OFFICIAL REPORT
AITHISG OIFIGEIL

Equalities and Human Rights Committee

Thursday 3 December 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Thursday 3 December 2020

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EQUALITIES AND HUMAN RIGHTS COMMITTEE
26th Meeting 2020, Session 5

CONVENER

Ruth Maguire (Cunninghame South) (SNP)

DEPUTY CONVENER

*Alex Cole-Hamilton (Edinburgh Western) (LD)

COMMITTEE MEMBERS

*Mary Fee (West Scotland) (Lab)
*Alison Harris (Central Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Gillian Martin (Aberdeenshire East) (SNP)
*Alexander Stewart (Mid Scotland and Fife) (Con)

*attended

THE FOLLOWING ALSO ATTENDED:

George Adam (Paisley) (SNP)

THE FOLLOWING ALSO PARTICIPATED:

John Swinney (Deputy First Minister and Cabinet Secretary for Education and Skills)

CLERK TO THE COMMITTEE

Claire Menzies

LOCATION

Virtual Meeting

Scottish Parliament

Equalities and Human Rights Committee

Thursday 3 December 2020

[The Deputy Convener opened the meeting at 09:00]

United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill: Stage 1

The Deputy Convener (Alex Cole-Hamilton): We have received apologies from the convener, Ruth Maguire, so, as the deputy convener I am stepping in for her today. I welcome George Adam, who is attending as a committee substitute.

Our first item of business is our final evidence session on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill. I welcome the Deputy First Minister and Cabinet Secretary for Education and Skills, John Swinney. Thank you for attending the committee this morning, Deputy First Minister. I understand that you have another committee appearance later this morning, so we will aim to conclude the session by 10:15. We have a lot to get through, but I invite you to make a brief opening statement before we move to questions.

The Deputy First Minister and Cabinet Secretary for Education and Skills (John Swinney): I welcome the opportunity to answer the committee's questions on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill. As the committee has heard in previous weeks, the bill will deliver transformational change for children and young people in Scotland. I am delighted that the bill has been so warmly received and that it is widely recognised that the maximalist approach that the bill takes is the right one for children and young people.

The bill will deliver a revolution in children's rights, requiring that children's rights must be respected, protected and fulfilled. It will drive a culture of everyday accountability for children's rights and will require public authorities to act consistently to uphold those rights.

As well as incorporating the UNCRC fully and directly, as far as possible, within the powers of the Scottish Parliament and ensuring that legal remedies such as strike-down and incompatibility declarators are available when breaches of children's rights occur, the bill goes even further by including measures that will drive proactive realisation of children's rights in practice. Those include important measures such as the children's rights scheme, the reporting requirement on listed public authorities and the requirements for the Scottish ministers to undertake child rights and wellbeing impact assessments and to make statements of compatibility. The bill will mean that, for the first time, the Scottish Government and public authorities will be directly accountable to children and young people for their rights under the UNCRC. That accountability is important.

The impact of the Covid-19 pandemic has been felt acutely by children and young people, and it has disrupted their lives in previously unimaginable ways. The impact of the pandemic and the United Kingdom's withdrawal from the European Union will continue to place additional burdens on children and young people—and across wider society—for years to come. The bill is essential to our recovery and to the fairer, more equal society that the Scottish Government wants for Scotland's future. I remain committed to implementing the bill as soon as possible, and I will continue to listen carefully to the views that are expressed on such an important issue.

By requiring that children's rights are respected, protected and fulfilled, the bill will ensure that all children and young people are supported to fully realise their potential. The bill builds on a strong foundation of respect for children's rights across public services in Scotland. Now is the time for Scotland to join the group of nations that place children's rights at the centre of our public services, our legal systems and, most importantly, our lives.

I look forward to answering the committee's questions.

The Deputy Convener: Thank you, Deputy First Minister. I congratulate you on an excellent bill that has widespread support. However, there is a tinge of concern around the fact that the bill has no commencement date. The Age of Criminal Responsibility (Scotland) Act 2019, which was passed 18 months ago, is still not live and our age of criminal responsibility is still eight years old. There is concern that the UNCRC bill will dangle false hope in front of young people, who will expect it to become law as soon as it receives royal assent. Would you consider amending the bill—or allowing us to do so—to add a commencement date in short order?

John Swinney: There is a very active debate about the appropriate moment for commencement. As I indicated in my opening remarks, I aim to make sure that the bill is commenced as quickly as possible. I am keen to hear the views of the committee on that question,

and I will actively look out for that issue in the reported feedback from the committee.

I am open to having that discussion, and I am keen to see commencement happen as swiftly as possible. The one caveat that I add to the discussion is that, when a bill of this significance is taken forward, we must be careful that we give adequate and appropriate opportunities for the necessary adaptation to be undertaken, to ensure that commencement can be taken forward within a realistic timescale. When the Human Rights Act 1998 was passed, there was—if my memory serves me correctly—a commencement period of about 18 to 24 months. I am anxious to avoid a period of that nature, but it is illustrative of the fact that, when a rights-based piece of legislation has come forward in the past, there has been an acknowledgement of the importance of ensuring adequate time for its implementation.

