Equalities, Human Rights and Civil Justice Committee

Human Rights implications of current and proposed education on the Isle of Mull

Correspondence from Jenni Minto MSP, Ariane Burgess MSP and Tim Eagle MSP

Dear Convener

We are writing as MSPs representing the Isle of Mull to request that the Equalities, Human Rights and Civil Justice Committee consider examining the human rights implications of current and proposed education provision on the island.

While there is widespread agreement that a new Mull Campus is urgently needed, significant concerns remain about whether Argyll and Bute Council's decision making process has adequately considered the rights of all children and families, particularly those living in the Ross of Mull.

Children from this area currently leave their families from the age of 11 to attend secondary school in Oban, staying in residential accommodation during the school week. This raises, we believe, important questions about the right to education, family life and the implementation of the UNCRC (Incorporation) (Scotland) Act 2024.

We attach a human rights analysis prepared by Professor Katie Boyle and Dr Michelle Donnelly of the University of Strathclyde, which raises concerns about the Council's consideration of these rights, the adequacy of its impact assessments and the extent to which children's views have informed decisions.

We recognise that the location and design of the campus are matters for Argyll and Bute Council. However, we believe the issues raised warrant parliamentary scrutiny, particularly given their wider implications for children and families in Scotland's rural and island communities.

We would therefore welcome the Committee's consideration of these matters, including the possibility of taking evidence from the report's authors, affected families, the Council and the Scottish Government.

We believe it is important that the rights incorporated into Scots law in 2024 are meaningfully reflected in decisions affecting children's education and family life.

We would be grateful if the Committee could consider this request as part of its work programme.

Yours sincerely

Jenni Minto MSP
Ariane Burgess MSP
Tim Eagle MSP

Human Rights Explainer: Education Provision on Mull

Professor Katie Boyle and Dr Michelle Donnelly[1]

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"Children in South-West Mull, whose right to family life is impacted by the decision to maintain education provision outwith geographical reach of their families following the award of funding to build a new school" Photo published with family permission

1. Background

The duty to provide education in Scotland is a relevant function[2] within the scope of the UN Convention of the Rights of the Child (Incorporation) (Scotland) Act 2024. This means that local authorities must comply with the right to education as defined in international human rights law when exercising this function.

Education provision on Mull faces two significant challenges for the local authority to satisfy the duty to secure the right to education in compliance with the UN Convention on the Rights of the Child. The right to education in the north of the island is severely hampered by the

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[2] Section 1 & 2 Standards in Scotland's Schools etc Act 2000 and section 6 of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024

deteriorating conditions of the island's only secondary school. In the south west of the island (SW Mull), children are required to leave their homes and families from the age of 11 to access education while living in a council run hostel in Oban. This directly impacts their right to family life and to an education to enable their full potential. Whilst some families may have benefited from the existing arrangements, this does not mean the default should remain for all families to face a cliff edge in terms of family life when their children reach the age of 11. The default should be to meet the best interests of every child to enable family life and educational provision simultaneously. Families do not currently have this choice.

An opportunity to address these challenges arose when the local authority was successfully awarded Scottish Government Learning Estate Investment Programme (LEIP) funding to build a new school in Mull. The funding application was not confined to a catchment area – it was made on behalf of the **whole island** community. Following confirmation of the award and after the Scottish Parliament incorporated the UNCRC, the local authority took the decision to build a new school retaining provision for children aged 2-18 within a single campus (December 2024). In March 2025 the local authority took the decision to locate this new single campus in the north of the island. These combined decisions have left the human rights challenges faced by children in SW Mull unaddressed.

A recent judicial review[3] raised by community representatives from across the island (north and south) challenged the site selection decision. The nature and restricted timeline of the initial judicial review required a focus on procedural legality and rationality of the site selection decision. The court's decision did **not** assess whether the site selection decision was substantively right or wrong, nor did it consider compliance with domestic human rights law.

This explainer examines the domestic human rights framework governing children's experience of education on the island of Mull. These are outstanding legal obligations that have not yet been addressed.

2. Key human rights provisions:

Right to family life

ECHR Article 8

UNCRC Articles 7, 8, 9, 18

UNCRC Preamble

Right to education

ECHR Article 2 Protocol 1

UNCRC Articles 28–29

[3] *Mull Campus Working Group LTD for Judicial Review* (Court of Session) [2026] CSOH 11 (18 February 2026)

ICESCR Article 13

Non-Discrimination

ECHR Article 14

UNCRC Article 2 is a "general principle" which informs the interpretation and implementation of the UNCRC as a whole (CRC General Comment No. 5). Geographical differentiation requires objective and reasonable justification.

Best interests of the child

UNCRC Article 3 is a "general principle" (CRC General Comment No. 5). The child's best interests must be a primary consideration in all actions (Art.3(1)).

Other key provisions

UNCRC Article 6 is a "general principle" (CRC General Comment No. 5). Right to life, survival and development – States parties must ensure that children develop to their full potential.

UNCRC Article 9 – right not to be separated from parents unless necessary for the best interests of the child.

UNCRC Article 12 is a "general principle" (CRC General Comment No. 5). Right to be heard – to express views freely in all matters and be given "due weight" based on age and maturity. Diverse participation in decision-making processes (CRC General Comment No. 12).

ECHR Article 6 – Right to fair procedures and reasons.

UNCRC Article 27 – Right to adequate standard of living.

UNCRC Article 31 – Right to play, leisure and cultural life.

The UNCRC preamble recognises the family as the "fundamental group of society."

In international law, separation from family must be:

- A measure of last resort
- Case-specific
- Temporary
- Regularly reviewed

Routine boarding for educational access raises concerns of **de facto alternative care**, which international guidance strongly discourages except where strictly necessary.

3. The UK and international human rights law

The UK has agreed to be bound by a number of international human rights treaties that it has signed and ratified:

Table: the UK's international human rights obligations

International Convention on the Elimination of All Forms of Racial Discrimination (signed: 11 Oct 1966, ratified: 07 Mar 1969); the International Covenant on Civil and Political Rights (signed: 16 Sep 1968, ratified: 20 May 1976), the International Covenant on Economic, Social and Cultural Rights, (signed:16 Sep 1968, ratified: 20 May 1976), the Convention on the Elimination of All Forms of Discrimination against Women (signed: 22 Jul 1981, ratified: 07 Apr 1986), the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (signed 15 Mar 1985, ratified 08 Dec 1988), the UN Convention on the Rights of the Child (signed: 19 Apr 1990, ratified: 16 Dec 1991), and the Convention on the Rights of Persons with Disabilities (signed: 30 Mar 2007, ratified: 08 Jun 2009).
The UK has also signed and ratified the European Convention of Human Rights (signed 4 November 1950, ratified: 8 March 1951) [*NB not related to European Union] and the European Social Charter, (signed 18 October 1961, ratified 26 February 1965 [*NB not related to European Union]).

