the case is before a higher court, or it has been referred to it by a lower court or tribunal). These include striking down the provision or issuing a declarator of incompatibility, with Ministers required under section 28 of the Act to report on what it intends to do in response and seek to make a statement to the Scottish Parliament on the matter. Additionally, the proposed exemption will not affect the existing ability of courts and tribunals to issue interim orders while they consider a compatibility question, and whether the exemption applies, or if they refer the case to a higher court.

Wider matters

Relationship with the Human Rights Bill

I note the Committee's interest in what Part 2 of the Bill could mean for how the government may approach future rights incorporation legislation.

The Scottish Government has made clear that, subject to the outcome of the 2026 Scottish Parliament election, we intend to bring forward a new Human Rights Bill in the next session, incorporating further international human rights treaties into Scots law within the limits of devolved competence.

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In our Discussion Paper on the Human Rights Bill published in July, we acknowledge that there may be circumstances in which the proposed Compliance Duty for that Bill may require an action which is expressly prohibited by existing legislation, or conflicts with a requirement in existing legislation. If a consistent reading is not possible, then we are proposing that public authorities will have a defence where they were compelled to act incompliantly by a conflicting statutory duty – similar to the one proposed in Part 2 of this Bill.

These proposals remain under active consideration and will continue to be informed by engagement with stakeholders over the coming months.

Broader Amendments to the UNCRC Act

We note that the CYPSCS have proposed broader amendments to the UNCRC Act itself. While we are open to continued discussion on these issues, we note that wider reform would require detailed engagement with stakeholders, including the courts and tribunals. This Bill is a targeted piece of legislation intended to address priority concerns within the current parliamentary session.

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