Nevertheless, I am open to having the discussion. I will consider the outcome of the committee's deliberations with great care, and I will respond to that before the stage 1 debate in Parliament.

The Deputy Convener: Thank you for that answer. You mentioned the Human Rights Act 1998, for which there was a very long commencement period. However, since the Children and Young People (Scotland) Act 2014 was passed, public bodies have had to act with cognisance of what the UNCRC means, and they have had to build in reporting processes. Do you not think that a lot of the work has already been done?

John Swinney: That is a pretty fair point. When I look at the practical issues that might arise from the incorporation of the UNCRC, I do not see a lot of issues emerging that suggest that a great deal of adaptation of practice or legislative provision is required. However, that is our interpretation, and the bill provides for interpretation by others—principally the courts. Therefore, we are continuing to look at that, because we have to be satisfied that our legislative framework is in as good a state as I suggest that it is in.

In principle, I accept the point that you make, but we have to be careful not to move into a situation in which—as you rightly said in your original question—expectations are high but there are challenges for practical implementation with which we have to wrestle. I am committed to exploring the matter with an open mind.

The Deputy Convener: Okay. Thank you.

Alison Harris (Central Scotland) (Con): Good morning, Deputy First Minister. The committee has heard strong views that section 4, on the interpretation of the UNCRC requirements, should be expanded to take account of the CRC general comments and concluding observations, as well as other opinions and international human rights duties. Will you consider that as an amendment at stage 2?

John Swinney: That issue is under active consideration. We are looking at a range of issues that have emerged around the drafting of the bill and the reactions from different interested parties, which get into the issue of what degree of detail it would be advisable, or not advisable, to have in the bill. The existing provisions touch on those issues to an extent.

The issues that Alison Harris raises are very much associated with the question of how much detail the provisions go into and how much we leave for subsequent consideration and interpretation within the strategic framework that we have established. Again, I will look carefully at what the committee determines on the subject, because I am keen to ensure that we proceed through the consideration of the bill with the objective of achieving maximum agreement on its provisions. I want to establish how we can best go about achieving that objective, and that question will be—[*Inaudible*.]—in the process.

Alison Harris: Let us move on to section 10, which specifically empowers the Children and Young People's Commissioner Scotland to raise court proceedings in respect of the duty on public authorities. More generally, section 7 states that an individual or an organisation can raise court proceedings in respect of that duty. In practice, for judicial review proceedings, litigants will also be required to demonstrate sufficient interest. Some witnesses have suggested that the drafting of section 7 could be amended to provide greater clarity on who has sufficient interest. Is that an amendment that you would consider at stage 2, cabinet secretary?

John Swinney: I am happy to do that. It is important that the step that we have taken in principle to enable the process of challenge to be undertaken in the format that the bill sets out is actually effective. The last thing that I want is to put into statue a provision that says that public authorities can be challenged if the practical reality is that there are too many hurdles to get over before a public authority can be challenged. That would be a, frankly, pointless provision.

I think that what we have in the bill is sufficiently workable to enable that opportunity to be taken, but parliamentary scrutiny exists to ensure that the Government's drafting assumptions are properly and fully tested. The test that I will be applying is whether I believe that a successful challenge is possible without being undermined by too many hurdles. I think that the provision is adequate, but we will look carefully to ensure that there is nothing inherent in the drafting of the bill that

would prevent the facility from being utilised by those who would wish to challenge public authorities.

Alison Harris: The committee has received written submissions offering mixed views on whether it is correct to exclude the period when a young person is under 18 in calculating the time limit for raising court proceedings under section 7. The Faculty of Advocates raised a concern that the time limits for raising court proceedings would place an onerous burden on public authorities with regard to record keeping. What advice would be provided to public authorities on record keeping?

John Swinney: There are already arrangements in place for ensuring that there is record keeping of the required nature and quality, and public authorities have a duty to fulfil those. I do not envisage a situation in which record keeping becomes an obstacle to the successful application of the bill's provisions, because our existing arrangements provide enough opportunity and resilience. Nevertheless, if a practical issue emerges, we will consider it.

09:15

One of the key issues is the approach, or the response, of public authorities to the incorporation of the UNCRC in domestic legislation. Fundamentally, I want this to create cultural change as opposed to, in essence, equipping us to handle a whole series of challenges further down the road. Although, in one of my earlier answers to Alison Harris, I said that I want to make sure that any challenge, should one come, is not bedevilled by insurmountable hurdles, equally, I do not want the process to be characterised by a series of challenges. I would rather that it be characterised by cultural change in our attitudes towards the protection and assertion of children's rights, so that public authorities are not reactively defending their practice against a challenge but are proactively changing their practice to make sure that there is UNCRC compliance. I would encourage public authorities to focus their efforts on changing the culture rather than on preparing their defences, or explanations, against challenges, should any be forthcoming.