It is well established in UK law that international legal obligations are not binding within domestic courts of law, unless such treaties go through a second process of incorporation.[4] This is what is known as a dualist system.

It may be helpful to note that many countries around the world embed international human rights law via domestic legislation or within their constitutions. For example, both Norway[5] and Sweden[6] have incorporated the UN Convention on the Rights of the Child into domestic law. Germany recognises the right to dignity as a fundamental principle of the constitution.[7] Portugal and Italy contain rights frameworks within their constitutions including the rights to a social minimum.[8] The UK, on the other hand, has a significant accountability gap in embedding international human rights into domestic law.[9]

In the UK, the only treaty that receives partial domestic incorporation across the state (England, Wales, Northern Ireland and Scotland) is the European Convention on Human Rights under the Human Rights Act 1998 and the devolved statutes, including the Scotland Act 1998. In Scotland, it is unlawful if the Scottish Parliament or any public body acts in a way that is incompatible with the ECHR (section 29 of the Scotland Act 1998), including the Scottish Government (section 57(2) Scotland Act 1998). Under the Human Rights Act, all public

[4] *International Tin Council Case* in which the House of Lords found that agreement by way of international treaty was made by the Royal Prerogative and did not extend to altering domestic law or rights of individuals without the intervention of Parliament and so was not a part of domestic law until it had been incorporated into it by domestic legislation, *Re J.H. Rayner (Mincing Lane) Ltd. Appellants v Department of Trade and Industry and Others,* [1989] 3 W.L.R. 969. Affirmed by *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696 and *R v Lyons* [2003] 1 AC 976

[5] Human Rights Act 1999

[6] United Nations Convention on the Rights of the Child Act 2018:1197

[7] Germany - Article 1 of the Basic Law (Grundgesetz)

[8] Portugal Constitution of 1976 and Articles 1-12 and 32, 38 Italian Constitution. For a discussion see Francesco Lucherini, German Law Journal, 27 February 2024, (2024), 25, pp. 335–350

[9] Katie Boyle, Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication (Routledge, 2022)

authorities are required to comply with the ECHR, including private bodies performing public functions (section 6 Human Rights Act 1998).

4. Incorporation of international human rights law at the devolved level

In addition to ECHR obligations, the Scottish Parliament has the power to implement and observe other international obligations.[10]

In 2024 the Scottish Parliament took steps to partially close the UK accountability gap for children by passing the UNCRC (Incorporation) Scotland Act 2024. This Act was passed unanimously by all Members of the Scottish Parliament (MSPs). It incorporates the UN Convention of the Rights of the Child into devolved areas of law. Under the UNCRC (Incorporation) (Scotland) Act 2024 it is unlawful for a public authority to act incompatibly with the UNCRC in relation to law within its scope (section 6 UNCRC Act 2024), including a court or tribunal.

Prior to the passing of the UNCRC (Incorporation) (Scotland) Act 2024 an earlier version of the Bill was referred by the UK Government to the Supreme Court. The UK Government was concerned that elements of the Bill went beyond the powers of the Scottish Parliament. The UK Supreme Court issued a judgment[11] that confirms the Scottish Parliament can incorporate international human rights law, including the UN Convention on the Rights of the Child within the scope of its devolved powers.

The UK Supreme Court clarified the scope of this power indicating that the Scottish Parliament can incorporate the international obligations in so far as they relate to public functions conferred by Acts of the Scottish Parliament (ASPs), including retrospective application to ASPs passed before the commencement of the 2024 Act. However, the Scottish Parliament cannot, according to the Supreme Court, interfere with the "unqualified power" of the UK Parliament to legislate for (or make laws for) Scotland.[12] This judgment was subsequently interpreted by the Scottish Government in a way that restricts the application of incorporation to functions conferred on public authorities by stand-alone Acts of the Scottish Parliament or in relation to common law functions. The Scottish Government introduced revised incorporation legislation to reflect this interpretation as part of the Bill's reconsideration process. A revised version of the Bill was passed and came into force on 16 July 2024.

Under the revised UNCRC legislation, even if an area is devolved to Scotland it does not automatically mean the UNCRC (Incorporation) Scotland Act 2024 applies. If for example, the

[10] Schedule 5 para.7(1)-(2) Scotland Act 1998 implementation of international obligations is an exception to the reservation of 'Foreign Affairs' to Westminster. See also, Lord Brodie in Whaley & Anor v. Lord Advocate [2003] ScotCS 178 (20 June 2003) para.44

[11] REFERENCES (Bills) by the Attorney General and the Advocate General for Scotland - United Nations Convention on the Rights of the Child and European Charter of Local Self-Government (Incorporation) (Scotland) [2021] UKSC 42 (06 October 2021)

[12] Ibid REFERENCES (Bills) by the Attorney General and the Advocate General for Scotland - United Nations Convention on the Rights of the Child and European Charter of Local Self-Government (Incorporation) (Scotland) [2021] UKSC 42 (06 October 2021) para.21

Scottish Parliament has passed legislation that amends an earlier Act of the UK Parliament, then the relevant provision is outwith the scope of the UNCRC Act 2024.[13]

An example that is outwith scope includes the Scottish Parliament's approach to free school meals, passed in the Education (Scotland) Act 2016. Section 22 of the 2016 Act directly amends section 53 of the Education (Scotland) Act 1980. Even although education and school meals are devolved matters, section 22 of the Education (Scotland) Act 1980 is outwith the scope of the UNCRC (Incorporation) (Scotland) Act 2024 because it amends a UK Act of Parliament.

On the other hand, and within scope of the UNCRC, section 1 of the Education (Scotland) Act 2016 provides that local authorities and Scottish Ministers have obligations relating to inequalities of outcome for pupils. Section 1 of the 2016 Act adds this provision by way of amendment to the Standards in Scotland's Schools etc. Act 2000. The Standards in Scotland's Schools etc. Act 2000 is an Act of the Scottish Parliament. It is within scope of the UNCRC (Incorporation) (Scotland) Act 2024 and therefore the Scottish Ministers and local authorities are bound to comply with the UN Convention of the Rights of the Child when exercising their statutory obligations conferred by the relevant sections of the Education (Scotland) Act 2016 and the Standard's in Scotland's Schools etc. Act 2000 (section 6 UNCRC (Incorporation) (Scotland) Act 2024).

