

# United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill

## MSP Briefing - Stage 2 - February 2021

We warmly welcome the introduction of the [UNCRC \(Incorporation\) \(Scotland\) Bill](#). This historic Bill marks a significant step towards ensuring children's human rights are respected, protected and fulfilled across Scotland. In our [written](#) and [oral](#) evidence to the Equalities and Human Rights Committee and [Stage 1 briefing](#) for MSPs, we highlighted a number of areas in which the Bill should be strengthened. This briefing addresses amendments which will be considered by the Equalities and Human Rights Committee at Stage 2.

### Interpreting the UNCRC requirements (Sections 1-5)

*We support amendments 2; 6; 7; 51.*

The UNCRC requirements should be interpreted in light of the rich and valuable guidance provided through General Comments, Concluding Observations, decisions made under the third Optional Protocol and reports from Days of General Discussion. As such, we welcome Scottish Government's amendment 7 which encourages courts to use sources emanating from the UNCRC to aid their interpretation. We further support amendment 2 which specifies courts "must" (rather than "may") consider these sources, whilst recognising they are not determinative.

We urge the Committee to further strengthen the interpretative provisions by including jurisprudence from wider UN Treaty Bodies and comparative law (amendment 51). The guidance provided by other UN Treaty Bodies – including on the rights of persons with disabilities, the elimination of discrimination against women and the elimination of racial discrimination - help to clarify the content of UNCRC rights and support an understanding of how the UNCRC has been developed and interpreted over time. Including wider UN Treaty Body jurisprudence within the Bill's interpretative provisions will ensure recognition of the interrelated and indivisible nature of human rights, encourage greater alignment with broader human rights treaties and help courts prepare for the incorporation of these - in line with the work of the National Taskforce for Human Rights Leadership.

### Definition of Public Authority (Section 6)

*We support amendment 9. We support the intention of amendments 9B and 53 and would welcome further commitment from Scottish Government to progress this through the Bill.*

Private and third sector bodies play an increasing role in the delivery of children's services. It is essential that all children across Scotland have equal treatment and redress, regardless of whether the service they receive is provided by the local authority, 'contracted out' or accessed privately. We welcome Scottish Government's amendment clarifying that 'functions of a public nature' include functions carried out 'under a contract or other arrangement with a public authority'.

Some issues require further consideration, including whether entities not necessarily engaged in a contract with or otherwise funded by a public authority are caught by section 6 and accordingly required to act compatibly with the UNCRC requirements. This includes private/independent schools, private care homes, private healthcare and private transport providers. The existing case-law relating to a similar provision under the Human Rights Act, and referred to at length during Stage 1 evidence, shows that private entities may not be defined as "public authorities" even where they are delivering public functions. This means that they may escape scrutiny under the terms of this Bill. If this matter is not addressed, it may create a "two-tier" system of accountability within the children's sector. We call on Scottish Government to commit to consider this issue

further through amendments at Stage 3, accompanying guidance and/or through the work of the National Taskforce for Human Rights Leadership.

### **Time limit for raising court challenge (section 7(7))**

*We oppose amendments 12-13.*

While breaches of children's rights should always be addressed as soon as possible, the Bill must acknowledge the numerous barriers which can prevent children from raising an action timeously. Children can face difficulties in accessing the necessary information, advice and support to know that their rights have been breached and to be able to assert them. As such, it is inappropriate to require children to lodge a claim within one year of the alleged violation. We oppose amendments 12-13 and reiterate our support for the existing provision that the one year "clock" begins to run when the child turns 18, with the courts having equitable discretion to extend thereafter.

### **Remedies for unlawful acts (sections 7-8)**

*We support amendments 10-11, 14-15; 18.*

In earlier evidence, we welcomed the intention behind section 8(1) which directs courts to grant such remedy as they consider "just and appropriate". However, we noted the meaning of "just and appropriate" was not clear from the face of the Bill. We welcome the various amendments which seek to clarify the issue by: providing that Scottish Ministers "must" specify additional remedies courts or tribunals may grant (amendments 10-11); specifying that remedies must be "effective" (amendment 14); requiring courts to ascertain the child's views as to what an effective remedy might be in their case, and to take these views into account (amendments 15, 18).

We welcome the positive presumption that all children are capable of forming a view. This supports children's right to be heard in judicial and administrative proceedings, as outlined in Article 12 of the UNCRC. However, we are concerned that the unnecessary inclusion of "unless the contrary is shown" and the direction that a court need not seek a child's views "if it is satisfied that the child is not capable of forming a view" have the potential to weaken the presumption by implying an obligation to challenge the presumption of capacity. We ask members to support amendment 18 but call on Scottish Government to bring forward amendments at Stage 3 to remove these unnecessary additions.

### **Powers for Scottish Human Rights Commission**

*We support amendments 16-17; 19; 27-28.*

We support the proposal to extend powers to bring or intervene in proceedings to the Scottish Human Rights Commission. This will ensure maximum protection for children's rights and pave the way for similar powers to be granted to the Children and Young People's Commissioner Scotland through any forthcoming Bill emerging from the work of the National Taskforce for Human Rights Leadership.