Mary Fee (West Scotland) (Lab): I have a couple of questions for you, cabinet secretary, the first of which is about the approach that is taken in the bill. The policy memorandum explains that two approaches could be taken to incorporation. One would be to make it

"unlawful for a public authority to 'act in a way which is incompatible'"

with rights. The second would be to place a "due regard" duty on public authorities. The independent incorporation advisory group, which is convened by Together and the Children and Young People's Commissioner Scotland, favours taking both approaches together in a dual duties approach. Will you explain to us why you chose the approach that makes it

"unlawful for a public authority to 'act in a way which is incompatible'"

with rights rather than the dual duties approach?

John Swinney: Obviously, such questions are a matter of judgment. I feel that our approach establishes the highest standard that is possible in the process. Essentially, we are saying to public authorities that they must satisfy themselves that their approaches are fundamentally compatible with the expectations of the UNCRC.

Following on from my answer to Alison Harris, in essence, we want to create the correct cultural approach in organisations, so that they think through their practice and approach to ensure that they are operating to the highest standards that can be expected under the UNCRC. For me, that was the deciding factor in what I accept was a choice between two particular routes, each of which is equally valid. I feel that our approach will put in place the highest standard of obligation, to ensure that the interests of children are secured as a consequence of the passing of the bill.

Mary Fee: That is very helpful. I appreciate that answer. One view that we heard in evidence is that favouring the dual duties approach would almost be like taking a belt-and-braces approach—it would leave organisations in no doubt that they have a responsibility in this area. Did you consider taking the dual duties approach simply to ensure that belt-and-braces approach?

John Swinney: Such issues are at the heart of the legislation and the philosophical debate around it. If I was to sit and have a discussion with myself about public authorities having "due regard to" versus their having to "act compatibly with", I would come down on the side of their having to "act compatibly with", because I think that that is a higher obligation than having to have "due regard to". A duty to have "due regard to" the UNCRC would perhaps be more arguable territory, whereas a duty to "act compatibly with" it will place on public authorities an obligation that will—to be blunt—be more difficult for them to wriggle out of. My judgment is that we should establish a clear approach in trying to secure the highest standard of action.

I completely understand the belt-and-braces argument that Mary Fee has put to me regarding the dual duties approach, but I worry that that approach would not give the sharpness and clarity that I want the bill to deliver. Scotland wants its public authorities to act compatibly with the

UNCRC, as that is the highest standard that we can expect.

Mary Fee: That is helpful—I appreciate the further explanation.

My second question is on the definition of a public authority. In our evidence sessions, there has been a fair bit of discussion of how we can strengthen that definition. Some witnesses have suggested that the Scottish Parliament should be included in the definition, and the policy memorandum states that that "would be desirable". There has been support for including the Parliament as a public authority, so I would be keen to hear your view on whether it should be covered by the bill. We have also heard a range of evidence to suggest that the definition in section 6 needs to be reviewed to take account of private and voluntary sector services that are outsourced by public authorities.

John Swinney: There are two important questions there. I personally favour the application of the duties in the bill to the Parliament, and that is the Government's position, too. However, there are a couple of significant factors that we have to address. I have written to the Presiding Officer on how we advance some of those questions. First, it would, in a sense, be a bit invidious of the Government to legislate for the application of a duty to the Parliament. It would perhaps be more appropriate for the Parliament to formulate such an application in its own deliberations, and the committee may well help in that process by producing its report on these issues. It is perhaps not appropriate, in all circumstances, for the Government to put in its legislation obligations on the Parliament.

Secondly, there are some tricky and complex legislative competence issues with regard to the Parliament. The Scottish Parliament is a product of the Scotland Act 1998—it does not have the ability to amend that act and we have to act compatibly with it. It may well be that, if the Parliament was to decide to pursue that particular approach, it would have to be careful to act within its legislative competence in respect of which obligations it could take on. The committee will be familiar with the fact that we have had to craft the bill carefully to ensure that we do not move into areas where we would transgress on legislative competence on any issues around the application of the bill.

I am open to, and I support, the point that Mary Fee has put to me. Nonetheless, Parliament needs to reflect on it carefully, and there are some complex issues to be resolved. As I said, I have written to the Presiding Officer and have encouraged dialogue between parliamentary and Government officials on that question.

The second issue that Mary Fee raises concerns organisations that are acting on behalf of public authorities. It is important that any public authority that asks any other body to act on its behalf must satisfy itself that that body is acting in a fashion that is compliant with the UNCRC. The thinking behind the bill—I am clear on this point—is that a public authority cannot divest itself of, or escape, its obligations under the UNCRC and pass them on to some other body. We have to satisfy ourselves that the bill is tight enough and that its provisions are sufficiently restrictive to ensure that no arrangements enable that to happen. I will consider and follow the debate carefully to enable that to be the case.