This distinction is very important in understanding the scope of incorporation. Despite the restricted scope of the UNCRC (Incorporation) (Scotland) Act 2024, the Scottish Parliament unanimously supported incorporation and demonstrated cross-party commitment to implement children's rights as far as possible within the devolved legal framework. The expectation is that both the spirit and the letter of the law will be upheld to secure and safeguard children's rights in Scotland.

5. Relevant functions within scope of the UNCRC (Incorporation) (Scotland) Act 2024: the right to education

The right to education is within the scope of UNCRC compliance. The Standards in Schools in Scotland's Schools etc. Act 2000 directly mirrors the right to education under the UNCRC, providing that every child has a right to education (section 1) and that all local authorities have an obligation to "secure that the education is directed to the development of the personality, talents and mental and physical abilities of the child or young person to their fullest potential" (section 2(1) – mirroring Article 29 UNCRC). In addition, local authorities have an obligation to have due regard to the views of the child or young person "in decisions that significantly affect that child or young person, taking account of the child or young person's age and maturity" (section 2(2)).

In Scotland, the right to education as defined under UNCRC is a statutory obligation as are the general principles of the best interests of the child (Article 3) and the right to be heard and for the child's views to be given due weight (Article 12) when meeting this statutory obligation. In other words, because these provisions are within scope of the UNCRC (Incorporation)

[13] Sections 6A and 6B UNCRC (Incorporation) (Scotland) Act 2024 as amended Children (Withdrawal from Religious Education and Amendment of UNCRC Compatibility Duty) (Scotland) Bill passed on 22 February 2026

(Scotland) Act 2024 they require UNCRC compatibility as a matter of domestic law in education provision. These are continuous obligations, not relating to one decision or a single action. These obligations apply to all decisions, actions and/or omissions on an ongoing basis.

6. Compliance with the ECHR under the Scotland Act 1998 and the Human Rights Act 1998

Regardless of the complexity of scope of UNCRC compliance, it must be noted that ECHR obligations apply regardless of the source of the public function. All public bodies are required to comply with the ECHR under section 6 of the Human Rights Act and the Scottish Government and its administration under section 57 of the Scotland Act 1998, and so ECHR obligations apply to all of the above.

It is unlawful for the Scottish Government to act in a way that is incompatible with the ECHR.[14] In the *Napier* case, Lord Bonomy held that despite a public authority being responsible for the provision of prison conditions, delegation of responsibility did not absolve the Scottish Government of compliance duties.[15] Section 6 of the UNCRC Act also includes the Scottish Ministers within the definition of a relevant public authority. Section 100 of the Scotland Act imposes a 1 year timeline to raise a case alleging human rights incompatibility (section 100(3B)) but allows the opportunity for the court to extend this timeline, should the court regard it to be equitable in the circumstances (such as in relation to the involvement of children). Similar provisions around timeline apply under the UNCRC Act (section 7(9)(-11)) recognising that the clock for any time bar applicable to a case brought by a child does not start 'ticking' until the child reaches the age of 18.

7. Compliance with UNCRC under the UNCRC Incorporation (Scotland) Act 2024

It is unlawful for a public authority to act incompatibly with the UNCRC when exercising relevant functions, including local authorities, the Scottish Government, and any private bodies performing public functions (section 6). Anyone with sufficient interest may rely on the UNCRC in any legal proceedings in any court or tribunal in Scotland that falls within the scope of compatibility requirements (section 7). This is a much broader test of "standing" (eligibility to raise proceedings) than under the ECHR, which requires the litigant to demonstrate they are a victim of a breach. When determining whether an act or omission is compatible, courts are signposted to relevant sources to aid interpretation (section 4), including:

- The preamble of the UNCRC, which recognises the family as the fundamental group of society and the natural environment for the growth and wellbeing of children" (section 4(2)(a))
- General Comments of the UN Committee about the interpretation of the UNCRC in relation to certain treaty provisions or thematic areas, including the UN Committee's General Comment No.1 on the right to education and General Comment No.5 on the implementation of UNCRC in domestic law, which includes new normative legal tests for compliance (such as progressive realisation for economic, social and cultural rights) (section 4(2)(c))

[14] Napier, Re Petition for Judicial Review CSOH [2004] ScotCS 100 (26 April 2004) P739/01
[15] Ibid

- UN Committee jurisprudence when deciding complaints under the Optional Protocol (section 4(2)(e)), including the decision under AB v Spain, in which the Committee held it was incompatible to deny education to a child based on residency status in contravention of the right to education (Article 28&29) and the right to non-discrimination (Art 2)
- Recommendations from Days of General Discussion held by the UN Committee, engaging children and young people, government officials, and civil society organisations to explore specific topics (section 4(2)(f)), including the 2005 Day of General Discussion on alternative care, which recommended the development of alternative care guidelines.
- Other international and comparative law (section 4(2)(g)), including the UN Committee on Economic Social and Cultural Rights General Comment on the right to education, the UN Guiding Principles on Alternative Care for children in residential settings away from the family home, and the UN Convention on Non-Discrimination in Education.

If a finding of incompatibility is determined, the court or tribunal may issue such remedies as it considers just, effective and appropriate (section 8). International human rights law has normative standards in what constitutes an effective remedy for a breach – it requires both effective legal processes that can lead to effective legal outcomes. Whilst damages can be an important component of effective relief**, other remedies can be equally if not more important to a rights holder including, an apology, cessation of the violation, guarantees of non-repetition and a commitment to improving the situation for others.** It is best practice to explore an aggregate of remedies when addressing a complex and systemic problem, this will often require a combination of interim or temporary measures, together with the potential use of deferential declaratory orders and/or mandatory interdicts.[16]

8. Discussion on the right to family life and the right to education

Right to family life

Article 8 ECHR provides that everyone has the right to respect for the right to private and family life, home and correspondence. Public authorities cannot interfere with this right except unless the interference can be justified. Justification of interference must demonstrate that the public authority acted lawfully, that the act or omission was necessary, that it pursued a legitimate aim, that the action/ inaction was proportionate to that aim and that no other reasonable alternative was available. Legitimate aims can include economic well-being of the country and the rights and interests of others. There is well established case law from courts in the UK and the European Court of Human Rights in Strasbourg that oversees compliance with the treaty – this jurisprudence provides further insight into the interpretation of the right to family life including

- National authorities generally have a wide margin of appreciation meaning that local decisions are normally best made by those aware of the multitude of local factors.[17]

[16] Katie Boyle, Access to Justice for Everyone, (Scottish Human Rights Commission) 2023, available at Copy of FINAL Access to Justice ElizD MS Sep 1

[17] *Handyside v United Kingdom* [1976] ECHR 5; Buckley v. the United Kingdom (judgment of 25 September 1996, *Reports* 1996-IV, p. 1271 para.97; LEE v THE UNITED KINGDOM (Inadmissible - Art 8 - Right to respect

- When there has been a manifest error in procedural safeguards, the court must examine whether the decision-making process leading to the measures of interference was fair such as to afford due respect to the interests safeguarded by the individual by Article 8.[18]

Article 8 therefore requires justification based on a genuine and substantive consideration of the right to family life as part of the decision-making process.