### **Children's Rights Scheme (sections 11-13)**

*We support amendments 20; 22-26; 47; 54-58.*

We welcome amendments that set requirements for the contents of the Children's Rights Scheme. These will help ensure the Scheme's effectiveness by encouraging systematic, robust and consistent consideration of children's rights across all decisions.

These amendments include the addition of key factors such as child-friendly complaints processes (amendment 23), access to justice (amendment 24); access to independent advocacy services (amendment 54), access to legal aid (amendment 55), and steps to ensure the rights of children with protected

characteristics or in situations of vulnerability (amendments 56, 58). We welcome Scottish Government's intention to create a proactive culture of children's rights through amendment 20.

In earlier evidence, we emphasised the importance of preparing a child-friendly version of the Children's Rights Scheme. We welcome amendment 47 which strengthens the existing provision by requiring a version that "children can understand" rather than one which "the Scottish Ministers consider will be understood by children".

### **Child Rights and Wellbeing Impact Assessments (CRWIA) (section 14)**

*We support amendments 29-30; 33-34.*

We support Scottish Government's proposals to strengthen the CRWIA provisions by removing a layer of ministerial discretion, instead providing that "Scottish Ministers must prepare and publish" CRWIA for decisions of a strategic nature (amendments 29, 30, 33). This goes some way to addressing the concerns expressed in our earlier evidence that Ministers had multiple layers of discretion.

### **Reporting duty on listed authorities (sections 15-16)**

*We support amendments 3-4; 35-37; 49; 59-60.*

We welcome Scottish Government's proposal to make the reporting duty 'forward-looking' by requiring authorities to give details of actions planned for the next reporting period (amendment 37). This approach will support the desired proactive culture shift anticipated by the Bill.

The Bill would be strengthened further by specifying topics upon which listed authorities must report. We support amendments 59-60 which require listed authorities to report what they are doing to: promote child-friendly complaints procedures; ensure access to independent advocacy services; ensure children's access to legal aid; and ensure the rights of children with protected characteristics or in situations of vulnerability are respected, protected and fulfilled. Specifying these issues will support listed authorities in taking a comprehensive approach to reporting and planning future steps.

We support amendment 49 which requires that reports be accompanied by a child-friendly version. This will support children's participation rights under Article 12 UNCRC and ensure coherence with other sections of the Bill where provision is already made for child-friendly versions (e.g. section 13(6) in relation to the Children's Rights Scheme).

In earlier evidence, we highlighted the need to include the Scottish Courts and Tribunals Service and the Scottish Prison Service in the list of authorities required to report. While often viewed as adult services, both agencies have a leading role to play in implementing the UNCRC requirements, particularly in relation to the best interests of the child (Article 3 UNCRC), children's relationships with their parents (Article 9), respect for the views of the child (Article 12), supporting children unable to live with their parents (Article 20) and youth justice (Article 40). We welcome amendments 3-4 which insert the Scottish Courts and Tribunals Service, and Scottish Ministers in the exercise of their powers under the Prisons (Scotland) Act 1989 into the list of authorities required to report. Including these agencies within the scope of the reporting duty will help to ensure that the best interests of children and families are at the heart of all planning and policymaking within the courts and prison systems.

### **Challenging incompatible legislation (section 18-23)**

*We support amendment 5.*

There have been broad calls from children and young people, as well as civil society organisations, for the Bill to be as accessible and 'child-friendly' as possible. In previous [evidence](#), we called for child-friendly reports on the steps Ministers are taking to address court declarators under section 23.

We note Scottish Government's amendment 41 requiring that reports are published "in such manner as Scottish Ministers consider appropriate" but note that this falls short of a requirement to produce a child-friendly report. We support amendment 5 which requires the publication of a child-friendly version. Given that the report will be about the steps being taken to address a breach of a child's rights, it is only right that this report is primarily one which children can understand.

### Commencement (section 40)

*We support amendments 1; 46.*

A commencement date must be included on the face of the Bill that is no later than six months after Royal Assent. This is essential to mitigate against the disproportionate impact that both COVID-19 and Brexit are having on children and young people, and to ensure their human rights are at the heart of all we do as Scotland moves towards recovery. We support the Equalities and Human Rights Committee's assertion that no significant additional preparation time is needed before commencement as public authorities should already have many relevant mechanisms in place. As such, we welcome amendment 1 in the first instance. As an alternative, we would accept Scottish Government's amendment 46 which provides for commencement within 12 months of Royal Assent, with flexibility to commence earlier.

### Supporting organisations





## Supporting individuals

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### **About Together (Scottish Alliance for Children's Rights)**

Together (Scottish Alliance for Children's Rights) is an alliance that works to improve the awareness, understanding and implementation of the UN Convention on the Rights of the Child (UNCRC) and other international human rights treaties across Scotland. We have over 450 members ranging from large international and national non-governmental organisations (NGOs) through to small volunteer-led after school clubs and interested professionals. Our activities include collating an annual State of Children's Rights report to monitor progress in implementing the UNCRC in Scotland. The views expressed in this submission are based on wide consultation with our members but may not necessarily reflect the specific views of every one of our member organisations.

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