Mary Fee: I welcome that response from the Deputy First Minister. In relation to the guidance that is attached to the bill, would he consider putting in detailed and specific guidance for public authorities when they do such outsourcing?

John Swinney: Yes. I said in my previous response to Mary Fee that I want to ensure that there is no sense that those obligations can be offloaded on to somebody else. That point will have to be expressly clear in statute and in any guidance that goes with the bill. I give the committee the assurance that we will consider the bill carefully to ensure that that is the case.

The Deputy Convener: I have a couple more questions before I bring in other members. Part 2 of the bill envisages that the existing court or tribunal, rather than a new judicial body, will authorise the judicial remedies—[*Inaudible*.] With a couple of exceptions, the committee has heard that courts and tribunals are not accessible to children and young people. Dr Katie Boyle also suggested that the requirement for an effective remedy should be put in the bill. Would you consider that proposal at stage 2?

John Swinney: I am not keen on the creation of new court or tribunal infrastructure. A range of arrangements are already in place, such as the mechanism by which the voice of children and young people can be heard through the route of the Children and Young People's Commissioner Scotland. That is designed to ensure that the provisions of the bill can properly address the issue of accessibility that you have raised.

If there are particular hurdles to children and young people accessing those remedies, I would want to, and be happy to, consider those in looking at the bill. I do not think that creating another element of court or tribunal infrastructure is a solution to that issue. I would be keener to ensure that we are satisfied that the arrangements of the court and tribunal system in Scotland today are accessible and compatible with addressing the interests of children and young people.

The Deputy Convener: Do you think that part 2 of the bill does enough to ensure that the judicial remedies that courts and tribunals can provide would be effective in practice? Will they focus on what a child or young person might want? Will they ensure changes in the public authority concerned for the benefit of other right holders in the future?

John Swinney: The mechanisms are there, but the earlier part of that process is more important. I would consider it a bit of a failure, frankly, if the remedy route had to be pursued. I go back to my answer to Alison Harris: I want not just a cultural, but a procedural change in public authorities to come from the passing of the bill, to ensure that children and young people do not have to seek remedies, because we will have changed our practice and approach to avoid such a necessity.

09:30

To compare things with the Human Rights Act 1998, we are in a fundamentally different place today as a consequence of the passing of that act and the conduct and execution of responsibilities by public authorities as they affect citizens of our country. That is not in all circumstances because of remedies that have been sought through the courts; it is because of the adaptation of public authority practice to be compatible with that act.

That is how I am looking at the bill. I see it as an opportunity for us to make significant progress on changing the way in which public authorities act and operate. If a remedy is sought through a court or tribunal, we will have to face that, but I would rather have the cultural change than rely on a series of remedies to change the way in which we go about addressing these issues.

The Deputy Convener: Thank you. That is helpful.

Alexander Stewart (Mid Scotland and Fife) (Con): I have questions about the child rights scheme and the wellbeing impact assessment. We have heard from many witnesses that the language in section 11(3) could be stronger—they have suggested changing the "may" to a "must". Would you consider that?

John Swinney: Words such as "may" and "must" are the meat and drink of stage 2 and 3 amendments. Mr Stewart is absolutely correct that there is a world of difference between "may" and "must", and legislators know that acutely. I am happy to consider those questions.

I hope that I have given the committee a sense that I am wedded to a maximalist approach. If there are elements where perhaps, in the use of a single word such as "may", we are not quite as robust as we would be if we used another word such as "must", I am open to considering that. Obviously, I will look carefully at areas in which the committee considers that the bill could be stronger to fulfil the objectives that we have set out in the policy memorandum and in our aspirations around the bill.

Alexander Stewart: There have also been suggestions about amending the content of the child rights scheme as set out in the bill. It has been suggested that we make additions relating to protected characteristics; vulnerable groups; access to advocacy, legal aid and human rights education; and the idea of ensuring that there are child-friendly complaints mechanisms. Do you agree that we should incorporate some of those matters and set out the content of the scheme in the bill?

John Swinney: There is always a balance to be struck around the degree of specificity in the bill. Parliament wrestles with questions about that with every bill, and there is no precise or perfect answer to the question. I would like the bill to be workable and focused on leading the process of cultural change that I have talked about on a number of occasions. If we begin to get into the specification of some of the issues that Mr Stewart mentions, the bill might perhaps become too complex and prescriptive. Of course, once we put provisions into primary legislation, it is quite difficult to change them at a later stage if standards move even further ahead and we do not quite have primary legislation that requires those standards to be followed.

Part of the art of legislation involves designing principles that can establish the correct framework for the pursuance of rights, in particular, as is envisaged in the bill before us, while creating opportunities for the use of guidance or regulation-making powers to adapt and increase the obligations placed on public authorities.