Council of Europe guidance on the right to family life provides the following helpful explanation about international law and the rights of the child under the ECHR:

> *"There is a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount (Strand Lobben and Others v. Norway [GC], 2019, § 207; Neulinger and Shuruk v. Switzerland [GC], 2010, § 135; X v. Latvia [GC], 2013, § 96) ... The child's interests dictate that the child's ties with the family must be maintained, except in cases where the family has proved particularly unfit."*[19]

Under the UNCRC and international law more broadly, there is a strong presumption in favour of children growing up in the family home. The preamble to the UNCRC recognises the family as the fundamental group of society and the natural environment for the growth and wellbeing of children.[20] Preventing family separation and preserving family unity are key components of the right protected by Article 9 UNCRC. Principally related to child protection, Article 9(1) requires that children are not separated from their parents against their will, except when necessary for the best interests of the child. Such separation should only occur as a measure of last resort, where the child is at risk of imminent harm and less intrusive measures could not protect the child.[21] When children are placed in alternative care it should therefore be as a last resort,[22] such as necessary for safeguarding reasons or to accommodate specific disability needs. The UN Committee on the Rights of Persons with Disabilities recognises that children's rights to community integration entails a right to live and grow up with a family. The Committee states that placement in a family-like residence and group home is **not** a substitute for the right to a family under the Convention on the Rights of Persons with Disabilities.[23]

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for private and family life, Art 9 - Freedom of thought, conscience and religion, Art 35 - Admissibility criteria Fourth Section [2021] ECHR 1129 (06 January 2022) para.76

[18] Buckley para.76-77 states *"Whenever discretion capable of interfering with the enjoyment of a Convention right such as the one in issue in the present case is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. Indeed it is settled case-law that, whilst Article 8 (art. 8) contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8"*, see also McMichael v. the United Kingdom judgment of 24 February 1995, Series A no. 307-B, p. 55, para. 87

[19] Guide on Article 8 - Right to respect for private and family life, home and correspondence(European Court of Human Rights, 2025), para.392

[20] UNCRC preamble

[21] UN CRC General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, CRC/C/GC/14, para.61.

[22] UN CRC General Comment No. 9 (2006) on the rights of children with disabilities, CRC/C/GC/9, para.47

[23] UN CRPD General Comment No. 5 (2017) on living independently and being included in the community, CRPD/C/GC/5, para.16.

De Facto Alternative Care and the Right to Family Life

In SW Mull, children must board in the council run hostel to access education. This is *de facto* and *de jure* (in fact and in law) alternative care for 5 out of every 7 days of the week during school term. It amounts to 179 days per year, constituting the majority of childhood from the age of 11 until end of secondary education provision.

Residential boarding for the purpose of accessing education is regulated under section 125A of the Education (Scotland) Act 1908, as amended by the Children (Scotland) Act 1995. Although this legislation is not within the scope of the UNCRC Act 2024, the local authority has a statutory obligation to safeguard and promote the welfare of the child under section 125A. This provision runs alongside alternative care arrangements under Part II of the Children (Scotland) Act 1995. The legislation governing residential care for education is within scope of the UNCRC.[24] In other words, because the children are accommodated in state-led alternative care to the family home whilst they are attending school, the state has special obligations and duties towards them within the domestic legal framework. This in turn requires the promotion of the welfare of the child and UNCRC compatibility in connection with alternative care arrangement.

The UN Guidelines for Alternative Care provide that, wherever possible, every effort should be made to enable the child to remain in the care of their family as the natural environment for their well-being and growth, rather than an alternative care arrangement.[25] Wherever possible, local authorities should prevent separation of children from their family unit, unless it is in their best interest to be looked after in alternative care (such as in the case of safeguarding).[26] These arguments do not hinge on broader tests of economic weighting and budget constraints, rather the focus is on meeting the best interests of the child and ensuring proximity to the child's home and family to avoid disruption to their family, social and cultural life.[27] In the case of family life, the presumption lies in favour of a childhood at home with your parents, carers and siblings, and integrated within your community. Limitations in international law that enable legitimate interference with this right tend to only occur in situations of safeguarding and/or meeting specific needs for the physical or mental best interests of the child, such as in the case of severe intellectual or physical disability. Even in these circumstances the presumption is always weighted in favour of family before institutional or residential settings.

These human rights dimensions have to date been entirely absent from the Mull education provision assessment. The human rights dimensions have been incorrectly applied in the Integrated Impact Assessment conducted by Stantec[28], and have been insufficiently addressed by the local authority in any publicly disclosed justification of their approach. In relation to Article 8, the Stantec Integrated Impact Assessment stated

[24] Social Care and Social Work Improvement Scotland (Requirement for Care Services Regulations 2011 made under section 58 of the Public Service Reform (Scotland) Act 2010
[25] UN Guidelines for the Alternative Care of Children (2009) A/RES/64/142, para.3.
[26] UN Guidelines for the Alternative Care of Children (2009) A/RES/64/142, para.155
[27] UN Guidelines for the Alternative Care of Children (2009) A/RES/64/142, para. 11
[28] Stantec Mull Campus Integrated Impact Assessment Report, on behalf of North Scotland Ltd (in partnership with Argyll & Bute Council) February 2025, available at Integrated Impact Assessment Report

> *"Article 8 is a qualified right and under the current proposals it is unlikely to be engaged on the basis that while the Education Authority is required to make arrangements to set its catchment areas, it does not require the children attending with those areas to attend the catchment schools."*[29]

If this represents the extent to which Article 8 has been considered by the relevant duty bearers, it is entirely inadequate to meet the procedural requirements, let alone the child rights dimension, of the local authority's statutory obligations. The Stantec report also states, in relation to UNCRC, that

> *"Article 9 is important, the Article covers instances where there is enforced separation by the State of a child and parent. Examples of that being where a child is removed from the parent(s) by virtue of procedures under social work legislation, where a parent is detained or imprisoned or where a court makes an order restricting contact between a child and parent. As such, Article 9 would not apply to the current scenario as parent's have a legal right to make a placing request for their child to attend a school that is not in their catchment area, as such Education Authorities cannot legally force children to only attend their catchment school."*[30]

This position does not adequately address the presumption in international human rights law that children grow up at home in their family environment unless there is no alternative available. It ignores the *de facto* and *de jure* nature of alternative care provision in order to access education. The reference to catchment areas does not reflect the lived reality on the ground on the practical feasibility (or the availability of adequate transport provision) for children in SW Mull to commute 3 hours per day to attend a school not in their catchment area.