Looking back over the 22 years of the Human Rights Act 1998, we would all accept that human rights law did not just change with the 1998 act; it has moved on at different incremental rates, with some significant landmark movements at some stages.

The point that I am making is that I would not want to constrain us to too significant an extent if we did not have that ability to progress the framework within which we operate.

Alexander Stewart: That is crucial to what involvement children and young people will have in the development of the scheme. It is important to ensure that there is a representative for children and young people across the piece. How will that be assessed? How will that involvement be achieved?

John Swinney: We need to ensure that we are hearing the voices of children and young people at every stage of the development of our approach.

I gave evidence to the Scottish child abuse inquiry on Friday, and one of the points that was drawn out of my evidence by Lady Smith was that, at critical moments in addressing the concerns of survivors, it was the voice of survivors that persuaded ministers to act. We may consider areas of development where there was not progress, and we could directly attribute that to not hearing the voices of survivors.

I take that analogy into the bill in saying that we must hear the voices of children and young people on a constant basis. We must have that anchored in the bill. I give the committee the reassurance that we have been listening carefully to the views of children and young people throughout the process, and we will continue to do so.

We take that dialogue forward through a number of channels. That includes dialogue with the Children's Parliament and the Scottish Youth Parliament, and through the very good and engaged work of Young Scot, which provides us with a ready channel of communication with young people that is actively developed on these questions. It is important that we sustain that throughout the passage of the bill, including at subsequent stages.

Alexander Stewart: Why are public authorities not subject to a child rights scheme?

John Swinney: The answer to that lies in my answer about changing the culture, which I have been labouring all morning. The whole approach of a child rights scheme almost suggests a degree of compartmentalisation of the handling of these issues, whereas I want public authorities to be culturally ready to deliver the type of engagement and participation that is envisaged in the bill to protect the rights of children and young people. That is my primary consideration and my hope for the bill, and that is where I think we have to secure improvement instead of concentrating on the development of child rights schemes, which might potentially indicate to organisations that those rights lie in a particular compartment. I want those values and aspirations to run through public authorities on a constant basis.

Alexander Stewart: Thank you, Deputy First Minister. That concludes my questions, convener.

The Deputy Convener: I will bring in Fulton MacGregor, who would like to explore impact assessments in a bit more detail.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Good morning, Deputy First Minister.

As the convener said, I want to ask about child rights and wellbeing impact assessments. The creation of a legal duty to carry out such assessments in relation to all primary legislation and most secondary legislation has been very much welcomed by the witnesses who have been before us. However, a number of them have raised concerns that ministers have discretion in relation to decisions of a strategic nature. For example, last week we heard from representatives from Together—the Scottish Alliance for Children's Rights—the Scottish Youth Parliament, YouthLink Scotland and Who Cares? Scotland. They all fully welcomed the creation of the duty to conduct assessments but echoed calls that we have heard for the words

"as the Scottish Ministers consider appropriate"

to be removed from section 14(5). What is the Scottish Government's position on that?

John Swinney: We are in territory on which I suspect that we will, when we come to stage 2, spend time in committee chewing over amendments. There might be circumstances in which we need latitude on the necessity to require that such provision be put in place. It might not be relevant to require, for some legislative instruments, the making of such an assessment if the content of the legislation simply has no relevance to or impact on the lives of children.

Mr MacGregor might fairly ask me to give him an example of that. I will give him a hint; I am sitting here thinking, "I hope he doesn't ask me that question." I was about to wander into that territory, but I do not think that it would be advisable for me to do so. I will simply say that the aim is to provide limited discretion where legislation might have literally no impact on children and young people and where undertaking a children's rights and wellbeing impact assessment would be an almost tokenistic exercise.

I do not want the use of the words

"as the Scottish Ministers consider appropriate"

to be interpreted in any way as a route through which to wriggle out of responsibilities. If it were to be perceived in that way, I would look again at the provision. The aim is simply to have a section that provides us with a bit of discretion should there be no real requirement for such an assessment to be undertaken.

Fulton MacGregor: That is a useful clarification of the Government's position and intention. There is a fair amount of consensus on the bill and few areas of contention, but I feel that that aspect is likely to be further explored in the stage 1 debate.

I will move on to your point about tick-box exercises, which links to my next line of

questioning. What consideration has been given to extending to all public sector organisations the duty to carry out child rights and wellbeing impact assessments? Witnesses have put it to the committee that the lack of mandatory provision in the Welsh model is a weakness.

Regardless of whether undertaking such assessments is made mandatory, how can the Government ensure that they are meaningful and that carrying them out is not seen as a tick-box exercise? I ask that in relation not only to the Government, whose position you have already explained, but in relation to other public bodies. The committee has previously taken evidence on equality impact assessments, which are often carried out at a local level. Stakeholders have sometimes felt that that has been a bit of a tick-box exercise. Will you comment on that in elaborating on your previous answer?