To date, there has been insufficient reference to normative standards in meeting the justification requirements for interference with the right to family life under EHCR, UNCRC, or broader tests of international law.

Right to education

Article 2 Protocol 1 of the ECHR provides for the right to education. Whilst there is margin of appreciation (discretion) in how to meet this right, case law provides some guidance on what is required to ensure non-discrimination in the enjoyment of the right.

For a difference in treatment not to be regarded as discriminatory, it must pursue a legitimate aim.[31] In the Belgian linguistic case the Court had occasion to address the question of the inability for children with French as their mother tongue, living in a Dutch-speaking region, to follow classes in French whereas Dutch-speaking children living in the French-language region could follow classes in Dutch. It found that the measure in question was not imposed in the interest of schools, for administrative or financial reasons, but proceeded solely from considerations relating to language, meaning there had been a violation of Article 2 of Protocol

[29] Stantec Integrated Impact Assessment para.7.4.5
[30] Stantec Integrated Impact Assessment para.7.4.4
[31] Guide on Article 2 of Protocol No. 1 – Right to education (European Court of Human Rights, 2025).

No. 1 taken together with Article 14 of the Convention.[32] In order to comply with Article 14, the existence of a legitimate aim is insufficient. The difference in treatment must also be proportionate.[33] Public authorities, have to be particularly attentive to the impact of the choices decided for groups who are the most vulnerable.[34]

There is also a general requirement under ECHR jurisprudence to interpret the right to education with reference to other instruments of international law, including the UN Convention on the Rights of the Child,[35] the International Covenant on Economic, Social and Cultural Rights and the UNESCO Convention Against Discrimination in Education.

The UN Committee on Economic, Social and Cultural Rights produced General Comment 13 on the right to education to be read in conjunction with UNCRC (Articles 28 and 29) and Article ICESCR (Articles 13 and 14).[36] The UN Committee on Economic, Social and Cultural Rights provides that the right to education should be available, acceptable and adaptable.[37] The Committee stipulates that *"when considering the appropriate application of these 'interrelated and essential features' the best interests of the student shall be a primary consideration."*[38] It specifically mentions that it *"should be physically accessible, within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a "distance learning" programme)".*[39] It also states that it should be provided on a non-discriminatory basis, including in relation to social or geographical origin.[40] It highlights a strong presumption against any retrogressive measures (backwards steps) taken in relation to the right to education, as well as other rights, including family life. If any deliberately backwards measures are taken, the duty bearer has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights and in the context of the full use of the maximum available resources.[41]

Article 28 and 29 UNCRC provide for the right to education to meet the full potential of the child. The right to education, along with the rights to play, leisure and sport, the right to an adequate standard of living and quality living conditions all constitute economic, social and cultural rights in international human rights law. Whilst UK public law jurisprudence has indicated a reluctance to engage in the scrutiny of rights compliance in areas of economic and social policy[42], the incorporation of the UN Convention on the Rights of the Child places new obligations on public authorities and sets different standards than traditional tests of

[32] CASE "RELATING TO CERTAIN ASPECTS OF THE LAWS ON THE USE OF LANGUAGES IN EDUCATION IN BELGIUM" v. BELGIUM (MERITS) Application no 1474/62;
[33] Altınay v. Turkey, 2013, *Application no. 37222/04* para.60
[34] Enver Şahin v. Turkey, 2018, § 68
[35] *Timishev v Russia*, 2005, Applications nos. 55762/00 and 55974/00
[36] CESCR General Comment 13, *Committee on Economic, Social and Cultural Rights at the Twenty-first Session, E/C.12/1999/10, 8 December 1999*
[37] UN CESCR General Comment 13, para.6
[38] UN CESCR General Comment 13, para.7
[39] UN CESCR General Comment 13, para.6(iii)
[40] CESCR General Comment 13, para 31-37
[41] Ibid para.45
[42] *SC, CB and 8 children, R. (on the application of) v Secretary of State for Work and Pensions & Ors* [2021] UKSC 26 (9 July 2021)

Wednesbury reasonableness that is based on a narrow test of irrationality.[43] Legal practitioners, including in-house lawyers as well as public law lawyers more broadly, require support and investment to upskill their legal knowledge of international human rights law.[44] There is a requirement to understand how compliance with rights, such as the right to education, can be understood under these wider international human rights tests that include higher normative standards. Accountabilty in this space is not designed to displace the role of the decision-maker by the court, but rather to invite the court to more closely scrutinise compliance (a stronger intensity of review) against new relevant considerations (set out by the normative legal tests in international human rights law).

For example, the UN Committee recognises that ESC rights as well as civil and political rights should be regarded as justiciable (subject to adjudication by a court).[45] There is a recognition and realistic acceptance that lack of resources – financial and otherwise, can hamper the full implementation of rights. International law obligates the duty to progressively realise rights according to the maximum available resources available.[46] The UN Committee on the Rights of the Child directly relies on the interpretation of progressive realisation developed by the UN Committee on Economic, Social and Cultural Rights.[47] Progressive realisation is a broad test with specific material factors to take into consideration. It applies to the right to education under Article 28 UNCRC.

Progressive realisation constitutes a number of interrelated duties including the obligations to take steps to realise rights through concrete strategies; to respect, protect and fulfil rights; to gather and deploy the maximum available resources to realise rights in a way that is effective, efficient, adequate and equitable; to ensure non-discrimination in realisation of the right; to provide an immediately realisable minimum core of rights; to refrain from retrogressive steps; to ensure any limitation on the enjoyment of a right can only be justified according to principles of legality, legitimacy and proportionality; and to provide access to an effective remedy if a violation of a right occurs.

When funding was secured for school provision in Mull it created a material change that required a fresh analysis of the above test. For example, the Scottish Government has taken steps to provide resources to meet the right to education via LEIP funding – the Scottish Government will require to satisfy itself that this funding programme complies with the progressive realisation of children's rights under UNCRC. When the funding was allocated to Argyll & Bute Council, it triggered a requirement that the resources are spent in a way that is equitable, efficient, adequate and effective – according to the doctrine of the maximum available resources. This requires meeting the minimum core of rights for all children, that any interference with rights meets the tests of legality, legitimacy and proportionality and that any interference is the least restrictive with no other alternative available. The local authority must satisfy itself that there is no discrimination in the enjoyment of the right to education, including

[43] The irrationality principle derives from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 in which a decision must be *"so unreasonable that no reasonable authority could ever have come to it"*

[44] Please see Appendix 1 on the broader tests of reasonableness expected in international human rights law compatibility assessments

[45] UN CRC General Comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child GC/2003/5, para.6

[46] UN CRC General Comment 5, para.7

[47] UN CRC General Comment 5, para.8

geographical and social origin and a thorough assessment of disaggregated data that helps ensure that all children's rights are being balanced and met proportionately. If the funding programme fails to meet the progressive realisation criteria, the local authority and all other relevant public authorities (including the Scottish Government) should seek to coordinate and collaborate to ensure compliance with the treaty.

Non-discrimination is an important requirement of education provision. In *AEA v Spain* (CRC/C/87/D/115/2020), the Committee on the Rights of the Child held that discrimination on the grounds of social origin is prohibited under the treaty in the provision of education. In this case the residence status of the child prohibited enrolment in school. The Committee found that the state had not demonstrated how the best of interests of the child had been considered as part of the decision-making process, rendering that process incompatible with the UNCRC. The Committee also rejected the argument that the overall public interest justified interference with the right. The right to education creates an obligation to respect and guarantee the right for all children, without discrimination of any form and cannot be subject to discretion. The decision-making process weighted up irrelevant factors and overlooked material factors, including the best interests of the child as a primary consideration. The Committee found a violation of the best interest principle and the right to education (Articles 3 and 28).

The human rights dimensions have been incorrectly applied in the Integrated Impact Assessment conducted by Stantec, and have been insufficiently addressed by the local authority in any publicly disclosed justification of their approach. **The Stantec Integrated Impact Assessment does not consider or address the right to education at all under A2P1 ECHR or Article 28 UNCRC.** Article 29 is mentioned briefly as "goals of education" (terminology used in a UNICEF summary edition of the treaty but entirely unsatisfactory for a substantive engagement with the legal obligations under international law). Article 29 is not addressed substantively.

To date, there has been no awareness or reference to normative standards in meeting the right to education or ensuring non-discrimination in accordance with ECHR, UNCRC, or broader tests of international law.

9. Routes to Legal Remedy

In the absence of a political solution to ensure rights compliance, it remains open to those with a sufficient interest to raise legal proceedings under the UNCRC Act (sections 6 and 7 mean that litigants can rely on the UNCRC in any legal proceedings in any civil court or tribunal). In relation to an ECHR claim there is an additional requirement to demonstrate that the litigant is a victim of a human rights breach for the purposes of the Convention, children themselves would meet this test. There are also additional expanded definitions in relation to public interest litigation that merits consideration.

Any legal proceedings in any court or tribunal provides a number of routes to remedy for a violation of the UNCRC. For example, an ordinary action in a civil court for relief based on a violation of a UNCRC right (if it can be established a public authority is acting or failing to act in connection with a relevant function). This could include a simple procedure in a sheriff court, or a judicial review in the court of session, or a case in a tribunal hearing relating to education,

housing etc. Essentially, all legal avenues remain open to challenge compatibility for relevant functions within scope of the UNCRC Act 2024 and additional mechanisms are available to raise ECHR compliance as a devolution issue under the Scotland Act 1998.

If an alternative to court is available that could offer an appropriate remedy then this route should be considered in terms of its compatibility with UNCRC requirements if that body is exercising a relevant public function. This could include routes via the Scottish Public Service Ombudsman, the Care Inspectorate, the Education Inspectorate, Audit Scotland or a local complaints mechanism. For example, the SPSO now has UNCRC compliant child-friendly complaints mechanisms and has previously heard cases about travel to school. There is, by way of example, an SPSO case about unsuitable school transport for a child in Shetland who was expected to walk down an unsafe road to access education.[48] The SPSO recommended that the local authority

> *"apologise for the long delay in reassessing the route, and for the poor complaints handling and general level of customer care, including the recognition of the impact of [the unsafe school transport route]."*

Cases like this would now need to consider UNCRC requirements under the statutory remit of the complaint body where it is within scope.

One of the difficulties about balancing out which route is most appropriate is that different accountability bodies will all have different powers and remits - so the outcomes they can offer might differ significantly. For example the SPSO will make recommendations, whereas courts if minded to do so could require action, or prohibit action. A court action therefore remains an important accountability mechanism for compliance, preferably of last resort.

One of the requirements of the UNCRC Act is that, when considering an appropriate remedy, the court or tribunal should offer relief (an outcome) that is "just, effective and appropriate" (section 7). When a court or tribunal is considering what relief to offer, it should listen to the child's views on what would be effective in practice (section 8).

An additional support mechanism when accessing a legal route to remedy under the UNCRC Act is the ability of the Children's Commissioner and Scottish Human Rights Commission to raise or intervene in proceedings under sections 11 and 12 of the 2024 Act – this provision was designed to try and alleviate some of the burden on children or families taking cases. It would be within the power of the Commissioner for Children and Young People in Scotland or Scottish Human Rights Commission to intervene in any future proceedings raised in connection with education provision in Mull should a UNCRC compatibility issue be raised under Chapter 25A of the Court of Session Rules.[49]

10. The right to an effective remedy

[48] Decision Report 201700875, Scottish Public Service Ombudsman, September 2018, available at https://www.spso.org.uk/decision-reports/2018/september/decision-report-201700875-201700875
[49] Chapter 25A Court of Session Rules, available at https://www.scotcourts.gov.uk/media/jjmk0an2/chap25a.pdf

Under international law, the right to an effective remedy requires domestic legal systems to enable effective, efficient and affordable processes that can lead to fair and human rights compliant outcomes.

In Scotland, the right to an effective remedy is not always guaranteed. Whilst the ECHR is incorporated in domestic law, Article 13 ECHR (right to a remedy) is not. This means if domestic remedies fall short, victims of human rights violations can take a case straight to the European Court of Human Rights in Strasbourg. Children and families are able to raise legal proceedings in relation to human rights law as it applies in Scotland. Acts or omissions connected to education provision on Mull are still open to legal challenge. In other words, there is no legal prohibition to children or their representatives exercising their right to seek access to justice on human rights grounds.