09:45

John Swinney: This comes down to how seriously such questions are taken by public authorities and whether assessments are truly built into the process of policy consideration. I will provide an example. Once I have finished giving evidence to the Equalities and Human Rights Committee, I will give evidence to the COVID-19 Committee about the Government's strategic framework for consideration of the four harms of dealing with Covid. Members are familiar with it; it is an equalities and human rights-based assessment that considers the direct health impacts of Covid, of which we are all acutely seized just now.

However, it is also required that we consider other factors, including impacts on the social and economic wellbeing of individuals. Within that, the approach that we take in considering such questions is fundamentally based on human rights and children's rights, because of the necessity to ensure that our policy-making and decision-making processes are compatible with obligations on the Government under which legislation requires that we operate.

The answer to Fulton MacGregor's question lies in how seriously and genuinely organisations take a human rights and children's rights-based approach to policy making and whether that is done in a fashion that is tokenistic—ticking boxes—or is built in to deliberative decision making.

In the process that we are going through on reconciliation of issues in the Covid strategic framework, such matters are wrestled with at every turn as we make individual decisions. This is about creating a climate and culture in which that happens. To be fair to public authorities, a lot of that work is nowadays part of their firmament; it is part and parcel of existing arrangements. However, the bill seeks to place a formal obligation on public authorities to ensure that that is the case.

Fulton MacGregor: That is a helpful answer. You are right: whether assessment is mandatory or not, it is down to the public bodies to ensure that it is not a tick-box exercise. That goes back to what you said about changing the culture. Our hope—that of all political parties and stakeholders—is that the bill helps to do that.

Are there any plans for education or training of staff who will be involved in child rights and wellbeing impact assessments? Has that been thought about yet?

John Swinney: That will have to be part of the operating culture of organisations, because organisations must have personnel who have the skills, perspective and outlook to ensure that issues are handled properly and that processes are gone through properly and meaningfully to inform policy making. A lot of good work already goes on in that respect, but we have to be assured, and public authorities will have to assure themselves, that they have the capacity to do that.

The Deputy Convener: I was thinking about the Deputy First Minister's struggle to find a bill to which a child rights and wellbeing impact assessment might not apply. I am sure that Mary Fee, who is a veteran of private bill committees, might have a suggestion. Perhaps the Pow of Inchaffray Drainage Commission (Scotland) Bill was one such bill.

George Adam has a supplementary question on Alexander Stewart's line of questioning.

George Adam (Paisley) (SNP): Thank you, convener. I do have a supplementary question on Alexander Stewart's questioning, and I will not take personally the fact that you dinghied me.

Good morning, Deputy First Minister. Alexander Stewart asked about stakeholders wanting more in the bill. In my time in Parliament, that has always been the case. With every single bill, stakeholders ask—as is their right—for things to be included. Sometimes it happens and at other times it does not.

Is not it the case that we need to find a way to get the balance right, to make the bill workable and to make sure that it delivers what it says it will deliver? Sometimes, I feel that the committee gets so caught up in the bubble of the bill that is being considered that we lose sight of the delivery model that we are looking for. Is not it the case that we need to strike that balance? That is the $64,000 question.

John Swinney: That is correct. Any bill requires careful judgment of the degree of prescription that is involved in the creation of new law, and Parliament is free to decide exactly how prescriptive it wishes to be. Mr Stewart's suggestion of changing "may" to "must" might sound to people like the choice between a three-letter word and a four-letter word, but there is a world of a difference between "may" and "must". There are fine judgments to be applied. Sometimes, we legislate in a prescriptive fashion and then find, a couple of years down the track, that that degree of prescription is too much. There is a debate to be had, but it helps if we have an open and frank discussion about those questions at this stage of proceedings, when the committee is gathering evidence and reflecting on it.

I hope that the committee is assured that I will take seriously the contents of its stage 1 report. It will inform my thinking on our stage 1 response and on any subsequent stage 2 amendments that the Government lodges. It will inform our reaction to stage 2 amendments that are lodged by members as part of the committee's processes and, subsequently, at stage 3.

In all that, we have to focus on the question that Mr Stewart and Mr Adam have raised about the right degree of prescription to have in the bill. There is no precise answer to the question, but, if we do not get it right, we could end up with a bill that is too long and detailed and that is cumbersome and difficult to implement, or with a bill that is too short and thin and not definitive enough to secure the change of practice that we aspire to. Between those two options is where we get it right.

George Adam: Thank you.

Gillian Martin (Aberdeenshire East) (SNP): Good morning, Deputy First Minister. In one of your answers to Mary Fee, you mentioned potential issues with legislative competence and, for existing legislation, the strike-down declarator that can be made when something is incompatible with the UNCRC. You mentioned that you have written to the Presiding Officer on that. It has been flagged up by legal experts who have appeared at committee. It was suggested that that be put to constitutional lawyers—in particular, in relation to the incompatibility declarator for future legislation, in case it clashes with the Scotland Act 1998.