Ideally, duty bearers should proactively take steps to remedy human rights violations that avoids the need for court intervention. As research demonstrates[50], legal proceedings place a significant burden on those seeking to access justice. Access to justice is like crossing a mountain range – it is an arduous journey for anyone, and an especially high burden for children. Human rights violations take a toll on those who must face the arduous access to justice journey – meaning you first of all have the violation to contend with, and then the additional burden of seeking justice for that violation. First, people must know about their rights before they can claim them. Second, you require emotional, financial and legal resources to pursue an access to justice journey. Third, there is often a fear of retribution for raising a claim, and research indicates that retribution occurs – where there is a worsening of conditions for those impacted or blaming the victim for the conditions of the complaint. Fourth, the journey is often complex, with multiple simultaneous routes and no clear indication of which one is most effective. It can be difficult to access and receive appropriate advice and advocacy. Our legal system tends to place the burden on the individual instead of enabling collective action. Finally, remedies themselves must be effective in both process and outcome, and not all of our legal routes to remedy have been calibrated in a way to meet this test. Ideally, rather than place the burden on families to raise further legal proceedings, a political solution that secures human rights compatibility would be most appropriate.

11. Legal aid

Legal aid would be open to those seeking to raise any further proceedings should they meet the eligibility test. It may be helpful to note that there are gaps in legal aid provision for collective access to justice when communities face a systemic problem. In a recent Scottish Parliament inquiry, the Scottish Legal Aid Board indicated in their evidence that the board will consider funding public interest litigation by operating a flexible reasonableness test in deciding whether an action is of wider public importance.[51] The case of educational provision in Mull is of immense public importance because the institutional infrastructure currently in place interferes with children's right to a family life, in contravention of a number of international treaties, including the European Convention of Human Rights and the UN Convention on the

[50] Katie Boyle et al, *Access to Social Justice: Effective Remedies for Social Rights* (BUP 2025)
[51] Report on the Equalities, Human Rights and Civil Justice Committee inquiry into Civil Legal Assistance in Scotland | Scottish Parliament

Rights of the Child. Any application for legal aid should ask for an assessment taking these wider considerations into account.

In Scotland there are options to pursue both collective class actions under the Group Proceedings Scotland Act 2018, if there is sufficient communality between cases.[52] A multi-party action helps relieve the burden on any one individual pursuing a case. There are rules about when and how multi-party proceedings can operate and, importantly, the Scottish Legal Aid Board does not fund group actions under Regulation 15.[53] However, recent evidence by SLAB to the Scottish Parliament would suggest it is important to test this position as there is a recognition by SLAB that public interest litigation falls withing their remit. Legally aided public interest litigation would most likely require a legally aided case to proceed on the basis of Scotland's approach to test and sist, which means one leading legally aided public interest case is raised and any other linked cases are paused whilst the outcome of the leading case is awaited. An alternative may be to seek a private law remedy for damages, in which case the option for multi-group proceedings is possible under the success fee arrangement should a case be successful.

12. Human rights leadership – routes to political solutions

Ideally there should be a structural response with multiple actors working together to find a resolution to the ongoing compliance issues on Mull. The Scottish Parliament has already exhibited global leadership by incorporating UNCRC at the devolved level – the legislation is considered world-leading by international experts. There is an opportunity to celebrate this achievement and to continue to deliver global human rights leadership in coordinating a political response to a compatibility issue. The United Nations Human Rights Council indicates that when rights realisation happens in practice, it requires cooperation between multiple actors from local to national level who must collaborate and coordinate in order to ensure each of the actors satisfy their human rights obligations.[54] This requires human rights leadership across these levels to actively work together to find solutions. It also emphasises that regardless of where responsibility is delegated, overall all liability for rights realisation remains a multi-level governance responsibility.

Ideally a multi-stakeholder intervention to help table solutions to the Mull campus location would help the local authority feel supported in re-assessing human rights compliance for all of the children in Mull in a way that enables the right to education and the right to family life to flourish simultaneously for all children. The default should be to meet the best interests of every child to enable family life and educational provision simultaneously. Families do not currently have this choice.

Routes forward include:

[52] Chapter 26A Rules of Court of Session. There must be sufficient communality between cases, *Mackay v Nissan* [2025] CSIH 14
[53] Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 prevents legal aid funding where there is a joint interest, making group proceedings impossible (to date) under the current interpretation of the Regulations.
[54] Human Rights Council, 'Resolution Adopted by the Human Rights Council on 27 September 2018 (A/HRC/RES/39/7)" (2018), p.2; Human Rights Council, 'Local Government and Human Rights: Report of the United Nations High Commissioner for Human Rights (A/HRC/42/22)', 9 July 2019, para. 1.

- Providing the local authority with any additional support required to ensure it is meeting its human rights obligations to children, including clarifying how LEIP funding requires human rights obligations to be considered and applied.
- ensuring that LEIP funding is sufficiently regulated so that human rights compliance is prioritised, in accordance with Scottish Government obligations as a duty bearer under section 57 Scotland Act 1998 and section 6 UNCRC (Incorporation) (Scotland) Act 2024.
- coordinating an approach that aligns duty bearers aims and objectives, including the local authority, Scottish Government, any public authority responsible for securing or overseeing funding arrangements, any public authority responsible for completing impact assessments, accommodation providers and schools. Public authorities include private bodies performing public functions.
- gather appropriate data and disaggregate it to fully understand the human rights impact of decision making in relation to current arrangements and future options, including for example, missed school days, educational attainment, lived experience of children and any mental health repercussions associated with living in residential care away from family home during childhood. Importantly- listen to those with lived experience to understand what these pressure points are.
- ensuring an understanding that impact assessments do not displace the need to take steps to ensure compliance with rights. An impact assessment is not enough to satisfy human rights compliance obligations.
- ensuring that broader normative standards inform decision-making with reference to the international human rights framework, and in accordance with obligations under domestic law.
- embedding genuinely participative and inclusive children's rights to be heard using the global leading Lundy model to inform compliance with Article 12 UNCRC. Undertaking child rights participation methods using the Lundy model would ensure children's views are heard, listened to and taken into account (Lundy principles require space, voice, audience, influence).
- at all times prioritising the best interests of the child as primary consideration.

Outstanding questions to address for all duty bearers

Key issues requiring further scrutiny:

Scottish Government Guidance[55] on progressive realisation under UNCRC obligations states:

> *"Progressive realisation requires States to work gradually towards the full realisation of rights, based on the maximum resources available. This means that States are expected to take continuous and purposeful steps forward, rather than achieving full compliance instantly. The concept has been interpreted by the CRC as applying to Articles 4 and 24-32 of the UNCRC.*

[55] United Nations Convention on the Rights of the Child (UNCRC): clarification of inherent obligations, Scottish Government, 13 September 2024, available at https://www.gov.scot/publications/clarification-inherent-obligations-united-nations-convention-rights-child-uncrc/pages/5/

Article 4 of the UNCRC states that States are required to "undertake all appropriate legislative, administrative and other measures to implement the rights recognised in the Convention". In the context of the UNCRC, progressive realisation particularly applies to economic, social, and cultural rights. This includes ensuring the right to education, the highest attainable standard of health, and an adequate standard of living. States are required to demonstrate that they are making measurable progress towards these goals, based on their available resources, and are also expected to prioritise these rights in their policy and budget decisions.

Progressive realisation does not mean indefinite postponement of action but rather a steady and purposeful advancement towards the full realisation of children's rights, while immediately respecting and protecting the rights that can be addressed without substantial resource allocation. It encompasses the principles of:

- *Use of Maximum Available Resources: States are obliged to utilise the maximum of their available resources to fulfil human rights. This includes financial, natural, human, technological, and organisational resources.*
- *Non-Retrogression: Under this principle, States must avoid taking steps backwards. In times of economic crisis, regressive measures may only be considered after assessing all other options and ensuring that children are the last to be affected, especially children whose rights are at risk.*
- *Minimum Core Obligations: Despite the allowance for phased implementation, States have immediate obligations to ensure at least the minimum essential levels of each right are met.*

Central to this concept in international law is that progress must be made over time towards the full realisation of these rights, in recognition that this process can be hampered by a lack of resources and may only be achieved over a period of time

Progressive realisation requires progress without delay. Can the human rights dimension of education provision receive an expedited fresh assessment and can decision-makers satisfy their legal obligations without delay? Further delay impacts all of the children on Mull.

- Is the decision to retain a single site campus for 2-18 provision arbitrary? Does this pit the rights of infant children against the rights of secondary school aged children unnecessarily? Is there a less restrictive alternative available that more adequately balances all children's rights? Could all children attend early years and primary provision locally and secondary school centrally? If this possible within LEIP rules to have a split site campus?
- Is requiring children to live away from home a proportionate response when balancing rights? Is there a less restrictive alternative to boarding arrangements that enables family life and education provision for all children on Mull?
- Have resources been allocated adequately, effectively, equitably and efficiently?
- Have children's views been properly ascertained in a substantive and inclusive way, and taken into account?
- Has a minimum core of rights protection been guaranteed?

- Has there been retrogression for any children? Has this retrogression been avoidable?

Have ongoing boarding arrangements been assessed substantively in relation to:

- Right to family life, least restrictive option available in order to prioritise family life and school access close to home wherever possible?
- Adequate standard of living, including housing conditions, access to food and living environment – these are legislative obligations within scope of UNCRC (Incorporation) (Scotland) Act 2024. The relevant functions are conferred under Regulation 10 of the Social Care and Social Work Improvement Scotland (Requirement for Care Services Regulations 2011 made under section 58 of the Public Service Reform (Scotland) Act 2010.
- Privacy, including shared rooms, use of CCTV, curfews – have these living conditions and right to privacy been assessed?
- Access to study and other wrap-around support, any reduction of services amounting to a retrogressive steps?
- Bullying risk, steps taken to ensure children not at risk of bullying or other forms of abuse? (Inspectorate reports of hostel have raised child protection and safeguarding concerns requesting that child protection procedures are implemented effectively, including that multi agency risk assessment informs the care and support of all young people) – this concern has been repeated over consecutive inspections raising UNCRC compatibility issues under Regulation 4(1)(b) (Welfare of Users) of The Social Care and Social Work Improvement made under section 58 of the Public Service Reform (Scotland) Act 2011.[56]
- Cultural participation and Art 31 UNCRC –steps taken to ensure children can meaningfully participate in cultural activities, sport, play and leisure? For example, Oban-based team games are played on weekends when students are back with families, and practices for teams based on the island are during the week when students are resident in Oban – meaning it is not practically feasible to play sports with a team.
- Educational loss and educational attainment– children are reported to miss up to 30 days of school per year due to ferry disruption but this data has not been gathered or disaggregated by the local authority and children are currently marked as in attendance when absence occurs due to weather disruption – has this data gap been considered as part of right to education or in relation to educational attainment? Has there been any consideration of long-term educational attainment/ impact for those who leave education early in order to return to family home before conclusion of secondary education?
- Is it possible to accommodate the needs and rights of all of the children in Mull by providing accessible, quality education from 2-18 for all children spreading geographical spread to ensure family life is protected? Could children aged 2-11 access early and primary education close to home and all children aged 11-18 attend centrally located secondary education? Is there anything prohibiting this solution? If so, what is required to address these barriers and who is required to step in to solve any remaining issues? If this relates to funding, has anyone in the local authority, North Hub Scotland or Scottish Futures Trust (responsible for LEIP) asked the Scottish

[56] Glencruitten Hostel School Care Accommodation Service, Care Inspectorate Report, 25 October 2024

Government? Has the Scottish Government had an opportunity to consider whether the funding complies with UNCRC and ECHR obligations?

Appendix 1.

Expanding public law definitions of reasonableness

The legal framework now in place in Scotland requires a deeper proportionality analysis than traditional *Wednesbury* reasonableness in the assessment of human rights compliance. There are well established tests in ECHR jurisprudence requiring consideration of whether or not a decision is manifestly without reasonable foundation in addition to proportionality assessments. In international law, reasonableness assessment as a standard/ intensity of review goes further. Limitations to rights must be necessary, proportionate, non-discriminatory and in accordance with the law.[57] In addition, when considering the duty to progressively realise economic, social and cultural rights additional material considerations are required in what is described as a form of 'proportionality-inflected reasonableness' test in the assessment of ESC rights, including asking whether:

- Appropriate steps have been taken to safeguard rights
- Interference with rights is necessary and proportionate
- No less restrictive alternative exists
- That there has been no discrimination
- That vulnerability has been prioritised
- That a minimum floor of protection has been guaranteed
- In the case of children's rights, children's best interests are a primary consideration and children have had an opportunity to have their voices heard
- Family separation is avoided unless no other alternative available and only as a measure of last resort
- Resource allocation is adequate, accessible, effective and efficient

These are continuing obligations, not one-off assessments and not connected to one particular decision or action.

Compliance requires action to realise rights.

[57] Article 4 ICESCR