If you have further detail to add, I will be happy for you to do so. However, if your answer to Mary Fee is the long and short of it, I will move on to other lines of questioning. Is the issue being considered by constitutional lawyers ahead of stage 2?

John Swinney: There is an issue of legislative competence that must be carefully navigated. In formulating the bill, I have been explicit that there are aspects of the UNCRC that we cannot put in domestic law because of limitations in our legislative competence.

Based on its existing provisions, the bill has been certified as having legislative competence—we are confident about that. However, we have to be careful, and the issue will have to be handled with great care when it comes to stage 2 and stage 3 amendments. I do not think that we would have to go very far to reach territory in which legislative competence might be contested.

The committee knows where I am coming from politically and what my aspirations are, but I have to make sure that we are careful about how we construct stage 2 and stage 3 amendments, in order to keep them within legislative competence.

To go back to the deputy convener's opening questions about commencement dates, the last thing that I want is for Parliament to pass the bill, and for it then to be referred to the Supreme Court by the Advocate General. We want to avoid that happening because of a legislative competence issue, so we must tread with care.

There is a slightly different issue regarding matters that I have written to the Presiding Officer about, which are essentially about the application of the bill to the Scottish Parliament. My judgment was that it would be impertinent for the Government to suggest what Parliament's reaction to the issues should be and that it is really for Parliament to consider them. The committee might well have something to say about that in its report.

In relation to the incompatibility declarator, a mechanism is in place that will allow the approaches that I specify in the bill to be taken, to ensure that our objectives are taken forward. I am confident that those provisions are robust.

Gillian Martin: Thank you for the explanation.

In part 4 of the bill, there is a requirement that all Government bills contain a statement on compatibility with the UNCRC. Why does the requirement not apply to members' bills?

John Swinney: That would perhaps get us into the territory of constraining the rights of Parliament. Your question is tied up with my thinking about the role of Government in specifying what Parliament can include in its legislation. Members of the Parliament are obviously free to address that matter when we consider amendments.

Gillian Martin: On section 23, there was a difference of opinion among legal experts on the duty to report. I am not sure whether you saw the previous evidence sessions, but a couple of legal experts said that the duty to report should be strengthened to make it a duty to take action. That

was not the unanimous view—there were conflicting opinions. What is your view on that point?

John Swinney: My sense is that section 23 provides for a combination of the obligation to report and the action that flows from it, which is to engage with Parliament. If there was a requirement to change legislation or to take any other action, that would flow from the obligation to report to Parliament. In essence, the section delivers what colleagues are looking for, which is a route to ensure that, if there is an issue, it can be addressed. It would then be for Parliament to decide how it would be addressed.

10:00

That brings us back into the territory of how much we specify in the bill. On the particular issue in Gillian Martin's question, we might design and specify a provision in the bill and then, a year down the track, find ourselves with another scenario that does not quite fit the picture. The drafting of section 23 creates a framework within which action can be taken should there be a strike-down or an incompatibility declarator.

Gillian Martin: On the discussion about child-friendly communication in reporting, Together suggested that the duty to report should include the duty to report in a child-friendly way. Is the Deputy First Minister open to that?

John Swinney: Yes, very much so. That is at the heart of the dialogue and the relationship that we have with a number of children's rights organisations. A lot of those considerations flow to us through the work of the children's panel, although not exclusively, because we are in dialogue with many other organisations in taking these matters forward. As a group of legislators, we are able to go through complex discussions and to wrestle with the virtues of "may" versus "must" at different stages. At the end of the process, that must be translated into a meaningful message to children and young people, so that they know what their rights are and how to pursue their rights and so that we ensure that they are properly supported and treated in society. We must move from a challenging and difficult-to-navigate piece of legislation—because that is what legislation is—to communication that can be understood, valued and appreciated and which is meaningful for children and young people. Therefore, I am happy to confirm that point.

Gillian Martin: Thank you for confirming that, because, at the many outreach events that I have been to with young people, that has been a key theme: they want to know their rights, and those rights have to be communicated in a child-friendly way.

My last question is on the resourcing to support public authorities to carry out the bill's policy aims. Can you explain the three-year implementation programme and how that will be resourced?

John Swinney: It will be resourced to ensure that, in essence, public authorities do not have to reinvent the wheel. The programme will provide approaches, materials and interventions to enable public authorities to be clear about and aware of all the issues with which they must wrestle and to ensure that those are reflected in the priorities that they take forward. We will work closely with a range of public bodies to ensure that that is the case, through the provision of materials, training interventions and other such support, so that their needs are properly and fully taken into account.

Gillian Martin: Convener, I said that that was my final question, but I have a supplementary question on the back of the Deputy First Minister's answer. We have talked about child-friendly communication. It might not be in the bill, but has an assumption that there will be a duty on all public authorities to have child-friendly communication on children's rights been factored into the resourcing?

John Swinney: Essentially, that underpins the approach that we will take to the direct communication on and explanation of the provisions in the bill. It is also an implicit assumption in what I consider public authorities should be doing in the ordinary course of their activities.

With regard to the discrete financial provisions of the bill, we will spend a relatively small amount of public money, in the grand scheme of things, on the promotion of awareness of children's rights. We spend an awful lot more money as a society on the delivery of public services as they affect children. We have to ensure that, in their delivery of services and in the determination of priorities during their on-going activities, public bodies take due account of the requirement to act compatibly with the bill. They have to ensure that they configure their approach and provisions to be compatible with those of the bill.

The Deputy Convener: No other member wishes to ask questions, and I understand that the Deputy First Minister is keen to get to his next evidence session, so I thank him for coming to see us today and for answering our questions. We are grateful.

10:06

Meeting suspended.

10:08

On resuming—

The Deputy Convener: Our second item of business is feedback from members on the virtual engagement sessions that we conducted to inform our scrutiny and consideration of the bill. We held several virtual engagement events during October and November that children and young people's groups facilitated. On behalf of the committee, I thank those who facilitated the events and, in particular, the children and young people who participated.

Notes on some of those events have already been published on the committee's web page, and more will be published shortly. Due to other commitments, not all committee members were able to attend the events, but I invite those who did to bring their thoughts to the committee now.

I will start with a brief reflection on my attendance at the Aberlour guardianship group event with a number of committee members, who might wish to reflect on it as well. The group was made up of young unaccompanied asylum seekers. It was a great event, which was conducted in four different languages, so my thanks go to the translators who kept us right throughout and gave us a glimpse into international diplomacy. It was very inspiring. It gave me an indication of how important rights are in every language and culture and how informed young people are, particularly those who have come to this country in the most critical and desperate circumstances. They have come here equipped with knowledge of their rights, and that is because the UNCRC is global, does not recognise barriers or languages and is something that people have an innate understanding of. That is very helpful.

Fulton MacGregor: I attended several events, and I will speak to them very generally. They were all very helpful. I encourage anyone watching this to check the record of those events. I attended the same event as you, deputy convener, and I agree with your sentiments. The young people who were there had the opportunity to tell us how the bill would affect them. It was very clear that they wanted the bill to be introduced and believe that it will enhance their lives and rights. We have a duty to make sure that that happens and that the bill is as good as possible.

I also want to say that our convener, Ruth Maguire, who is not here today, attended all the events—and there was a significant number of them.

Gillian Martin: I thank the outreach team and the clerks, who organised an enormous number of events. The convener attended every one of the events and she has to be commended for that.

I went to four very different events with different demographics of young people and children. I went to one with members of the Scottish Youth Parliament and YouthLink Scotland and another with Who Cares? Scotland and care-experienced young people and children. The event that really brought a smile to my face was the one with the under-12s, Licketyspit theatre company and Barnardo's. It was held on a Saturday morning and it was delightful. The work that has been done with very young children to help them to know their rights is really imaginative. As the bill becomes law, a lot more of that will be rolled out to enable young people to know their rights, but in a fun way. It was terrific.

I want to echo what the convener and Fulton MacGregor have said about the session with Aberlour guardianship and the asylum-seeking young people. I asked the Deputy First Minister about child-friendly communication; it will be important to have communication in the languages of the young people that we look after in Scotland who have come from other countries, particularly those who were unaccompanied, to ensure that they know their rights, too. The same goes for the care-experienced young people that I spoke to. Knowing that it is a law is a very big deal to those young people. We had some testimony from young people who felt that their rights had not been respected in the past. They said that knowing that the UNCRC is in law is important but that the communication so that they know their rights and how to exercise them is fundamental. My thanks go to all the young people I spoke to, whose comments were very helpful for my thoughts on the importance of the bill.

The Deputy Convener: Once again, I thank everyone who participated in those events. I also note the number of responses to our call for views, which was directly and specifically focused on children and young people, to complement the standard call for views. We have had 40 responses in total from, or on behalf of, children and young people. That is a significant and encouraging rate of response, as it is the first time that any parliamentary committee has issued such a call for views. It demonstrates how engaged our young people can be when given the opportunity. We hope that some of those suggestions, ideas and drawings will feature in our report.

Witness Diversity Statistics 2019-20

10:15

The Deputy Convener: The next item is consideration of a note by the clerks on witness diversity. I refer members to paper 2. Do members have any comments on the paper? If there are no comments, I thank the clerks for preparing the note. We will take that information on board.

Our next meeting will be on Thursday 10 December, when we will consider an initial draft report on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill.

10:16

Meeting continued in private until 10:34.

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